

## A HEALTHY DISRESPECT FOR THE LAW: THE 2025 MAWHINNEY LECTURE IN PROFESSIONAL ETHICS<sup>†</sup>

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*This article contends that lawyers should cultivate a healthy level of disrespect for the law. Professional ethics codes place the notion of respect for the law at the core of legal identity. However, this reverence serves to suppress moral outrage and shields systemic injustice from critique. This article challenges the assumption that lawyers and law students owe respect to the law in a traditional sense, and argues that suspicion of the law is a more appropriate starting point given historical and ongoing inequality. Disrespect, when principled and proportionate, can advance justice, and it is justice, rather than fidelity to law, that should guide the legal profession.*

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### INTRODUCTION

In March 2018, a professor was confronted by law students who objected to his writing in support of the Trump administration’s immigration policies. As he invoked the rule of law to justify his position, a student shouted: “Fuck the law!”<sup>1</sup> Hearing this, he responded: “Fuck the law? That’s a very odd thing. You are all in law school. And it is a bizarre thing to say fuck the law when you are in law school.”<sup>2</sup>

In September 2023, I posted a lighthearted TikTok saying: “As a law professor who teaches criminal law, I felt compelled to inform you to be gay, do crimes.”<sup>3</sup> It would be my first — but hardly last — public controversy as a law professor. The reaction from

<sup>†</sup> This article was given at the J Donald Mawhinney Lectureship in Professional Ethics at the University of British Columbia’s Peter A Allard School of Law. It was not subject to peer review and received lighter editing to preserve the original tone and style of the lecture.

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<sup>1</sup> Josh Blackman, “#Heckled” (2019) 18:1 First Amendment L Rev 1 at 42.

<sup>2</sup> *Ibid.*

<sup>3</sup> Kevin Maimann, “Where Does ‘Be Gay, Do Crime’ Even Come From?”, *Xtra* (5 March 2024), online: [perma.cc/3CN7-SQKH].



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conservative pundits was rapid, with headlines asking whether this was any way for a law professor to talk. As one writer pointed out: “At issue, is respect for the law. Period.”<sup>4</sup> The law school’s social media was flooded with comments ranging from incensed to hateful and had to be locked down.

I doubt that the criticisms were in good faith. Indeed, I suspect that it was as much if not more fuelled by my claim that people “be gay” than my claim that they “do crime.”<sup>5</sup> Yet both examples nonetheless give way to pressing questions. Why would it be bizarre for a law student to say “fuck the law”?<sup>6</sup> Why would it be inappropriate for a law professor to tell people to “be gay, do crimes?”

The underlying assumption seems to be that law students and law professors owe greater respect for the law than those outside the legal profession. This is no rare view. The first comprehensive professional ethics code proposed by the American Bar Association pithily stated: “To lawyers especially, respect for the law should be more than a platitude.”<sup>7</sup> A related sentiment is expressed in Canada’s *Model Code of Professional Conduct*: “A lawyer must encourage public respect for and try to improve the administration of justice.”<sup>8</sup>

Respect for the law, to many, lies at the very heart of what it means to be a lawyer. W. Bradley Wendel exemplifies this viewpoint well when he says:

Without the constitutive obligation of fidelity to law, lawyers are just sophists—offering nothing beyond the kind of half-baked moral advice that any decent client could supply for herself. If there is something distinctive about our profession, it has to be a commitment to the value of legality and a corresponding obligation to respect the law.<sup>9</sup>

Respect for the law is a fluid notion. It does not have to mean that the law cannot be criticized nor, perhaps, to some extent, disobeyed.<sup>10</sup> Yet it does connote a sense of solemn reverence for the law as an institution. Jurists may say that the law is “misguided, out of touch with reality, or perverse,”<sup>11</sup> but they should not say such things as: “Fuck the law, fuck the courts, and fuck you.”

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<sup>4</sup> Linda Slobodian, “Is This Any Way for a Law Professor to Talk?”, *Western Standard* (1 November 2023), online: [perma.cc/GT3H-SHXW].

<sup>5</sup> Not least because one of the originators of the controversy is infamous for commonly inspiring bomb threats towards those who support LGBTQIA2S+ rights: David Ingram, “After Libs of TikTok Posted, at least 21 Bomb Threats Followed”, *NBC News* (7 February 2024), online: [perma.cc/9FUL-YWSA].

<sup>6</sup> Indeed, isn’t it established wisdom, bestowed upon us by the great English classic that is *Oliver Twist*, that “the law is a[n] ass”? Charles Dickens, *Oliver Twist: Or, A Parish Boy’s Progress* (London: Bentley, 1838) at ch LI.

<sup>7</sup> American Bar Association, *Model Code of Professional Responsibility* (Chicago: ABA, 1969) at EC 1-5.

<sup>8</sup> Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2024), online: [perma.cc/Z5JS-74QA] at 5.6-1.

<sup>9</sup> W Bradley Wendel, “Legal Ethics is About the Law, Not Morality or Justice: A Reply to Critics” (2012) 90:3 *Tex L Rev* 727 at 741. To be sure, his position is hardly unannounced and he adds: “[r]espect for the law may include grudging acquiescence as well as open disobedience” (*ibid* at 736).

<sup>10</sup> This is notably the view of Wendel, *ibid* at 736–38.

<sup>11</sup> *Ibid* at 738.

I take the contrary view. Disrespect for the law is no more a vice for jurists than for the lay public. Quite the opposite — if the legal profession is to be of value to society, it must entertain a measure of disrespect for the law.

Reverence asks us to subdue our anger towards injustice. It asks us to see the law as but a few shy steps away from justice, and to quell our fury to the same degree. This cannot do. “Legal interpretation takes place in a field of pain and death,” as Robert Cover points out.<sup>12</sup> The law is a business of violence. In a business of violence, suspicion should be our starting position. Under the blazing light of the Canadian legal system’s history, function, and outcomes, that suspicion should coalesce into disrespect.

If the arc of the moral universe bends towards justice, as Dr. Martin Luther King Jr. has famously said, it is only thanks to those who, before us, shared in a healthy disrespect for the law.<sup>13</sup> If there is a professional virtue to be found, I hope to convince you that it is that one: a healthy disrespect for the law.

### I. WHY ARE WE TALKING ABOUT THIS?

To join the legal profession is no easy feat. When looking back on law school, our focus is often on the sleepless nights, the brutality of first-year law, or the stress of firm interviews. What we tend to forget is the moral dimension of becoming a lawyer. Law school is not only a matter of becoming a competent lawyer, but also wrestling with how “to practice law within a system of laws that is not ‘always a system of justice.’”<sup>14</sup> What we tend to forget is the moral strife felt by law students who orient themselves toward justice as they become a cog in what is ostensibly an injustice machine.

Far from abating with time, this sentiment is surging forth from our law faculties with renewed vigour. This should be no surprise. First, many marginalized students naturally hold the law in ambivalent if not hostile regard given its historical and ongoing role in perpetrating and perpetuating injustices toward their own communities. I know I did.<sup>15</sup> As the number of marginalized students increases, so will criticisms of the law.

But that isn’t all. Disaffected law students are also struggling with their relationship to the law because they see the world around them change in ways that challenge prevailing narratives of the law as a fount of progress and justice. The law has failed to counter rising income inequality, deteriorating standards of living, and widening racial disparities in the carceral system. The late-stage capitalism has been girlbossing a bit too hard.

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<sup>12</sup> Robert M Cover, “Violence and the Word” (1986) 95:8 Yale LJ 1601 at 1601.

<sup>13</sup> Martin Luther King Jr, “Remaining Aware Through a Great Revolution” (Address delivered at the National Cathedral, Washington, 31 March 1968). As King also wrote, “[h]uman progress never rolls in on wheels of inevitability; it comes through the tireless efforts of men willing to be coworkers with God, and without this hard work, time itself becomes an ally of the forces of social stagnation”: Letter from Martin Luther King Jr to Clergy (16 April 1963) “Letter from a Birmingham Jail”.

<sup>14</sup> Tiffany Thomas, “Lawyers Behaving ‘Badly’: Should Lawyers Be Breaking the Rules?”, *Slaw* (28 March 2017), online: [perma.cc/UMY6-V6WM].

<sup>15</sup> Unfortunately, many fear negative professional consequences should they speak up against injustices — failing to act less as a result of jurisprudence than jurists’ prudence.

Rather than helping us, the law seems poised to serve the interests of anti-democratic populisms.<sup>16</sup> Since my aim is not to depress, I will only give a few examples.<sup>17</sup> Internationally, humanitarian law has repeatedly proved unable to prevent war crimes, crimes against humanity, and genocide, even when the countries involved take pride in being democratic and respecting the rule of law.<sup>18</sup> In the United States, decades of judicial infiltration by the Federalist Society have culminated in the Supreme Court overruling *Roe v. Wade*, paving the way for the criminalization of abortion in countless states.<sup>19</sup> People are now wondering whether rights relating to birth control, same-sex marriage, interracial marriage, and even desegregation will survive this onslaught.<sup>20</sup> And in Canada, we have seen populist governments increasingly invoke the *Canadian Charter of Rights and Freedoms'* notwithstanding clause to target marginalized communities.<sup>21</sup> In 2019, Quebec used the notwithstanding clause to ban teachers, lawyers, judges, and law enforcement from wearing religious clothing such as the hijab, burqa, turban, or kippah.<sup>22</sup> In the last few years, some provinces have invoked or threatened to invoke the notwithstanding clause to grant parents veto power over trans youth's choice of name and pronouns in schools, ban gender-affirming care for minors, and ban trans women from women's sports.<sup>23</sup> Some organizations have since

<sup>16</sup> The rise of anti-democratic populisms in Canada and worldwide has been observed by many: see e.g. Amanda Lewellyn, "Can Canada Stave Off Populism?", *Vox* (23 April 2024), online: [perma.cc/2TWP-SZRU]; Richard Mailey, "The Notwithstanding Clause and the New Populism" (2019) 28:4 *Const Forum* Const 9; Erik Voeten, "Populism and Backlashes Against International Courts" (2020) 18:2 *Perspectives Pol* 407; Justice Rosalie Silberman Abella, "Judicial Independence, Democracy and Human Rights" (2019) 52:1 *Israel LR* 99; Justice Rosalie Silberman Abella, "Freedom of Expression or Freedom from Hate: A Canadian Perspective" (2018) 40:2 *Cardozo L Rev* 503; Kenneth Roth, "The Dangerous Rise of Populism: Global Attacks on Human Rights Values" (2017) *J Intl Affairs* (special edition) 79. On the distinction between democratic and anti-democratic populisms, see notably David Fontana, "Unbundling Populism" (2018) 65:6 *UCLA L Rev* 1482; Bojan Bugarcic, "Could Populism Be Good for Constitutional Democracy?" (2019) 15 *Annual Rev L & Soc Science* 41.

<sup>17</sup> Needless to say, further examples abound. See e.g. Darren Major, "ICC's Decision to Seek Warrants for Both Israeli and Hamas Leaders is 'Troubling,' Trudeau Says", *CBC News* (21 May 2024), online: [perma.cc/V8PH-5NLB]; Edward Keenan, "Doug Ford's Pursuit of 'Like-Minded Judges' Risks Taking Us Down the Same Disastrous Path as the U.S.", *Toronto Star* (1 March 2024), online: [perma.cc/CA9S-GKXC]; Faculty Members at the University of Alberta and University of Calgary Faculties of Law, "An Open Letter Regarding the Response to Recent Protests at the Universities of Alberta and Calgary", *ABLawg* (14 May 2024), online: [perma.cc/RL2R-BTHS]; Fionnuala Braun, "Alberta's Bill 18 Spells the End of Academic Freedom", *Edmonton Journal* (24 April 2024), online: [perma.cc/QRW5-8FE6].

<sup>18</sup> Freddie Clayton, "Isolated Israel Argues U.N. Court Ruling Leaves Door Open to Rafah Offensive", *NBC News* (27 May 2024), online: [perma.cc/J3WL-V6DX].

<sup>19</sup> Andy Kroll, Andrea Bernstein & Ilya Marritz, "We Don't Talk About Leonard: The Man Behind the Right's Supreme Court Supermajority", *ProPublica* (11 October 2023), online: [perma.cc/URY9-VTXM]; *Dobbs v Jackson Women's Health Organization*, 597 US 215 (2022).

<sup>20</sup> Quint Forgey & Josh Gerstein, "Justice Thomas: SCOTUS 'Should Reconsider' Contraception, Same-Sex Marriage Rulings", *Politico* (24 June 2022), online: [perma.cc/X9TZ-GF6S]; Maureen Groppe, "Clarence Thomas Criticizes Brown v. Board of Education. It Comes at an Awkward Moment", *USA Today* (24 May 2024), online: [perma.cc/L5VU-H56V].

<sup>21</sup> Steve Rukavina, "New Research Shows Bill 21 Having 'Devastating' Impact on Religious Minorities in Quebec", *CBC News* (4 August 2022), online: [perma.cc/9HMN-9FT3]; Caitlin Salvino & Nathalie Des Rosiers, "Saskatchewan's Use of the Notwithstanding Clause Reveals its Fundamental Flaw", *Policy Options* (29 September 2023), online: [perma.cc/53H7-H4P7]; *UR Pride Centre for Sexuality and Gender Diversity v Saskatchewan (Education)*, 2023 SKKB 204 at para 98; Darren Major & Tom Parry, "Poilievre Hints to Police He Would Use Notwithstanding Clause to Change Laws", *CBC News* (29 April 2024), online: [perma.cc/7PKR-GYZ].

<sup>22</sup> *Act respecting the laicity of the State*, CQLR c L-03.

<sup>23</sup> Florence Ashley, "Parental Rights Over Transgender Youth: Furthering a Pressing and Substantial Objective?" 62:1 *Alta L Rev* 87; Matthew Black, "Alberta Law Professors Believe Province's Planned Transgender Policies Violate Charter Rights", *Edmonton Journal* (15 February 2024), online: [perma.cc/BUD5-ZZRJ].

begun deploying similar parental rights narratives to grant parents veto powers over abortion.<sup>24</sup>

Whatever rights we once had, they may soon be mere shadows.<sup>25</sup> It would seem right to be concerned, in this context, “about an excessive tendency on the part of citizens and lawyers to obey the law.”<sup>26</sup> Why should we retain our commitment to the law if the law stands for injustice?

## II. WHEN SHOULD WE (DIS)RESPECT THE LAW?

What attitude should jurists hold toward the law as an institution? It seems a good starting point to recognize that there are some contexts in which we should respect the law and others in which we ought not to respect it. Even in a world of angels, some form of law is necessary for social coordination.

The law depends on a significant degree of acceptance and obedience to fulfil this coordinative role. And, as Cover points out, this acceptance must come as a matter of course for the system to function:

Taken for granted in this judicial act is the structure of cooperation that ensures, we hope, the effective domination of the present and prospective victim of state violence — the convicted defendant. The role of judge becomes dangerous, indeed, whenever the conditions for domination of the prisoner and his allies are absent.<sup>27</sup>

While Cover does not starkly distinguish between different kinds of reasons for obedience, it seems clear that a legal system would rapidly devolve into instability and grind to a halt if its legitimacy was questioned at every turn by those tasked with implementing it. Indeed, H.L.A. Hart makes such a point in *The Concept of Law*, a functioning legal system does not turn on *why* private citizens obey the law, so long as they do, but it *does* need its officials to accept its normative pull, its legitimacy, in order to function.<sup>28</sup> Officials — and let us be reminded that lawyers are officers of the court — must accept the law as something that should be obeyed and whose disobedience is blameworthy. In other words, it depends on officials adopting an attitude of respect for the law.

Yet it is clear that there are many situations in which we are not bound to respect for the law; indeed, we can readily conceive of contexts where we are bound to utter contempt for the law. Where the legal system is so rife with injustice that its function cannot be described as anything more than structured inhumanity, it deserves nothing but disrespect. I hope that we can agree on at least two examples: Nazi Germany and the Antebellum South. In a state defined by genocide and slavery, respect for the law is an evil. Indeed, the obligation to

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<sup>24</sup> Adam Toy, “Alberta Parental Rights ‘Push Poll’ Full of ‘Red Flags,’ Connections to Anti-Abortion Groups”, *Global News* (7 February 2024), online: [perma.cc/35M5-4AN4].

<sup>25</sup> Mailey, *supra* note 16.

<sup>26</sup> Wendel, *supra* note 9 at 739.

<sup>27</sup> Cover, *supra* note 12 at 1618.

<sup>28</sup> HLA Hart, *The Concept of Law*, 3rd ed by Leslie Green, Joseph Raz & Penelope A Bulloch (Oxford: Oxford University Press, 2012) at 116–17.

disrespect the law may bear greater weight for jurists, given their unique role in upholding the system — and their correspondingly unique ability to undermine it.

We owe respect to just laws being applied justly in a fundamentally just system. We owe utter contempt to the laws of a fundamentally and violently unjust system. The more difficult question lies in what is to be done in contexts that fit neither extreme. Scholars of professional ethics and philosophers of civil disobedience alike have traditionally characterized legal systems such as ours as near-just, giving rise to an obligation to respect and promote respect for the law.<sup>29</sup> What are we to do, in such a system?

In a near-just system, jurists are in a double bind. Harkening back to Canada's *Model Code of Professional Conduct*, we must “encourage public respect for and try to improve the administration of justice.”<sup>30</sup> Our obligation is twofold. On the one hand, we must encourage public respect for the legal system — which seems incompatible with a disrespectful attitude, since we can hardly expect the public to respect the legal system if its caretakers won't. On the other hand, we must try and make it more just — which may involve sharp critiques that can hardly be characterized as respectful.

If “lawyers are those who uphold the foundation of the legal system,” it seems reasonable to resolve the tension by re-emphasizing the importance of respect for the legal system and constraining jurists to forms of law reform that maintain respect for the legal system, though they may be highly critical of specific laws.<sup>31</sup> Jurists may disagree, even vehemently, but they may not cross the line into impoliteness, irreverence, or contempt. As Judith A. McMorrow points out:

It is one thing to say that a general citizen can both show respect for an institution and defy some of its dictates. It is more troublesome, however, to assert that lawyers can legitimately uphold and defy the law simultaneously.<sup>32</sup>

I struggle with this argument. Why? To put it simply, its premise cuts both ways. If jurists are uniquely responsible for the proper functioning of the legal system, then they are also uniquely responsible for its injustices. And if they are responsible for its injustices, should they not endeavour to disclaim these injustices and do everything in their power to bring the legal system into alignment with justice, even if doing so entails a measure of disrespect? And since the law is a system of structured violence — police, bailiffs, and wardens dancing in synchrony to the judge's pen — should our starting point not be one of suspicion rather than respect? To be sure, the shape and measure of disrespect will surely vary with the shape

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<sup>29</sup> See e.g. Wendel, *supra* note 9 at 740; John Rawls, “The Justification of Civil Disobedience (1969)” in Samuel Freeman, ed, *Collected Papers* (Cambridge: Harvard University Press, 1999) 176. Wendel also uses the term “moderately decent society,” which strikes me as more accurate but runs into the problem of being too low a bar. Interestingly, the assumption that we live under a near-just legal system has been sharper among philosophers of civil disobedience than scholars of professional ethics, perhaps due to the sheer influence of Rawls on the civil disobedience literature.

<sup>30</sup> Federation of Law Societies of Canada, *supra* note 8 at 5.6-1.

<sup>31</sup> Judith A McMorrow, “Civil Disobedience and the Lawyer's Obligation to the Law” (1991) 48:1 Wash & Lee L Rev 139 at 146.

<sup>32</sup> *Ibid* at 145.

and measure of injustice — I am arguing for a *healthy* disrespect for the law. But disrespect as an instrument of change should not be so readily discarded.<sup>33</sup>

While the precise bounds of our duty to the law are doubtless changed by virtue of our legal training, it does not become absolute. Nor does it necessarily become more stringent. At times, our influence on the public's view of the law may well generate an enhanced obligation to disrespect the law in the name of justice. When laypersons comply out of fear of punishment, we may be the last stronghold against injustice.

### III. HOW DOES OUR CURRENT SYSTEM MEASURE UP?

Respect is earned, not owed. Bringing disrepute to the legal system is only an evil if it is undeserved. I have suggested that jurists should begin from a place of suspicion and entertain a healthy disrespect for the law, commensurate with the measure of its injustice. What is the measure of this injustice? As I will explain, I believe that the measure of this injustice is such that our suspicion should coalesce into a healthy disrespect for the law as a whole rather than merely for individual unjust laws.

As the esteemed Brennan Lee Mulligan points out:

I don't know what you kids are up to, but I do know one thing: laws are threats made by the dominant socioeconomic ethnic group in a given nation. It's just a promise of violence that's enacted and police are basically an occupying army, you know what I mean?<sup>34</sup>

While not entirely accurate — H.L.A. Hart's critiques of command theory come to mind — the quote does provide us with a framework to reflect on the purpose of the legal system in our society.

Law does not emerge as if by magic. It is created, shaped by the hand of legislatures, courts, lawyers, and law enforcement. As Richard Quinney explains, “the state is created by that class of society that has the power to enforce its will on the rest of society.”<sup>35</sup> It is designed to serve the interests of the powerful. It does not do so perfectly nor simplistically, especially in an electoral democracy, but it nevertheless does so.

In a capitalist society, this entails not only protecting the concentration of property in the hands of the few but also facilitating as great an accumulation of wealth as is feasible without the sociopolitical system falling into intractable instability. So pervasive is the law's role in maintaining the inequities of capitalism that some philosophers like Evgeny Pashukanis

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<sup>33</sup> This was the fate reserved to Morgoth: JRR Tolkien, *The Silmarillion*, 2nd ed by Christopher Tolkien (London: HarperCollins, 1999).

<sup>34</sup> Dimension 20, “Fantasy High: Family in Flames (Ep 15)” (22 September 2019) at 00h:48m:25s, online (video): [youtube.com/watch?v=xYZnyhOc4Rw].

<sup>35</sup> Richard Quinney, “Crime Control in Capitalist Society: A Critical Philosophy of Legal Order” (1973) 8:1 *Issues in Criminology* 75 at 88.

claimed that a communist society would no longer have anything properly called law.<sup>36</sup> While I am not sure I agree, it does hint at the degree to which law is structured by capitalism.

We can nuance this analysis by recognizing the racial aspect of capitalism. The allocation of resources under capitalism is predicated on racial hierarchy. Although racial inequality is certainly less stark today than it was at the time of confederation, it remains that the wealthy are disproportionately white and that Black, Indigenous, and other racialized individuals are disproportionately part of the poor working class.

As Olúfémí O. Táíwò explains, “the world as a whole is formed from the areas of colonialism built off the trans-Atlantic slave trade.”<sup>37</sup> Canada’s economy greatly benefited from slavery, be it institutions like Scotiabank being funded by wealth derived from slavery or others like the Hudson’s Bay Company selling commodities to an England greatly enriched by slavery.<sup>38</sup> Moreover, Canada’s existence is predicated on the territorial dispossession of Indigenous peoples. Armed with the legitimating imprimatur of the law, European settlers stole the land we live on from Indigenous communities, whether through violence or deceit. Today, Canadian courts continue to operate under a fiction of settler sovereignty that legitimates the continued operation of settler law.

Racist laws and institutions run through Canadian history. Canadian legal history is indissociable from racism. Laws restricting Asian immigration and barring people of Asian descent from hiring white women to protect white businesses.<sup>39</sup> Laws prohibiting traditional Indigenous clothes, dances, and ceremonies.<sup>40</sup> Anti-Black and anti-Indigenous segregation laws and policies.<sup>41</sup> The residential school system and its heir, the child welfare system.<sup>42</sup> Institutions and policies designed to enshrine white supremacy and racial capitalism as the law of the land.

Anti-Blackness and settler colonialism have shaped today’s criminal legal system.<sup>43</sup> The Royal Canadian Mounted Police’s predecessor organization, the North-West Mounted Police, was created to control Indigenous communities as European settlers expanded westward —

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<sup>36</sup> Evgeny Bronislavovich Pashukanis, *Pashukanis: Selected Writings on Marxism & Law*, ed by Piers Beirne & Robert Sharlet, translated by Peter B Maggs (London: Academic Press, 1980) at 46.

<sup>37</sup> Olúfémí O Táíwò, “A Framework to Help Us Understand the World” (2023) 1 Hammer & Hope art 8.

<sup>38</sup> Afua Cooper, *The Enslavement of Africans in Canada* (Ottawa: Canadian Historical Association, 2022) at 7, 22; Tanya Talaga, “Unfreedom in Our Fabric”, *The Globa and Mail* (23 August 2024), online: [perma.cc/8VGK-3DU9].

<sup>39</sup> Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900–1950* (Toronto: University of Toronto Press, 1999) at 136.

<sup>40</sup> Lisa Monchalin, *The Colonial Problem: An Indigenous Perspective on Crime and Injustice in Canada* (Toronto: University of Toronto Press, 2016) at 117; Backhouse, *supra* note 39 at 56.

<sup>41</sup> Monchalin, *supra* note 40 at 103, 116; Backhouse, *supra* note 39 at 226–28.

<sup>42</sup> Truth and Reconciliation Commission of Canada, *Canada’s Residential Schools: The Legacy, Final Report of the Truth and Reconciliation Commission of Canada* (Montreal & Kingston: McGill-Queen’s University Press, 2015) at 14–15, 33–34; Truth and Reconciliation Commission, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Montreal & Kingston: McGill-Queen’s University Press, 2015) at 139; Legacy of Hope Foundation, “Bi-Giwen: Honouring Our Journeys — Truth-Telling From the Sixties Scoop” (2017), online: [perma.cc/LK2Z-XVMD]; Cindy Blackstock et al, *Wen:de We Are Coming to the Light of Day* (Ottawa: First Nations Child and Family Caring Society of Canada, 2005) at 43.

<sup>43</sup> Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Halifax: Fernwood Publishing, 2017).

a role the RCMP has played throughout its history.<sup>44</sup> As for contemporary law enforcement philosophies and techniques, they were greatly influenced by the United States, whose policing history is rooted in anti-Blackness. According to Elizabeth Hinton and DeAnza Cook, the first wave of mass incarceration in the United States arose shortly after emancipation, as Southern legislatures adopted laws “to force formerly enslaved people back into an exploitative labor system that resembled the plantation regime in all but name.”<sup>45</sup> As Black communities migrated north to large cities, Northern governments began to “cast black people as a uniquely dangerous and lawbreaking group” in order to justify the expansion of policing and incarceration under the pretext of law and order.<sup>46</sup>

The War on Crime of the 1960s and the War on Drugs of the 1970s onwards trafficked heavily in racist stereotypes to justify the development of “new proactive policing tactics and special units ... military-grade weaponry and crime reporting technologies, and advanced paramilitary deployments.”<sup>47</sup> Having moved north thanks in part to similar racial stereotypes and law-and-order narratives, such techniques now define Canadian law enforcement. Working closely with prosecutors and marked by us-versus-them thinking,<sup>48</sup> it is these law enforcement bodies who determine the real shape of criminal law. As William Stuntz explains:

[C]riminal law does not drive criminal punishment.... The definition of crimes and defenses plays a different and much smaller role in the allocation of criminal punishment than we usually suppose. In general, the role it plays is to empower prosecutors, who are the criminal justice system’s real lawmakers.<sup>49</sup>

The Canadian criminal legal system is indelibly stained by anti-Indigenous and anti-Black sentiments. Overpolicing and over-incarceration are at once colonial tools and an afterlife of slavery. Racial capitalism’s schemes of surveillance and control are evident in the outcomes of the criminal legal system.<sup>50</sup> As the rate of incarceration continues to decrease across Canada, the proportion of Black and Indigenous people in carceral facilities continues to rise. Black individuals are being incarcerated at 2.5 times their proportion of the population, whereas Indigenous individuals are being incarcerated at close to 6.5 times their proportion of the population.<sup>51</sup> It should be no surprise that some have taken to calling it the criminal *injustice* system.

<sup>44</sup> Bernadette Lajtmán, “State Sanctioned Violence: The Relationship of the RCMP and Indigenous Canadians” (2020) 9:1 *Prandium: J Historical Studies*; Adam J Barker & Emma Battell Lowman, “Settler Colonialism and the Criminalization of Indigenous People in Canada” in Kathryn M Campbell & Stephanie Wellman, eds, *Justice, Indigenous Peoples, and Canada: A History of Courage and Resilience* (New York: Routledge, 2023) 37; Jaskiran Dhillon & Will Parrish, “Canada Police Prepared to Shoot Indigenous Activists, Documents Show”, *The Guardian* (20 December 2019), online: [perma.cc/2JEA-429Y].

<sup>45</sup> Elizabeth Hinton & DeAnza Cook, “The Mass Criminalization of Black Americans: A Historical Overview” (2021) 4 *Annual Rev Criminology* 261 at 267.

<sup>46</sup> *Ibid* at 269.

<sup>47</sup> *Ibid* at 264.

<sup>48</sup> Johnny Nhan, “Police Culture” in Jay S Albanese, ed, *The Encyclopedia of Criminology and Criminal Justice* (Oxford: Blackwell Publishing Ltd, 2014); Kevin Cyr, “Rethinking Police Testimony — Notes, Lies, and Videotape” (2014) 60:4 *Crim LQ* 522.

<sup>49</sup> William J Stuntz, “The Pathological Politics of Criminal Law” (2001) 100:3 *Mich L Rev* 505 at 506.

<sup>50</sup> Maynard, *supra* note 43.

<sup>51</sup> Statistics Canada, “Adult and Youth Correctional Statistics, 2020/2021”, *The Daily* (20 April 2022), online: [perma.cc/ZMB3-HMYT].

Time has not disappeared these injustices. There have been no reparations. No land back. No recognition of Indigenous sovereignty. Little respect for Aboriginal title and rights. Law has not eradicated discrimination, ensured access to safe drinking water on reserves, or ended wealth and income inequality. Because the law has never undergone a clean break from its past, rules that appear neutral continue to perpetuate — and often aggravate — inequalities. If we only owe respect for the law in a near-just system, what are we to make of this? It doesn't look good.

Canadian law is built upon a series of founding injustices. Reverence for the law asks us to ignore these founding injustices. It asks us to pretend that the Canadian government is a legitimate sovereign and that the law is a neutral forum in society's ever-progressing march to justice. But injustice is not an occasional outcome in our otherwise fundamentally just system. Rather, justice is an occasional outcome of our fundamentally unjust system. The use of the notwithstanding clause to narrow who gets to participate in civil society and pursue a life-destroying law-and-order agenda is less an aberration than a return to form.<sup>52</sup> Canadian law only looks near-just for those who are privileged enough to be unhampered by the greatest of its injustices.<sup>53</sup> For the greater numbers of us, its primary operation is to ruin lives. To quote Chief Justice Beverley McLachlin:

The Canadian legal system is sometimes said to be open to two groups — the wealthy and corporations at one end of the spectrum, and those charged with serious crimes at the other.<sup>54</sup>

Everyone seeks the law.<sup>55</sup> Yet, to the rest of us, the door to the law is forever closed.

Given the pervasiveness and foundational nature of injustice in Canadian law, I believe that our suspicion should coalesce into a healthy disrespect for the system as a whole — rather than merely individual unjust laws. If injustice is unexceptional, so should be our contempt for the law. We should foster a healthy disrespect for the law, commensurate with the measure of its injustice. And its measure is great indeed.

#### IV. IS DISRESPECT A GREATER EVIL THAN COMPLIANCE?

I can hear a daimon on my shoulder ask: but is this disrespect not a greater evil than compliance? Do we not have other means of redress? Are we not destabilizing society and fostering anarchy? Are we not just inviting jurists to act as condescending elites overriding popular morality? None of these considerations lead me away from a healthy disrespect for the law.

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<sup>52</sup> Moreover, the use of the notwithstanding clause against vulnerable minorities undermines yet another argument against civil disobedience — namely that there are other meaningful opportunities for altering the law: Terrance Sandalow, “Fortas: Concerning Dissent and Civil Disobedience (Review II)”, Book Review (1969) 67:3 Mich L Rev 599 at 606.

<sup>53</sup> I realize this is perhaps a provocative claim, but it is one that direly needs to be made given the uncritical attitude that law schools so often foster among its students.

<sup>54</sup> The Right Honourable Beverley McLachlin, “The Challenges We Face” (Address delivered to the Empire Club of Canada, Toronto, 8 March 2007), online: [perma.cc/YND8-JW5E]. We can ask how open courts are to those charged with serious crimes given how overworked duty counsel and defense lawyers who take legal aid certificates are.

<sup>55</sup> Franz Kafka, *The Trial*, translated by Mike Mitchell (Oxford: Oxford University Press, 2009) at 153–55.

In the face of injustice, jurists have means of redress that are not equally available to the public.<sup>56</sup> Courts are open to us in degrees and manners unrecognizable to the public. The organized bar also holds sway with politicians — opening up yet another avenue of advocacy. Yet these means of redress should not be overstated. Engaging in lengthy impact litigation pro bono is out of reach for many lawyers, nor are all lawyers litigators, let alone specialized in the relevant areas of law. Lawsuits are expensive and lengthy, asking us to wait years for a final ruling as the lives lost and ruined continue to mount. They have also often proven ineffective tools of change.<sup>57</sup> As Dean Spade explains:

Discrimination and violence against people of color have persisted despite law changes that declared them illegal. The persistent and growing racial wealth divide in the United States suggests that these law changes have not had their promised effects, and that the structure of systemic racism is not addressed by the work of these laws.<sup>58</sup>

The ineffectiveness of legal challenges is only magnified by governments' growing recourse to the notwithstanding clause. Their use of the notwithstanding clause shatters our constitutional commitment to human rights, depriving lawyers of one of the few approved means of contesting injustice.<sup>59</sup> Where courts confirm that the law offers no protection against injustice, this avenue of redress is also closed.<sup>60</sup> In other words, litigation is often not an effective alternative.

It is true that lawyers, as members of the organized bar, can make their voices heard with greater weight and visibility than most. As C.D. Evans argues:

When justice is not being given, there is no doubt that all lawyers — regardless of their personal views, and mindful of their oath of office — have a duty to speak out against the tyranny of the majority. Those who do *not* so speak out are more guilty of conduct unbecoming, perhaps, than those who do. And who is better qualified to pass upon the justness or not of a law than a lawyer?<sup>61</sup>

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<sup>56</sup> As explained by Sandalow, *supra* note 52 at 606, opposition to civil disobedience is often predicated on the availability of alternative means of challenging unjust laws.

<sup>57</sup> Mark Tushnet, "The Critique of Rights" (1994) 47:1 SMU L Rev 23; Derrick A Bell Jr, "Brown v. Board of Education and the Interest-Convergence Dilemma", Case Comment (1980) 93:3 Harv L Rev 518.

<sup>58</sup> Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law*, revised ed (Durham: Duke University Press, 2015) at 40.

<sup>59</sup> I am, admittedly, glossing over prominent debates as to the nature and justifiability of the notwithstanding clause. See e.g. Peter L Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal: McGill-Queen's University Press, 2024). I do not believe that any and all uses of the notwithstanding clause are incompatible with our commitment to human rights. For instance, its use to overturn decisions enshrining the rights of the rich to the detriment of the public and democratic governance would seem not only appropriate, but a furtherance of human rights. It is a historical happenstance that Canada has not had decisions like *Citizens United v Federal Election Commission*, 558 US 310 (2010) and *Federal Election Commission v Ted Cruz for Senate*, 596 US 289 (2022). I do not, however, believe that using the notwithstanding clause in furtherance of anti-democratic populist agendas is compatible with our commitment to human rights.

<sup>60</sup> Moreover, lawyers are typically prohibited from instructing people on how to violate the law and avoid punishment and from assisting or encouraging illegal conduct: Federation of Law Societies of Canada, *supra* note 8 at 3.2-7. The rule has a notable exception — it does not preclude lawyers from advising a client to violate the law in order to bring a bona fide constitutional challenge. The availability of this test case exception is further restricted where the notwithstanding clause is invoked.

<sup>61</sup> CD Evans, "On the Duty of Advocating Civil Disobedience (Law Society of Alberta v Harry Midgley: Fear and Loathing in Edmonton and Camrose)" (1980) 18:3 Alta L Rev 520 at 524 [emphasis in original].

Open letters by law professors expressing concerns about police suppression of student speech and announced anti-trans policies have garnered media attention and been invoked by opponents of the decisions.<sup>62</sup> I would not have signed them if I believed them useless. Yet their impact is often far less than assumed — lawyers, law professors, judges, and the organized bar are constantly ignored by governments who care more about elections than rights and justice.

Disrespect for the law can enhance the impact of jurists' words, precisely because of their close relationship to the legal system. Their contempt is far more effective than the lay public's. Because jurists are agents of the law, their contempt can act as a catalyst of moral epiphany. Jurists, perhaps more than anyone,

can force the community to confront the disconnect between its reality and its professed ideals and cast doubt on the authenticity of its commitment to civic friendship.

...

Their incivility helps to isolate the deceptions of civic friendship. It calls civility's bluff.<sup>63</sup>

A parallel of this phenomenon can be glimpsed in social media responses to professors being arrested when defending their students' right to erect encampments in protest of their universities' complicity in war crimes, crimes against humanity, and genocide against Palestinians by the Israeli military.<sup>64</sup> Disrespect for the law is a central tool of the jurist's commitment to justice and the struggle against tyranny. Jurists should not be censored and made less effective in the name of politeness.<sup>65</sup> To be rude is to be effective.<sup>66</sup> It would be disastrous to justice if becoming a lawyer deprived us of one of our most effective tools for opposing despotism and oppression.

Might disrespect for the law bring about the greater evil of anarchy? By disrespecting the law as an institution rather than limiting ourselves to unjust laws, we may cross from dissent to rebellion and anarchy.<sup>67</sup> Although I doubt that our legal system is so fragile, I accept this premise for a moment. And so what? Anarchy is not chaos but the absence of domination, hierarchy, and unjustified authority.<sup>68</sup> Is that so bad? What this objection misses is that a healthy disrespect for the law aims to destabilize the legal system, at least to some degree.<sup>69</sup> Respect is earned, not owed. Is destabilizing an oppressive legal order truly more evil than

<sup>62</sup> Black, *supra* note 23; Michael Rodriguez, "Alberta Professors Condemn Police for 'Violent Infringement' of Students' Protest Rights", *Calgary Herald* (14 May 2024), online: [perma.cc/2538-65ZD].

<sup>63</sup> Candice Delmas, "Uncivil Disobedience" in Melissa Schwartzberg, ed, *Nomos LXII: Protest and Dissent* (New York: New York University Press, 2020) 9 at 36.

<sup>64</sup> See e.g. Nell Gluckman, "'Call the Philosophy Department Office and Tell Them I Have Been Arrested'", *The Chronicle of Higher Education* (7 May 2024), online: [perma.cc/ZBC2-TEXD]; Ryan Quinn, "As Police Clear Encampments, Professors Arrested Along With Students", *Inside Higher Ed* (30 April 2024), online: [perma.cc/83RY-JKSU]. On the aim of encampments, see Judi Rever, "Students Lift Veil on University Financing and Demand End to Genocide Complicity", *Canadian Dimension* (2 June 2024), online: [perma.cc/9FF6-B7C5]; Raphael Magarik, "The Complicity of Israeli Academia", *Jewish Currents* (23 May 2024), online: [perma.cc/K744-PZY9].

<sup>65</sup> Alice Woolley, "Does Civility Matter?" (2008) 46:1 Osgoode Hall LJ 175.

<sup>66</sup> Sometimes.

<sup>67</sup> Delmas, *supra* note 63 at 23–24. Delmas ultimately rejects this objection as factually inaccurate, pointing out, as many others have, that civil disobedience can ultimately bolster the law's integrity and protect the rule of law in the long term.

<sup>68</sup> Andrew Fiala, "Anarchism" in Edward N Zalta & Uri Nodelman, eds, *The Stanford Encyclopedia of Philosophy*, Winter 2021 ed, online: [perma.cc/5D4Y-D9FH].

<sup>69</sup> Delmas, *supra* note 63 at 24.

speaking up against it? As Terrance Sandalow convincingly points out, ethical behaviour in Nazi Germany consisted precisely in “active, violent resistance directed not only at the specific law but at disruption of the system.”<sup>70</sup> And though our current context is not that of Nazi Germany,<sup>71</sup> I hardly think that people ought to have waited until the doors of Auschwitz opened to rebel against a legal order that paved the way for the Third Reich.<sup>72</sup> By raising the spectre of anarchy to quell contempt for the law, it seems that we are turning the rule of law into an instrument of injustice — that, to me, is far more dangerous than any destabilization that may befall.

Be that as it may, who are we to decide what is just? We can find this concern expressed by W. Bradley Wendel, who worries “that labeling some laws as anachronistic, foolish, or otherwise undeserving of respect reflects a certain elite condescension toward normative positions with which we (the ‘royal we’) disagree.”<sup>73</sup> To better translate the concern to the Canadian context, let’s throw in a reference to the Laurentian elite. If we follow this argument, we should discount our healthy disrespect for the law lest we act as a condescending legal elite and override popular morality in the process.

We should first resist the adequation of injustice with majoritarian will. The views of elected representatives should not be conflated with the views of the people. We know the views of the people far more poorly than we often pretend, let alone their informed and considered views. The majoritarian facade of anti-democratic populisms and fascism is often little more than deceit, secured through misinformation, propaganda, and manipulation.<sup>74</sup> Gerrymandering, voter suppression, quashing dissent, and media bias can all be used to choreograph the appearance of public opinion. By picking who gets the megaphone, a different government can craft a different popular will.

More gravely, as soon as it is voiced, the argument falls prey to a *reductio ad absurdum* — if we accept it, it leads us to unacceptable conclusions. Put plainly, I reject out of hand any argument that would have us keep silent before the horrors of slavery, genocide, and apartheid. The tyranny of the majority is not less tyrannical because many agree with it. To use an apocryphal quote often used by John F. Kennedy, “[t]he hottest places in Hell are reserved for those who in times of moral crisis preserve their neutrality.”<sup>75</sup> If condescension is a condition precedent for preventing injustice, then so be it. But beyond biting the bullet, there are other concerns with the argument. The first is that it equates popular morality with the views of the majority. Yet respecting and, indeed, uplifting the views of vulnerable minorities is an integral component of democracy. Nor can their inclusion within civil society be undermined by majority will without threatening the very fabric of democratic

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<sup>70</sup> Sandalow, *supra* note 52 at 607.

<sup>71</sup> That said, many would honestly argue that our society is engaged in genocide on multiple fronts, as Sandalow pointed out long ago in the context of the Vietnam war: *ibid.*

<sup>72</sup> See e.g. United States Holocaust Memorial Museum, “The Enabling Act”, *Holocaust Encyclopedia* (2 June 2025), online: [perma.cc/7N4X-REN8].

<sup>73</sup> Wendel, *supra* note 9 at 738.

<sup>74</sup> Bugarcic, *supra* note 16 at 44; Fontana, *supra* note 16 at 1494–95; Umberto Eco, “Ur-Fascism”, *The New York Review* (22 June 1995), online: [perma.cc/Y8VE-3J5M]. According to Umberto Eco, fascism is a particular form of anti-democratic populism.

<sup>75</sup> See Deborah Parker, “The Historical Presidency: JFK’s Dante” (2018) 48:2 *Presidential Studies Q* 357.

governance. Is the protection of minorities not one of the principles underlying our constitutional order?

## V. HOW SHOULD WE NAVIGATE DISRESPECTING THE LAW?

When should jurists hold the law in contempt? Where is the line? I do not believe that we should disrespect the law everywhere and everywhen. We should instead follow Mari Matsuda in multiple consciousness:

There are times to stand outside the courtroom door and say “this procedure is a farce, the legal system is corrupt, justice will never prevail in this land as long as privilege rules in the courtroom.” There are times to stand inside the courtroom and say “this is a nation of laws, laws recognizing fundamental values of rights, equality and personhood.” Sometimes, as Angela Davis did, there is a need to make both speeches in one day. Is that crazy? Inconsistent? Not to Professor Davis, a Black woman on trial for her life in racist America. It made perfect sense to her, and to the twelve jurors good and true who heard her when she said “your government lies, but *your* law is above such lies.”<sup>76</sup>

Even if you think judges aren’t shit, you’ll sometimes have to suck up. Nor does a healthy disrespect mean undermining the law in those rare moments where it does serve justice. David Luban suggests that we only have an obligation to obey the law when the law corresponds to moral requirement, or where obedience is a matter of doing our fair share within a “fair and reasonable scheme of social cooperation.”<sup>77</sup> Elsewhere, we do not owe it obedience, let alone respect.

Your starting position should be that the law deserves some disrespect, for it is rooted in injustice, filled with unjust laws, and applied with injustice. To be healthy, your disrespect should be proportionate and guided by a deep and authentic desire for justice. What makes disrespect healthy is its intelligibility, its ability to raise consciousness, to increase justice or at least shine a light on its absence.

Beyond that, I have no grand advice.<sup>78</sup> Justice belongs to morality, and morality belongs to each and every one of us. The balance of healthy disrespect is a question of conscience. It is not one that can be answered by others.<sup>79</sup> “Within each lawyer’s conscience a touchstone,” without which we cannot lay claim to the honour of our profession.<sup>80</sup> The most important

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<sup>76</sup> Mari J Matsuda, “When the First Quail Calls: Multiple Consciousness as Jurisprudential Method” (1989) 11:1 Women’s Rts L Rep 7 at 8 [emphasis in original].

<sup>77</sup> David Luban, “Legal Ideals and Moral Obligations: A Comment on Simon” (1996) 38:1 Wm & Mary L Rev 255 at 258.

<sup>78</sup> Others have more advice than I proffer, some more compatible with my arguments than others: see Dubian Ade, “Black is Crime: Notes on Blaqqillegism”, *Hood Communist* (12 February 2020), online: [perma.cc/2H6L-5M8D]; Mary Nardini Gang, *Be Gay Do Crime: An Introduction* (Contagion Press, 2019); King, *supra* note 13; Michael E Tigar, “Fortas: Concerning Dissent and Civil Disobedience (Review II)”, *Book Review* (1969) 67:3 Mich L Rev 612 at 618; Tony Milligan, *Civil Disobedience: Protest, Justification and the Law* (New York: Bloomsbury, 2013) at 36; Delmas, *supra* note 63 at 35.

<sup>79</sup> See e.g. Dale Gibson, “Civil Disobedience and the Legal Profession” (1966) 31:4 Sask Bar Rev 211 at 220–21.

<sup>80</sup> Borrowed from Robert M Palumbos, “Within Each Lawyer’s Conscience a Touchstone: Law, Morality, and Attorney Civil Disobedience” (2005) 153:3 U Pa L Rev 1057. The title is itself derived from the American Bar Association, *supra* note 7, Preamble.

thing a lawyer can have is a strong moral compass of their own and a willingness to stand by it. Find your line, and guard it with a fervour that can only come from love.

## VI. CONCLUSION

To be a lawyer is to be involved in a system of injustice, to take part in the business of violence. I have no intent to stop telling people to “be gay, do crime.” I have nothing but admiration for those who, in the name of justice, dare say: “Fuck the law, fuck the courts, and fuck you.”<sup>81</sup> Trash talk the law. Call courts fuckwits.

Our legal order would only be bettered if we, jurists, collectively fostered a healthy disrespect for the law.<sup>82</sup> The arc of the moral universe may bend towards justice, but it is only thanks to those who share in a healthy disrespect for the law. Justice, not law, should be our measure. As crises succeed one another at an ever-increasing pace, we cannot allow ourselves to forget that.

Be irreverent. Be indignant. Be defiant. The law is not sacred. People are.

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<sup>81</sup> As the song goes, “fuck you and your mom and your sister and your job, and your broke-ass car and that shit you call art. Fuck you and your friends that I’ll never see again. Everybody but your dog, you can all fuck off”: GAYLE, “abcdefu” on *A Study of the Human Experience Volume One* (Atlantic Records, 2022).

<sup>82</sup> Although I have not spoken directly about disciplinary proceedings, I believe that we should not punish lawyers who express contempt for the law in the name of justice nor threaten the livelihood of those who engage in principled disobedience, so long as their acts are reasonably proportional, are not incompatible with their duty towards their clients, and respect norms of human dignity. See Milligan, *supra* note 78 at 36. Authors seem to agree that civil disobedience by lawyers should not be punished by licensing bodies, or at least be subject to lesser punishment: Palumbos, *supra* note 80 at 1095; Luban, *supra* note 77 at 259; McMorrow, *supra* note 31 at 154; Tigar, *supra* note 78 at 618; Gibson, *supra* note 79 at 223. In the words of Delmas, *supra* note 63 at 37: “Fyodor Dostoyevsky said that one can judge a society by how well it treats its prisoners. I venture that a society’s treatment of its civil and uncivil disobedients would be a good yardstick, too.”