Protest Lawyering

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INTRODUCTION

A superficial search of the term "lawyers as protestors" suggests that lawyers serve a limited role in protest movements. In this limited view, lawyers may serve as counselors to putative protestors, either preemptively informing protestors of their legal rights or providing pro bono defense services to protestors who have been arrested or otherwise entangled with the legal system due to protest activity.[1] Historically, lawyers have also played a meaningful role in social protest movements through litigation.[2] As litigators, these lawyers have had "a direct line to change through law making."[3] Although these roles are critically important, the conception of lawyers as participating in social and political protest through either pro bono defense services or affirmative litigation is stunted in its imagination of lawyers' capacity to affirmatively participate in protest. To a certain extent, this conception seems natural. Given that they are uniquely positioned to represent clients, it follows logically that as "officers of the law," lawyers would effectively engage in protest on behalf of private clients. However, it appears equally sound that lawyers—precisely as officers of the law—share a unique ethical responsibility to actively engage in protest beyond the "traditional" lawyer role.[4]

This note argues that lawyers are ethically duty-bound to join certain protest movements through a historical and conceptual exploration of how lawyers have

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1. *See, e.g.*, *Know Your Rights: Protestors' Rights*, AM. C.L. UNION, https://www.aclu.org/know-your-rights/protesters-rights/#im-attending-a-protest (last visited Dec. 9, 2021) [https://perma.cc/DAF7-BM3G]; Marisa M. Kashino, *These DC Lawyers and Legal Groups are Offering Free Help to Protestors*, WASHINGTONIAN (June 5, 2020), https://www.washingtonian.com/2020/06/05/these-dc-lawyers-and-legal-groups-are-offering-free-help-to-protesters/ [https://perma.cc/5NWU-MAFJ]; McKenzie Jean-Philippe, *How Protestors Can Find a Lawyer Offering Free Representation*, OPRAH DAILY (June 4, 2020), https://www.oprahdaily.com/life/a32757714/how-to-find-free-lawyers-for-protesters/ [https://perma.cc/8V4D-CWQV].

2. *See* Jayanth K. Krishnan, *Lawyering for a Cause and Experiences from Abroad*, 94 CALIF. L. REV. 575, 575–76 (2006) ("As the civil rights movement gained momentum in the 1950s and 1960s, a group of talented lawyers—including Thurgood Marshall, Constance Baker Motley, Jack Greenberg, and others—rose in prominence by using litigation to champion the rights of minorities."); James E. Moliterno, *The Lawyer as Catalyst of Social Change*, 77 FORDHAM L. REV 1559, 1559–61 (2009) ("These law giants made their social change through litigation, proposal of new legislation, and creating new modes of legal analysis—all fairly traditional lawyer role activities . . . .").

3. Moliterno, *supra* note 2, at 1560.

4. *Cf id.* at 1561 (considering the idea that "lawyer qualities, natures, and tendencies" may qualify lawyers as effective agents of social change outside the traditional lawyer role).

been, and ought to be, involved in dealing with issues of tyranny, liberty, and sovereignty. To inform this analysis, Part One will examine protest as part of the American legal fabric and the role that lawyers have played in weaving that fabric's foundation, dating back to the pre-Revolutionary period. Part Two will demonstrate how lawyers are uniquely positioned to participate in protest movements as "protest lawyers," by emphasizing the specific legal skills and expertise that enable them to do so. Lastly, Part Three argues that lawyers share in an ethical responsibility to engage in protest lawyering as embodied by the preamble to the American Bar Association's *Model Rules of Professional Conduct*.

Protest lawyering reimagines the capacity of lawyers to serve as officers of the law. While lawyers who counsel protestors and engage in affirmative litigation are often associated with public interest law,[5] empowering the sizeable number of lawyers unengaged with this work in a professional capacity creates a legion of legal officers during those times when they are most dire. In doing so, this note seeks to encourage and equip lawyers across the entire profession to leverage their status and expertise in furtherance of strengthening American democracy and safeguarding civil rights and liberties—particularly for those among us who have been systemically disenfranchised.

I. PROTEST AND THE AMERICAN LEGAL FABRIC

Throughout the seventeenth century, the British government promulgated a series of charters that expressed the respective terms of grants to operate the colonies.[6] In their plain language, some of these charters explicitly guaranteed the rights and immunities of emigrating colonists as free and natural subjects of Great Britain. Take, for example, the Second Charter of Virginia (1609), which explicitly declared that

> [A]ll and every the Persons being our Subjects, which shall go and inhabit within the said Colony and Plantation ... shall HAVE and ENJOY all Liberties, Franchizes, and Immunities of Free Denizens and natural Subjects within any of our other Dominions to all Intents and Purposes, as if they had been abiding and born within this our Realm of England, or in any other of our Dominions.[7]

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5. *See* Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 893, 899–900 (2008).

6. *See, e.g.*, The Second Charter of Virginia—1609, *in* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3790, 3790–3802 (Francis Newton Thorpe ed., 1909); The Charter of Maryland—1632 in 3 *id.* at 1677–86; Grant of the Province of Maine—1639 in *id.* at 1625–37; Charter of Massachusetts Bay—1629 in *id.* at 1846–60.

7. The Second Charter of Virginia—1609, *supra* note 6. at 3800.

Such charters were initially received and thereafter well understood within the colonies as conferring legal rights upon the colonists and their progeny.[8] However, Parliament was quick to begin chipping away at what most colonists believed to be these fundamental rights, beginning with a series of taxes levied on the American colonies.[9] The Stamp Act of 1765 is well-known for galvanizing colonists' efforts to reassert their liberties as British subjects.[10] News of the Stamp Act emboldened colonists, but their efforts to resist the Act and others like it were not necessarily calls for violent uprising. On the contrary, "the methods of protest these Stamp Act resisters employed over the decade leading to the American Revolution . . . innovated methods of nonviolent protest that would be broadly adapted across the modern world – developing new forms of committee networks, sponsoring waves of solidarity demonstrations, and crafting unprecedentedly widespread boycott campaigns."[11]

Against this backdrop, and as part of an ongoing legal debate over the rights and immunities of colonists, protest became essential to the American legal fabric. By authoring a series of documents that were uniquely legal in nature, lawyers played a central role in shaping and advancing a widespread social and political protest movement against what they perceived as the crown's tyrannical assertion of power. These documents—in both form and content—were not peripheral to the national protest movement that preceded revolution. On the contrary, these documents and the legal arguments they presented laid the legal foundation upon which the colonists could unequivocally reclaim their asserted rights and liberties.

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8. *See Declaration and Resolves of the First Continental Congress* (1774), https://avalon.law.yale.edu/18th_century/resolves.asp [https://perma.cc/Y7DB-GV9F] ("[O]ur ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England."). However, not all charters were so explicit in their granting of rights and immunities, and the belief that these charters conferred legal rights was hardly unanimous within Parliament. *See* William F. Swindler, *"Rights of Englishmen" Since 1776: Some Anglo-American Notes*, 124 UNIV. PENN. L. REV. 1083, 1084 (1976) ("In retrospect, it was rather evident that few persons in England saw in the granting of the Virginia Charter an instrument for extending domestic constitutional rights beyond the seas."). As a result, the question of whether the colonists in fact had legal rights under English common law—and if so, which rights—was subject to live legal debate in the decades leading up to the American Revolution. As part of this debate, colonists asserted the legal and philosophical connection between natural and legal rights. *See, e.g., The Massachusetts Resolves*, October 29, 1765, in *The Action of the Colonial Assemblies*, *in* PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS 44, 56 (Edmund S. Morgan ed.) ("*Resolved*, That there are certain essential Rights of the *British* Constitution of Government, which are founded in the Law of God and Nature, and are the common Rights of Mankind—Therefore, . . . this inherent Right, together with all other essential Rights, Liberties, Privileges and Immunities of the People of Great Britain have been fully confirmed to them by *Magna Charta*, and by former and later Acts of Parliament."). This argument forms an important legal basis for colonial assertions of legal rights and protections in the pre-Revolutionary protest era.

9. *See generally* VAN TYNE & CLAUDE HALSTEAD, *The American Revolution: Fundamental and Immediate Causes*, *in* AMERICAN NATION A HISTORY 3–24 (Albert Bushnell Hart ed., vol. 9 1904-1918).

10. *See* MICAH ALPAUGH, *Nonviolence, Positive Peace, and American Pre-Revolution Protest, 1765–1775, in* THE SPECTER OF PEACE: RETHINKING VIOLENCE AND POWER IN THE COLONIAL ATLANTIC 157–186 (Michael Goode & John Smolenski eds., 2018) ("[N]ews of the Stamp Act had arrived in Britain's American colonies, sparking a resistance movement in towns like Boston and New York, where popular political mobilization had rapidly spread.").

11. *Id.* at 157–58.

A close reading of some of these protest documents sheds light on the central role that lawyers played in intellectualizing and materializing social and political protest in the pre-Revolutionary era. By empowering the public to engage in protest, identifying key legal principles under which colonists' rights were infringed, using concepts of tyranny, liberty, and sovereignty, not just as provocative rallying cries but as legal terms of art, and employing traditional tools of legal interpretation to do so, these documents illuminate the inception of an American legal tradition of protest lawyering.

A. LETTERS FROM A FARMER IN PENNSYLVANIA TO THE INHABITANTS OF THE BRITISH COLONIES

John Dickinson was a Philadelphia lawyer, merchant, and politician.[12] Nicknamed by historians the "Penman of the Revolution,"[13] Dickinson believed the English King and Parliament to be "radical innovators" in contrast to the colonists, who, in dissenting from England's tyrannical exercises of power, were "defenders of [the] ancient traditions" seeking only to restore or preserve their legal rights.[14] Dickinson authored *Letters from a Farmer in Pennsylvania to the Inhabitants of the British Colonies* ("*the Letters*") in response to a series of British parliamentary acts ordering the colonies to tax themselves in order to "furnish food and shelter for soldiers stationed within its boundaries."[15] *The Letters* also resisted the Declaratory and Townshend Acts, which sought to reclaim Great Britain's "full power and authority to make laws and statutes . . . to bind the colonies and people of America . . . in all cases whatsoever,"[16] and to restructure "the entire colonial customs machinery" on Parliament's terms, respectively.[17] Widespread legal debate emerged from these acts, as British-imposed taxes on the colonies generally, as well as specific taxation procedures, were increasingly perceived among colonists as a violation of their legal rights.[18]

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12. JUSTIN DU RIVAGE, *Revolution Against Empire*, *in* SONS OF LIBERTY, SONS OF LICENTIOUSNESS 178–204, 181 (2017).

13. Jane E. Calvert, *Liberty without Tumult: Understanding the Politics of John Dickinson*, *in* PA MAGAZINE OF HIST. AND BIOGRAPHY 233–62, 235 (July 2007).

14. FORREST MCDONALD, EMPIRE AND NATION, ix, xi (Forrest McDonald ed., 2d ed. 1999) (hereinafter "MCDONALD").

15. *Id*. at xii.

16. ARTHUR BERRIEDALE KEITH, *The Challenge to Imperial Supremacy*, *in* CONSTITUTIONAL HISTORY OF THE FIRST BRITISH EMPIRE 342–85, 351 (1930).

17. MCDONALD, *supra* note 14, at xii.

18. One such debate unfolded over the alleged difference between internal and external taxes, which Dickinson addresses head-on. *See* John Dickinson, *Letters From a Farmer in Pennsylvania to the Inhabitants of the British Colonies*, *in* EMPIRE AND NATION 1–86, 21–26 (Forest McDonald ed.,1999); *see also* Paul Leicester Ford, *Reviewed Work(s): The Life and Times of John Dickinson, 1732–1808 by Charles J. Stille*, 6 POL. SCI. Q. 554, 555 ("The distinction drawn by [Bland, Dulaney and Dickinson] between internal and external taxes was, in the light of to-day, a very fine-spun and typically lawyer-like argument; but it gave the colonies a common ground between 1766 and 1775 and so rendered valuable service.").

It is plain from his *Letters* that Dickinson was compelled by a sense of responsibility to share his legal expertise with the public.[19] As an initial matter, Dickinson published *the Letters* as twelve installments in the *Pennsylvania Chronicle and Universal Advertiser*, a newspaper for the general public.[20] In doing so, his *Letters* were not only addressed to his "dear Countrymen"[21] in rhetoric, but were made accessible in a way that, as a practical matter, empowered the colonists to protest these Acts on legal grounds. Dickinson is also explicit about his purpose in authoring *the Letters*: "to convince the people of these colonies that they are at this moment exposed to the most imminent dangers; and to persuade them immediately, vigorously, and unanimously, to exert themselves in the firmest, but most peaceable manner, for obtaining relief."[22] As such, he advances his view affirmatively and in response to an imagined interlocutor he calls "the public." Throughout, Dickinson's language is both adamant and mild. Although his condonement of protest was not a sanction of civil disobedience or downright revolution, Dickinson fervently insists on a methodical and systematic protest movement by which colonial institutions would promulgate resolutions, instruct their agents, and petition the crown for redress, using legal doctrine to ground their case.[23]

1. ISSUE SPOTTING

Dickinson offers more than just rhetorical empowerment. First, he identifies key legal issues for his readers, outwardly acknowledging that many of those issues are not clearly obvious to a non-legal mind and so have gone largely unnoticed in then-contemporary social and political circles.[24] His concerns are not unfounded, but stem from his surprised observation that "little notice has been taken of an act of parliament, as injurious in its principle to the liberties of these colonies, as the *Stamp Act* was" and "that *two* assemblies of this province have

19. *See* Dickinson, *supra* note 18, at 3 ("I have acquired, I believe, a greater knowledge in history, and the laws and constitution of my country, than is generally attained by men of my class, many of them not being so fortunate as I have been in the opportunities of getting information."); *id.* at 46 ("Regarding the act on this single principle, I must again repeat, *and I think it my duty to repeat*, that to me it appears to be unconstitutional.") (emphasis added).

20. MCDONALD, *supra* note 14, at xiii. Such newspapers served as critical channels of information flow in the pre-Revolutionary era. *See generally* Arthur M. Schlesinger, *The Colonial Newspapers and the Stamp Act*, 8 NEW ENG. Q. 63–83 (1935); ROBERT G. PARKINSON, *Newspapers on the Eve of the Revolutionary War*, *in* THIRTEEN CLOCKS: HOW RACE UNITED THE COLONIES AND MADE THE DECLARATION OF INDEPENDENCE 13 (2021).

21. Dickinson, *supra* note 18, at 3.

22. *Id.* at 17.

23. *Id.* at 85, 20.

24. *Id.* at 6 ("It is indeed probable, that the sight of red coats, and the hearing of drums, would have been more alarming; because people are generally more influenced by their eyes and ears, than by their reason. But whoever seriously considers the matter, must perceive that a dreadful stroke is aimed at the liberty of these colonies.").

sat and adjourned, without taking notice of this act."[25] In this sense, Dickinson views himself as filling in with a distinctly legal perspective where one is necessary but otherwise absent.

The Letters consider numerous legal issues that are raised by several acts of Parliament. For example, Letter I takes on the Suspending Act, which "prohibited the New York Assembly from conducting further business until it complied with the financial requirements of the Quartering Act (1765) for the expenses of British troops stationed there."[26] Here, Dickinson shrewdly points out that Parliament's attempt to compel compliance to the Quartering Act by suspending the New York Assembly's lawmaking authority is just another unlawful tax on the colonies.[27] He questions the Suspending Act's legality by examining the relative powers possessed by the New York Assembly and British Parliament:

> The matter being thus stated, the assembly of *New York* either had, or had not, a right to refuse submission to the act. If they had . . . then the parliament had *no right* to compel them to execute it. If they had not *this right*, they had *no right* to punish them for not executing it; and therefore *no right* to suspend their legislation, which is a punishment.[28]

Dickinson's claim is rooted in the legal principle that "the people of New York cannot be legally taxed but by their own representatives" and that therefore the New York Assembly—as those representatives—"cannot be legally deprived of the privilege of legislation, only for insisting on that exclusive privilege of taxation."[29] Further, Dickinson points out that the suspension via a parliamentary act rather than a royal restraint on the governor of New York "gives the suspension a consequence vastly more affecting" in its legal implication; namely, that the parliamentary assertion is one of "*supreme authority* of the *British* legislature over these colonies *in the point of taxation*, and is intended to compel *New York* into a submission to that authority."[30] As a legal matter, Dickinson claims, this compulsion is a clear violation of the colonists' liberty.

Dickinson proceeds to "issue spot" in his subsequent letters, but—committed to presenting refined and serviceable legal issues—also engages in what resembles a sort of legal briefing with the public. In doing so, he considers possible responses from "the public" to the legal issues that he identifies, addresses them in turn, and ultimately distills his arguments until they are sufficiently developed for use in the larger protest movement unfolding within the colonies. For

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25. *Id.* at 4, 6.

26. *Suspending Act*, ENCYC. BRITANNICA, https://www.britannica.com/topic/Suspending-Act (last visited Apr. 2, 2022) [https://perma.cc/C5NP-AMEM].

27. Dickinson, *supra* note 18, at 4 ("What is this but *taxing* us at a *certain sum*, and leaving to us only the *manner* of raising it? How is this mode more tolerable than the *Stamp Act*?").

28. *Id.* at 5.

29. *Id.*

30. *Id.* at 5–6

example, Letter II problematizes the Townshend Acts by considering the constitutional argument that the acts exceed Parliament's authority to tax for the general welfare by taxing solely to raise revenue for the crown.[31] In response, the public expresses concern that only members of Parliament who promulgate trade statutes are equipped to distinguish between statutes designed to regulate trade from those intended to raise revenue.[32] Dickinson responds that "the objection is of no force in the present case, or such as resemble it; because the act now in question, is formed expressly for the sole purpose of raising a revenue."[33] This exchange exemplifies the way in which Dickinson chooses to protest *alongside* the public. By conversing with the public in an interlocutory manner, Dickinson grounds the ongoing protest movement in legal issues that explicitly account for the public's political concerns.

2. LEGAL TERMS OF ART

Another uniquely legal feature that characterizes Dickinson's *Letters* is his employment of terms of art.[34] More specifically, Dickinson takes concepts like tyranny, liberty, sovereignty—terms that have evocative colloquial currency in times of political unrest—and binds them to their legal origins.[35] Although these terms have no static meaning, their reference to specific legal concepts have technical significance in legal argumentation, which is precisely what Dickinson's *Letters* engage in.[36] Indeed, these terms acquired substantive legal significance throughout Great Britain's own constitutional history.[37] During periods of contest with the monarchy, the British Parliament invoked and reaffirmed these concepts to insist on its constitutional authority as a representative, legislative body and thereby insist on its constituents' rights as subjects of the British monarch.[38]

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31. *Id.* at 7–15.

32. *Id.* at 34–35.

33. *Id.* at 35 (capitalization edited).

34. *See* DAVID MELLINKOFF, LANGUAGE OF THE LAW 16–17 (1963) (identifying "terms of art" as part of the "language of the law").

35. This note will not develop a complete set of necessary and/or sufficient conditions for defining these concepts. Instead, it will endeavor to lay out some of the core features that apply these terms as legal concepts.

36. *See* Evans v. United States, 504 U.S. 255, 278 (1992) (Thomas, J., dissenting) ("The Court's analysis is based on the premise, with which I fully agree, that when Congress employs legal terms of art, it knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind.") (quoting Morissette v. United States, 342 U.S. 246, 263 (1952)) (internal citations omitted).

37. *See, e.g.*, *Petition of Right* (1628) (available online at https://digitalarchive.parliament.uk/book/view?bookName=Petition%20of%20Right&catRef=HL%2fPO%2fPU%2f1%2f1627%2f3C1n2&mfstId=912c18a1-13be-41c6-9ff5-ef38a9420e9b#page/n1/mode/1up) [https://perma.cc/3DS7-S693]; *English Bill of Rights* (1689), https://avalon.law.yale.edu/17th_century/england.asp [https://perma.cc/YK3E-QLGS].

38. *Petition of Right* (1628), *supra* note 37 ("The Petition exhibited to his Majesty by the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, concerning divers Rights and Liberties of the Subjects . . . ."); *English Bill of Rights* (1689), *supra* note 37 ("And they do claim, demand and insist upon all and singular the premises as their undoubted rights and liberties . . . ."); *see also* ROBERT ALLEN RUTLAND, *The English Beginnings, in* BIRTH OF THE BILL OF RIGHTS 1776–1791, 3–12 (1955).

In employing these concepts as legal terms of art, Dickinson affords protestors valuable access to the British Parliament's own legal tools with which to dismantle the all-too-familiar extralegal exercise of power over British subjects. For example, in discussing the constitutionality of parliamentary taxation for the sole function of raising revenue, Dickinson inquires, "[u]pon the whole, the single question is . . . whether the parliament can legally take money out of our pockets, without our consent."[39] Unsurprisingly, Dickinson answers his question with a resounding no, stating, "[i]f they can, our boasted liberty is but *Vox et praeterea nihil* (A sound and nothing else)."[40]

This language of "consent" derives directly from English legal conceptions of tyranny, liberty, and sovereignty. Take, for example, the 1628 Petition of Right. The Petition of Right was "a legislative act of statutory character and effect,"[41] whereby the British Parliament petitioned King Charles I to honor Parliament's "rights and liberties, according to the laws and statutes of [Great Britain]."[42] The very first right Parliament asserts is the statutory right that

> [N]o tallage or aid shall be laid or levied by the king or his heirs in this realm, without the good will and assent of the archbishops, bishops, earls, barons, knights, burgesses, and other the freemen of the commonalty of this realm . . . by which statutes before mentioned, and other the good laws and statutes of this realm, your subjects have inherited this freedom, that they should not be compelled to contribute to any tax, tallage, aid, or other like charge not set by common consent, in parliament.[43]

The notion of consent as a doctrinal feature of the legitimate exercise of political power reflects a Lockean historical perspective of legitimate sovereignty, which contends that "[i]n civil societies political authority rests in the last instance on agreement, on consent."[44] That Dickinson chooses to continue this consent- and representative-based tradition of legitimizing or de-legitimizing certain exercises of political authority in equipping pre-Revolutionary protesters is evidently highly deliberate.

Although Dickinson encourages peaceful protest to unlawful exercises of power, *the Letters* do grapple with the liminal zone between peaceful protest and

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39. Dickinson, *supra* note 18, at 15.

40. *Id.*; *see also id.* at 46–47 ("But to have done this, without expressly 'asserting and maintaining' the power of parliament to take our money without our consent, and to apply it as they please, would not have been . . . sufficiently declarative of its supremacy nor sufficiently depressive of *American* freedom.").

41. L.J. Reeve, *The Legal Status of the Petition of Right*, 29 HIST. J. 257, 258 (1986).

42. *Petition of Right* (1628), *supra* note 37.

43. *Id.*

44. JOHN DUNN, LOCKE: A VERY SHORT INTRODUCTION 1–46, 40 (2003); *see also* JOHN LOCKE, TWO TREATIES OF GOVERNMENT 168 (Mark Goldie ed., 1993) ("[T]he beginning of political society depends upon the consent of the individuals, to join into and make one society . . . ."); *id.* at 172 ("And thus much may suffice to shew, that as far as we have any light from history, we have reason to conclude, that all peaceful beginnings of government have been laid in the consent of the people.").

total revolution. In fact, by distinguishing resistance against a legitimate sovereign's illegitimate exercise of power from resistance against an altogether illegitimate sovereign, Dickinson better positions himself to advocate for the kind of systematized protest movement he envisions. To do so, Dickinson once again adopts a Lockean perspective. Central to this perspective is the notion that tyranny not only invites but authorizes popular opposition. According to Locke, if the basis of a legitimate sovereign is consent—an essential element of which is trust[45]—then "the people might not only withhold their allegiance if the king violated his trust; they would be justified in rebelling."[46]

Dickinson inserts himself squarely into this discussion, once again grounding his argument in English legal history. Take, for example, his prevailing concern with *incremental* intrusion into colonists' liberties and insistence that a "spirit of apprehension . . . be always kept among [the colonists], in its utmost vigilance."[47] Here, Dickinson is referencing the English's toleration of King Charles I's death-by-a-thousand-cuts-style prerogative.[48] He states,

> Acts, that might *by themselves* have been upon many considerations excused or extenuated, derived a contagious malignancy and odium from other acts, with which they were connected. They were not regarded according to the simple force of each, but as parts of a system of oppression. Every one therefore, however small in itself, became alarming, as an additional evidence of tyrannical designs . . . . The consequences of these mutual distrusts are well known: But there is no other people mentioned in history, that I recollect, who have been so constantly watchful of their liberty, and so successful in their struggles for it, as the *English*.[49]

In encouraging the public to remain vigilantly aware of advances—especially subtle ones—into their rights and liberties, Dickinson toes the line between popular opposition and governmental dissolution, ultimately endorsing a popular protest movement that notes even minor usurpations of power. At the same time, Dickinson arms the public with the legal tools necessary to oppose tyrannical assertions of power by appealing to English legal history and constitutional principles. In so doing, Dickinson contributes to the pre-Revolutionary protest movement in his specific capacity as an American-trained lawyer.

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45. *See* DUNN, *supra* note 44, at 42 ("at the centre of Locke's conception of government . . . was the idea of trust. Government was a relation between men, between creatures all of whom were capable of deserving trust and any of whom could and sometimes would betray it.").

46. HOWARD NENNER, *Loyalty and the Law: The Meaning of Trust and the Right of Resistance in Seventeenth-Century* England, 48 J. BRIT. STUD. 859, 868 (2009) (citing JOHN LOCKE, *Two Treatises of Government* [1690], ed. Peter Laslett (Cambridge 1960; repr., 1963), *Second Treatise*, sec. 242, 477; James Tully, "Locke," in Burns, *Political Thought*, 635–37).

47. Dickinson, *supra* note 18, at 69.

48. *Id*. at 69–70.

49. *Id*. at 70.

3. CANONS OF LEGAL INTERPRETATION

Dickinson's use of traditional tools of legal interpretation further characterizes *the Letters* as a legal protest document. Tools of legal interpretation can be broadly divided into two categories: textual and purposivist.[50] Textual tools of legal interpretation generally focus on a statute's wording, with emphasis on the final text. Common textual tools include dictionary definitions, common usage, contextual indications, and legislative history[51]—the latter used only to track the evolution of a word, rather than Congress's intent in adopting it. Purposivist tools examine the impetus for legislating in the first place, and include legislative history (e.g., committee reports, senators' or representatives' comments during floor-debates), judicial precedent identifying purpose, and the "purpose" provisions in pieces of legislation, among others.[52] Employing these tools is a legal reasoning skill; a large part of lawyers' and judges' jobs includes applying these skills to specific sets of facts and using them to build a case or parse out ambiguities idling in the law.[53]

Dickinson plainly employs his legal interpretation skills in *the Letters*. For example, Letter IV responds to the argument that there is a material difference between levying internal and external taxes.[54] The public is concerned that this distinction may be used to justify parliamentary taxation.[55] Dickinson responds "with a total denial of the power of parliament to lay upon these colonies any '*tax*' whatever."[56] In doing so, he traces the definition of the term "tax," to which he "annex[es] that meaning which the constitution and history of *England* require to be annexed to it; that is—that it is *an imposition on the subject, for the sole purpose of levying money*."[57] Additionally, Dickinson traces the origin of taxing in the early ages of the monarchy, describing a system by which people gifted and granted their personal property "under the names of aids, tallages, talks, taxes, and subsidies, etc."[58] Whatever their title, these gifts and grants had a shared purpose: their public use.[59]

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50. *See* William N. Eskridge, Jr. *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 610–12 (1990); *see generally* John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV 70 (2006); *see also* MCI Telecommunications v. Am. Tel. and Tel. Co., 512 U.S. 218 (1994) (applying several of these tools).

51. *See* Eskridge, Jr., *supra* note 50, at 610.

52. *See id.* at 611 (referring to purposivism as an "archaeological" method, that "would examine the background and public deliberation preceding the statute's enactment to reconstruct the probable 'intent' of Congress . . .").

53. *See generally* FREDERICK SCHAUER, *Introduction: Is There Legal Reasoning?*, *in* THINKING LIKE A LAWYER 1, 1–12 (2009); FREDERICK SCHAUER, *The Interpretation of Statutes*, *in id.* at 148–170.

54. Dickinson, *supra* note 18, at 21–26.

55. *Id.* at 21.

56. *Id.*

57. *Id.*

58. *Id.* at 21–22.

59. *Id.* at 22 ("But whatever the name was, they were always considered as *gifts of the people to the crown, to be employed for public use*.").

Pivoting to a purposivist argument, Dickinson follows the statutory history of the word "tax" in the British Parliament and through its continued use in colonial legislation.[60] He states,

> Whenever we speak of taxes among Englishmen, let us therefore speak of them with reference to the intentions with which, and the principles on which they have been established. This will give certainty to our expression, and safety to our conduct: but if when we have in view the liberty of these colonies, and the influence of "taxes" laid without our consent, we proceed in any other course, we pursue a Juno indeed, but shall only catch a cloud.[61]

Dickinson subsequently cites several resolves of the congress at New York, reasoning that "[t]he rough draft of the resolves . . . are now in my hands, and from some notes on that draft . . . I am satisfied, that the congress understood the word 'tax' in the sense here contended for."[62] For Dickinson, this history illustrates the distinction between constitutional and unconstitutional taxation, namely, that constitutional taxes are levied for the pubic good and never to raise revenue for the crown. Dickinson's case in point is that from the inception of the term "tax" and through its modern-day use, no British or colonial legislation has distinguished between internal and external taxes; that "every imposition 'to grant to his Majesty *the property of the colonies,*' was thought a "tax"; and that any such imposition levied without the people's consent "was not only 'unreasonable, and inconsistent with the principles and spirit of the *British* constitution,' but destructive 'to the freedom of a people.'"[63] In making this case, Dickinson leans heavily on both textualist and purposivist tools of legal interpretation.

B. THE MASSACUSETTS CIRCULAR LETTER

A critical feature of pre-Revolutionary legal protest documents was their faculty for prompting further legal discourse within the movement and in turn, promulgating other similar documents. Dickinson's *Letters from a Farmer in Pennsylvania to the Inhabitants of the British Colonies* reached Samuel Adams and James Otis Jr.,[64] who co-authored the 1768 *Massachusetts Circular Letter* ("*Circular Letter*") to the Colonial Legislatures after a "tumultuous debate within the Massachusetts House of Representatives."[65] That Dickinson's *Letters* influenced the authorship of the *Circular Letter* and the ideas therein is documented in

60. *Id*. at 23–24.

61. *Id*. at 23.

62. *Id*. at 23 n.‡.

63. *Id*. at 23–24; *see also id*. at 47–48 (engaging in textual analysis to resolve whether the term "British" in the Stamp Act extends to the British colonies).

64. Although Samuel Adams only briefly studied law, James Otis Jr. was a Harvard-educated Boston lawyer and legal icon of the pre-Revolutionary protest era. *See* Philip Foglia, *The Lawyer Who Lit the Fuse of the American Revolution*, 85 N.Y. ST. B.J. 26, 27 (2015).

65. Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652, 1673–74 (2021).

Adams' writings.[66] Much like Dickinson's *Letters*, the *Circular Letter* functioned as a legal protest document. Notably, the *Circular Letter* did not serve clients or have legislative import. Instead, the document was intended to persuade sister colonial legislatures to join in protesting recent parliamentary legislation as unconstitutional by adopting the Massachusetts House of Representative's legal position.[67] As such, the *Circular Letter*'s markedly legal character likewise illustrates the way in which pre-Revolutionary protest lawyers engaged in conversation—both with the public and each other—in an effort to refine and deploy legal arguments to advance the sort of cohesive and legally-defensible protest movement that Dickinson envisioned.

The *Circular Letter* first proclaims the right of the American subjects to assert their "natural and constitutional right" to "the full enjoyment of the fundamental rules of the British constitution."[68] It then proceeds to make constitutional arguments reminiscent of—and likely directly drawing from—those in Dickinson's *Letters*. One familiar argument claims that "the Acts made [in Parliament], imposing duties on the people of this province, with the sole and express purpose of raising a revenue, are infringements of their natural and constitutional rights . . . ."[69] However, the *Circular Letter* goes a step even further in its constitutional claims by binding such claims to assertions of natural rights.[70] In doing so, Adams and Otis Jr. make two appeals. On the one hand, their reference to constitutional rights asserts an interpretation of English legal identity and recognizes it as site of deliberation about precedential rights. Presumably, under this legal theory, arguments alleging usurpations of parliamentary authority are at least subject to rebuttal.[71] On the other hand, Adams and Otis Jr. reach beyond English constitutional doctrine to stake their claims in a less negotiable source of law: natural rights. Although the precedential weight of this argument in pre-Revolutionary Great Britain is debatable, the force of this authority for those who subscribe to it is palpable. The introduction of natural rights as a source of legal grievance thus adds a layer to Dickinson's claims in his *Letters*.

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66. *See id*. at 1672–75.

67. *Id*. at 1674–75.

68. *Massachusetts Circular Letter to the Colonial Legislatures, February 11, 1768*, https://avalon.law.yale.edu/18th_century/mass_circ_let_1768.asp [https://perma.cc/TY4V-44JW] (hereinafter "*Circular Letter*").

69. *Id.*

70. *Id.*

71. In fact, there is an interesting history to the afterlife of the *Circular Letter*, which includes a series of subsequent exchanges between the Secretary of State for the Americas and the Massachusetts House of Representative. *See* Bowie, *supra* note 65, at 1675–80. A close look into whether the Secretary's reply focused more on the *Circular Letter*'s constitutional claims than its appeal to natural rights exceeds the scope of this discussion but would be valuable. Also central to this subsequent back-and-forth was the question of *Circular Letter*'s legality. *See Circular Letter*, *supra* note 68 ("[T]his House have preferred a humble, dutiful, and loyal petition, to our most gracious sovereign, and made such representations to his Majesty's ministers, as they apprehended would tend to obtain redress."). While also beyond the scope of this note, the question of whether these legal protests documents were seen as legitimate in the legal sense is also an interesting wrinkle in this discussion. *See* Bowie, *supra* note 65 at 1675–76.

Like Dickinson, Adams and Otis Jr. lean heavily on legal concepts that are deeply embedded in English common law. Indeed, Adams' and Otis Jr.s' appeal to "natural rights"—and accompanying claim that British Parliament had infringed on those rights—reflects the inevitable connection at that time between American-trained lawyers and an English jurisprudential conception of natural rights.[72] In particular, a natural rights theory has significant roots in Locke's *Two Treaties of Government*. Writing from 1680–83, Locke argues that individuals exist in a natural state, which he describes as "a state of perfect freedom to order their actions, and dispose of their possessions, and persons as they think fit, within the bounds of the law of nature."[73] However, Locke distinguishes this state of liberty from a "state of license,"[74] and in doing so identifies certain natural rights to life, health, liberty, or possession."[75] Because these rights are natural, a person is not licensed to dispossess another of these basic rights.[76]

Just less than a century later, Sir William Blackstone, a prominent English jurist[77] published four volumes of his *Commentaries on the Laws of England* ("*Commentaries*").[78] Fundamental to Blackstone's *Commentaries* was the Lockean declaration that "rights to personal security, liberty, and property were accorded by 'the immutable laws [of nature] . . . .'"[79] Although Blackstone's theory on natural rights differs in certain respects to that of Locke's—particularly with regard to property rights[80]—Locke's fundamental thesis is inextricably weaved into Blackstone's theory on the rights of persons in English law. Locke's influence on Blackstone is readily apparent in Blackstone's discussion of absolute rights, in which he states: "By the absolute *rights* of individuals we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy whether out of society or in it."[81]

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72. There is extensive discussion of the evolution and place of natural rights in English common law. *See generally* Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale,* 103 YALE L.J. 1652 (1994); Albert W. Alschuler, *Rediscovering Blackstone*, 145 UNIV. PENN. L. REV. 1–55 (1996). This note does not set out to exhaust this debate. Instead, it aims to consider one prominent interpretation of Lockean thought and account for its eventual incorporation into, and influence on, American jurisprudence.

73. LOCKE, *supra* note 44, at 116.

74. *Id*. at 117.

75. *Id.*

76. *Id*. ("The state of nature has a law of nature to govern it, which obliges everyone: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions.").

77. *Sir William Blackstone,* ENCYC. BRITANNICA, https://www.britannica.com/biography/William-Blackstone (last visited Apr. 2, 2022) [https://perma.cc/DEC6-BPMR].

78. Alschuler, *supra* note 72, at 5.

79. *Id*. at 23.

80. *Id*. at 23–24.

81. SIR WILLIAM BLACKSTONE, *Of the Absolute Rights of Individuals, in* COMMENTARIES ON THE LAWS OF ENGLAND: BOOK 1 THE RIGHTS OF PERSONS (First Rate Publishers 2018).

Blackstone's impact on American jurisprudence cannot be understated. The likes of Chief Justice John Marshall, James Wilson, John Jay, Nathaniel Greene, James Kent, John Adams, and President Abraham Lincoln, among others, subscribed to Blackstone's *Commentaries*. Indeed, almost every American lawyer before 1900 would have read at least part of Blackstone.[82] Moreover, "[t]he *Commentaries* were published while other treatises on national law emerged throughout Europe" and as such, "they gave clarity and structure to an increasingly disorderly English law."[83] This point is critical to understanding the legal nature and import of the *Circular Letter*. Because of Blackstone's prominence in early American jurisprudence, legally trained colonists like Adams and Otis Jr., as well as those on the receiving end of the *Circular Letter*, would have understood themselves to be invoking a natural rights tradition of not just English philosophical origins but of a distinctively legal tradition. Thus, when Adams and Otis Jr. convey that

> It is, moreover, their humble opinion, which they express with the greatest deference to the wisdom of the Parliament, that the Acts made there, imposing duties on the people of this province, with the sole and express purpose of raising a revenue, are infringements of their natural and constitutional rights; because, as they are not represented in the British Parliament, his Majesty's commons in Britain, by those Acts, grant their property without their consent,[84]

they invoke a rich legal heritage. Such an appeal contributed a distinctively legal component to the larger protest movement against the British Parliament.

Letters from a Farmer in Pennsylvania to the Inhabitants of the British Colonies and the *Massachusetts Circular Letter* highlight some of the ways in which lawyers engaged meaningfully in the pre-Revolutionary protest era. As legal protest documents, these letters identified relevant issues for redress, employed legal terms of art that appealed to longstanding English legal tradition, exercised canonical tools of statutory interpretation, and were addressed not to judges, but to fellow protest lawyers and the public at large.[85] Both documents came to play a meaningful role in the emergence of revolutionary methods of nonviolent protest[86] during that time.[87] By choosing to employ these tools and

82. Alschuler, *supra* note 72, at 7.

83. *Id.* at 8.

84. *Circular Letter*, *supra* note 68.

85. While colonial assemblies functioned as robust legislative bodies, note that their treatment here is not a matter of legislative authority. The *Circular Letter* had no legislative import. Instead, it represents a deliberate choice *by* a legislative body to adopt a specifically non-legislative document—a legal protest document—the likes of which served to transform these assemblies into nodes within a larger network of protestors.

86. ALPAUGH, *supra* note 10, at 157–58.

87. *See* Bowie, *supra* note 65 at 1671–75 (describing how Dickinson's *Letters from a Farmer* eventually prompted the New York General Assembly to protest the Restraining Act); *id.* at 1675–76 (recounting the afterlife of the *Circular Letter*).

make these arguments well-beyond the context of a traditional attorney-client relationship, these lawyers created some of the necessary conditions for drastic political change, not through litigation, but through protest lawyering.

II. CONCEPTUAL FRAMEWORK: LAWYERS AS PROTESTORS

It is hardly surprising that protest lawyering is part of the professional history of lawyers in America. Legal training is designed to equip lawyers with a distinct set of skills and expertise that enables them to counsel, litigate, and legislate. But "lawyerly" skills are not necessarily unique to these ends.[88] On the contrary, the ability to identify key legal issues,[89] employ legal reasoning, problem-solve,[90] advocate, and persuade may be just as valuable outside the four walls of the courtroom as it is within, and these skills fill important gaps in the experience and expertise of the public and sub-populations therein.[91] The skills detailed in the previous section—namely, issue spotting and the use of legal terms of art and canons of legal interpretation—scratch the surface of those skills that lend themselves to protest lawyering. The following brief discussion broadens that point to include advocacy and persuasion as skills that enable lawyers to contribute to protest, both beyond the "traditional lawyer role" but still in their unique capacity as lawyers.

Advocacy and persuasion are elemental legal skills.[92] "Whether you are a litigator, transactional lawyer, or trial lawyer, part of your job is to persuade people to make decisions, or do things, that they may not have chosen to do but for your intervention. Lawyers persuade judges, juries, opposing counsel, colleagues, and clients."[93] Likewise, protest movements are organized to advocate for a particular group of people or cause and to persuade a whole host of entities—from governments, to corporations, to the public at large—to modify their stances in furtherance of that cause.[94] As such, lawyering and protesting share a common ground in their demand for individuals trained in advocacy and persuasion.

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88. *See, e.g.*, Heidi Li Feldman, *What Lawyers Can and Should Do about Mendacity in Politics*, 56 DUQ. L. REV. 125, 127 (arguing that lawyers have a particular expertise in parsing mendacity).

89. *See, e.g.*, Rhonda McMillion, *ABA Leaders Zero in on a Dozen Key Issues for Advocacy Efforts in Congress*, 89 ABA J. 68–69 (2003).

90. Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 2 (1984) ("Lawyering means problem-solving.").

91. *See, e.g.*, Feldman, *supra* note 88, at 134–35 ("As in the market for consumer goods, politicians and voters have limited opportunity for the sort of repeated face-to-face personal interaction in which people can best deploy commonsense methods for evaluating truthfulness . . . . Here is where lawyers can be useful. Lawyers can deploy their expertise in parsing unproblematic mendacity from pernicious mendacity. They can examine politicians and identify patterns and practices of mendacity that strike at the essential components of representative democracy.").

92. *See* Kathryn Stanchi, *Persuasion: An Annotated Bibliography*, 6 J. ASS'N LEGAL WRITING DIRS. 75, 75 (2009); Sam Wald, *Putting a Lawyer's Skills to Work Outside the Law*, 34 MAR. L.A. LAW. 8 (2011); Lopez, *supra* note 90, at 2.

93. Stanchi, *supra* note 92, at 75.

94. *See generally* Ruud Wouters & Stefaan Walgrave, *Demonstrating Power: How Protest Persuades Political Representatives*, 82 AM. SOCIO. REV. 361 (2017); HELENA FLAM & ÅSA WETTERGREN, *Civil*

At the most rudimentary level, lawyers are trained advocates. Indeed, at the heart of fulfilling one's role as a lawyer is advocating zealously for one's clients.[95] Moreover, the principle that clients' voices should be elevated throughout representation is well-recognized as a pillar of effective and ethical client advocacy.[96] This client-centered approach strays from a more antiquated legal counseling model, which "assumes that clients should be passive and delegate decisionmaking responsibility to their lawyers . . . and that professional problems tend to call for technical solutions beyond the ken of laypersons."[97] Instead, lawyers are trained "to provide opportunities for clients to make decisions themselves but also to enhance the likelihood that the decisions are truly the client's and not the lawyer's."[98] This process necessarily includes active listening, thoughtful questioning, managing client reluctance, and ascertaining clients' problems and legal positions, among other activities.[99]

Legal advocacy is critical even beyond the attorney-client relationship. As advocates, lawyers are prepared to engage in public advocacy, which describes "a set of deliberate actions designed to influence public policies or public attitudes in order to empower the marginalised."[100] John Samuel explains,

> In a liberal democratic culture, public advocacy uses the instruments of democracy and adopts non-violence and constitutional means. It is perceived as a value-driven political process, because it seeks to question and exchange existing unequal power relations in favour of those who are socially, politically, and economically marginalised.[101]

As such, public advocacy and protest lawyering are largely overlapping. Lawyers, using their advocacy skills, represent groups of people and their accompanying interests by embedding themselves within protest movements—instruments of democracy—and offering up their legal knowledge and expertise in furtherance of protestors' goals. In this sense, client-centeredness is still highly relevant in this context. *Letters from a Farmer* and the *MA Circular Letter* are illustrative of this approach. Whereas Dickinson adopts an interlocutory model to

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Disobedience, in PROTEST CULTURES 397–405 (Kathrin Fahlenbrach, Martin Klimke, and Joachim Scharloth eds., 2016); JONATHAN ALEXANDER & SUSAN C. JARRATT, *Introduction, in* UNRULY RHETORICS (Jonathan Alexander, Susan C. Jarratt, Nancy Welch eds., 2018).

95. *See generally* Monroe H. Freedman & Abbe Smith, *Zealous Representation: The Persuasive Ethic*, *in* UNDERSTANDING LAWYERS' ETHICS 67–127 (5th ed. 2016).

96. *See generally* DAVID A. BINDER & SUSAN C. PRICE, *Legal Interviewing and Counseling: A Client-Centered Approach* (1977).

97. Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 506 (1990).

98. *See id.* at 512–44 for a discussion of philosophical, political, socio-historical, ethical, and psychological arguments support the adoption of the client-centered model.

99. *See generally* BINDER & PRICE, *supra* note 96.

100. John Samuel, *Public Advocacy and People-Centred Advocacy: Mobilising for Social Change*, 17 DEV. IN PRAC. 615, 616 (2007).

101. *Id.*

address colonists' interests and concerns, Adams and Otis Jr. advocate for the Massachusetts House of Representatives—and ultimately for sister colonial assemblies—not by coopting the decisionmaking process from those whose interests they seek to represent but by "humbly" presenting their own legal position, "freely submit[ing] their opinions to the judgment of others," and ultimately inviting their fellow protestors to "point out to them anything further that may be thought necessary."[102] In this regard, all three of these protest lawyers centered protestors' interests in their public advocacy.

Advocacy alone is not sufficient to effect change. Advocacy must be persuasive. Although persuasive legal advocacy does not follow a script, several techniques are well-understood to aid in effective legal advocacy and persuasion. For example, the use of narrative theory can aid in what Gerald Lopez refers to as "lay-lawyering," which describes "the things one person does when he helps another solve a problem.[103] Adopting a compelling rhetorical stance is critical to effective lay-lawyering because "[h]uman beings think about social interaction in story form," and because stories "help us make choices about asserting our own needs and responding to other people."[104] Importantly, form is a critical feature of storytelling, but it is not separate from the rhetoric it conveys. Indeed, "to relegate the study of narrative to the form through which such stories are transmitted is to dismiss the power of stories in the very nature of language itself."[105]

Such deliberate rhetorical choices are self-evident even in Dickinson's *Letters*. Writing as a fictitious farmer, Dickinson introduces his legal argument through the following narrative:

> I am a farmer, settled after a variety of fortunes, near the banks, of the river Delaware, in the province of Pennsylvania. I received a liberal education, and have been engaged in the busy scenes of life . . . . My farm is small, my servants are few, and good; I have a little money at interest; I wish for no more . . . . Being master of my time, I spend a good deal of it in a library, which I think the most valuable part of my small estate; and being acquainted with two or three gentlemen of abilities and learning, who honour me with their friendship, I believe I have acquired a greater share of knowledge in history, and the laws and constitution of my country, than is generally attained by men of my class, many of them not being so fortunate as I have been in the opportunities of getting information.[106]

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102. *Circular Letter*, *supra* note 68.

103. Lopez, *supra* note 90, at 2.

104. *See id*. at 3; *see also* STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *Communication Skills, in* ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS 51, 57–59 (1999).

105. Delia B. Conti, *Narrative Theory and the Law: A Rhetorician's Invitation to the Legal Academy*, 39 DUQ. L. REV. 457, 459 (2001).

106. Dickinson, *supra* note 18, at 3.

Both Dickinson's use of this fictitious persona and his decision to host his narrative in letter form illustrates some of the ways in which lawyers may employ their persuasion skills in protest lawyering. Of course, in representing clients, lawyers cannot advocate in front of a judge and jury as farmers or submit legal briefs via letters. But it is a fundamental part of a lawyer's job to persuade laypeople of a legal position; that Dickinson's awareness that he must do so on a mass scale as a protest lawyer likely explains some of his rhetorical decisions, at least in part.[107] Perhaps more importantly, protest lawyering is uniquely unencumbered by the rules and customs of the courtroom. On the contrary, in participating in protest, lawyers are free to call on their wide range of distinctive skills and use them as they deem most persuasive, so long as they are lawful and ethical.

III. THE LAWYER'S ETHICAL RESPONSIBILITY TO ENGAGE IN PROTEST LAWYERING

Lawyers have a well-recognized obligation to uphold and reform the law. This obligation envisions a lawyer's responsibilities beyond zealous advocacy for private clients and instead imagines a lawyer's role as one that actively promotes the public good.[108] The preamble to the *Model Rules* describe a lawyer as "an officer of the legal system and a public citizen having special responsibility for the *quality* of justice" (emphasis added).[109] Accordingly, the *Model Rules* describe a lawyer's duties to include "challeng[ing] the rectitude of official action, seek[ing] improvement of the law," employing "knowledge [of the law] in reform of the law," and "us[ing] civil influence to ensure equal access to our system of justice . . . ."[110] The responsibility of "further[ing] the public's understanding of and confidence in the rule of law and the justice system" is likewise among a lawyer's duties as a public citizen.[111] Although the *Model Rules* fall short of illustrating just how these duties may be well-served, their language plainly signals that a lawyer's "special obligation" far exceeds their obligations to their immediate clients. Each one of these special responsibilities is embodied by the protest lawyer.

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107. *See* Pierre Marambaud, *Dickinson's "Letters from a Farmer in Pennsylvania" as Political Discourse: Ideology, Imagery, and Rhetoric*, 12 EARLY AM. LITERATURE 62, 65-71 (1977) for a more in-depth discussion on Dickinson's rhetorical choices.

108. *See, e.g.*, Judith A. McMorrow, *Civil Disobedience and the Lawyer's Obligation to the Law*, 48 WASH. & LEE L. REV. 139 (1991) ("[T]he lawyer has special obligations both to uphold the law and to strive to make the law just."); Deborah L. Rhode, *The Profession and the Public Interest*, 54 STAN. L. REV. 1501, 1503–08 (2002) (arguing against the assumption that "zealous advocacy in an adversary system is the best means of protecting rights and promoting truth, whatever its costs in particular cases"); Margalit Fox, *Monroe Freedman, Influential Voice on Legal Ethics, Dies at 86*, N.Y. Times (Mar. 2, 2015), https://www.nytimes.com/2015/03/03/nyregion/monroe-freedman-expert-on-legal-ethics-dies-at-86.html [https://perma.cc/W4CG-XVB3] (noting Professor Freedman's position that lawyers "are here to help members of the public," and that lawyers "are not helping members of the public the way [they're] supposed to do it if [they] are not there to tell people who are ignorant of their rights that they've got rights").

109. MODEL RULES OF PROF'L CONDUCT pmbl. (hereinafter MODEL RULES).

110. MODEL RULES pmbl.

111. MODEL RULES pmbl.

The lofty ideals of the *Model Rules'* preamble may seem substantively detached from the highly technical requirements of the rules themselves. But as demonstrated, those ideals have depth in the heritage of the American-, and broader Anglo-, legal profession.[112] A rich body of scholarship gives life to the preamble's text,[113] in addition to the primary sources that have been explored herein. Take, for example, Hegel's critic of technocratic law:

> Since the binding force of law rests upon the right of self-consciousness . . . the laws ought to be universally made known.[114]
>
> To hang up the laws, as did Dionysius the Tyrant, so high that no citizen could read them, is a wrong. To bury them in a cumbrous apparatus of learned books, collections of decisions and opinions of judges . . . so that no one can attain a knowledge of them, unless he has made them a special subject of study, is the same wrong in another form . . . . Jurists, who have a detailed knowledge of the law, often look on it as their monopoly. He who is not of their profession, they say, shall not be learned . . . . But we do not need the services of a shoemaker to find out if the shoe fits, nor do we need to belong to a particular trade in order to have a knowledge of the objects which are of universal interest in it. Right concerns freedom, the worthiest and holiest thing in man, the thing which he must know in so far as he is answerable to it.[115]

Or, for example, Chief Judge Harry T. Edwards argument that "as part of their professional role, lawyers have a positive duty to serve the public good."[116]

> [A] lawyer does not view law solely in instrumental and market terms as the outcome of aggressive assertion by adversary interests in courts, legislatures, and other institutions, or consider justice as largely subsumed by what the pluralistic system comes up with. Rather, a lawyer seeks to serve his clients *and* the public good, and these commitments are not seen as mutually exclusive.[117]

In this spirit, lawyers should not read the highly technical terms of the *Model Rules* as detached from the ideals presented in their preamble; it is these principles that give life to the rules, for it is well-understood that it is "part of a lawyer's duty to conform their practice to our highest ideals."[118]

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112. *See* Deborah L. Rhode, *Lawyers as Citizens*, 50 WM. & MARY L. REV. 1323, 1324–26 (2009).

113. This note does not purport to even scratch the surface of all the ways in which scholarship has imagined the civic responsibilities of lawyers. Instead, it rests on the general premise—and seeks to demonstrate through some historical examples—that the notion that a lawyer's role compels social consciousness and public citizenry is embedded in the American legal professional heritage and inseparable from the ethical rules that circumscribe the profession. *See generally* Rhode, *supra* note 112; Harry T. Edwards, *A Lawyer's Duty to Serve the Public Good*, 65 N.Y.U. L. REV. 1148 (1990).

114. G.W.F. HEGEL, PHILOSOPHY OF RIGHT 174 § 215 (S.W Dyde trans, 2000).

115. *Id*.

116. Edwards, *supra* note 113, at 1150; *see also* Moliterno, *supra* note 2.

117. Edwards, *supra* note 113, at 1148–49 (quotations omitted).

118. *Id*. at 1150.

Indeed, there are promising examples of lawyers today who embody this spirit and continue the tradition of protest lawyering. One such example is *Lawyers Defending American Democracy* ("LDAD"), a coalition of over 14,000 lawyers whose mission is to "galvanize lawyers to defend the rule of law in the face of an unprecedented threat to American democracy."[119] The coalition operates primarily through open letters to fellow members of the legal profession and the public at large. For example, following the January 6, 2021 deadly assault on the United States Capitol during which white supremacist insurrectionists attempted to undermine the peaceful transfer of power,[120] LDAD published an open letter called *Lawyers, Stand Up!*[121] In its letter, the group reasserted that "[l]awyers have no special province when it comes to politics. We have our views, like all citizens, and we should act on them. But when it comes to defending our Constitution and our system of laws, we have a special duty and an exceptional perspective."[122] The group is similarly vocal about ongoing egregious attacks on voting rights in America.[123] Operating from a sense of dedication to the rule of law and a recognition of the "exceptional perspective" that lawyers ought to lend to critical activist movements, LDAD's mission embodies the spirit of the *Model Rules* and the profession in general. By coalescing around a shared responsibility toward achieving a genuine democracy, building a network of fellow protest lawyers throughout the profession and country, crafting legal arguments that undergird critical efforts at social and political reform, and making these arguments accessible to the public, this coalition honors and continues the American protest lawyer's legacy.

A lawyer's ethical responsibility to serve the public good makes the case for protest lawyering. As gatekeepers of legal knowledge and specialists in issue spotting, legal reasoning, public advocacy, and persuasion, lawyers are uniquely positioned to embed themselves within grassroots protest movements not just as providers of counseling and litigation services but as protestors themselves. In doing so, lawyers advance popular demands to improve the quality of justice,

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119. *Our Mission*, LAWS. DEF. AM. DEMOCRACY, https://ldad.org/about (last visited Apr. 2, 2022) [https://perma.cc/4LME-VSEB].

120. *See* Peter Baker & Sabrina Tavernise, *One Legacy of Impeachment: The Most Complete Account So Far of Jan. 6*, N.Y. TIMES (Aug. 31, 2021), https://www.nytimes.com/2021/02/13/us/politics/capitol-riots-impeachment-trial.html [https://perma.cc/V3YS-K9UJ]; Sabrina Tavernise & Matthew Rosenberg, *These Are the Rioters Who Stormed the Nation's Capitol*, N.Y. TIMES (May. 12, 2021), https://www.nytimes.com/2021/01/07/us/names-of-rioters-capitol.html [https://perma.cc/J2E2-HM2U].

121. *Lawyers, Stand Up!*, LAWS. DEF. AM. DEMOCRACY, https://ldad.org/letters-briefs/lawyers-stand-up (last visited Apr. 2, 2022) [https://perma.cc/V3ES-48ZQ].

122. *Id.*

123. *See, e.g.*, *Regarding Voter Suppression*, LAWS. DEF. AM. DEMOCRACY, https://ldad.org/letters-briefs/regarding-voter-suppression (last visited Apr. 2, 2022) [https://perma.cc/E29K-4URP]; *Open Letter to Protect Against Voter Suppression*, LAWS. DEF. AM. DEMOCRACY, https://ldad.org/letters-briefs/letter-voter-suppression (last visited Apr. 2, 2022) [https://perma.cc/M9NE-T4K2]; Matt Reynolds, *Lawyers Call on Members of the Profession to Defend Voting Rights*, ABA J. (Nov. 22, 2021), https://www.abajournal.com/web/article/lawyers-call-on-members-of-the-profession-to-defend-voting-rights [https://perma.cc/PY3N-KRYX].

challenge usurpations of legitimate sovereignty, ensure equal access to legal institutions, and reform our broken systems[124] by grounding these demands in persuasive legal positions that compel adherence to these causes. All lawyers and legal institutions today ought to feel the weight of this monumental responsibility.

CONCLUSION

Today, the legal progression is broadly divided into categories: cause or social justice lawyering[125] and corporate law.[126] Importantly, this distinction has become entrenched in the development of lawyers' professional identities.[127] Research shows that law students entering the corporate side of the profession tend to experience professional role distancing, which describes "the process by which individuals create and maintain conceptual distance from the 'virtual self implied in the [professional] role.'"[128] In the legal profession specifically, this

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124. *See* MODEL RULES pmbl.

125. Several terms are used to connote this type of lawyering. *See* AUSTIN SARAT & STUART A. SCHEINGOLD, Cause Lawyering: Political Commitments and Professional Responsibilities 33 (1998) ("Such lawyering as I have called 'lawyering for the good' others have called 'social justice' lawyering, public interest' lawyering, 'rebellious' lawyering, 'activist' lawyering, progressive lawyering, 'transformative' lawyering, equal justice lawyering, 'radical' lawyering, lawyering for social change, 'critical' lawyering, social conscious lawyering, lawyering for the underrepresented, lawyering for the subordinated, 'alternative' lawyering, political lawyering, and 'visionary' lawyering, to name but a few of the variations.").

126. *See generally* Rachel F. Moran, *The Three Ages of Modern American Lawyering and the Current Crisis in the Legal Profession and Legal Education*, 58 SANTA CLARA L. REV. 453 (2019) (categorizing the rise of corporate law and the rise of cause lawyering as distinct "ages" of modern American lawyering); Deborah Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027 (2008) (assessing public interest law as a distinct sector in the modern American legal landscape); Ralph Nader, *An Open Letter to Harvard Law Students*, THE HARVARD LAW RECORD (Sept. 14, 2020), http://hlrecord.org/an-open-letter-to-harvard-law-students-2020/ [https://perma.cc/K8KB-RUEF] (Describing large corporate law firms as "creating far more deep and damaging injustice for our society" and encouraging students toward public interest law activity); Charles R. Halpern & John M. Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 GEO L.J. 1095 (1971) (describing the emergence of public interest firms as a response, in part, to "harmful" and "unresponsive" corporate abuse). Note, that these categories reflect rough distinctions and do not purport to reflect the precise and several divisions within the legal profession. *See* SARAT & SCHEINGOLD, *supra* note 125, at 33–37 (1998) (addressing challenges to identifying the boundaries of these categories); BURTON A. WEISBROD, *Conceptual Perspective on the Public Interest: An Economic Analysis*, *in* PUBLIC INTEREST LAW: An Economic and Institutional Analysis 4 (1978) ("The concept of 'public interest' is complex and not susceptible of any simple definition. While the term 'public interest' has been used in many contexts through the ages, there has developed no consensus as to what it means.").

127. *See generally* John Bliss, *Divided Selves, Professional Role Distancing among Law Students and New Lawyers in a Period of Market Crisis*, 42 LAW & SOC. INQUIRY 855–97 (2017); William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DePaul J. for Soc. Just. 7, 9 (2007) (noting that "research shows that two-thirds of the students who enter law school with intentions of seeking a government or public-interest job do not end up employed in that work"); Tan N. Nguyen, *An Affair to Forget: Law School's Deleterious Effect On Student's Public Interest Aspirations*, 7 CONN. PUB. INT. L.J. 95, 95 (2008) ("[A]lthough a great deal of these graduates entered law schools with aspirations of engaging in public interest work following graduation, few actually do so."); Richard L. Abel, *Choosing, Nurturing, Training, and Placing Public Interest Law Students*, 70 FORDHAM L. REV. 1563 (2002) (discussing "the erosion of public interest commitment during law school").

128. Bliss, *supra* note 127, at 856.

means that new lawyers entering social justice-oriented positions "sustain an integrated view of professional identity," through which their professional and personal roles become aligned,[129] while those entering the corporate sector tend to develop "a more instrumentalized corporate lawyer identity profile," which distances their professional identity from the personal and political values that many law students and lawyers claim attracted them to the profession in the first place.[130]

But the values that are present in the *Model Rules* apply uniformly to cause lawyers and corporate lawyers. The ethical obligations a lawyer assumes when joining the legal profession include a professional responsibility to "seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession"; to "cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education"; "to further the public's understanding of and confidence in the rule of law and the justice system"; and to "use civic influence to ensure equal access to our system of justice . . . ."[131] These responsibilities are not new, but find deep roots in American legal history.

Indeed, long before cause lawyering existed as a distinct segment within the legal profession, some of the most mainstream and well-regarded American lawyers—John Dickinson, Samuel Adams, and James Otis Jr., to name just a few—were acting well beyond the confines of the courtroom to fulfill these responsibilities on behalf of a pre-Revolutionary protest movement. These lawyers set out to improve and innovate methods by which colonists could assert their fundamental rights, cultivate and disseminate the critical legal arguments that called for the restoration of those rights, and further the public's understanding of those legal arguments—all within the context of widespread social and political protest.

This demonstration of admirable ethical lawyering launched a tradition of protest lawyering as a cornerstone of the American legal identity. That tradition endures today through organized coalitions of protest lawyers, like LDAD. Hopefully, by fulfilling their ethical duty to protest tyranny, political disenfranchisement, and social injustice alongside other members of the public, lawyers who have experienced role distancing will also reconnect their personal values to their professional identities. The need for lawyers to fulfill this professional responsibility is as dire now as it has ever been.

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129. *Id*. at 867–72.
130. *Id*. at 887, 872–79.
131. MODEL RULES pmbl.