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Foreword

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COLLOQUIUM
SUBVERSIVE LAWYERING
FOREWORD

Bennett Capers & Bruce A. Green***

Is there such a thing as subversive lawyering? And if so, what is it? These are the questions that motivate this colloquium issue.

To be sure, other, similar terms exist and have been explicated. Movement lawyering.¹ Rebellious lawyering.² Resistance lawyering.³ Indeed, we were particularly inspired by Daniel Farbman’s article *Resistance Lawyering*, in which he uncovers the stories of abolitionist lawyers who, confronting the Fugitive Slave Act of 1850,⁴ “employed every means at their disposal to frustrate, delay, and dismantle the system within which they were practicing.”⁵ But still, we wondered if subversive lawyering might be something different. Something akin to resistance lawyering, and yet distinct. We ourselves were unsure of the answer, but our intuition suggested there was a *there* there, if we could simply puzzle it out. It was with this openness in mind that we reached out to scholars writing and practicing in different areas of the law—housing law, criminal law, labor law, etc.—who we suspected might be interested in exploring the topic. This is how we framed the invitation:

* Professor of Law; Director of the Center on Race, Law, and Justice, Fordham University School of Law. This Foreword was prepared for the Colloquium entitled *Subversive Lawyering*, hosted by the *Fordham Law Review* and co-organized by the Center on Race, Law, and Justice and the Stein Center for Law and Ethics on October 15–16, 2021, at Fordham University School of Law. A thanks to the authors who contributed to the collection and to the Race, Law, and Justice Center’s Deborah A. Batts fellows, Cameron Porter and Lamar Smith, for providing research for this Foreword. Also, a special thanks to Grant Emrich and the rest of the *Fordham Law Review* editors and staff for their outstanding work in putting this Colloquium together.

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1. See generally Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645.
2. See generally GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* 66 (1992).
3. Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1880 (2019).
4. Ch. 60, 9 Stat. 462 (repealed 1864).
5. Farbman, *supra* note 3, at 1880.

What does it mean in the practice of law to be subversive, i.e., to seek to reform, disrupt, or even overthrow aspects of the legal system through means that are less than transparent, and even transgressive? What does subversive lawyering mean in particular law practices, e.g., in consumer and housing law; in prosecution or government representation; in transactional practice? Can subversive lawyering be justified? Does it even need justification? And how can subversive lawyering and the pursuit of broader political goals be reconciled with ethical duties to one's client and as an officer of the court? For that matter, how does subversive lawyering differ from, complement, or measure up against other kinds of resistance or movement lawyering, or against other ways of seeking social change through the law or through the political process? Is subversive lawyering something that should be encouraged, and perhaps taught? Even if a lawyer is not fully "subversive" (under whatever definition one adopts), are there useful lessons to be drawn from the concept of subversive lawyering? This colloquium will bring together legal scholars in various areas to think through and address these questions.⁶

Looking back on the invitation now, two things stand out. One, we wanted our authors unrestrained. Two, through our colloquium on subversive lawyering, we hoped our contributors would help us figure out what subversive lawyering is. And what it could be.

This is not to say that the two of us were wholly without opinions. Indeed, as invited scholars asked clarifying questions, certain ideas of our own began to crystallize. For Green, the concept was capacious enough to include not only Daniel Farbman's abolitionist lawyers but also the brave lawyers who played a crucial role in this country's independence. At what the American legal profession considers a high-water mark, lawyers set the stage for the American Revolution. In 1774, lawyers John Adams, Patrick Henry, and Roger Sherman were among the members of the First Continental Congress who most vigorously promoted independence.⁷ What is sometimes skirted over is that these attendees defied King George III and, in doing so, willingly violated the law by attending the Continental Congress.⁸ Less than two years later, lawyers Thomas Jefferson and Robert Livingston, along with Adams and Sherman, were four-fifths of the committee of five—the fifth being Benjamin Franklin—that drafted the Declaration of Independence.⁹ From the point of view of England at the time, this declaration constituted treason.¹⁰ And yet it is a liberating document, a democratizing document,

6. Email from Bennett Capers, Prof. of L., Fordham Univ. Sch. of L., Dir., Ctr. on Race, L. & Just. (Oct. 24, 2020, 7:50 AM) (on file with author).

7. See, e.g., MARY BETH NORTON, 1774: THE LONG YEAR OF REVOLUTION 192 (2020) (discussing John Adams and Patrick Henry); MARK DAVID HALL, ROGER SHERMAN AND THE CREATION OF THE AMERICAN REPUBLIC 50, 55 (2013) (discussing Roger Sherman).

8. See NORTON, *supra* note 7, at 128.

9. See *The Declaration of Independence: A History*, NAT'L ARCHIVES, <https://www.archives.gov/founding-docs/declaration-history> [<https://perma.cc/4S7F-2ZV2>] (last visited Mar. 4, 2022).

10. See generally RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE (2016).

setting aside the stain of chattel slavery. In many ways, these early lawyers were engaged in subversive lawyering, one of us would say.

For Capers, however, something more is required to set subversive lawyering apart. For example, in an email to a scholar who sought more information about how subversive lawyering might differ from rebellious lawyering, Capers responded by suggesting that rebellious lawyering is overt and confrontational. It wears its rebellion on its sleeve. By contrast, Capers argued, subversive lawyering suggests something more covert. It suggests the Black poet Paul Laurence Dunbar's line, "We wear the mask that grins and lies."¹¹ A spy in the enemy's camp. A wolf in sheep's clothing. A sleeper agent. A lawyer as a trojan horse, keeping hidden, for now, the battle they plan on waging from inside. Subversive lawyering rarely announces itself as such. To be sure, the goal may align with resistance lawyering. Or rebellious lawyering. But the means is decidedly more subtle.

Of course, these are just our own initial ideas. As we thought about it more, we wondered about other things. For example, does the term subversive lawyering have a politics? Stated differently, should the term include those "on the other side" who have a very different conception of what is "right" and what is "good"? Consider, for example, how lawyers supported Donald Trump's efforts to subvert the legitimate, lawful results of the 2020 presidential election—that is, to subvert democratic self-governance itself.¹² Soon after the election, the public witnessed, in real time, lawyers' efforts to use false and frivolous allegations of election fraud to try to persuade courts to invalidate the election results.¹³ Through the ongoing efforts of the media and, of late, the Select Committee to Investigate the January 6th Attack on the United States Capitol, we later learned that Trump's lawyers also plotted in the shadows to persuade state election officials not to certify valid state election results, to persuade state legislatures to send unelected slates of electors to Washington, D.C., and to persuade the vice president to throw the election to Congress rather than to certify the electoral count.¹⁴ Thankfully, the courts, most state election officials, most state legislators, most members of Congress, and the vice president rejected Trump's efforts.¹⁵ While more lawyers than not acted

11. PAUL LAURENCE DUNBAR, *We Wear the Mask*, in THE COMPLETE POEMS OF PAUL LAURENCE DUNBAR 71, 71 (Dodd, Mead & Co. 1922).

12. See, e.g., Mike Scarcella, *Giuliani, Suspended in N.Y., Faces Attorney Ethics Probe in D.C.*, REUTERS (Aug. 6, 2021, 6:13 PM), <https://www.reuters.com/legal/government/giuliani-suspended-ny-faces-attorney-ethics-probe-dc-2021-08-06/> [<https://perma.cc/44VD-U5EZ>]; Clara Hendrickson, *Lawyers Who Tried to Overturn Michigan's Election Argue They Shouldn't Be Punished*, DETROIT FREE PRESS (Feb. 8, 2022, 6:06 PM), <https://www.freep.com/story/news/politics/elections/2022/02/08/kraken-sidney-powell-trump-michigan-election/6703093001/> [<https://perma.cc/AX5C-XJ6J>].

13. See, e.g., Scarcella, *supra* note 12; Hendrickson, *supra* note 12.

14. See Philip Bump, *By Memo or by Mob, Trump and His Team Positioned the Country for Chaos*, WASH. POST (Sept. 21, 2021, 10:22 AM), <https://www.washingtonpost.com/politics/2021/09/21/by-memo-or-by-mob-trump-his-team-positioned-country-chaos/> [<https://perma.cc/TTD8-R8KY>].

15. See, e.g., Russell Wheeler, *Trump's Judicial Campaign to Upend the 2020 Election: A Failure, but Not a Wipe-Out*, BROOKINGS (Nov. 30, 2021), <https://www.brookings.edu/>

honorably, this was not a moment of unalloyed pride for the legal profession. Trump's lawyers were surely subversive. Should the term "subversive lawyering" therefore include them?

Other questions surfaced when several of the contributors for this Colloquium gathered via Zoom in August 2021 for an informal discussion about questions that remained on the table for our formal colloquium on October 15 and 16. The law offers lawyers tools but also procedural restraints. Some of our authors questioned whether lawyers' tools are up to the task, recalling Audre Lorde's caution that "*the master's tools will never dismantle the master's house.*"¹⁶ One might also question whether the legal processes are the right places in which to make change and whether lawyers, given the limitations within which they work and, in many cases, their own cautiousness, are the right agents of change. We normally assume that lawyers should not subvert the law or legal process to their clients' detriment; we normally assume lawyers owe their clients loyalty. If we start from these assumptions, the question becomes how lawyers might undermine the law's objectives either to further clients' interests, as in the case of the abolitionist lawyers, or independently of legal representations, as in the case of colonial American lawyers yearning for independence. If the American Revolution is any indication, then would-be subversive lawyers, even at their most powerful, cannot single-handedly dismantle unjust laws and processes. Perhaps the most any individual lawyer can do is make tiny cuts that combine with those made by others, both lawyers and nonlawyers.

Consider, too, progressive criminal justice issues, which are finally becoming part of the national conversation. At a time when many are celebrating the election of progressive prosecutors, those committed to more radical change are asking: What good can progressive prosecutors really do?¹⁷ Are they limited to implementing reformist reforms, or can they really champion nonreformist reforms that lead to radical change?¹⁸ More pointedly, is progressive prosecution consistent with abolitionism?¹⁹ For that

blog/fixgov/2021/11/30/trumps-judicial-campaign-to-upend-the-2020-election-a-failure-but-not-a-wipe-out/ [https://perma.cc/L7SX-J7XQ].

16. AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER* 110, 112 (1984).

17. In many ways, progressives are asking the same question Abbe Smith and Paul Butler separately asked over a decade ago. See generally Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 *GEO. J. LEGAL ETHICS* 355 (2001); PAUL BUTLER, *Should Good People Be Prosecutors?*, in *LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE* 101, 101–21 (2009).

18. The distinction comes from André Gorz, who championed the possibility of "nonreformist reforms." ANDRÉ GORZ, *STRATEGY FOR LABOR: A RADICAL APPROACH* 6–8 (1967). For more of this distinction with respect to criminal justice reform, see, for example, Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 *CALIF. L. REV.* 1781, 1844 (2020); Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 *HARV. L. REV.* 1, 114–18 (2019) (discussing "[n]onreformist [a]bolitionist [r]eforms"); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 *NW. U. L. REV.* 1609, 1623 (2017).

19. Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 *UCLA L. REV.* (forthcoming 2022).

matter, can one be a defense lawyer and an abolitionist?²⁰ These questions resonate with our own concerns teaching criminal law and procedure. Can one teach about the criminal legal process without, to some extent, legitimating it? Can one do any of this and be subversive?

We are not alone in raising questions such as these. A public defender, who has almost 600,000 followers on TikTok and nearly 60,000 on Twitter, recently questioned whether radical lawyers can exist.²¹ As his tweet put it, “The practice of law is inherently not radical. You can be a person with radical beliefs who is a lawyer, but I don’t think lawyers are doing anything radical.”²² His contention was of a piece with an observation made by others: that being at a law school by definition already involves an indoctrination, a privileging of the status quo.²³

Some of our contributors would vociferously deny that lawyers are not “doing anything radical.”²⁴ Others, we suspect, would say that the sentiment is sobering but likely true. One great benefit of hosting a discussion on this topic is the opportunity to elicit varied perspectives on questions such as this. And perhaps to be reminded of critical race theory’s commitment to hope even in the face of despair.²⁵ If the practice of law is inherently not radical—or, to use our term, “subversive”—how can we change that? What preconditions would foster good subversive lawyering, or to borrow from Congressman John Lewis, create “good trouble”?²⁶ And for lawyer-teachers, an equally important question is: how can law professors prepare their students to fight the good (subversive) fight?

Although our contributors could not possibly respond to all of these questions, each offers interesting insights on the broad theme of subversive lawyering. We commend to you their writings:

20. Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in a Criminal Defense Clinic*, 45 N.Y.U. REV. L. & SOC. CHANGE 159 (2021) (asking whether one can be a public defender without legitimizing a flawed criminal law system); see also Eli Salamon-Abrams, Note, *Remaking Public Defense in an Abolitionist Framework: Non-reformist Reform and the Gideon Problem*, 49 FORDHAM URB. L.J. 435 (2022).

21. Alex Peter (@LoIOverruled), TWITTER (Jan. 2, 2022, 11:13 AM), <https://twitter.com/LoIOverruled/status/1477674519825461250> [<https://perma.cc/P8RK-JFEY>]. On Peter’s influence and number of followers, see Samantha Berlin, *Lawyer Goes Viral After Asking Viewers to Stop Telling Him About Crimes They’ve Committed*, NEWSWEEK (Dec. 22, 2021, 12:11 PM), <https://www.newsweek.com/lawyer-goes-viral-after-asking-viewers-stop-telling-him-about-crimes-theyve-committed-1662179> [<https://perma.cc/25Q7-7BNP>].

22. Peter, *supra* note 21.

23. See Bennett Capers, *The Law School as a White Space*, 106 MINN. L. REV. 7, 12 (2021); see also Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 591–92 (1982).

24. Peter, *supra* note 21.

25. See, e.g., Bennett Capers et al., *Introduction*, in CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW (forthcoming 2022); see also Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1352 (2011).

26. Joshua Bote, *‘Get in Good Trouble, Necessary Trouble’: Rep. John Lewis in His Own Words*, USA TODAY (July 19, 2020, 12:46 PM), <https://www.usatoday.com/story/news/politics/2020/07/18/rep-john-lewis-most-memorable-quotes-get-good-trouble/5464148002/> [<https://perma.cc/G6UJ-HDWJ>].

In *Bargaining for Abolition*, Zohra Ahmed compares the criminal court system to a workplace in which labor is required to keep it running.²⁷ As an example of subversive lawyering, she advocates for unionized public defenders to use collective bargaining negotiations to reduce funding and eliminate staff positions for police and prosecutors' offices.

In his contribution, *A Commons in the Master's House*, Daniel Farbman addresses how those of us who seek to change systems are tasked with deciding how to balance our struggles within and against the systems we want to alter.²⁸ He highlights historical events, as well as his personal experience tackling this issue. Farbman communicates how institutional actors can make space within hostile institutions to support resistance movements.

Christina John and Russell Pearce decided that in addressing subversive lawyering, they also wanted to subvert the expectations and norms about who publishes in law reviews. To this end, they invited several coauthors who have encountered the law as members of the public, not as practicing lawyers or legal academics. Collectively, in *Subversive Legal Education: Reformist Steps Toward Abolitionist Visions*, the authors explore reforms that encourage equity and democracy within existing methods for distributing legal education.²⁹ They begin with reformist steps as temporary solutions toward reaching a just society and end with the notion that abolishing the existing system is necessary to reach a democratic and participatory model of legal education.

In *When We Fight, We Win: Eviction Defense as Subversive Lawyering*, Eloise Lawrence explores the meaning of subversive lawyering within the realm of Massachusetts housing court.³⁰ The essay examines the use of the "sword and shield" model of eviction defense, which combines legal defense, the "shield," with grassroots activism, the "sword," to promote justice on both the micro and macro levels.

In *Policy by the People, for the People: Designing Responsive Regulation and Building Democratic Power*, Scott Cummings and Doug Smith call for a new model of policymaking that considers the effect of policies on marginalized groups rather than the interests of those with power.³¹ The authors explore the role of policy design as a part of legal advocacy and offer examples of how lawyers can encourage the creation of policies that are more responsive to the needs of powerless groups.

27. Zohra Ahmed, *Bargaining for Abolition*, 90 FORDHAM L. REV. 1953 (2022).

28. Daniel Farbman, *A Commons in the Master's House*, 90 FORDHAM L. REV. 2061 (2022).

29. Christina John, Russell G. Pearce, Aundray Jermaine Archer, Sarah Medina Camiscoli, Aron Pines, Maryam Salmanova & Vira Tarnavska, *Subversive Legal Education: Reformist Steps Toward Abolitionist Visions*, 90 FORDHAM L. REV. 2089 (2022).

30. Eloise Lawrence, *When We Fight, We Win: Eviction Defense as Subversive Lawyering*, 90 FORDHAM L. REV. 2125 (2022).

31. Scott L. Cummings & Doug Smith, *Policy by the People, for the People: Designing Responsive Regulation and Building Democratic Power*, 90 FORDHAM L. REV. 2025 (2022).

How about using plea bargaining unions to challenge mass incarceration? Can such unions be a way to engage in subversive lawyering? These are the questions Andrew Crespo takes up in *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*.³² His essay explores the concept of plea strikes, assesses its potential pitfalls, and highlights how criminal defense lawyers could use plea bargaining unions as a tool of subversion.

For his contribution, Paul Butler offers another take on Audre Lorde's famous quote. In *Progressive Prosecutors Are Not Trying to Dismantle the Master's House, and the Master Wouldn't Let Them Anyway*, Butler examines the progressive-prosecutor movement and notes that most progressive prosecutors "are mainly reformers rather than radicals."³³ Moreover, when a handful of progressive prosecutors have attempted to use their most potent tool—discretion—in radical ways, they have sometimes been stripped of that tool, further demonstrating the limits of criminal justice reform.

Of course, these are just a few examples of how one might think about subversive lawyering. Much more might be said in response to the questions with which we started. We hope this collection of writings is only the beginning of a conversation, and not the last word.

32. Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 FORDHAM L. REV. 1999 (2022).

33. Paul Butler, *Progressive Prosecutors Are Not Trying to Dismantle the Master's House, and the Master Wouldn't Let Them Anyway*, 90 FORDHAM L. REV. 1983 (2022).