LEGAL ETHICS AND THE PROMOTION OF SUBSTANTIVE EQUALITY

Daniel Del Gobbo*

The Federation of Law Societies of Canada's Model Code of Professional Conduct recognizes the commitment of the legal profession to protect the public interest and respect the requirements of human rights laws. Following in the wake of the Statement of Principles controversy at the Law Society of Ontario, this article argues that the standard conception of lawyers' professional role morality in Canada—the neutral partisan—takes a thin and "bleached out" view of legal ethics. In making this case, the article reads the limited body of professional discipline caselaw through the lens of critical theory to show that current practices of lawyer regulation pertaining to human rights and equality are underinclusive. Next, the article argues that lawyers have a positive obligation to promote substantive equality in their professional life and work. This obligation should be reflected by revisions to the Model Code and other professional regulatory measures to ensure that law societies take a comprehensive and systematic approach to promoting substantive equality within their mandate. As such, the purpose of the article is to shift the terms of professional debate about what protecting the public interest and respecting the requirements of human rights laws mean.

Le Code type de déontologie professionnelle de la Fédération des ordres professionnels de juristes du Canada reconnaît l'engagement de la profession juridique à protéger l'intérêt du public et à respecter les lois sur les droits de la personne. Dans la foulée de la controverse entourant la déclaration de principe proposée par le Barreau de l'Ontario, nous faisons valoir dans cet article que la conception standard au Canada du sens moral professionnel associé à la fonction de juriste – la neutralité partisane – s'appuie sur une vue simpliste et « javelisée » de l'éthique du droit. À cette fin, nous

* Banting Postdoctoral Fellow, McGill University Faculty of Law; S.J.D. and Trudeau Scholar, University of Toronto Faculty of Law; LL.M., Harvard Law School; J.D., Osgoode Hall Law School; Hons. B.A., Queen's University; of the Bar of Ontario. I am grateful to Faisal Bhabha, Brenda Cossman, Tim Dare, Robert Leckey, Malcolm Mercer, Janet Mosher, Pooja Parmar, Stephen Pitel, Amy Salyzyn, Joshua Sealy-Harrington, Lorne Sossin, and Deanne Sowter for their comments on a previous draft. I was fortunate to present the work on the Rhode Early Career Scholars Panel at the International Legal Ethics Conference at the UCLA School of Law in Los Angeles, California, the Global Meeting on Law and Society at ISCTE in Lisbon, Portugal, and the Canadian Association for Legal Ethics Conference at the Bora Laskin Faculty of Law, Lakehead University in Thunder Bay, Ontario, all in 2022. Funding for the research was provided by the International Association of Legal Ethics and the OBA Foundation Chief Justice of Ontario Fellowship in Legal Ethics and Professionalism Studies, 2021–22.

interprétons les quelques cas dans la jurisprudence en droit disciplinaire sous l'angle de la théorie du criticisme pour montrer que les actuelles pratiques de réglementation de la profession, en ce qui a trait aux droits humains et à l'égalité des personnes, ne sont pas suffisamment inclusives. Puis, nous arguons que les juristes ont l'obligation positive de favoriser l'égalité réelle dans leur vie professionnelle, et que le Code type et les autres mécanismes de réglementation professionnelle doivent être révisés de manière à véhiculer cette obligation pour garantir que les barreaux fassent rigoureusement et systématiquement la promotion de cette égalité dans le cadre de leur mandat. La finalité de cet article consiste à recentrer le débat autour des visées véritables de la protection de l'intérêt public et du respect des lois sur les droits de la personne.

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Introduction

One of the most challenging and abiding questions in legal ethics is the scope of lawyers' duty to protect the public interest. In Canada, the issue made national headlines in 2019 when the Law Society of Ontario ("LSO") revoked a rule that required lawyers to "adopt and abide by a statement of principles acknowledging their obligation to promote equality, diversity and inclusion generally, and in their behaviour towards colleagues, employees, clients, and the public."[1] The LSO adopted the Statement of

[1] See Amanda Jerome, "LSO Repeals Statement of Principles, Replaces it with Acknowledgment of Human Rights Laws", *The Lawyer's Daily* (11 September 2019), online: <www.thelawyersdaily.ca> [perma.cc/8P4L-3V9U]. For the Statement of Principles requirement, see Law Society of Upper Canada, *Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions* (November 2016)

Principles ("SOP") requirement after an internal working group released the 2016 report, *Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions*, which found that racialized licensees face systemic barriers and discrimination in the legal system.[2] The report recommended the SOP requirement as part of a suite of mandatory and voluntary measures intended to "accelerate cultural change," an objective framed in light of the LSO's rights and obligations under its governing legislation, Ontario's *Law Society Act*, to "fulfil[l] its multiple roles in the public interest as change agent, facilitator, resource and regulator."[3]

The SOP requirement became a lightning rod for controversy immediately after it was adopted.[4] Critics lambasted the LSO for its perceived overreach in creating a positive obligation on lawyers to "promote" equality, diversity, and inclusion rather than merely "respecting" them.[5] According to the critics, the requirement compelled speech and created a moral litmus test by forcing lawyers to express a particular opinion about substantive equality, a contentious political issue. On a fundamental level, they suggested, the standard conception of lawyers' professional role morality in Canada conflicts with this requirement. Arthur Cockfield wrote: "Forcing lawyers to subscribe to a particular worldview for regulatory purposes is an unacceptable intrusion into a lawyer's liberty and promotes significant harm to the public."[6] The ethical principle underpinning the standard conception is neutral partisanship, which reflects the importance of a lawyer's moral non-accountability for their client's choices. The principle of neutral partisanship is believed to protect the public interest because it helps to ensure that clients receive the best representation possible. In Cockfield's view, requiring lawyers to respect their clients' choices is professionally responsible so long as the

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at 2, online (pdf): <lawsocietyontario.azureedge.net> [perma.cc/4H32-DGMV] [*Working Together for Change*].

2 *Working Together for Change*, *supra* note 1 at 11.

3 *Ibid* at 6, 24. The LSO's functions and the principles to be applied in carrying them out are provided by the *Law Society Act*, RSO 1990, c L.8, ss 4.1–4.2.

4 See Joshua Sealy-Harrington, "Twelve Angry (White) Men: The Constitutionality of the Statement of Principles" (2020) 51:1 Ottawa L Rev 195 at 199–202 [Sealy-Harrington, "Constitutionality"].

5 See e.g. Arthur J Cockfield, "Limiting Lawyer Liberty: How the Statement of Principles Coerces Speech" (2018) Queen's Law Research Paper Series No 2018–100 at 21–23, online: *SSRN* <papers.ssrn.com> [perma.cc/M7SB-36Q8] [Cockfield, "Lawyer Liberty"]; *Alford v The Law Society of Upper Canada* (19 October 2018), Toronto, Ont Div Ct No 510/18 (fresh as amended notice of application).

6 Arthur Cockfield, "Why I'm Ignoring the Law Society's Orwellian Dictate", *The Globe and Mail* (17 October 2017), online: <www.theglobeandmail.com> [perma.cc/G64Z-E9Y2] [Cockfield, "Orwellian Dictate"].

choices are legal. Substantive equality, by contrast, reflects a "particular worldview." Requiring lawyers to promote substantive equality is professionally irresponsible because it exceeds what the law requires.

Challenging the critics' view, I begin this article from the proposition that the standard conception of professional role morality is morally deficient. This is hardly a novel claim. Legal ethics scholars have criticized the standard conception for failing to take adequate account of the public interest for decades. In this article, I take these criticisms one step further. Professional role morality should be interpreted to include a positive obligation on lawyers to promote substantive equality. I conceive of this responsibility broadly. It encompasses a lawyer's choice of clients, relationships with employees, behaviour toward other lawyers, representation on client matters, effects of their work on third parties, and conduct in their private life. The legal and moral foundations of this interpretation can be found in lawyers' extant obligations to protect the public interest and respect the requirements of human rights laws. This interpretation should be enforced through a range of professional regulatory measures to ensure that law societies take a more comprehensive and systematic approach to promoting substantive equality within their mandate. As such, my primary purpose in this article is to shift the terms of professional debate about what protecting the public interest and respecting human rights laws mean.

My argument proceeds in two parts. In Part One, I elaborate my critique of the standard conception, explaining that its precepts take a thin and "bleached out" view of legal ethics. In making this case, I review the limited body of professional discipline jurisprudence through the lenses of critical race theory and feminist legal theory to show that current practices of lawyer regulation pertaining to human rights are underinclusive. In Part Two, I explain that lawyers have a positive obligation to conduct themselves in an equitable manner and bring about equitable outcomes in cases where equality concerns are salient to the issues. I explain why this interpretation is legally and morally justified before considering the professional regulatory implications of this interpretation. I focus my recommendations on a central task—revising the Federation of Law Societies of Canada's *Model Code of Professional Conduct*—to lay the groundwork for lawyers to think more creatively and redemptively about how they can promote substantive equality in their professional life and work.[7]

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[7] Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: FLSC, 2022 [*Model Code*].

Part I—The Conventional Approach

A) Procedural Justice and Professional Role Morality

The standard conception of professional role morality rests on the principle of neutral partisanship. The first concept, "neutrality," speaks to the theory of lawyers' moral non-accountability for their client's choices when acting as resolute advocates for their clients, or "partisans," in the legal system.[8] The Supreme Court of Canada recognized the importance of the principle of neutral partisanship (sometimes called "commitment to the client's cause") as one part of a lawyer's broader duty of loyalty in *R v Neil*, ensuring that a lawyer will not "soft peddle" their representation of their clients out of concern for someone or something else.[9] Rule 5.1-1 of the *Model Code* confirms the principle: "When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law[.]"[10] The Commentary to Rule 5.1-1 adds: "The lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (except as required by law …) to assist an adversary or advance matters harmful to the client's case."[11]

The theory of moral non-accountability that underpins the standard conception is a liberal one. In a free and equal society, there will inevitably be a plurality of conceptions of the good. Community members might not always agree on the correct answers to legal questions in a substantive sense, but they should be able to agree on the neutral structure and therefore political legitimacy of the legal procedures in place for answering them. Stephen Pepper explains: "The lawyer is a good person in that he provides access to the law; in providing such access without moral screening he serves the moral values of individual autonomy and equality."[12] The

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8 For classic statements of the thinking behind this model, see Monroe H Freedman, *Lawyers' Ethics in an Adversary System* (Indianapolis, Ind: Bobbs-Merrill, 1975); Charles Fried, "The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship" (1976) 85:8 Yale LJ 1060 at 1071–72, 1084; Richard Wasserstrom, "Lawyers as Professionals: Some Moral Issues" (1975) 5:1 Human Rights 1 at 9–10; William H Simon, "The Ideology of Advocacy: Procedural Justice and Professional Ethics" (1978) 1978:1 Wis L Rev 29 at 36–37 [Simon, "Ideology"]; Stephen L Pepper, "The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities" (1986) 1986:4 American Bar Foundation Research J 613; David Luban, "The Adversary System Excuse" in David Luban, ed, *Legal Ethics and Human Dignity* (Cambridge: Cambridge University Press, 2007) 19 at 23–55.

9 2002 SCC 70 at para 19. See also *Strother v 3464920 Canada Inc*, 2007 SCC 24 at para 1.

10 *Model Code*, *supra* note 7, r 5.1-1.

11 *Ibid*.

12 Pepper, *supra* note 8 at 634. See also Tim Dare, "Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers" (2004) 7:1 Legal Ethics 24 at 25–29 [Dare, "Ethical

ethical implication of this theory is that the formal rules of the legal system are procedurally sound and sufficiently constraining of clients' interests on their own. Lawyers who conduct themselves resolutely within the terms of legality are absolved from moral accountability for the content of their clients' choices and the outcomes that result from them. Procedural justice and professional role morality are conflated on this view.[13] Fidelity to the rules is the highest ethical virtue.[14]

In the standard conception, lawyers have an obligation to promote substantive equality in cases where the principle of neutral partisanship requires it. Poverty lawyers, for instance, might work at a community legal clinic or represent a low-income client whose mandate requires them to promote tenants' rights, workers' rights, or immigrants' rights, as the case may be. Outside these circumstances, lawyers are free to promote substantive equality in cases where the principle of neutral partisanship permits it, that is, barring any conflicts between its promotion and their clients' interests. Lawyers are free to promote substantive equality in their conduct outside of work as well, barring any conflicts of interest again. Corporate lawyers, for instance, might volunteer on the board of a charitable organization so long as their clients' interests are not materially and adversely affected by the lawyer's work in that capacity. Lawyers might also engage in law reform. Tim Dare encourages lawyers to move between partisan and reformist roles in this way, reflecting a clean break between professional role morality and its two alternatives, personal morality and broad-based "ordinary" morality in society.[15] His recommendation cites the importance of maintaining role differentiation in professional life, while recognizing the contribution of personal and ordinary morality to broader social change, including reformist efforts by lawyers to bring the law, and hence professional role morality, closer to a lawyer's personal and ordinary moral ideals.[16]

Accordingly, the standard conception recognizes that promoting substantive equality might be an independently laudable objective for lawyers to pursue. In the majority of cases, however, it will be a personal or ordinary moral obligation rather than an ethical one. Lawyers engage in client-directed behaviour that is legally permissible, but

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Obligations"]; W Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton, NJ: Princeton University Press, 2010) at 36 [Wendel, *Fidelity to Law*].

13 See Simon, "Ideology", *supra* note 8 at 38.

14 I have criticized this assumption elsewhere. Daniel Del Gobbo, "Queer Dispute Resolution" (2019) 20:2 Cardozo J Conflict Resolution 283 at 290.

15 Tim Dare, *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role* (London, UK: Routledge, 2016) at 150 [Dare, *Counsel of Rogues*].

16 *Ibid*.

potentially problematic from a substantive equality perspective all the time. Consider the labour lawyer who represents a large, multinational farming corporation in challenging the claims of migrant farm workers, a racialized group with temporary immigration status, that they should receive basic employment benefits and protections from the corporation. The power imbalance between the parties and the relatively precarious position of the migrant farm workers in society, a problem made worse by their lacking the protections being sought in the case, renders the workers vulnerable to harm and exploitation.[17] So long as the lawyer challenges the workers' claims within the limits of the law, the standard conception holds that there is nothing objectionable about this mandate from an ethical perspective. It would be professionally irresponsible for the lawyer to promote substantive equality in the case if the lawyer's conduct exceeds what the law or the corporation's interests permit.

B) Bleaching Out the Substance

The standard conception takes a thin and "bleached out" view of professional responsibility and ethics. Coined by Sanford Levinson and elaborated by David Wilkins, the term "bleached out professionalism" refers to the complex social process by which lawyers are presumed to adopt the standard conception's professional role morality as their own.[18] Professionalism is a greedy ideology, Wilkins writes, because it requires exclusive and undivided loyalty from its members.[19] The standard conception overtakes a lawyer's professional identity and becomes the primary basis for evaluating actions taken in the context of the lawyer's professional life and work. Legal ethics are regulated on the presumption of universality. The *Model Code* is a general statement of rules that purports to apply to every lawyer equally. As such, lawyers are presumed to "bleach out" or shed their personal morality and other identity group characteristics—their race, gender, religion, sexual orientation, *etc.*—as

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[17] I base this hypothetical on the realities faced by migrant farm workers. See generally Fay Faraday, *Canada's Choice: Decent Work or Entrenched Exploitation for Canada's Migrant Workers?* (Toronto: George Cedric Metcalf Charitable Foundation, 2016), online (pdf): <metcalffoundation.com> [perma.cc/VFM4-VAW5]; Aziz Choudry & Adrian A Smith, *Unfree Labour?: Struggles of Migrant and Immigrant Workers in Canada* (Oakland, Cal: PM Press, 2016).

[18] See David B Wilkins, "Identities and Roles: Race, Recognition, and Professional Responsibility" (1998) 57:4 Md L Rev 1502 at 1503 [Wilkins, "Identities and Roles"], citing Sanford Levinson, "Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity" (1993) 14:6 Cardozo L Rev 1577. See also David B Wilkins, "Fragmenting Professionalism: Racial Identity and the Ideology of Bleached Out Lawyering" (1998) 5:2/3 Intl J Legal Profession 141.

[19] Wilkins, "Identities and Roles", *supra* note 18 at 1503–04.

irrelevant to their professional role because they are potentially corrupting of their capacity to serve as resolute advocates.[20] The presumption holds regardless of whether the lawyer's personal morality or identity group characteristics are salient to a client's case in some way (e.g., racial or gender-based discrimination claims).[21] The Commentary to Rule 5.1-1 makes this explicit: "A lawyer should refrain from expressing the lawyer's personal opinions on the merits of a client's case to a court or tribunal."[22]

The presumption is justified by reference to the twin concepts of client autonomy and consumer protection.[23] According to the liberal view, clients benefit from the standardization of legal and professional competence. Clients should not be concerned that the nature or quality of their lawyer's representation might suffer because the lawyer and client have different racial or gender identities, the lawyer fails to subscribe to the client's personal moral norms, or the client's interests conflict with an ordinary moral norm in society.[24] If every client is equal before the law, then lawyers should not allow these characteristics to interfere with their professional responsibility to provide their clients with every opportunity the legal system offers them.[25] It is effectively to say that freedom requires lawyers be role differentiated empty vessels, ready to assume their client's interests on demand, or else the legal profession could force the community's agreement on controversial issues. Lawyer neutrality is necessary to protect the masses from the oligarchy of a ruling lawyer class.[26] Cockfield criticizes the SOP requirement on similar grounds, calling it a chilling "Orwellian dictate" that prevents individual self-fulfillment and equal participation in democracy because it "implicates the lawyer's ability to give candid advice to their client or argue the client's position," making it harder for clients to see their lawyers as "neutral and independent-minded people" committed to the client's cause.[27]

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20 *Ibid* at 1504–05.

21 For a compelling account of a lesbian lawyer's struggles in this context, see Nancy D Polikoff, "Am I My Client?: The Role Confusion of a Lawyer Activist" (1996) 31:2 Harv CR-CLL Rev 443.

22 *Model Code*, *supra* note 7, r 5.1-1.

23 See Wilkins, "Identities and Roles", *supra* note 18 at 1512.

24 Rules of confidentiality are frequently justified on a similar basis. Clients are likely to fear seeking legal assistance if they believe that lawyers can break their confidence. For commentary, see David M Tanovich, "Law's Ambition and the Reconstruction of Role Morality in Canada" (2005) 28:2 Dal LJ 267 at 281–83 [Tanovich, "Role Morality"].

25 For a consumer protection argument on the merits of professional regulation, see Michael J Trebilcock, "Regulating the Market for Legal Services" (2008) 45:5 Alta L Rev 215.

26 See Melissa Mortazavi, "The Cost of Avoidance: Pluralism, Neutrality, and the Foundations of Modern Legal Ethics" (2017) 42:1 Fla St UL Rev 151 at 174–76.

27 Cockfield, "Lawyer Liberty", *supra* note 5 at 29; Cockfield, "Orwellian Dictate", *supra* note 6.

The standard conception bleaches out the content of lawyers' professional obligations in a second and closely interrelated way. Previously, I explained that the standard conception conflates the concepts of procedural justice and professional role morality. By this, I mean that it regards the fair and efficient administration of the legal system to be the primary benchmark for measuring what is ethical. Implicit in this view is the formalist assumption that legal rules and procedures are rational, objective, and predictable.[28] The law is a source of ethical guidance by virtue of its reflection of Herbert Wechsler's neutral principles.[29] Lawyers should not be held accountable for their clients' choices under law because the generality and sanctity of neutral principles should transcend the substantive outcomes that result from them. Gerald Postema criticizes it as a kind of evasion.[30] The standard conception permits lawyers to hide behind these principles and evade responsibility for the harms their clients cause by pretending that lawyers have no relevant moral agency to influence them.[31] In this way, the standard conception reflects a strict legal positivist view of professional role morality. It is premised on a clear distinction between legal (neutral) and extra-legal (personal or ordinary moral) norms, with only the former category being relevant to ethical interpretation by virtue of it having a formal legal pedigree that is seen as intrinsically good and worth preserving.[32]

One can illustrate the flaws in this thinking by reference to the empirical claims that our legal-constitutional order is "colourblind" or that the competitive, win/lose structure of rights-based adjudication is "gender neutral," to give two well-known and widely criticized examples. Claims to colourblindness and gender neutrality reflect the same formalist assumptions that law is freestanding from culture, binds people identically

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[28] See Allan C Hutchinson, *Legal Ethics and Professional Responsibility*, 2nd ed (Toronto: Irwin Law, 2006) at 28 [Hutchinson, *Legal Ethics*].

[29] Herbert Wechsler, "Toward Neutral Principles of Constitutional Law" (1959) 73:1 Harv L Rev 1. Critiques of proceduralist jurisprudence and Wechsler's article in particular helped to lay the groundwork for critical race theory. See Charles L Black Jr, "The Lawfulness of the Segregation Decisions" (1960) 69:3 Yale LJ 421; Derrick A Bell Jr, "*Brown v Board of Education* and the Interest-Convergence Dilemma" (1980) 93:3 Harv L Rev 518; Gary Peller, "Neutral Principles in the 1950's" (1988) 21:4 U Mich JL Ref 561.

[30] Gerald J Postema, "Moral Responsibility in Professional Ethics" (1980) 55:1 NYUL Rev 63 at 74.

[31] *Ibid*.

[32] For statements of the positivist view, see Dare, "Ethical Obligations", *supra* note 12; Dare, *Counsel of Rogues*, *supra* note 15; Wendel, *Fidelity to Law*, *supra* note 12; W Bradley Wendel, "Legal Advising and the Rule of Law" in Kieran Tranter et al, eds, *Reaffirming Legal Ethics: Taking Stock and New Ideas* (London, UK: Routledge, 2010) 45 [Wendel, "Legal Advising"]; W Bradley Wendel, "The Limits of Positivist Legal Ethics: A Brief History, a Critique, and a Return to Foundations" (2017) 30:2 Can JL & Jur 443.

and uniformly, and operates independently from race, gender, and other intersecting systems of oppression. Critical race theorists and feminist legal theorists have long argued that claims to the law's colourblindness and gender neutrality are false.[33] Across a wide range of contexts, the combined forces of white supremacy and male domination have made whiteness and maleness the standards for measuring what is normal and then, in a masked exercise of power, claimed to be "rational," "objective," and "predictable." Legal rules and procedures might be colourblind or gender-neutral on their face—that is to say, equal on the formal level—but they fail to live up to these ideals in substance. Research on the law's role in contributing to racial and gender subordination is extensive. Constance Backhouse and Rosemary Cairns Way illustrate how historical conceptions of professionalism in Canada have been enforced in a manner that perpetuates oppression based on race, gender, and other factors.[34] The *Working Together for Change* report testifies to the barriers that racialized licensees must overcome to succeed in the legal profession: "Examples of challenges faced [by racialized licensees] … include discrimination and stereotyping, negotiating concepts of 'culture' and 'fit,' and lack of mentors, networks and role models."[35]

The fair and efficient administration of legal rules and procedures—what critical scholars call the "law on the books"—is a poor guarantor of the material effects of these rules and procedures on the ground—the "law

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[33] For critiques of colourblindness, see Neil Gotanda, "A Critique of 'Our Constitution is Color-Blind'" (1991) 44:1 Stan L Rev 1; Kimberlé Williams Crenshaw, "Color Blindness, History, and the Law" in Wahneema Lubiano, ed, *The House that Race Built* (New York: Vintage Books, 1998) 280; Lani Guinier & Gerald Torres, *The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy* (Cambridge, Mass: Harvard University Press, 2002) at 32–66; Ian Haney López, *White by Law: The Legal Construction of Race*, 10th Anniversary ed (New York: New York University Press, 2006). For critiques of gender neutrality, see Catharine A MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence" (1983) 8:4 Signs: Journal of Women in Culture and Society 635 at 644–45; Ann C Scales, "The Emergence of Feminist Jurisprudence: An Essay" (1986) 95:7 Yale LJ 1373 at 1377; Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass: Harvard University Press, 1987) at 54–55.

[34] Constance Backhouse, "Gender and Race in the Construction of 'Legal Professionalism': Historical Perspectives" in Adam Dodek & Alice Woolley, eds, *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016) 126; Rosemary Cairns Way, "Reconceptualizing Professional Responsibility: Incorporating Equality" (2002) 25:1 Dal LJ 27. See also Jerold S Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York: Oxford University Press, 1976); Annie Rochette & Wesley Pue, "Back to Basics? University Legal Education and 21st Century Professionalism" (2001) 20:1 Windsor YB Access Just 167; Leah Goodridge, "Professionalism as a Racial Construct" (2022) 69:1 UCLA L Rev Discourse 38.

[35] *Working Together for Change, supra* note 1 at 13.

in action." By relegating these effects outside the scope of professional regulation, the standard conception obscures the role of the law on the books in structuring the lives of racialized people, women, and other historically marginalized groups on exclusionary terms. In this way, the standard conception perpetuates the status quo. It confers political legitimacy to the state and long-standing maldistributions of power and resources by framing critiques of the legal profession's complicity in these maldistributions as biased, illiberal, and ethically overreaching. Instead of providing support to historically marginalized groups, the standard conception provides a form of legal and professional cover for marginalizing these groups further and changing nothing.[36] As the term "bleached out" implies, the relationship between professional role morality and racial and gender subordination is effectively whitewashed by the standard conception's choice to obscure it.

C) The Ethical Economy of Respecting Human Rights

Central to the SOP controversy is a conflict between the standard conception and the promise of human rights realization in Canada. The Preface to the *Model Code* recognizes the commitment of the legal profession to protect the public interest: "As participants in a justice system that advances the rule of law, lawyers hold a unique and privileged position in society. Self-regulatory powers have been granted to the legal profession on the understanding that the profession will exercise those powers in the public interest."[37] Previously, the Commentary to Rule 6.3 of the *Model Code* provided the following obligation that explained what protecting the public interest includes: "A lawyer has a special responsibility to respect the requirements of human rights laws in force in Canada, its provinces

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[36] For complementary takes, see Hutchinson, *Legal Ethics*, *supra* note 28 at 27; Richard L Abel, "Why Does the ABA Promulgate Ethical Rules" (1981) 59:4 Tex L Rev 639; Anthony V Alfieri, "Fidelity to Community: A Defense of Community Lawyering", Book Review of *Lawyers and Fidelity to Law* by W Bradley Wendel, (2012) 90:3 Tex L Rev 635; Katherine R Kruse, "Fidelity to Law and the Moral Pluralism Premise", Book Review of *Lawyers and Fidelity to Law* by W Bradley Wendel, (2012) 90:3 Tex L Rev 657; Faisal Bhabha, "Religious Lawyering and Legal Ethics" in Richard Moon & Benjamin L Berger, eds, *Religion and the Exercise of Public Authority* (Oxford: Hart Publishing, 2016) 41 at 41–42.

[37] *Model Code*, *supra* note 7, Preface. The Supreme Court of Canada has confirmed that law societies self-regulate in the public interest. See *Pearlman v Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869 at 887, 84 DLR (4th) 105; *Green v Law Society of Manitoba*, 2017 SCC 20 at para 22; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 36. For commentary, see Alice Woolley & Amy Salyzyn, "Protecting the Public Interest: Law Society Decision-Making after Trinity Western University" (2019) 97:1 Can Bar Rev 70.

and territories and, specifically, to honour the obligations enumerated in human rights laws."[38] The Federation of Law Societies of Canada published amendments to Rule 6.3 in 2022, immediately before this article went to press. The Commentary to the revised Rule 6.3-1 elaborates on the former rule: "Lawyers are uniquely placed to advance the administration of justice, requiring lawyers to commit to equal justice for all within an open and impartial system. Lawyers are expected to respect the dignity and worth of all persons and to treat all persons fairly and without discrimination. A lawyer has a special responsibility to respect and uphold the principles and requirements of human rights and workplace health and safety laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in such laws."[39]

Law societies have enacted similar provisions in provincial codes across the country. Rule 6.3.1-1 is the relevant provision of Ontario's *Rules of Professional Conduct*: "A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate […] with respect to professional employment of other lawyers, articled students, or any other person or in professional dealings with other licensees or any other person."[40] The Commentary to Rule 2.1-1 contains similar language: "A lawyer has … a special responsibility to recognize the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights laws in force in Ontario."[41] The relevant provision in the Barreau du Québec's *Code of Professional Conduct for Lawyers* is exceptional because it is structured differently than the other provincial rules: "[T]he practice of the profession of lawyer is based on the following values and principles which a lawyer must take into consideration in all circumstances: (1) compliance with legal provisions and preservation of the rule of law; (2) access to justice; (3) respect for individuals and protection of their fundamental rights, including the right to be free from discrimination and harassment."[42]

According to Cockfield, the LSO's position that lawyers have a professional obligation to promote human rights and substantive equality specifically is not borne out by these rules. In Cockfield's view, the language of "promoting" human rights suggests that lawyers have a positive duty to conduct themselves in an equitable manner or bring

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38 Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: FLSC, 2019, r 6.3.

39 *Model Code*, *supra* note 7, r 6.3-1.

40 Law Society of Ontario, *Rules of Professional Conduct*, Toronto: LSO, 2019, r 6.3.1-1 [LSO *Rules*].

41 *Ibid*, r 2.1-1.

42 CQLR, c B-1, r 3.1, Preamble.

about equitable outcomes. The language of "respecting" human rights, by contrast, suggests that lawyers have a negative duty to avoid engaging in harassment and other discriminatory conduct only.[43] He suggests that "promotion" implies proactivity, while "respect" implies reactivity and passivity. Cockfield cites a legal analysis by Alice Woolley in support of his position that the promotion requirement is unlawful: "All [existing professional] duties are … either passive (recognize and acknowledge) or negative (prevent, stop, respect). None of them seem sufficient as a basis for claiming that lawyers have a positive duty to advance equality, diversity and inclusion. Lawyers perhaps should have that duty, but unless they have it already the legal basis for requiring lawyers to acknowledge that they have it just doesn't seem to be there."[44] The crux of the matter for Woolley is that the LSO failed to satisfactorily identify a source for the positive obligation, either in the rules or the law governing lawyers.[45] If there is no source, the LSO's position raises concerns about its political legitimacy in creating and enforcing an obligation that does not exist. The requirement, although praiseworthy, would fall outside of the LSO's authority: "Regulators can make you acknowledge what is, but not what they wish to be."[46]

Cockfield and Woolley's opinion is supported by the limited body of jurisprudence interpreting the meaning of these rules. I have found a total of six reported decisions in which courts or law society tribunals commented on the special responsibility of lawyers.[47] In all six cases, law society regulatory bodies evaluated conduct that was alleged to be intentionally discriminatory toward clients, other lawyers, or members of the public. The facts of *Law Society of Upper Canada v Kay*, released in 2008, are illustrative.[48] In that case, the lawyer sent a letter to a client that was menacing in tone, threatened criminal sanctions, and exploited the fact of the client's ethnicity in order to secure payment of his fees.[49]

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43 Cockfield, "Lawyer Liberty", *supra* note 5 at 21–23.

44 *Ibid* at 21, citing Alice Woolley, "Ontario's Law Society: Orwell's Big Brother or Fuller's Rex?" *Slaw* (31 October 2017), online: <www.slaw.ca> [perma.cc/9RMV-4XVF] [Woolley, "Ontario's Law Society"].

45 Woolley, "Ontario's Law Society", *supra* note 44.

46 *Ibid*.

47 See *Paletta, Re,* 1996 CanLII 915 (Ont LST); *Law Society of Upper Canada v Kay*, 2008 ONLSAP 2 [*Kay*]; *Mathurin v Scully*, 2010 HRTO 2340; *Law Society of Ontario v Fernando*, 2021 ONLSTH 63 [*Fernando*]; *Davison (Re)*, 2022 LSBC 23 [*Davison*]; *Cherniack (Re)*, 2022 LSBC 36 [*Cherniack*]. There are other cases in which lawyers engaged in conduct that raises human rights and equality issues, but these cases are the only ones that interpret the meaning of the rules in question.

48 *Supra* note 47.

49 *Ibid* at para 49.

The lawyer referenced the client's country of origin, India, and created a false binary between the client and Canadians.[50] In another case, *Davison (Re)*, released in 2022, the lawyer engaged in sexual harassment and other harassing behaviour towards employees that contributed to a toxic work environment, including kissing and other physical contact, sexual banter, and inappropriate comments about race and ethnicity.[51] None of the cases were borderline cases of ethically permissible or impermissible conduct. Amy Salyzyn observes that it can be challenging to know precisely how law societies are exercising their prosecutorial discretion because the majority of complaints never reach the formal adjudication stage.[52] Granting this point, the facts of these cases suggest that complaints relating to human rights issues are prosecuted rarely and only where the alleged professional misconduct is egregious—that is to say, in cases where lawyers fail to meet their first and lowest hurdle of a negative duty to avoid engaging in harassment and other discriminatory conduct only.

In my view, the cases are evidence of a phenomenon that Harry Arthurs calls the "ethical economy" of legal regulation in Canada.[53] Consistent with efficiency principles, law societies tend to discipline lawyers when the profession's reward from the prosecution is high and the risk of adverse consequences is low.[54] Law society resources of time, money, and energy are scarce. As a result, the majority of prosecutions involve misconduct about which there is a clear moral consensus about its lack of professionalism or the public's credibility in the legal profession is at stake (e.g., breaches of fiduciary duty, mishandling trust funds, ungovernability by the law society, or as in the *Kay* and *Davison* cases, intentional racial and ethnic discrimination and sexual harassment).[55] The problem is likely made worse by path dependence. Law societies are taking a conservative

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50 *Ibid.*

51 *Supra* note 47 at para 53.

52 See Amy Salyzyn, "Law Society Complaints: What We Don't Know and Why This is a Problem" *Slaw* (10 June 2015), online: <www.slaw.ca> [perma.cc/2PML-FU33].

53 HW Arthurs, "The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?" (1995) 33:4 Alta L Rev 800 at 802. For commentary on this phenomenon, see Alice Woolley, "Regulation in Practice: The 'Ethical Economy' of Lawyer Regulation in Canada and a Case Study in Lawyer Deviance" (2012) 15:2 Legal Ethics 243 [Woolley, "Regulation"].

54 See Woolley, "Regulation", *supra* note 53 at 243.

55 *Ibid.* Michael Trebilcock makes a similar point in his characterization of professional disciplinary processes as having an overwhelmingly "misconduct" orientation, meaning that they focus on cases of dishonest or unethical behaviour, rather than a "passive competence" or "active competence" orientation, meaning that they focus on failures to meet acceptable standards of professional competence. Trebilcock, *supra* note 25 at 225.

approach to prosecutions in a regulatory culture that is characterized by historical non-enforcement and complacency.

Complicating the picture further, evidence suggests that the most frequent targets of professional misconduct complaints and law society attention are sole and small firm practitioners.[56] One explanation for this trend is that many of these practitioners engage in challenging practice areas, yet they suffer from a relative lack of "collegial supports and controls" over their work that are common in larger firms.[57] Another explanation is that the ethical economy has shaped prosecutorial discretion towards these practitioners, many of whom are members of historically marginalized groups, because they have less power and resources than other lawyers and are therefore less likely to resist the law society's policing of their conduct.[58] The *Working Together for Change* report suggests the same, finding that "racialized licensees were more likely to go into sole practice as a result of barriers faced in other practice environments" and recognizing "the vulnerability of racialized licensees … in the context of professional regulation and discipline."[59]

In my view, the standard conception suffers from a failure of moral aspiration. Cockfield is correct that regulatory proceedings finding that lawyers have a positive duty to promote substantive equality are rare. However, it would be a mistake to suggest that this conclusion is foreclosed by the *Model Code* on the basis that law societies have failed to exercise their prosecutorial discretion in this manner to date. Courts and law society tribunals have not clearly pronounced on what it means for lawyers to fulfill their special responsibility to respect the requirements of human rights laws. Research on the ethical economy suggests that the cases have been motivated less by the force of legal and moral principle than by a combination of resource-based concerns, historical inertia, and bleached out ideology. Cockfield's position that promoting substantive equality is a personal or ordinary moral obligation only, a "particular worldview," bleaches out the mandate of law societies to protect the public interest because it reduces their power and legitimacy to prosecuting the most egregious cases of harassment and other discriminatory conduct only. The standard conception sets an extremely low moral bar.

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56 See Woolley, "Regulation", *supra* note 53 at 244.

57 *Ibid.*

58 *Ibid.*

59 *Working Together for Change*, *supra* note 1 at 13.

Part II—Towards a New Ethical Paradigm

A) Promoting Substantive Equality

It is commonly observed that there exists a "crisis of professionalism" among lawyers today.[60] The ethical challenges facing the profession are wide-ranging, but one of the persistent and overarching concerns is that, outside of limited exceptions like poverty law and criminal defence work, the standard conception fails to strike the correct balance between client interests and the public interest. As I explained in the previous section, the standard conception is constituted by legal rules and procedures that are claimed to promote individual self-fulfillment and equal participation in democracy so long as the requirements of procedural justice are met. However, the standard conception has been criticized for bleaching out the content of lawyers' professional responsibility because it privileges form over content, principle over consequences, and uses a narrow legal and client-centric framing instead of a broad and contextual framing of the lawyer's role in society and what protecting the public interest means.

Critical scholars have proposed formulations that seek to recalibrate the relationship between law, ethics, and morality, including theories that challenge the standard conception by expanding its reference points to include both legal and extra-legal moral norms. As the Preface to the *Model Code* reflects, the privileged position of lawyers in society is based on the moral values that guide lawyers as professionals: "More is expected of [lawyers] than forensic acumen. A special ethical responsibility comes with membership in the legal profession."[61] The provision confirms the basic realist insight that the law of lawyering and the morality of lawyering are not coextensive. The central questions of what makes a competent lawyer and responsible professional are fundamentally moral questions that transcend the forensic acumen implied by legal formalism and positivism. Critics have found inspiration in a wide range of moral sources—Anthony Kronman cites the common good of political fraternity;[62] Deborah Rhode emphasizes a lawyer's background and lived experiences;[63] Thomas Shaffer insists on the communal aspect of religiously grounded moral

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60 See e.g. Cairns Way, *supra* note 34 at 30.

61 *Model Code*, *supra* note 7, Preface.

62 See Anthony T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, Mass: Harvard University Press, 1993) at 94.

63 See Deborah L Rhode, "Ethical Perspectives on Legal Practice" (1985) 37:2 Stan L Rev 589 at 643–47; Deborah L Rhode, *In the Interests of Justice: Reforming the Legal Profession* (Oxford: Oxford University Press, 2003) at 17 [Rhode, *In the Interests of Justice*].

discernment;[64] while Jean Stefancic and Richard Delgado encourage lawyers to engage in more creative thought and expressive activity as a humanizing force.[65]

I take a similarly critical position in this article. However, my claim is more targeted than prior accounts because it is focused on substantive equality. Clients, lawyers, and members of the public would benefit from a legal profession that reinforces the moral values underlying the law's equality guarantees. Law societies should recognize that lawyers have a positive obligation to conduct themselves in an equitable manner and bring about equitable outcomes in particular cases. Far from exceeding what the law requires, the legal and moral foundations of this interpretation can be found in lawyers' extant obligations to protect the public interest and respect the requirements of human rights laws.

1) Legal Foundations

The Supreme Court of Canada considered the relationship between professional regulation and equality in *Trinity Western University v Law Society of Upper Canada*, a 2018 case.[66] Trinity Western University is an evangelical Christian institution in Langley, British Columbia that proposed to open a law school requiring its faculty and students to adhere to a religiously motivated code of conduct prohibiting "sexual intimacy that violates the sacredness of marriage between a man and a woman," a policy that harmed LGBTQ2 people and others.[67] In ruling that the LSO's decision to reject the school's accreditation was reasonable, the Court confirmed that the LSO's mandate to facilitate access to justice under sections 4.1 and 4.2 of Ontario's *Law Society Act* includes an "overarching interest in protecting the values of equality and human rights in carrying out its functions."[68] The LSO was entitled to consider more than faculty and student interests in making its decision, but the potential harms to the LGBTQ2 community as a whole.[69] Commenting further, the Court ruled that the LSO was correct in finding that the public interest would be furthered by efforts to "promote" a more representative bar: "Access to justice is facilitated where clients seeking legal services are able to access a legal profession that is reflective of a diverse population and responsive

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64 See Thomas L Shaffer, *On Being a Christian and a Lawyer: Law for the Innocent* (Provo, Utah: Brigham Young University Press, 1981); Thomas L Shaffer, "On Religious Legal Ethics" (1994) 35:4 Catholic Lawyer 393 at 397.

65 See Jean Stefancic & Richard Delgado, *How Lawyers Lose Their Way: A Profession Fails its Creative Minds* (Durham, NC: Duke University Press, 2005) at 84.

66 2018 SCC 33 [*Trinity Western*].

67 *Ibid* at para 1.

68 *Ibid* at para 21.

69 *Ibid* at para 25.

to its diverse needs."[70] The Court's reasons were consistent with its 2017 ruling in *Green v Law Society of Manitoba*, where it held that a law society's broad and purposive interpretation of its public interest mandate and choice to impose positive, substantive requirements on lawyers, specifically continuing professional development requirements, were entitled to deference.[71]

Further to these ends, law societies have released policy statements and enacted professional obligations on lawyers to promote substantive equality. In Ontario, the *Working Together for Change* report was the latest in a series of LSO initiatives meant to increase racial and ethnic diversity in the legal profession. The first was a 1992 survey of Black law students, articling students, and recently called lawyers, which found that 59% of respondents believed that certain areas of practice, particularly corporate/commercial law, were effectively closed to them.[72] LSO initiatives to increase gender and sexual diversity have a longer history, reaching back to a 1989 study of women lawyers and 1991 report called *Transitions in the Ontario Legal Profession* in which the LSO found that across all work settings, women were more likely to occupy lower positions in the power hierarchy, report difficulties balancing career and family life, and experience sexual harassment.[73] In response to these findings, the LSO adopted Rule 28 on non-discrimination in 1994, one of the precursors to Rule 6.3-1 of the *Model Code* and Rule 6.3.1-1 of the Ontario *Rules of Professional Conduct*.[74] The LSO released the *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession* in 1997, which elaborated its commitment to combatting racism and sexism and included a recommendation that the LSO should continue to "actively promote the achievement of equity and diversity within the profession."[75]

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70 *Ibid* at para 23. For complementary analyses of the LSO's mandate, see Justin P'ng, "The Gatekeeper's Jurisdiction: The Law Society of Ontario and the Promotion of Diversity in the Legal Profession" (2019) 77:2 U Toronto Fac L Rev 82 at 85–98; Sealy-Harrington, "Constitutionality", *supra* note 4 at 216; Malcolm Mercer, "Equality, Diversity and Inclusion: What Can We Agree On and What Can't We?" (6 June 2020), online (blog): *Malcolm Mercer* <malcolmmercer.ca> [perma.cc/R3HV-8ASU].

71 *Supra* note 37 at paras 24–25, 28–29.

72 See Law Society of Upper Canada, *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession* (Toronto: Law Society of Upper Canada, 1997) at 8–9, online (pdf): <lawsocietyontario.azureedge.net> [perma.cc/B4CH-Q3Y8] [*Bicentennial Report*].

73 Law Society of Upper Canada: Standing Committee on Women in the Legal Profession, *Transitions in the Ontario Legal Profession: A Survey of Lawyers Called to the Bar Between 1975 and 1990* (Toronto: Law Society of Upper Canada, 1991).

74 *Bicentennial Report, supra* note 72 at 10. See also Tanovich, "Role Morality", *supra* note 24 at 292, n 90.

75 *Bicentennial Report*, *supra* note 72 at 37. For commentary on the importance of promoting diversity in the legal profession, see Adam M Dodek, "Canadian Legal Ethics:

To repeat, Rule 6.3-1 of the *Model Code* provides that lawyers have a special responsibility to respect the requirements of human rights laws. By his own account, Cockfield's interpretation of the rule can be captured by the following equation: "respect, recognize ≠ promote."[76] In my view, Cockfield's interpretation fails to acknowledge that which Canadian courts, human rights tribunals, and law societies have recognized for decades. Equality is not a neutral principle. It cannot be served by treating likes alike in the formal, Aristotelian sense.[77] Lawyers should not assume that a given policy or action binds people identically and uniformly because it appears colourblind or gender-neutral on its face or, like the code of conduct in *Trinity Western*, it fails to explicitly target LGBTQ2 people for exclusion and therefore claims not to discriminate. Rather, it is well-established that equality has both a formal and substantive dimension, consistent with the remedial objectives of human rights legislation and the interpretive guidance of constitutional equality jurisprudence under section 15 of the *Charter*.[78] The Preamble to the Ontario *Human Rights Code* reflects the political conditions that human rights legislation is meant to promote, emphasizing not only formal equality under law, but also "the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community."[79]

The *Human Rights Code* provides that everyone has a right to equal treatment without discrimination in five areas of social activity:

Ready for the Twenty-First Century at Last" (2008) 46:1 Osgoode Hall LJ 1 at 41–43; Carman J Overholt, "Diversity and Professionalism in the Practice of Law" (2011) 44:1 UBC L Rev 91 at 94; Faisal Bhabha, "Towards a Pedagogy of Diversity in Legal Education" (2014) 52:1 Osgoode Hall LJ 59 at 68–69 [Bhabha, "Pedagogy"]; P'ng, *supra* note 70.

[76] Cockfield, "Lawyer Liberty", *supra* note 5 at 21, citing LSO Bencher Anne Vespry's expression of her objections to the SOP requirement. Vespry's objections are elaborated in Woolley, "Ontario's Law Society", *supra* note 44.

[77] Rejection of the formal equality approach has been a hallmark of Canada's constitutional equality jurisprudence for decades. See *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 165–66, 56 DLR (4th) 1, citing Aristotle, *Ethica Nichomacea,* Book V3 at 1131a-6, translated by WD Ross, *The Nicomachean Ethics* (Oxford: Oxford University Press, 1925); *Fraser v Canada (AG)*, 2020 SCC 28 at para 40–45 [*Fraser*]. For commentary, see Joshua Sealy-Harrington, "The Alchemy of Equality Rights" (2021) 30:2 Const Forum Const 53.

[78] It is well-established that constitutional law principles should inform the interpretation of human rights legislation. See *Dickason v University of Alberta*, [1992] 2 SCR 1103 at 1121, 95 DLR (4th) 439.

[79] RSO 1990, c H.19. For commentary on the remedial objectives of human rights legislation, see Gwen Brodsky, Shelagh Day & Frances Kelly, "The Authority of Human Rights Tribunals to Grant Systemic Remedies" (2017) 6:1 Can J Human Rights 1; Dominique Clément, "Renewing Human Rights Law in Canada" (2017) 54:4 Osgoode Hall LJ 1311.

employment; accommodation (housing); goods, services, and facilities; contracts; and membership in trade and vocational associations.[80] Lawyers are governed by these protections in their multiple roles as employers and employees, landlords and tenants, providers of legal services to clients, parties to and drafters of contracts and other agreements, and members of a self-regulated profession. Breaches of the *Human Rights Code* can be intentional or unintentional and can arise from individual or systemic conduct, including adverse effects discrimination.[81] The Commentary to Rule 6.3.1-1 of the *Rules of Professional Conduct* states this explicitly: "An action or policy that is not intended to be discriminatory can result in an adverse effect that is discriminatory. If the application of a seemingly 'neutral' rule or policy creates an adverse effect on a group protected by Rule 6.3.1-1, there is a duty to accommodate."[82] The Human Rights Tribunal of Ontario has repeatedly recognized that the *Human Rights Code* should be given a broad and purposive interpretation and that it enshrines positive rights, crucially, not simply access to a remedy where a breach has been found.[83] All of these forms and contexts fall within a lawyer's professional obligation to respect the requirements of human rights laws.

The current test for discrimination was stated by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, a 1999 case.[84] The test provides that a policy or action taken by an employer or service provider must be rationally connected to the work or service in question, must be adopted by the employer or service provider in good faith, and must be reasonably necessary for the employer or service provider to impose in the circumstances, despite the fact that the policy or action creates a disadvantage on protected grounds, for the policy or action to be permissible.[85] The test requires that an employer or service provider must take positive steps to inform themselves about the practicalities of reasonable accommodation and to provide such accommodation to the point of undue hardship, where necessary.[86] In

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80 *Ibid*, ss 1–9.

81 See *Ontario Human Rights Commission v Simpson-Sears Ltd*, [1985] 2 SCR 536, 23 DLR (4th) 321; *Moore v British Columbia (Education)*, 2012 SCC 61 at paras 58–62 [*Moore*]; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para 32.

82 LSO *Rules*, *supra* note 40, r 6.3.1-1.

83 See *Association of Ontario Midwives v Ontario (Health and Long-Term Care)*, 2018 HRTO 1335 at para 226.

84 [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin*]. For the relevant provision in Ontario, see *Human Rights Code*, *supra* note 79, s 11.

85 *Meiorin*, *supra* note 84 at para 54.

86 *Ibid* at para 62; *Moore*, *supra* note 81 at para 61. The Human Rights Tribunal of Ontario has repeatedly recognized the positive nature of the duty to accommodate. See

framing the test, the Court was careful to explain the broader implications of its analysis, explicitly rejecting the formal equality approach and citing an article by Shelagh Day and Gwen Brodsky on the relationship between accommodation and structural transformation, with the latter requiring "an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed."[87] The test has been repeatedly confirmed by the Court, most recently in *Stewart v Elk Valley Coal Corp* in 2017.[88]

The LSO tribunal confirmed these principles in *Law Society of Ontario v Fernando*, a regulatory decision released in 2021.[89] The facts of *Fernando* are similar to the *Kay* case above in that both involved intentional racial and ethnic discrimination towards clients. In *Fernando*, the lawyer engaged in a pattern of harmful and offensive communications, including repeated references to a client's race, ethnicity, and gender as a South Asian woman.[90] The tribunal found that lawyers who occupy a position of authority over clients, employees, other lawyers, or in their practice generally, have both negative and positive duties to prevent discrimination under the *Human Rights Code*.[91] The tribunal went further, commenting that the LSO's mandate to regulate the legal profession and prevent discrimination under Rule 6.3.1-1 of the *Rules of Professional Conduct* extends to actions that fall outside the five areas of social activity covered by the *Human Rights Code*, including actions taken in a lawyer's professional capacity with respect to third parties and in a lawyer's personal capacity.[92]

The LSO tribunal's findings on the breadth of Rule 6.3.1-1 relate to criticisms of the breadth of the SOP requirement. Cockfield challenged the notion that lawyers should be required to acknowledge their obligation to promote substantive equality "generally," including in their behaviour toward the public, on the basis that this behaviour was separate from a lawyer's professional life and work and therefore irrelevant to a lawyer's fitness to practice, meaning that it was outside the LSO's authority

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Britton v General Motors of Canada, 2012 HRTO 683 at para 17, citing *Oak Bay Marina Ltd v British Columbia (Human Rights Tribunal) (No 2)*, (sub nom *Gordy v Painter's Lodge (No 2)*, 2004 BCHRT 225 at para 84; *Stewart v Ontario (Government Services)*, 2013 HRTO 1635 at para 41. See also LSO *Rules*, *supra* note 40, r 6.3.1-3, Commentary.

87 *Meiorin*, *supra* note 84 at para 41, citing Shelagh Day & Gwen Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996) 75:3 Can Bar Rev 433 at 462. See also *Fraser*, *supra* note 77 at para 36.

88 2017 SCC 30.

89 *Fernando*, *supra* note 47.

90 *Ibid* at paras 92–112.

91 *Ibid* at para 118.

92 *Ibid* at para 117.

to regulate.[93] I believe this view is mistaken. The privileged position of lawyers in society means that lawyers have a positive obligation to encourage respect for and try to improve the administration of justice in both their professional and personal capacities, including a commitment to the principle of equal justice for all. The Commentary to Rule 6.3-1 of the *Model Code* establishes that "the provisions of this [r]ule do not only apply to conduct related to, or performed in, the lawyer's office or in legal practice."[94] Rule 6.3-1 is supported by the Commentary to Rule 2.1-1, which provides that law societies can prosecute a lawyer's conduct "in either private life or professional practice [that reflects] adversely upon the integrity of the profession," and the Commentary to Rule 5.6-1, which provides that a lawyer's responsibility to the administration of justice is "not restricted to the lawyer's professional activities" because it is a "general responsibility resulting from the lawyer's position in the community."[95] The Commentary to Rule 5.6-1 underscores the positive nature of the obligation: "[A] lawyer should not hesitate to speak out against an injustice."[96]

The most recent case that speaks to these issues is *Cherniack (Re)*, a regulatory decision released by the Law Society of British Columbia in 2022.[97] In *Cherniack*, the lawyer became offended by a speaker's comments in an online public forum.[98] The two individuals had no prior relationship.[99] After the forum ended, the lawyer sent an email to the speaker that contained profane, insulting, and discriminatory language, including racist and homophobic slurs.[100] The email was not sent in the lawyer's professional capacity, nor did the lawyer identify himself as a lawyer in the email.[101] Nevertheless, the tribunal found that the lawyer's actions contravened Rule 6.3-1 of the *Code of Professional Conduct for British Columbia*, calling the email a grave affront in a society that "embraces ideals such as promoting 'a climate of understanding and mutual respect where all are equal in dignity and rights.'"[102] The tribunal explained the importance of regulating actions taken in the lawyer's personal capacity: "[The speaker's] objection demonstrates both that the public expects a certain standard of conduct by lawyers and that the [lawyer in this case] failed to meet that standard. Such conduct is damaging to the perception

93 Cockfield, "Lawyer Liberty", *supra* note 5 at 24.
94 *Model Code*, *supra* note 7, r 6.3-1.
95 *Ibid*, rr 2.1-1, 5.6-1.
96 *Ibid*.
97 *Cherniack*, *supra* note 47.
98 *Ibid* at para 18.
99 *Ibid.*
100 *Ibid* at paras 20, 23.
101 *Ibid* at para 20.
102 *Ibid* at para 42.

of the legal profession generally, and as a result, is damaging to public confidence in the administration of justice."[103]

The relationship between legal ethics and human rights is further confirmed by the content of international human rights instruments and requirements to respect Indigenous legal orders in Canada. The Commentary to Rule 6.3-1 recognizes the importance of remediating colonial state violence and intergenerational trauma: "Indigenous peoples may experience unique challenges in relation to discrimination and harassment as a result of the history of the colonization of Indigenous peoples in Canada, ongoing repercussions of the colonial legacy, systemic factors, and implicit biases. Lawyers should take particular care to avoid engaging in, allowing, or being willfully blind to actions which constitute discrimination or any form of harassment against Indigenous peoples."[104] In the *Working Together for Change* report, the LSO confirmed the legal profession's responsibility to implement the Calls to Action found in the Truth and Reconciliation Commission of Canada's final report, issued in 2015.[105] Notably, Call to Action 27 asks the Federation of Law Societies of Canada to ensure that lawyers are familiar with the history and legacy of residential schools, Indigenous laws, Treaties and Aboriginal rights, and the *United Nations Declaration on the Rights of Indigenous Peoples*, which the federal government affirmed through the passage of Bill C-15 in 2021.[106] The Call to Action speaks to the relationship between Rule 6.3-1 and Rule 3.1 of the *Model Code*, which governs professional competence.[107] The Call to Action provides that respect for Indigenous legal orders "will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism," making the links between competence and substantive equality explicit.[108]

It follows from these authorities that respecting the requirements of human rights laws requires lawyers to promote substantive equality

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103 *Ibid* at para 52.

104 *Model Code*, *supra* note 7, r 6.3-1.

105 *Working Together for Change*, *supra* note 1 at 23–24. See Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Committee, 2015), online (pdf): <Executive_Summary_English_Web.pdf> [perma.cc/QME9-WQLS] [*TRC Report*].

106 *TRC Report*, *supra* note 105 at 168. For the text of Bill C-15, see *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14. For more on the relationship between legal ethics and international human rights, see Jonathan H Marks, "Toward a Unified Theory of Professional Ethics and Human Rights" (2012) 33:2 Mich J Intl L 215.

107 *Model Code*, *supra* note 7, rr 6.3-1, 3.1.

108 *TRC Report*, *supra* note 105 at 168.

in their professional life and work.[109] To facilitate compliance, it may be helpful to revise Rule 6.3-1 of the *Model Code* to state the conclusion more plainly—"respect, recognize = promote"—but the term "respect" is technically sufficient on its own. Joshua Sealy-Harrington makes the point concisely that the SOP requirement is merely a "regulatory reminder" that lawyers should reflect on their pre-existing obligations under human rights legislation.[110] Even Woolley concedes that the LSO had the authority to impose the SOP requirement so long as these pre-existing obligations existed. Woolley writes: "Provided there is in fact a legally established duty on Ontario lawyers to promote equality, diversity and inclusion, then there is no reason whatsoever why licensees cannot be required to acknowledge that duty and identify strategies for accomplishing it."[111]

One could take an even stronger view on Rule 6.3-1's interpretation. Faisal Bhabha asks: "Why include the rule at all if it requires nothing more than what statutory human rights already require of lawyers?"[112] Bhabha points out, like Sealy-Harrington does, that lawyers have pre-existing obligations to promote substantive equality under human rights laws. Human rights tribunals and commissions are charged with resolving complaints brought under these laws. Considering these facts, Bhabha suggests that key to interpreting the rule is recognizing the "special" nature of the responsibility of lawyers, a term whose inclusion in the rule should be given interpretive weight or else the term, and indeed the rule as a whole, would be tautological. On this theory, it follows that the rule is more than a simple restatement of pre-existing obligations. The plain meaning of the term "special" confirms that the responsibility of lawyers is both greater than and independent from the responsibility of other employers and service providers as a condition of lawyers' professional licensing and role in society, one of the bases upon which legal ethics are regulated independently from human rights laws in the first place.

The legal content of the special responsibility of lawyers is this. Lawyers have a positive obligation to promote substantive equality when acting in their professional capacity as employers and service providers and in their personal capacity as citizens. As I explained by reference to

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109 Other critics have suggested that Rule 6.3-1 of the *Model Code* and corresponding rules in the provincial codes should be interpreted in this manner, albeit without providing the same legal analysis. See David M Tanovich, "'Whack' No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases" (2013–14) 45:3 Ottawa L Rev 495 at 510 [Tanovich, "Whack' No More"]; Noel Semple, "Harassment in the Legal Profession: A Few Bad Apples?" *Slaw* (24 February 2020), online: <www.slaw.ca> [perma.cc/M3VD-565U]; Sealy-Harrington, "Constitutionality", *supra* note 4 at 215–18.

110 Sealy-Harrington, "Constitutionality", *supra* note 4 at 218–19.

111 Woolley, "Ontario's Law Society", *supra* note 44.

112 Bhabha, "Pedagogy", *supra* note 75 at 70.

the ethical economy in the previous section, law societies have chosen, until now, to prosecute cases in which lawyers failed to meet their negative obligation to avoid engaging in harassment and other discriminatory conduct only. There is nothing legally preventing them from choosing otherwise in the future.[113] Law societies are entitled to find that lawyers are required, inter alia, to take reasonable steps to prevent harassment and other discriminatory conduct before it occurs, to take remedial action after it occurs, and to conduct themselves in an equitable manner and bring about equitable outcomes that meet the requirements of human rights laws.

2) Moral Foundations

If the law of lawyering and the morality of lawyering are not coextensive, then it remains for me to explain why it is a good thing, normatively speaking, to recognize that lawyers have a positive duty to promote substantive equality. As I explained above, the force of this argument rests on the basic realist insight that legal ethics requires something more than mere compliance with the formal law. Recall my example of the labour lawyer who represents the large corporation in challenging the claims of the migrant farm workers. The fact that the *Model Code* permits something to happen (the corporation's position on the organizing effort) is insufficient to conclude that the consequences of it happening are morally acceptable from a substantive equality perspective or otherwise, particularly if the consequences cause harm to other people (the migrant farm workers). Correspondingly, the fact that the *Model Code* fails to provide or even prohibits something from happening is insufficient to conclude that the consequences of it happening are not morally acceptable.

To be clear, I am not suggesting that the formal lawmaking process cannot lend things moral worth. Richard Devlin and Jocelyn Downie suggest that lawyers have moral obligations that are based in the legally derived concept of "public interest vocationalism."[114] The base term, "vocation," has two relevant aspects—the technical, referring to a lawyer's

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[113] My criticism in this section is inspired by Elaine Craig's argument that the failure of law societies to effectively regulate the conduct of criminal defence lawyers in sexual assault cases is a choice. Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal: McGill-Queen's University Press, 2018) at 131. For further commentary on the sexual assault context, see Tanovich, "Whack' No More", *supra* note 109.

[114] Richard Devlin & Jocelyn Downie, "Public Interest Vocationalism: A Way Forward for Legal Education in Canada" in Fiona Westwood & Karen Barton, eds, *The Calling of Law: The Pivotal Role of Vocational Legal Education* (Burlington, VT: Ashgate, 2014) 85. See also Richard Devlin, "Bend or Break: Enhancing the Responsibilities of Law Societies to Promote Access to Justice" (2014) 38:1 Man LJ 119 [Devlin, "Bend or Break"].

practical abilities, and the aspirational, referring to the calling of the lawyer into service of moral norms and values.[115] The clarifying term, "public interest," identifies the moral norms and values that lawyers are called to serve.[116] The first source of these norms is the legislative mandates of law societies to protect the public interest. The second source of these norms is written and unwritten constitutional principles, including "respect for minorities," "respect for the inherent dignity of the human person," "respect for cultural and group identity," and "commitment to social justice and equality," which tailor the content of the legislative mandates to the Canadian context.[117] Considering these norms and values, Devlin and Downie explain that a person's entry into the legal profession is more than a private preference or career choice, but a publicly conferred privilege, contingent on their calling, which entails the fulfillment of a moral obligation to promote constitutional principles as a condition of membership.[118] I would extend this theory to regard human rights laws as giving meaning to the public interest as well. Lawyers owe a higher moral duty as "officers of the court" to promote substantive equality, a duty which lay people and licensed professionals in other fields do not have.[119]

Related to claims about public interest vocationalism are claims about trusteeship. David Luban explains that the role of lawyers in the political community places them in a moral and specifically fiduciary or trustee-like relationship with its citizens.[120] Lawyers are trustees that have been designated by the political community, acting as principal, with an exclusive license to provide a good, legal services, for the benefit of the community as a whole.[121] The community's role in facilitating the market for legal services is not merely regulative, but constitutive: "it creates the

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115 Devlin & Downie, *supra* note 114 at 92. The term "vocation" has a third aspect, the religious, which Devlin and Downie reject as irrelevant in the context of the legal profession. *Ibid* at 91.

116 *Ibid* at 93–94.

117 *Ibid*.

118 *Ibid* at 93.

119 The professional obligations of cause lawyers are frequently described in similar terms. See Anthony V Alfieri, "Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists" (1996) 31:2 Harv CR-CLL Rev 325 at 352; Austin Sarat & Stuart Scheingold, "Cause Lawyering and the Reproduction of Professional Authority: An Introduction" in Austin Sarat & Stuart Scheingold, eds, *Cause Lawyering: Political Commitments and Professional Responsibilities* (New York: Oxford University Press, 1998) 3 at 3; Basil S Alexander, "Pragmatic Assorted Strategies: How Canadian Cause Lawyers Contribute to Social Change" (2019) 90 SCLR (2d) 3.

120 See David Luban, "Is There a Human Right to a Lawyer?" (2014) 17:3 Leg Ethics 371 [Luban, "Is There a Human Right"]. Luban's argument is further elaborated in David Luban, *Lawyers and Justice: An Ethical Study* (Princeton, NJ: Princeton University Press, 1988) [Luban, *Lawyers and Justice*].

121 Luban, "Is There a Human Right," *supra* note 120 at 379.

law that the lawyer dispenses."[122] Because the law has been manufactured for the community's benefit, the community is entitled to impose reasonable conditions on the legal profession that are consistent with the purposes of the trustee relationship it created.[123] One such condition is a moral obligation on lawyers to protect the public interest, and specifically to ensure that the law's benefits are administered fairly and equitably among the community's citizens. Lawyers must "forbear from collectively harmful actions."[124] Luban never makes this point explicitly, but it follows from this theory that lawyers have an included obligation to promote a more equitable legal order that faithfully represents the community it serves, mindful of the increasingly globalized, pluralistic, and transnational legal contexts in which clients operate. Lawyering and moral activism are married on this view. Luban writes: "At the minimum, lawyers should counsel clients to take the interests of third parties into account; at the maximum, lawyers should sometimes refrain from zealously advancing client interests even when doing so is lawful."[125]

Running in tandem with this argument, Steven Lubet and Cathryn Stewart observe that many lawyers collect economic rents by virtue of their exclusive license to practice law—payments well in excess of what is necessary to sustain the free market—and therefore it is morally incumbent on them to provide pro bono legal services or otherwise give back to the community.[126] Lawyers are profiting from their exploitation of law, a public commodity. As a result, they are imposing significant costs on the community's citizens, whom law is intended to serve, in the form of increased legal fees and other barriers to accessing justice.[127] The implications of this imbalance are brought into focus when one realizes that law school tuition in Canada is heavily subsidized by the state and many lawyers' salaries are paid by taxpayer dollars as a result of government entities contracting out their work.[128] Every lawyer benefits from the legal profession's exploitation of law in some way, including lawyers who are

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122 *Ibid* at 380.

123 *Ibid*.

124 David Luban, "The Social Responsibilities of Lawyers: A Green Perspective" (1995) 63:6 Geo Wash L Rev 955 at 963.

125 *Ibid* at 955. For commentary on Luban's argument, see Richard Devlin, "Breach of Contract?: The New Economy, Access to Justice and the Ethical Responsibilities of the Legal Profession" (2002) 25:2 Dal LJ 335 at 360–64 [Devlin, "Breach of Contract"]; Trevor CW Farrow, "Sustainable Professionalism" (2008) 46:1 Osgoode Hall LJ 51 at 94–95; Alice Woolley, "Imperfect Duty: Lawyers' Obligation to Foster Access to Justice" (2008) 45:5 Alta L Rev 107 at 114–20 [Woolley, "Imperfect Duty"].

126 Steven Lubet & Cathryn Stewart, "A 'Public Assets' Theory of Lawyers' Pro Bono Obligations" (1997) 145:5 U Pa L Rev 1245 at 1262–64.

127 *Ibid*. See also Luban, *Lawyers and Justice*, *supra* note 120 at 287.

128 See Devlin, "Breach of Contract", *supra* note 125 at 362–63.

not working in private practice or charging high legal fees.[129] Considering these realities, Lubet and Stewart's claim is that a purely profit motivated, client-centric model of lawyering, without a strong commitment to pro bono publico, creates negative externalities that some citizens are capable of bearing, but other citizens are not, which puts a strain on these citizens and the integrity of the legal system as a whole.

Critics like Rhode and Woolley have argued that market and other regulatory forces on the legal profession are structural in nature, such that the burden of transforming them should not fall on lawyers alone, but other beneficiaries of the legal system as well.[130] The point is well made. Gillian Hadfield explains that the homogeneity of law, the complexity of legal rules and procedures, and the monopoly of the state over coercive dispute resolution are powerful market incentives that pull lawyers into private practice and other legal resources into the corporate-commercial sphere.[131] The ensuing competition between business clients and individual clients for the provision of legal services prices many people out of the market.[132] Radical changes to the structure of the market are needed to correct this maldistribution, including changes to the nature of business and individual wealth to reconcile the achievement of economic and equality goals. Granting this point, Lubet and Stewart's claim remains that lawyers have a moral obligation to help reduce the barriers to accessing justice which their collection of economic rents creates, if not eliminate these barriers entirely in a fundamentally unequal system, by shifting the costs of their participation in the system to make it more equitable.

Research on the problem of access to justice in Canada is extensive. Over 65% of Canadians facing law-related conflicts are either uncertain of their rights, unwilling to use the legal system, think nothing can be done, or believe that seeking justice will take a long time or cost too much money.[133] Concerns about legal fees are compounded by a constellation of social, cultural, psychological, emotional, and other health-related challenges faced by people who cannot exercise their rights or otherwise fulfill their interests.[134] The obstacles are greatest for racialized people,

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129 *Ibid* at 371.

130 See Rhode, *In the Interests of Justice, supra* note 63 at 27; Woolley, "Imperfect Duty", *supra* note 125 at 117–18.

131 Gillian K Hadfield, "The Price of Law: How the Market for Lawyers Distorts the Justice System" (2000) 98:4 Mich L Rev 953 at 956.

132 *Ibid*.

133 See Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa: Department of Justice Canada, 2009) at 55–67, 88.

134 See Trevor CW Farrow, "What is Access to Justice?" (2014) 51 Osgoode Hall LJ 957 at 964–65 [Farrow, "What is Access"]; Trevor CW Farrow, *Civil Justice, Privatization,*

women, and other historically marginalized groups who have been systematically denied the resources, experience, and opportunities to navigate the legal system on equal footing as other groups.[135] Like the broader class hierarchy that it reflects, the financial capacity of clients to pay their lawyers and find effective legal representation is frequently a proxy for race, gender, and other intersecting systems of oppression. From this perspective, the moral obligation of lawyers to facilitate access to justice is properly understood as more than a barrier reduction or cost shifting project. The rhetoric of barrier reduction, without more, implies that the forms of justice to be "accessed" in this conception—the provision of legal services; courts and tribunals in their current form—are things worth accessing in the first place.[136] For historically marginalized groups, this is not always the case.

It is well-established that access to justice has both procedural and substantive components. As I explained in the previous section, procedural justice is the community's right to resolve their conflicts in a fair and efficient process under law. The principle confirms that legal rules and procedures must be formally just by conforming to the notion of formal equality of treatment. The principle is fundamental to the administration of the legal system, but as a formal requirement only, it is an extremely weak

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Democracy (Toronto: University of Toronto Press, 2014) at 191; Matthew Dylag, "How Ontarians Experience the Law: An Examination of Incidence Rate, Responses, and Costs of Legal Problems" in Trevor CW Farrow & Lesley A Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020) 110 at 119–23.

135 See generally Constance Backhouse, "What is Access to Justice?" in Julia Bass, WA Bogart & Frederick Zemans, eds, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 113; Ab Currie, "A National Survey of the Civil Justice Problems of Low- and Moderate-Income Canadians: Incidence and Patterns" (2006) 13:3 Intl J Leg Profession 217; Patricia Hughes, "Advancing Access to Justice through Generic Solutions: The Risk of Perpetuating Exclusion" (2013) 31:1 Windsor YB Access Just 1. For empirical evidence, see Yedida Zalik, "Where There is No Lawyer: Developing Legal Services for Street Youth" (2000) 18 Windsor YB Access Just 153; Janet E Mosher, "Lessons in Access to Justice: Racialized Youths in Ontario's Safe Schools" (2008) 46:4 Osgoode Hall LJ 807; Sarah Buhler, "'Don't Want to Get Exposed': Law's Violence and Access to Justice" (2017) 26:1 J L & Soc Pol'y; Reem Bahdi, "Arabs, Muslims, Human Rights, Access to Justice and Institutional Trustworthiness: Insights from Thirteen Legal Narratives" (2018) 96:1 Can Bar Rev 72.

136 See Roderick A Macdonald, "Access to Justice and Law Reform" (1990) 10:1 Windsor YB Access Just 287 at 303–05. For commentary on the "access to courts" and "access to justice" distinction, see Deborah Rhode, "Access to Justice: Connecting Principles to Practice" (2004) 17:3 Geo J Legal Ethics 369 at 372–73; Nancy Cook, "Looking for Justice on a Two-Way Street" (2006) 20 Wash UJL & Pol'y 169 at 169; Patricia Hughes, "Law Commissions and Access to Justice: What Justice Should We Be Talking About?" (2008) 46:4 Osgoode Hall LJ 773 at 777–79; Farrow, "What is Access", *supra* note 134 at 970.

conception of the benefits that law can provide and the legal profession's role in administering them fairly and equitably. The problem of access to justice has been exacerbated by the standard conception's reduction of the task to nothing more than facilitating access to neutral structures. The standard conception fails to take account of whether legal rules and procedures are substantively just, or as I framed it previously, whether the material effects of the "law in action" are morally unjustifiable because they contribute to extant hierarchies. Facilitating access to substantive justice requires lawyers to be mindful of history, patterns of systemic discrimination, the individual circumstances of community members affected by the law, and the social, cultural, and economic contexts in which conflicts arise. In this sense, facilitating access to substantive justice and promoting substantive equality are closely interrelated.[137]

Arguably, the process of reconstructing professional role morality is already underway. David Tanovich suggests that Canadian lawyers are gradually moving towards a conception of the public interest that requires them to act in the "pursuit of justice," or the "correct resolution of legal disputes or problems in a fair, responsible, and non-discriminatory manner."[138] In Tanovich's view, the pursuit of justice entails the following ethical obligations on lawyers, many of which have both procedural and substantive justice components:

> a) Do what you reasonably can to promote accessibility to legal representation;
> b) Ensure that your competence extends beyond legal skills and knowledge to cultural sensitivity and understanding (i.e., cultural competence);
> c) Protect your client's right to a fair process and a result which is consistent with the legal merit of the claim;
> d) Generally avoid deceitful, obstructionist, or other conduct that will frustrate the ability of the process to produce the legally correct result;
> e) Do not engage in conduct that will have a discriminatory impact on third parties;
> f) Protect your client's right to be free from discriminatory practices or conduct; and
> g) Be responsible. Avoid and disclose conduct that will unjustifiably harm an innocent third party.[139]

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137 For complementary takes, see Faisal Bhabha, "Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions" (2007) 33:1 Queen's LJ 139; Joshua Sealy-Harrington, "Access to (In)justice: A Critical Race Reflection" *The Lawyer's Daily* (24 March 2021), online: <www.thelawyersdaily.ca> [perma.cc/4FEE-2MW2].

138 See Tanovich, "Role Morality", *supra* note 24 at 284.

139 *Ibid* at 284–85.

Tanovich acknowledges that these obligations will sometimes require lawyers to engage in practices that infringe on client autonomy, for instance, by refusing to follow a client's instructions or breaking client confidence.[140] However, these practices are morally acceptable in cases where they comport with the law, "properly interpreted" in a manner consistent with principles of equality and harm reduction.[141] The is the key insight from Tanovich's work. Lawyers should feel empowered by the moral force of equality law to conduct themselves accordingly.[142] Tanovich cites an article by Esmerelda Thornhill on the links between ethics and equality, clarifying that the pursuit of justice is an equality-seeking mission.[143] Thornhill writes: "Concepts of social justice … compel the legal profession to pursue equality which will promote, enhance and value cultural, ethnic, racial and sexual diversity. This will enable heretofore excluded groups to be productive, successful, and satisfied members of the legal profession."[144]

My final point is a response to the claim that recognizing a positive duty to promote substantive equality exists would be legally or morally unprecedented—a step beyond what courts and law society tribunals have recognized in the past. Grounding legal ethics in the text of the *Model Code*, the law governing lawyers, and their interpreting authorities—as important as the legal foundations of my position are—constrains the moral imagination of lawyers to remake Canadian law and society into something new. The *Model Code* represents a minimum and overly generalized benchmark. As Lon Fuller puts it, the freezing of professional role morality in a recorded text, the shift from a reflexive and deliberative practice of identifying one's moral values to the codification of edicts and fatwas and legislation, transforms the field of legal ethics from a "morality of aspiration" to a "morality of duty," or rules-based justification.[145] Generally speaking, the *Model Code* tells lawyers what they cannot do; it rarely tells lawyers what they can and should do. Legal ethics is the province of lawyers, judges, and equality activists alike, with every interpreter being contextually situated and bringing their own moral perspectives to bear on the task. Professional role morality is a contingent concept that cannot

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140 *Ibid* at 285.

141 *Ibid* at 284.

142 The point is consistent with William Simon's approach to legal ethics and the pursuit of justice. See William H Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge, Mass: Harvard University Press, 1998) at 9–10, 138.

143 Tanovich, "Role Morality", *supra* note 24 at 285, citing Esmerelda MA Thornhill, "Ethics in the Legal Profession: The Issue of Access" (1995) 33:4 Alta L Rev 810.

144 Thornhill, *supra* note 143 at 812.

145 Lon L Fuller, *The Morality of Law,* Revised Ed (New Haven, Conn: Yale University Press, 1969) at 5–6.

claim to have a fixed or objective basis, whether in the *Model Code* or otherwise. Cockfield's interpretation that "respect, recognize ≠ promote" is a moral choice, not an inevitability. Lawyers are free to interpret their moral obligations otherwise.

In my view, legal ethics should aspire to the fullest realization of human powers to create a better world—practicing law with compassion and empathy; cultivating relations marked by equal care, concern, and respect for other people; and resisting the oppressive structures that have prevented historically marginalized groups from flourishing. Legal ethics should conceive of professional role morality in a progressive way, encouraging lawyers to find creative, holistic, and life-affirming solutions to the myriad problems that Canadian law and society faces. It is effectively to ask: *Can lawyers support the kinds of social transformations and resulting reallocations of power and resources that critical race, feminist, and other utopian projects envision? Can lawyers contribute meaningfully to social movements for change, reaching outside the limits of the law and state institutions in which they embedded to fashion a world in which substantive equality exists?* The challenge of practicing law in a radical manner is that it resists the circumscription of prevailing legal methods and interpretations and that it invites, if not demands, lawyers to rethink concepts of fairness, equality, access to justice, the public interest, and ultimately, the raison d'être of the legal profession as a whole.[146] In her path-breaking work on prison abolition and transformative justice, Mariame Kaba encourages equality activists to begin their abolitionist journey not by thinking, "What do we have now, and how can we make it better?", but instead, "What can we imagine for ourselves and the world?"[147] I would encourage lawyers to think the same.

B) The Professional Implications of an Equality Promotion Ethic

The promise of recognizing that lawyers have a positive obligation to promote substantive equality, like the promise of the *Working Together for Change* report, is "accelerating cultural change" in the Canadian legal profession, both in terms of its composition and representativeness of the population and its capacity to fulfill its public interest mandate. In this final section, I canvas a range of professional regulatory measures that operate in this cultural register. Several of these measures have been proposed by lawyers, considered in legal scholarship, and tabled by law society

[146] See Allegra M McLeod, "Prison Abolition and Grounded Justice" (2015) 62:5 UCLA L Rev 1156 at 1238; Amna A Akbar, Sameer M Ashar & Jocelyn Simonson, "Movement Law" (2021) 73:4 Stan L Rev 821 at 861–62.

[147] Mariame Kaba, *We Do This 'Til We Free Us: Abolitionist Organizing and Transforming Justice* (Chicago, Ill: Haymarket Books, 2021) at 3.

regulatory bodies in the past where they remain controversial and largely unadopted by the profession. Other measures listed in this section are new. In canvassing these measures, I begin to illustrate what recognizing that lawyers have a positive obligation should entail—how lawyers can begin to make equality rights real—in the hopes of inspiring critical reflection and debate that pushes Canadian law and society forward.

I cannot explore every possible initiative, so I have focused my recommendations on a central task—revising the *Model Code*—which should be readily achievable and effective in the short term. I take this position somewhat vexedly in light of my critique of code-based morality in the previous section. However, I believe the task remains an important one. The *Model Code* represents the formal commitment of lawyers to promoting commonly held values. Revising the rules is necessary because the rules provide the basis for professional regulatory measures that can have beneficial impacts in society at large. However, I recognize simultaneously the risks of taking a rules-based and specifically formalist approach to compliance, in which the rules are little more than "ethical window-dressing," as Allan Hutchinson puts it, because they enable self-interested conduct and legitimate the bad things that lawyers do.[148] In this section, I think of the rules as a starting point, rather than the endpoint, of a more comprehensive project that begins with code-based morality to raise professional consciousness and foster a sense of higher moral purpose among lawyers, changing the culture of the legal profession from within. The SOP requirement was adopted for a similarly important purpose—facilitating reflection and discourse as the starting point of a strategy.[149]

One of the recommendations in the *Working Together for Change* report is that the LSO should review and revise, where appropriate, the Ontario *Rules of Professional Conduct* to reinforce the professional obligations of licensees to recognize, acknowledge, and promote equality, diversity, and inclusion.[150] The recommendation does not elaborate which rules or commentaries should be revised, but simply states that the rules should be reviewed to determine how this objective can be advanced.[151] In my view, the public consultation process leading to the release of the report provides a model for how this review should be conducted. The Federation of Law Societies of Canada should invite submissions from law societies, legal practitioners, equality-seeking groups, and other stakeholders about how substantive equality can be operationalized in the *Model Code* and provincial codes of professional conduct. One of the

148 Hutchinson, *Legal Ethics*, *supra* note 28 at 13.

149 See Sealy-Harrington, "Constitutionality", *supra* note 4 at 219.

150 *Working Together for Change, supra* note 1 at 25.

151 *Ibid*.

challenges in conducting this review will be thinking about ethics and equality systemically, but without diminishing the importance of client autonomy, consumer protection, and other legal and moral values that codes of professional conduct are meant to protect.

This recommendation is a timely one. As I explained previously, the Federation of Law Societies of Canada revised Rule 6.3-1 of the *Model Code* in 2022. The Commentary to the rule provides that lawyers should foster a professional environment that is "respectful, accessible, and inclusive."[152] In particular, the Commentary highlights the risks of bullying in the workplace, sexual harassment, and reprisals against individuals who make human rights complaints.[153] The Commentary states that lawyers should be alert to their internal, unconscious biases and careful to avoid practices that reinforce those biases in the provision of legal services.[154] These are promising developments and the Federation should be commended for implementing them. However, the revisions fall short of the kind of broad-based review and comprehensive reforms that are needed. The first problem is that most of the revisions focus on clarifying a lawyer's negative obligations under human rights laws only. The provincial codes contain such negative guidance already. The second problem is that the revisions focus on Rule 6.3-1 to the exclusion of other rules.[155] In my view, human rights are relevant to the interpretation of the entire *Model Code* and not only Rule 6.3-1, informing everything from the lawyer-client relationship to the processes and outcomes of legal decision-making. Many of these interpretations are not obvious.

Rule 3.1-2 of the *Model Code* provides that "[a] lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer."[156] The rule includes a list of fundamental competencies, including "knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises."[157] I would revise this list to require lawyers to consider the substantive equality implications of their practice and represent their clients accordingly. As a first step, law societies should introduce human rights and equality issues in its entry-level reference materials

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152 *Model Code*, *supra* note 7, r 6.3-1.

153 *Ibid*.

154 *Ibid*.

155 Critics have proposed amendments to Rule 8.5 of the American Bar Association's *Model Rules of Professional Conduct* (2010) to cultivate equality promotion, but they have similarly focused on the single rule only. See David Douglass, "The Ethics Argument for Promoting Equality in the Profession" *ABA Journal* (1 November 2019), online: <www.abajournal.com> [perma.cc/97HW-SKKS].

156 *Model Code*, *supra* note 7, r 3.1-2.

157 *Ibid*.

for licensing.[158] Additionally, law societies should mandate that lawyers receive training in human rights and equality on a regular basis, including a focus on cultural competence and intersectionality, as part of their continuing professional development requirements.[159] Recall that Call to Action 27 in the Truth and Reconciliation Commission's final report asks the Federation of Law Societies of Canada to ensure that lawyers have "skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism."[160] Pooja Parmar has argued that cultural competence requires lawyers to be mindful of how Indigenous peoples' encounters with the settler legal system are influenced by racism, colonial legacies, and professional conceptions that fail to address issues of culture, language, and other forms of difference.[161] I fully endorse this view. Competent lawyering requires lawyers to understand how race, gender, and other intersecting systems of oppression bear down on clients and community members, particularly in cases where a client's position may not be easily translatable across identity and experience.

Consider Rule 3.2-1 of the *Model Code*, which governs client service.[162] The Commentary to the rule provides examples of the expected practices of competent lawyers, including keeping clients "reasonably informed," responding to "reasonable requests" for information, and providing clients with "complete and accurate relevant information" about legal matters.[163] As Martha Davis has argued in the context of the American Bar Association's *Model Rules of Professional Conduct*, the moderating qualifications of "reasonable" and "relevant" communication sit in tension with the concept of individual human dignity, a human rights norm, to the extent that they restrain full disclosure by lawyers and therefore prevent clients from taking ownership and participating actively in the resolution of legal disputes on their own terms.[164] Generally speaking,

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158 See *Working Together for Change*, *supra* note 1 at 40–41.

159 *Ibid* at 39–40. Following the *Working Together for Change* report's recommendation, the LSO expanded its continuing professional development requirements to include three hours of equality, diversity, and inclusion programming in 2016. See "CPD Equality, Diversity and Inclusion Requirement" (2021), online: *Law Society of Ontario* <lso.ca> [perma.cc/JT9J-QNQK].

160 *TRC Report*, *supra* note 105 at 168.

161 Pooja Parmar, "Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence" (2019) 97:3 Can Bar Rev 526 at 556. For complementary analyses, see Rose Voyvodic, "Lawyers Meet the Social Context: Understanding Cultural Competence" (2005) 84:3 Can Bar Rev 563; Samuel Singer, "Trans Competent Lawyering" in Joanna Radbord, ed, *LGBTQ2+ Law: Practice Issues and Analysis* (Toronto: Emond, 2019) 159.

162 *Model Code*, *supra* note 7, r 3.2-1.

163 *Ibid*.

164 Martha F Davis, "Human Rights and the Model Rules of Professional Conduct: Intersection and Integration" (2010) 42:1 Colum HRLR 157 at 179–80. For commentary

taking a substantive equality approach to reasonableness standards in the *Model Code* requires lawyers to ensure that the provision of legal services is contextual to the experiences of clients and community members whose lives are most affected by the services in question. In the context of Rule 3.2-1, this means revising the content of the reasonable communication standard by changing the nature and format of client counselling, increasing the frequency of correspondence, ensuring that information is accessible, and finding greater opportunities for client involvement in legal decision-making.[165] Lawyers who represent clients who are legally unsophisticated, face operational barriers, or have other relevant characteristics (e.g., identity, language, literacy, socio-economic status, health) must take these factors expressly into account.[166] The purpose behind the change would be to ensure that lawyers are guided by equality values in exercising their professional discretion under the rule.

In revising Rule 3.2-1 and others, law societies should pay careful attention to the interaction between codes of professional conduct, the procedural rules of courts and tribunals, and other practice directives. The Commentary to Rule 5.1-1 explains the lawyer's role in adversarial proceedings as follows: "[T]he lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law."[167] The Commentary continues: "In civil proceedings, a lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections, attempts to gain advantage from slips or oversights not going to the merits or tactics that will merely delay or harass the other side."[168] Consider the harmful effects of SLAPP suits or retaliatory actions brought by individuals that are subject to public criticism in order to

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on the importance of client involvement, see Peter Gabel & Paul Harris, "Building Power and Breaking Images: Critical Legal Theory and the Practice of Law" (1982–83) 11:3 NYU Rev L & Soc Change 369 at 391; Lucie E White, "Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak" (1987–88) 16:4 NYU Rev L & Soc Change 535 at 538.

165 Supreme Court of Canada found in *Salomon v Matte-Thompson,* a 2019 case, that a lawyer's duty to advise has three components, encompassing duties to inform, to explain, and to advise. *Salomon v Matte-Thompson*, 2019 SCC 14 at para 52. The content of the duty will depend on the circumstances, including the object of the mandate, the client's characteristics, and the expertise the lawyer claims to have in the field in question. *Ibid* at para 53, citing *Côté v Rancourt*, 2004 SCC 58 at para 6.

166 For commentary on literacy, see Hughes, *supra* note 136 at 13–15.

167 *Model Code*, *supra* note 7, r 5.1-1.

168 *Ibid*.

silence their critics.[169] The equality implications are clear in sexual violence cases. Plaintiffs, typically male, are bringing defamation lawsuits in record numbers as a means of intimidating and harassing their accusers, typically female, and salvaging their reputations.[170] Critical to understanding how substantive equality can be operationalized in Rule 5.1-1 is understanding how courts and tribunals operate, specifically the circumstances in which these kinds of harmful practices are permitted and even encouraged to happen, and how the rules of civil procedure might correspondingly have to change. As I explained above, the problem of access to justice is not simply a matter for legal ethics to address, but a problem that has roots in the structure of the market for legal services and the construction of rules and procedures that provide for exploitation.[171]

In recent years, the Canadian Bar Association and other legal and professional organizations have released reports calling for greater flexibility, streamlining, and modernization of the rules of civil procedure as a means of facilitating access to justice. [172] All of these proposals have legal ethics and specifically equality implications, yet few of the reports consider them in a meaningful way. For instance, the Action Committee on Access to Justice in Civil and Family Matters' *Roadmap for Change*, published in 2013, recommends the following about expediting civil actions and applications: "Parties should be encouraged to agree on common experts; to use simplified notices; to plead orally where appropriate (to reduce the cost and time of preparing legal materials); and,

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169 See *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22 at para 2. For commentary, see Byron Sheldrick, *Blocking Public Participation: The Use of Strategic Litigation to Silence Political Expression* (Waterloo, Ont: Wilfrid Laurier University Press, 2014); Hilary Young, "The Canadian Defamation Action: An Empirical Study" (2017) 95:3 Can Bar Rev 591 at 599–602; Taylor Hudson, "1704604 Ontario Ltd. v. Pointes Protection Association: Anti-SLAPP Motions - The Ontario Court of Appeal Points the Way" (2019) 49:3 Adv Q 367.

170 See Shaina Weisbrot, "The Impact of the #MeToo Movement on Defamation Claims Against Survivors" (2020) 23:2 City University NY L Rev 332; Madison Pauly, "She Said, He Sued" *Mother Jones* (March/April 2020), online: <www.motherjones.com/crime-justice/2020/02/metoo-me-too-defamation-libel-accuser-sexual-assault/> [perma.cc/68KD-Q855].

171 See Hadfield, *supra* note 131 at 1001–02.

172 See e.g. Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2013) [*Roadmap for Change*]; Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report* (2013), online (pdf): <representingyourselfcanada.com> [perma.cc/B7QA-8W29]; Canadian Bar Association, *Reaching Equal Justice: An Invitation to Envision and Act* (Ottawa: Canadian Bar Association, 2013); Canadian Bar Association, *Futures: Transforming the Delivery of Legal Services in Canada* (Ottawa: Canadian Bar Association, 2014) [CBA, *Futures*].

generally, to talk to one another about solving problems in a timely and cost-effective manner."[173] The Supreme Court of Canada confirmed in *Hryniak v Mauldin*, a 2014 case, that "a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system."[174] Building on these recommendations, Rule 5.1-1 should be revised to clarify what ethical lawyering requires in the summary judgment, simplified procedure, and case management contexts. A focus on equality should not mean that lawyers are prevented from taking strong legal positions, but rather that in certain cases, lawyers are required to take these positions in a more efficient and accessible process that reduces the costs and complexity of litigation for everyone. Given the particular challenges faced by self-represented litigants, lawyers who participate in hearings against these individuals may have a heightened ethical responsibility to increase access.[175]

Expediting civil actions and applications is a chiefly process-level recommendation that leaves open the more challenging question, raised by Cockfield and others, of whether lawyers should have a positive duty to bring about equitable outcomes in particular cases. I believe the answer to this question is yes. Lawyers should carve out provisions in the *Model Code* that provide for equitable outcomes in cases where equality concerns are salient to the issues. In making this recommendation, I am not suggesting that equality interests should override client interests or that lawyers should be permitted to substitute client interests with their own. Concerns about client autonomy, the risks of lawyer paternalism, and the oligarchy of the ruling lawyer class are legitimate. Rather, I am recommending that as a general matter, lawyers should be required to comport with human rights laws, properly interpreted in a manner that includes a positive obligation on lawyers to promote substantive equality in cases where the equality rights and interests of historically marginalized groups are engaged.

The requirement is a contextual one. In "easy" cases, client interests and equality interests will be consistent because the clients retained their lawyers to provide equitable outcomes already. Poverty lawyers that work at community legal clinics or represent low-income clients, for instance, will frequently meet this requirement by virtue of their mandate, the circumstances of their client's case, or the nature of the claims being

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173 *Roadmap for Change*, *supra* note 172 at 16.

174 2014 SCC 7 at para 2.

175 See generally Julie Macfarlane, Katrina Trask & Erin Chesney, "The Use of Summary Judgment Procedures Against Self-Represented Litigants: Efficient Case Management or Denial of Access to Justice?" (Windsor, Ont: The National Self-Represented Litigants Project, The University of Windsor, 2015), online (pdf): <scholar.uwindsor.ca> [perma.cc/K6PD-88DA].

made and relief being sought. In "hard" cases, client interests and equality interests will sit in tension. Recall my example of the large corporation and migrant farm workers. In cases like this, lawyers representing the more powerful party—the corporation in this example—should be permitted to engage in practices that minimally infringe on client autonomy, either by providing equitable outcomes themselves where possible, encouraging their clients to provide them, or withdrawing from the mandate as necessary. Lawyers can positively influence their clients' conduct by reminding them of their human rights obligations, counselling them to take equality concerns seriously, finding ways to generate value and create mutual gains for both parties, and facilitating processes and interactions that prevent their clients from harming others. The *Model Code* should be revised to make these permissions explicit.

One of the boldest interventions in this area is the *Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples,* released in 2018.[176] The purpose of the Directive is to cement an approach to litigation that realizes the following objectives: (1) promoting reconciliation; (2) recognizing Aboriginal rights; (3) upholding the honour of the Crown; and (4) respecting and advancing Indigenous self-determination and self-governance.[177] It is constituted by a list of 20 litigation guidelines. Several of the guidelines entail the fulfillment of both procedural and substantive justice obligations, including the provision of equitable outcomes. Although it is a client-led initiative that is primarily aimed at federal government lawyers, the Directive states that the guidelines represent "best practices" that could apply to litigation and other forms of conflict resolution involving Indigenous peoples in Canada.[178] Here and throughout, the guidelines outline a positive vision of the lawyer's role that has potentially wide-ranging application to lawyering generally, including in private sector contexts.[179] Law societies should take inspiration from it.

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176 Department of Justice Canada, *The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples* (Ottawa: Department of Justice Canada, 2018) [Department of Justice Canada, *Directive*].

177 *Ibid* at 6.

178 *Ibid* at 5, n 2. For similar interventions, see Law Society of Upper Canada, *Guidelines for Lawyers Acting in Aboriginal Residential School Cases* (23 February 2012), online (pdf): <www.law.utoronto.ca> [perma.cc/6KAN-CC6F]; Federation of Law Societies of Canada, *Report of the Truth and Reconciliation Calls to Action Advisory Committee* (June 2020), online (pdf): <Advisory-Committee-Report-2020.pdf> [perma.cc/HR6M-AFXZ].

179 Here, I challenge the argument that government lawyers should owe higher ethical duties in comparison to other lawyers. See Allan C Hutchinson, "In the Public Interest: The Responsibilities and Rights of Government Lawyers" (2008) 46:1 Osgoode Hall LJ 105; Adam M Dodek, "Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law" (2010) 33:1 Dal LJ 1;

Consider guideline 4, which provides that lawyers "should vigorously pursue all appropriate forms of resolution throughout the litigation process."[180] One of the core themes of the guideline is that lawyers "must" consider problem-solving approaches and brainstorm creative options that promote reconciliation, an equitable outcome, outside of formal processes and beyond what is "strictly required by law."[181] Accordingly, the text of the guideline recognizes, correctly in my view, that mediation and other forms of consensual dispute resolution have the potential to transform the substance of conflict relationships for the better, placing the outcomes of the litigation within the control of Indigenous peoples themselves. Relatedly, lawyers "must" engage meaningfully with Indigenous legal traditions.[182] The text recognizes, correctly again, that practicing law in a culturally competent manner requires lawyers to facilitate processes of Indigenous dispute resolution as an important part of Indigenous self-determination and governance. Crucially, lawyers are empowered by the guideline to exceed the minimum requirements of the law to make these outcomes possible. Lawyers are required to take positive steps. However, the guideline's embrace of mediation is not romantic or unequivocal. It is careful to mention that problem-solving approaches should be employed "reasonably," that is to say, responsibly in a manner that respects client interests and promotes reconciliation in the context of the litigation.[183]

Compare this provision with Rule 3.2-4 of the *Model Code*, which states that "[a] lawyer must advise and encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and must discourage the client from commencing or continuing useless legal proceedings."[184] The Commentary to the rule is relatively brief: "A lawyer should consider the use of alternative dispute resolution (ADR) when appropriate, inform the client of ADR options and, if so instructed, take steps to pursue those options."[185] Between these two sentences, the rule provides little guidance on the expected form or content of mediation discussions and the range of outcomes that may be available.[186] The failure to address outcomes is a major shortcoming. Lawyers cannot force their clients to settle a matter, but they could be required by the rule to brainstorm and recommend creative options that lead to equitable

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Jennifer Leitch, "A Less Private Practice: Government Lawyers and Legal Ethics" (2020) 43:1 Dal LJ 315.

180 Department of Justice Canada, *Directive*, *supra* note 176 at 10.

181 *Ibid* at 10–11.

182 *Ibid* at 11.

183 *Ibid.*

184 *Model Code*, *supra* note 7, r 3.2-4.

185 *Ibid.*

186 See Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (Vancouver: UBC Press, 2008) at 200–05.

outcomes by "expanding the pie" of resources available to the parties.[187] I recognize that such a requirement would be challenging to enforce, but its introduction would help to foster more pro-social behaviour among clients and engender a culture of collaboration in the adversary system. Correspondingly, the rule could elaborate the procedural safeguards required to conduct these processes safely and effectively and make these outcomes possible. The rule should be revised to reflect these changes.

Rule 3.2-4 is instructive for another reason. It is well-established that the growth, complexity, and increasing specialization of fields in which lawyers work, considered in light of the variety of "law jobs" that lawyers take within them—civil litigator, contract drafter, mediation advocate, business strategist, policy advisor—means that the ethical issues that one lawyer faces might never be faced by another. Lawyers understand and make ethical choices through what Lynn Mather, Craig McEwan, and Richard Maiman call "communities of practice"—groups of practitioners with whom the lawyers interact in a particular location and to whom the lawyers compare themselves and look for commonly held expectations and standards, each with a semi-autonomous approach to professionalism.[188] Legal ethics scholars have argued that in response to these trends, codes of professional conduct should permit for greater variation between communities without losing the generality that is necessary for systems of professional regulation to be viable.[189] According to Wilkins, codes of professional conduct should consist of two types of rules: general rules that provide a foundation for widespread compliance regardless of practice area and context-specific rules called "middle-level principles" that isolate and respond to formal laws, practice directions, and community expectations that change from practice area to practice area.[190] In my view, Rule 3.2-4 is one place where middle-level principles can be introduced in the *Model Code* to ensure that equality concerns are met.

Consider the family law context as an example. The growing number and the personal, often volatile nature of conflicts relating to family

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[187] The basic strategy is explained in Carrie Menkel-Meadow, "Toward Another View of Legal Negotiation: The Structure of Problem Solving" (1984) 31:4 UCLA L Rev 754 at 840.

[188] See Lynn Mather, Craig A McEwen & Richard J Maiman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (Oxford: Oxford University Press, 2001).

[189] See Stanley Sporkin, "The Need for Separate Codes of Professional Conduct for the Various Specialties" (1993) 7:1 Geo J Leg Ethics 149; Richard F Devlin, "Normative, and Somewhere to Go? Reflections on Professional Responsibility" (1995) 33:4 Alta L Rev 924 at 929.

[190] David B Wilkins, "Legal Realism for Lawyers" (1990) 104:2 Harv L Rev 468 at 515–19.

breakdown has necessitated a reorientation of family court services and practice in Canada toward mediation and other problem-solving approaches like parenting coordination and collaborative law.[191] The relative informality of these processes has raised concerns that women and other family members leaving relationships characterized by family violence may be threatened, harmed, or otherwise pressured to participate in mediation and consent to settlement terms that favour their abusers.[192] The risks are particularly acute in "coercive controlling" relationships, meaning there has been a pattern of domination by one intimate partner, typically male, who interweaves physical and sexual violence, intimidation, sexual degradation, and other tactics to control the other intimate partner, typically female.[193] Deanne Sowter has considered the implications of coercive control in the professional competence, future harm exception, and confidentiality contexts.[194] In my view, Rule 3.2-4 should be revised to require family lawyers to consider its implications in the mediation context as well. Among other middle-level principles, family lawyers should be required to complete mandatory training on family violence, pre-screen their clients for suitability before mediation takes place, and recommend processes that prevent face-to-face contact between the parties as needed (e.g., shuttle mediation).[195]

My final recommendation is based on the following redistributive insight. Lawyers can promote equitable outcomes by reallocating time, money, and other resources to public interest cases. The Commentary to Rule 2.1-2 provides that "collectively, lawyers are encouraged to enhance the profession through … participating in legal aid and community legal

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191 See *Association de Médiation Familiale du Québec v Bouvier*, 2021 SCC 54 at para 1.

192 *Ibid* at paras 53–54. For commentary on the risks of informality, see Wanda Wiegers & Michaela Keet, "Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities" (2008) 46:4 Osgoode Hall LJ 733; Noel Semple, "Mandatory Family Mediation and the Settlement Mission: A Feminist Critique" (2012) 24:1 CJWL 207; Daniel Del Gobbo, "Feminism in Conversation: Campus Sexual Violence and the Negotiation Within" (2021) 53:3 UBC L Rev 591 at 634–47.

193 See Evan Stark, "Re-presenting Battered Women: Coercive Control and the Defense of Liberty" (2012) at 7, online (pdf): *Stop Violence Against Women* <www.stopvaw.org> [perma.cc/LEE9-793N].

194 See Deanne Sowter, "Full Disclosure: Family Violence and Legal Ethics" (2020) 53:1 UBC L Rev 141; Deanne Sowter, "The Future Harm Exception: Coercive Control as Serious Psychological Harm and the Challenge for Lawyers' Ethics" (2021) 44:2 Dal LJ 603.

195 The Government of Canada released a toolkit to help family lawyers identify and respond to family violence in 2022. See Department of Justice Canada, *HELP Toolkit: Identifying and Responding to Family Violence for Family Law Legal Advisers* (4 January 2022), online: <www.justice.gc.ca> [perma.cc/2CN9-R3WH]. See also Deanne Sowter, "If It Wasn't Required Before, It Is Now: All Family Lawyers Must Screen for Family Violence" *Slaw* (2 November 2021), online: <www.slaw.ca> [perma.cc/33QP-PAZQ].

services programs or providing legal services on a pro bono basis."[196] The Commentary to Rule 4.1-1 provides the same: "it is in keeping with the best traditions of the legal profession to provide services pro bono and to reduce or waive a fee when there is hardship or poverty or the client or prospective client would otherwise be deprived of adequate legal advice or representation."[197] The references to poverty and the challenges faced by self-represented litigants are commendable in these rules, but the language of "encouragement" is insufficient because it means that participation in these programs is merely optional and, by extension, the legal profession's mandate to facilitate access to justice is nothing more than token beneficence or chivalry. In my view, lawyers should be required by these rules, not merely encouraged by them, to provide public interest legal services on a pro bono basis and report on the contribution of these services to the law society. The category of "public interest legal services" includes work that facilitates access to justice for historically marginalized groups directly (e.g., legal representation), law reform and other legal advocacy efforts on behalf of these groups (e.g., policy work, position statements), and building the capacity of these groups to engage with the legal system (e.g., community organizing and education).[198]

The first part of the requirement is the barrier reduction or cost shifting element. Critics have proposed a wide range of formulations, but I find Devlin's proposal of a time or money investment to be most compelling.[199] As a general rule, lawyers must contribute a minimum of 50 hours per year to public interest legal services, or they must contribute the monetary equivalent of these hours to a fund for legal aid and community legal services calculated based on their hourly rate, or they must contribute a combination of the two that equals the same. Considering my critique of barrier reduction in the previous section, I realize that a time or money investment is limited in its transformative potential barring a more radical change to the structure of the market for legal services, but it is not nothing.

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196 *Model Code*, *supra* note 7, r 2.1-2.

197 *Ibid*, r 4.1-1.

198 My conception of public interest legal services is inspired by the introduction of pro bono publico requirements at Canadian law schools, many of which include the criteria that the work must be law-related and public interest-oriented in order to qualify. See e.g., "About the Osgoode Public Interest Requirement (OPIR)" (last visited 1 November 2022), online: *Osgoode Hall Law School* <www.osgoode.yorku.ca> [perma.cc/EK3L-2G6S]. For commentary on the role of experiential education in promoting equality, see Bhabha, "Pedagogy", *supra* note 75 at 104–07.

199 Devlin, "Breach of Contract", *supra* note 125 at 374. See also Devlin, "Bend or Break", *supra* note 114 at 143–45. For a complementary take, see Lorne Sossin, "The Public Interest, Professionalism, and Pro Bono Publico" (2008) 46:1 Osgoode Hall LJ 131.

Legal aid and community legal services programs in Canada have been chronically understaffed and underfunded for years.[200]

Law societies should enforce the investment rule in a manner consistent with equality principles. For instance, the rule could be tailored to the circumstances of poverty lawyers, entry-level lawyers, and lawyers experiencing financial and other relevant hardships, recognizing that a "flat tax" on the profession could lead to unfairness. I am particularly mindful of the challenges faced by poverty lawyers who provide public interest legal services to historically marginalized groups already, many of whom work long hours and barely make ends meet. And I am conscious of the risks of forcing "big law" and other private sector lawyers to parachute into marginalized communities in which they have no experience and lack cultural competence, potentially causing harm to these communities in the process. Lawyers should be provided with multiple options to meet their obligations under the rule. The category of public interest legal services should be interpreted broadly, encompassing both legal representation and other kinds of legal work, not all of which is community-based. The financial option provides a pathway for lawyers as well, recognizing that every lawyer has something meaningful to offer.

The second part of the requirement is the reporting element. Lawyers must file a written report on the contribution of their pro bono hours or the monetary equivalent of these hours as part of their regular reporting requirements to the law society. As I intimated above, the legal profession has failed to build its commitment to facilitating access to justice into the fabric of ethical identity and culture because it has failed to make pro bono work mandatory. Requiring lawyers to put people before profits in a closed market economy is not intuitive.[201] Accordingly, the purpose of the report is not to "compel speech" or "compel private thought" or even to monitor compliance with the requirement. So long as a report is completed successfully, its contents should remain confidential to the law society.[202] Rather, the purpose of the report is to cultivate an ethic of equality promotion through experiential learning and, ideally, critical self-reflection on the lawyer's role in society, linking pro bono work to the broader public service orientation of the legal profession as a whole.

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200 See Action Committee, *Roadmap for Change*, *supra* note 172 at 3–4.

201 For commentary on the "big law" context, see Daniel Del Gobbo, Book Review of *Breakdown: The Inside Story of the Rise and Fall of Heenan Blaikie* by Norman Bacal, (2017) 54:4 Osgoode Hall LJ 1359.

202 See Sealy-Harrington, "Constitutionality", *supra* note 4 at 246.

Conclusion

In this article, I have argued that the standard conception of lawyers' professional role morality in Canada has limited the promise of the law's equality guarantees. Correspondingly, I have argued that the standard conception should be interpreted to include a positive obligation on lawyers to promote substantive equality. This is not a radical claim because it is founded in the content of lawyers' pre-existing obligations. However, the force of some lawyers' opposition to the SOP requirement—a relatively modest intervention by comparison to mandatory pro bono, for instance—suggests that it will be a controversial one. As critical scholars have long recognized, the professional and ethical questions of who receives legal services, what form the services take, and how they receive them are controversial because they have massive implications on the balance of power and resources in society.[203] Filling in the content of bleached out professionalism threatens to correct that balance.

My recommendations in this article have been wide-ranging, but they are unified by the recognition that lawyers have a professional obligation to represent their clients in a more contextual and critically engaged manner than the standard conception provides. In some cases, this means embracing the law as a tool of recognition and empowerment for historically marginalized groups, working within legal processes and institutions as they are currently constituted. In other cases, it means challenging the law's role for being complicit in extant hierarchies and reimagining legal processes and institutions for the better, both theoretically and practically. It means withdrawing from a mandate when the continuous involvement of lawyers would harm the client's cause, empowering historically marginalized groups to act for themselves more frequently. It might even mean engaging in practices that are morally justifiable from a substantive equality perspective, but that straddle the line between legally acceptable and unacceptable conduct. Calls for redistributing resources in society may or may not correspond to legal permissions and entitlements. The Canadian Bar Association suggested in its *Futures* report, published in 2014, that bold measures to facilitate access to justice were both possible and necessary: "no idea, no institution, no model, and no regulation should be sacrosanct."[204] The current rules are no exception.

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[203] See Gabel & Harris, *supra* note 164 at 396; Allan C Hutchinson, "Practicing Law for Rich and Poor People: Towards a More Progressive Approach" (2020) 23:1–2 Leg Ethics 3 at 11.

[204] CBA, *Futures*, supra note 172 at 66.