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VIRTUOUS LAW-BREAKING

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ABSTRACT

A rapidly growing body of scholarship embraces virtue jurisprudence, a series of (often ad hoc) attempts to incorporate the philosophical tradition of virtue ethics into legal theory. Broadly understood, virtue ethics describes an approach to moral questions that emphasizes the importance of developing and embodying various virtues, often as manifestations of human flourishing. Scholars typically contrast virtue ethics with deontological and consequentialist moral theories, tracing virtue-centered analysis to ancient Greek philosophers, and in particular to Aristotle. Virtue ethics has experienced a revival over the past 65 years; but, long before that, it proved especially influential in Catholic moral thought, particularly through the work of Aquinas. Perhaps relatedly, scholars have seized on virtue jurisprudence to defend a range of politically conservative positions, such as originalist constitutional interpretation and the propriety of utilizing the law to regulate ostensibly “private” immoralities.

This Article reveals the radically underappreciated progressive promise of virtue jurisprudence. Virtue jurisprudence requires no religious commitments whatsoever, but a strong version entails acceptance of the moral significance of developing one’s character—both within and without

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the law. On a compelling understanding of the virtues, rejecting a state of perpetual disadvantage under the law is a meaningful marker of the virtue of self-respect, and a repudiation of the vice of servility that would otherwise be imposed by the legal system itself. Thus, contrary to the predominant tenor of research on the subject, virtue jurisprudence can ground significant resistance to—and even defiance of—the law. In making this argument, the Article also draws novel connections between virtue jurisprudence and literature on (inter alia) race, feminism, and sexual orientation to reveal the unnoticed potential of virtue jurisprudence to push forward work in those and related areas. At a time when massive and widespread protests across the United States reflect a groundswell of support for overturning certain long-standing, legally-ingrained, systemic disadvantages of people of color, many might be surprised to learn that virtue jurisprudence can serve as a potent theoretical ally.

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INTRODUCTION

In the spring of 2020, in the midst of an ongoing global COVID–19 pandemic that had already killed approximately 100,000 Americans, protestors surged into the streets in response to the Minneapolis police killing an unarmed Black man named George Floyd.¹ That incident, which bystanders captured on a gruesome video,² served as a flashpoint for local

1. See generally *Cumulative Cases*, JOHNS HOPKINS UNIV. & MED.: CORONAVIRUS RES. CTR., <https://coronavirus.jhu.edu/data/cumulative-cases> [<https://perma.cc/HY6U-BZQ8>] (last updated Jul. 16, 2020, 3:00 AM) (charting COVID–19 cases and deaths around the world and showing approximately 100,000 confirmed U.S. deaths by May 26); see also *A Timeline of the George Floyd and Anti-Police Brutality Protests*, AL JAZEERA (June 11, 2020), <https://www.aljazeera.com/news/2020/06/timeline-george-floyd-protests-200610194807385.html> [<https://perma.cc/GDR4-VV3N>] (providing a timeline and backstory for the protests, which began on May 26, the day after George Floyd was killed). A bystander recorded the end of Floyd’s encounter with a group of four police officers. The video depicts Floyd, hands cuffed behind his back, pinned to the ground on his stomach while a white, male officer kneels on Floyd’s neck. See also Christine Hauser et al., *‘I Can’t Breathe’: 4 Minneapolis Officers Fired After Black Man Dies in Custody*, N.Y. TIMES (May 26, 2020), <https://www.nytimes.com/2020/05/26/us/minneapolis-police-man-died.html> [<https://perma.cc/R49M-GHP7>] (last updated June 15, 2020) (describing the video and showing part of it). The video shows the officer, Derek Chauvin, ignoring Floyd’s pleas for air. *Id.* Chauvin continued to apply pressure to Floyd’s neck for at least eight minutes and 15 seconds. See Nicholas Bogel-Burroughs, *8 Minutes, 46 Seconds Became a Symbol in George Floyd’s Death. The Exact Time Is Less Clear*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/us/george-floyd-timing.html#click=https://t.co/krx9rgdPbb> [<https://perma.cc/2H7D-8QK8>] (last updated June 20, 2020). That span included almost three minutes after Floyd became unresponsive. See Trone Dowd, *George Floyd Was Held Down for Almost 3 Minutes After He Went Unresponsive and Had No Pulse*, VICE (May 29, 2020, 6:53 PM), https://www.vice.com/en_us/article/4ayvew/george-floyd-was-held-down-for-almost-3-minutes-after-he-went-unresponsive-and-had-no-pulse [<https://perma.cc/S3K9-E3XA>]. Floyd was eventually taken to a hospital, where he was pronounced dead. See *George Floyd: What Happened in the Final Moments of His Life*, BBC NEWS (July 16, 2020), <https://www.bbc.com/news/world-us-canada-52861726> [<https://perma.cc/R76E-7P6M>]. An autopsy commissioned by Floyd’s family later concluded that Floyd “died not just because of the knee on his neck—held there by the officer, Derek Chauvin—but also because of two other officers who helped pin him down by applying pressure on his back.” Frances Robles & Audra D.S. Burch, *How Did George Floyd Die? Here’s What We Know*, N.Y. TIMES (June 2, 2020), <https://www.nytimes.com/article/george-floyd-autopsy-michael-baden.html> [<https://perma.cc/CB89-F8AE>]. The county medical examiner concurred that Floyd was killed by the police while they were restraining him. See Lorenzo Reyes, Trevor Hughes & Mark Emmert, *Medical Examiner and Family-Commissioned Autopsy Agree: George Floyd’s Death Was a Homicide*, USA TODAY (June 1, 2020, 11:33 AM), <https://www.usatoday.com/story/news/nation/2020/06/01/george-floyd-independent-autopsy-findings-released-monday/5307185002/> [<https://perma.cc/8WSA-3G4X>] (last updated June 1, 2020, 8:46 PM). Nearly a year later, a jury convicted Chauvin of charges arising from the incident, finding him guilty of second-degree murder, third-degree murder, and second-degree manslaughter. Janelle Griffith & Corky Siemaszko, *Derek Chauvin guilty of murder in George Floyd’s death*, NBC NEWS (Apr. 20, 2021), <https://www.nbcnews.com/news/us-news/derek-chauvin-verdict-reached-trial-over-george-floyd-s-death-n1264565> [<https://perma.cc/M23J-N0PR>].

2. See Christine Hauser et al., *‘I Can’t Breathe’: 4 Minneapolis Officers Fired After Black Man Dies in Custody*, N.Y. TIMES (May 26, 2020), <https://www.nytimes.com/2020/05/26/us/minneapolis-police-man-died.html> [<https://perma.cc/R49M-GHP7>] (last updated June 15, 2020) (reporting on the killing and showing part of the video).

protests that quickly spread across the country and even far abroad.³ The demonstrations have largely advanced the messaging of Black Lives Matter, denouncing racism and police violence against Black people.⁴ Protests have been massive and widespread.⁵ Many have been entirely peaceful and lawful;⁶ others have remained peaceful but manifested modest civil disobedience, such as the violation of local curfews;⁷ and still others have included vandalism and looting.⁸

3. See *Protests Across the Globe After George Floyd's Death*, CNN (June 13, 2020, 3:22 PM), <https://www.cnn.com/2020/06/06/world/gallery/intl-george-floyd-protests/index.html> [<https://perma.cc/R49M-GHP7>] (collecting photographs of Black Lives Matter protests from around the world).

4. See Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/GXV2-9L26>] (referring to the demonstrations as “Black Lives Matter protests”).

5. See Lara Putnam et al., *Black Lives Matter Beyond America's Big Cities*, WASH. POST (July 8, 2020, 6:00 AM), <https://www.washingtonpost.com/politics/2020/07/08/black-lives-matter-beyond-americas-big-cities/> [<https://perma.cc/X8HR-3XMK>] (estimating between 5,000 and 8,000 discrete “anti-racism/anti-police-brutality” protests around the United States between the end of May and the first week of July of 2020, including many in small towns around the United States, and referring to the protests as “the largest sustained mobilization in the United States in our lifetimes.”). See also Larry Buchanan et al., *supra* note 4 (mapping some of the protests around the United States, graphically depicting their respective sizes, and estimating that between 15 and 26 million people had participated in protests as of early July).

6. See Dalton Bennett et al., *The Crackdown Before Trump's Photo Op*, WASH. POST (June 8, 2020), <https://www.washingtonpost.com/investigations/2020/06/08/timeline-trump-church-photo-op/?arc404=true> [<https://perma.cc/GSF4-ZVSR>] (noting that “[m]any [Black Lives Matter protests] were peaceful” and reporting in particular on the “largely peaceful demonstrators” who were removed by force from Lafayette Square, near the White House, on June 1, 2020). See also, e.g., Rusty Simmons, *Hundreds March Peacefully in Martinez in Major Black Lives Matter Demonstration Following Mural Defacement*, S.F. CHRON. (July 12, 2020, 9:31 PM), <https://www.sfchronicle.com/bayarea/article/Protesters-gather-in-Martinez-for-major-Black-15403218.php> [<https://perma.cc/H55B-3AE3>] (reporting on one peaceful protest in San Francisco).

7. See Meg Kelly & Elyse Samuels, *Who Caused Violence at Protests? It Wasn't Antifa*, WASH. POST (June 22, 2020, 3:00 AM), <https://www.washingtonpost.com/politics/2020/06/22/who-caused-violence-protests-its-not-antifa/> [<https://perma.cc/59AK-KEPN>] (“Officials have arrested more than 14,000 people across 49 cities nationwide since May 27, according to a Washington Post tally of data provided by police departments and included in media reports. Thousands were arrested for low-level offenses, including curfew violations and failure to disperse.”); see also Brittney Martin, *Texas Black Lives Matter Protesters Were Largely Local and Nonviolent, According to Arrest Data*, TEXAS MONTHLY (June 25, 2020), <https://www.texasmonthly.com/news/texas-protest-arrest-data-nonviolent-local/> [<https://perma.cc/D9AU-M3BY>] (noting that protests in Texas were “largely local and nonviolent,” and reporting that “[t]he majority of apprehensions during the first week of demonstrations over police violence were for curfew violations, obstructing roadways, and other low-level offenses.”). See also Sally J. Scholz, *Civil Disobedience in the Social Theory of Thomas Aquinas*, 60 THE THOMIST: A SPECULATIVE QUARTERLY REVIEW 449, 451 (1996) (quoting James Rachels in defining “civil disobedience” as “public, conscientious, nonviolent refusal to comply with the law.”).

8. See Dalton Bennett, et al., *The Crackdown Before Trump's Photo Op*, WASH. POST (June 8, 2020), <https://www.washingtonpost.com/investigations/2020/06/08/timeline-trump-church-photo-op/?arc404=true> [<https://perma.cc/GSF4-ZVSR>] (noting that some Black Lives Matter protests “included property destruction and clashes with police”); Elise Haas et al., *Tear Gas Used After PPB*

The demands of the protestors speak to the empirically demonstrable, systemic disadvantages of people of color within the justice system.⁹ Many other groups—such as women, various religious minorities, and members of the LGBTQ community—also face pervasive disadvantages before the law.¹⁰ The tension inherent in transgressing the boundaries of the law intending to reform it raises fascinating questions that have generated substantial scholarly attention in the past. A generation of literature written in the years shortly after the American Civil Rights Movement in the 1950s and 1960s framed those questions in terms of duty or obligation: most generally, under what conditions and to what extent are members of a polity subject to a generic duty or obligation to obey the law?¹¹ The answers vary, but they frequently depend on the legitimacy of (or overall level of justice manifested by) the state in question.¹²

However, a rapidly-growing and extremely promising strand of legal theory casts doubt on such deontic framing for any number of important questions. In the 1950's, independently of the Civil Rights Movement, moral philosophers began making “the aretaic turn”¹³—reviving an interest

Precinct Set On Fire, Businesses Looted, KOIN 6 News (June 25, 2020, 4:50 PM) <https://www.koin.com/news/protests/portland-protest-march-george-floyd-blm-black-lives-matter-rose-city-justice-rally-vigil/> [https://perma.cc/2J67-QDWP] (last updated June 26, 2020, 7:55 AM) (detailing reports that “[p]rotesters in Portland . . . looted businesses and set one side of Portland Police Bureau’s North Precinct on fire early Friday morning, after a night of demonstrations turned destructive.”). Notably, according to the FBI, “the greatest threat of lethal violence [at the protests] continues to emanate from lone offenders with racially or ethnically motivated violent extremist ideologies and [domestic violent extremists] with personalized ideologies,” including members of certain right-wing extremist groups. Martin, *supra* note 7.

9. See *infra* Section III.A.

10. See *infra* Section III.A.

11. See *infra* text accompanying notes 137–144.

12. For example, according to William Edmundson:

Theories of political obligation normally concede that there is no duty to obey the laws of unjust regimes. Positive accounts thus typically defend the view that there is a pro tanto duty to obey the laws of sufficiently just states, while allowing that other moral principles will be needed to support particular duties to comply with just laws promulgated or administered by unjust states.

William A. Edmundson, *The Virtue of Law Abidance*, 6 PHILOSOPHERS’ IMPRINT 1, 6 (2006) [hereinafter Edmundson, *Law Abidance*].

13. See COLIN FARRELLY & LAWRENCE B. SOLUM, *An Introduction to Aretaic Theories of the Law*, in VIRTUE JURISPRUDENCE 3–4 (Colin Farrelly & Lawrence B. Solum eds., 2008) [hereinafter FARRELLY & SOLUM, *Aretaic Theories*] (tracing the etymology of the word “aretaic” to classical Greek and defining it as “of, or pertaining to, excellence or virtue”). See also generally Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475 (2005) (urging an aretaic turn in constitutional theory). Consensus treats the seminal moment for the aretaic turn in moral theory as the publication of G.E.M. Anscombe’s *Modern Moral Philosophy* in 1958. See LAW, VIRTUE & JUSTICE 1 (Amalia Amaya & Ho Hock Lai eds., 2013) [hereinafter Amaya & Lai, *LAW, VIRTUE & JUSTICE*] (“Virtue ethics re-emerged in the late 1950’s, with Elizabeth Anscombe’s important article ‘Modern Moral Philosophy’”); COLIN FARRELLY & LAWRENCE B. SOLUM, *An Introduction to Aretaic*

in virtue ethics, an approach to moral philosophy inspired largely by Aristotle.¹⁴ Fundamentally, virtue ethics “emphasizes the virtues, or moral character, in contrast to an approach which emphasizes duties or rules (deontology) or which emphasizes the consequences of actions (utilitarianism [or consequentialism]).”¹⁵ The virtues themselves are dispositions, often carefully cultivated, to act well along particular dimensions when called upon by the circumstances—for example, to be courageous, humble, or charitable.¹⁶ Per traditional formulations, to embody the virtues is to function well as a human—that is, to flourish.¹⁷ Proponents believe virtue ethics offers a richer lens for evaluating moral deliberation than deontology and consequentialism;¹⁸ the virtues arguably shine a distinctive light on motives, moral character, “moral education, moral wisdom and discernment, friendship and family relationships, the role of emotions in our moral life, and the questions of what sort of person I should be, and of how we should live.”¹⁹ Virtue ethics now stands as a legitimate and prominent alternative to the consequentialist and deontological moral theories that previously monopolized the landscape of moral theory.²⁰

Theories of the Law in VIRTUE JURISPRUDENCE 3–4 (Colin Farrelly & Lawrence B. Solum eds., 2008) (similarly identifying Anscombe’s paper as the key influence in the aretaic turn in moral philosophy).

14. Karen Stohr, *Contemporary Virtue Ethics*, 1 PHIL. COMPASS 22, 23 (2006) (“The dominant mode of virtue ethics has historically been, and continues to be, Aristotelian. By this I mean that most virtue ethicists see themselves as heavily indebted to Aristotle in some way, shape, or form.”).

15. This is a serviceable but rather rough characterization. According to philosopher Rosalind Hursthouse,

[T]he lines of demarcation between the three approaches have become blurred. Describing virtue ethics loosely as an approach which ‘emphasizes the virtues’ will no longer serve to distinguish it. By the same token, of course, deontology and utilitarianism are no longer perspicuously identified by describing them as emphasizing rules or consequences in contrast to characters.

ROSALIND HURSTHOUSE, *ON VIRTUE ETHICS* 1, 4 (Oxford Univ. Press 1999) [hereinafter, HURSTHOUSE, *VIRTUE ETHICS*]. This is, in part, because deontologists and consequentialists have begun incorporating certain elements of virtue ethics into their own theories. *Id.* at 3. I will introduce more precision in the following Section.

16. See *infra* Section I.A.

17. See *infra* Section I.A. Some readers may recognize a similarity between this notion of human flourishing and the capability approach made famous by Amartya Sen and Martha Nussbaum (among others). For some background on the capability approach, see generally Ingrid Roybens & Morton F. Byskov, *The Capability Approach*, STAN. ENCYCLOPEDIA PHIL. (Dec. 10, 2020) <https://plato.stanford.edu/entries/capability-approach/> [<https://perma.cc/47BS-LT2A>]. Although virtue ethics and the capability approach are related, they are distinct enough that I will set aside the latter for the balance of this Article.

18. Note also that I will treat the terms “utilitarianism” and “consequentialism” as interchangeable here, though the former is more properly understood as a specific form of the latter.

19. HURSTHOUSE, *VIRTUE ETHICS*, *supra* note 15, at 3.

20. HURSTHOUSE, *VIRTUE ETHICS*, *supra* note 15, at 2 (“And now in the latest collections (as I write, in 1998), [virtue ethics] has acquired full status, recognized as a rival to deontological and utilitarian approaches, as interestingly and challengingly different from either as they are from each

Running about a half-century behind, legal theory picked up on the aretaic turn as well, but in the form of “virtue jurisprudence”—the application of virtue analysis to various facets of the law.²¹ Virtue jurisprudence has proliferated rapidly; scholars have applied virtue-oriented approaches to theories of adjudication or judicial selection,²² legal ethics,²³

other.”) *See also* Amaya & Lai, LAW, VIRTUE & JUSTICE LAW, *supra* note 13 at 1 (“Virtue ethics . . . has established itself as a major approach in normative ethics.”).

21. *See supra* note 13 (describing this timeline by reference to numerous sources). In fact, exactly 50 years separate the publication of G.E.M. Anscombe’s paradigm-shifting paper in moral theory and the appearance of Colin Farrelly and Lawrence Solum’s foundational edited volume on virtue jurisprudence. *Id.*

22. *See* Suzanna Sherry, *Judges of Character*, 38 WAKE FOREST L. REV. 793 (2003); Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2003) [hereinafter Solum, *Judging*]. *See also* Lawrence B. Solum, *A Tournament of Virtue*, 32 FL. ST. L. REV. 1365 (2005); Lawrence B. Solum, *Judicial Selection: Ideology versus Character*, 26 CARDOZO L. REV. 659 (2005).

23. *See* ROSALIND HURSTHOUSE, *Two Ways of Doing the Right Thing*, in VIRTUE JURISPRUDENCE 236 (Colin Farrelly & Lawrence B. Solum eds., 2008); Justice Jeff Brown, “*A Scout Is Trustworthy*”: *Applying Virtue Ethics to Lawyer Professionalism*, 3 ST. MARY’S J. ON LEGAL MALPRACTICE & ETHICS 2 (2013); Michael S. McGinniss, *Virtue Ethics, Earnestness, and the Deciding Lawyer: Human Flourishing in a Legal Community*, 87 NOTRE DAME L. REV. 19 (2011); Robert Araujo, S.J., *The Virtuous Lawyer: Paradigm and Possibility*, 50 S.M.U. L. REV. 433, 434 (1997); *see also* Robert F. Cochran, Jr., *Professionalism in the Postmodern Age: Its Death, Attempts at Resuscitation, and Alternate Sources of Virtue*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 305, 305 (2000); Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-at-Law: Lessons from Dostoyevsky*, 35 HOUS. L. REV. 327, 328 (1998); Robert F. Cochran, Jr., *Lawyers and Virtues: A Review Essay of Mary Ann Glendon’s ‘A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society’ and Anthony T. Kronman’s ‘The Lost Lawyer: Failing Ideals of the Legal Profession,’* 71 NOTRE DAME L. REV. 707, 708 (1996); Heidi Li Feldman, *Beyond the Model Rules: The Place of Examples in Legal Ethics*, 12 GEO. J. LEGAL ETHICS 409 (1999); Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 908–09 (1996); James W. Perkins, *Virtues and the Lawyer*, 38 CATH. LAW. 185, 187 (1998); Thomas L. Shaffer, *The Legal Profession’s Rule Against Vouching for Clients: Advocacy and ‘The Manner That Is The Man Himself’*, 7 NOTRE DAME J.L. ETHICS & PUB. POL’Y 145, 146 (1993); Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 511–32 (1999); Paul R. Tremblay, *The New Casuistry*, 12 GEO. J. LEGAL ETHICS 489 (1999).

antitrust law,²⁴ bankruptcy law,²⁵ criminal law,²⁶ contract law,²⁷ property law,²⁸ intellectual property law,²⁹ constitutional law,³⁰ tort law,³¹ corporate

24. See Elbert L. Robertson, *A Corrective Justice Theory of Antitrust Regulation*, 49 CATH. U. L. REV. 741 (2000).

25. See Matthew Bruckner, *The Virtue in Bankruptcy*, 45 LOY. U. CHI. L. J. 233 (2013).

26. See Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 ARIZ. L. REV. 251 (1995); Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423 (1995); Kyron Huigens, *Virtue and Criminal Negligence*, 1 BUFF. CRIM. L. REV. 431 (1998); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996); see also John Gardner, *The Gist of Excuses*, 1 BUFF. CRIM. L. REV. 575 (1998); Victor Tadros, *The Characters of Excuse*, 21 OXFORD J. LEGAL STUD. 495 (2001); Kyron Huigens, *On Aristotelian Criminal Law: A Reply to Duff*, 18 NOTRE DAME J.L. ETHICS & PUB POL'Y 465 (2004), (reprt. as Kyron Huigens, *On Aristotelian Criminal Law: A Reply to Duff*, in VIRTUE JURISPRUDENCE 214 (Colin Farrelly & Lawrence B. Solum eds., 2008)); Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEO. L.J. 387 (2002). See Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 SETON HALL L. REV. 288, 290 (1993); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 31 (2003); Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1430–31 (2003); Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383, 1383 (2002). But see Antony Duff, *Virtue, Vice, and Criminal Liability*, in VIRTUE JURISPRUDENCE 193 (Colin Farrelly & Lawrence B. Solum eds., 2008) (expressing skepticism about an Aristotelian approach to criminal law).

27. See Chapin F. Cimino, *Virtue and Contract Law*, 88 OR. L. REV. 703 (2009).

28. See DAVID LAMETTI, *The (Virtue) Ethics of Private Property: A Framework and Implications*, in NEW PERSPECTIVES ON PROPERTY LAW, OBLIGATIONS AND RESTITUTION 39 (A. Hudson ed., 2003); Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009); see also Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009); Eric R. Claeys, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889 (2009). But see Katrina M. Wyman, *Should Property Scholars Embrace Virtue Ethics - A Skeptical Comment*, 94 CORNELL L. REV. 991 (2009) (critiquing Peñalver's theory of virtue ethics and property law).

29. See David W. Opperbeck, *A Virtue-Centered Approach to the Biotechnology Commons (Or, the Virtuous Penguin)*, 59 ME. L. REV. 315 (2007); see also Yochai Benkler & Helen Nissenbaum, *Commons-based Peer Production and Virtue*, 14 J. POL. PHIL. 394 (2006).

30. See Lee J. Strang, *Originalism's Promise, and Its Limits*, 63 CLEV. ST. L. REV. 81, 99 (2014); Lee J. Strang, *Originalism and the Aristotelian Tradition: Virtue's Home in Originalism*, 80 FORDHAM L. REV. 1997 (2012).

31. See Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431 (2000).

law and governance,³² medical law,³³ environmental law,³⁴ international criminal justice,³⁵ and more.³⁶ Yet, for all of these substantive applications, virtue jurisprudence has barely contended with the most basic and fundamental subject that its adoption underscores: the relationship between human flourishing and the law itself.³⁷

Moreover, to the limited extent that scholars have explored the implications of tailoring the law to promote virtue-oriented human flourishing, their conclusions have been decidedly conservative. Some have relied on virtue jurisprudence to call for the law to regulate private but ostensibly “vicious” conduct.³⁸ Others have suggested virtue jurisprudence

32. See Barbara Mescher & Bryan Howieson, *Beyond Compliance: Promoting Ethical Conduct by Directors and Corporations*, 1 CORP. GOVERNANCE L. REV. 93 (2005); James McConvill, *Positive Corporate Governance and its Implications for Executive Compensation*, 6 GERMAN L. J. 1777 (2005); see also Ronald J. Colombo, *Toward a Nexus of Virtue*, 69 WASH. & LEE L. REV. 3 (2012); Mark Neal Aaronson, *Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism*, 8 ST. THOMAS L. REV. 113, 116 (1995). See Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 858, 890 (1997); Caryn L. Beck-Dudley, *No More Quandaries: A Look at Virtue Through the Eyes of Robert Solomon*, 34 AM. BUS. L.J. 117, 119–24 (1996); Jeffrey Nesteruk, *The Moral Dynamics of Law in Business*, 34 AM. BUS. L.J. 133, 135–37 (1996); Jeffrey Nesteruk, *Law, Virtue and the Corporation*, 33 AM. BUS. L.J. 473, 473–75 (1996) [hereinafter, Nesteruk, *Law, Virtue and the Corporation*].

33. See Amaya & Lai, LAW, VIRTUE & JUSTICE, *supra* note 13, at 9, note 58 (Amalia Amaya & Ho Hock Lai eds., 2013) (citing two instances in which “virtue ethics has made its way into textbooks and monographs on medical law”).

34. See Jeffrey M. Gaba, *Environmental Ethics and Our Moral Relationship to Future Generations: Future Rights and Present Virtue*, 24 COLUM. J. ENVTL. L. 249, 251–52 (1999); Bradley A. Harsch, *Consumerism and Environmental Policy: Moving Past Consumer Culture*, 26 ECOLOGY L.Q. 543, 547–48 (1999).

35. See Jamie Gaskarth, *The Virtues in International Society*, 18 EUR. J. INT’L REL. 431 (2011).

36. For some additional citations to works of virtue jurisprudence, see generally Solum, *The Aretaic Turn in Constitutional Theory*, *supra* note 13, at 493–95. I have borrowed a number of the citations offered above from Solum’s piece and from Amaya & Lai, LAW, VIRTUE & JUSTICE, *supra* note 13. Notably, I am not aware of a virtue-based analysis of policing, specifically, but there is no obvious basis for doubting that such an analysis would be possible. Given the complexities of the decisions faced by police in many instances, such an approach may in fact prove quite fruitful—subject to the limitations identified below for “role virtues.” See *infra* note 78.

37. As I will outline below, the purist approach to virtue jurisprudence endorses the view that the focus of the law should be to promote the virtue-oriented flourishing of its subjects. See, e.g., FARRELLY & SOLUM, *Aretaic Theories*, *supra* note 13, at 2 (“For virtue jurisprudence, the final end of the law is not to maximize preference satisfaction or to protect some set of rights and privileges; the final end of law is to promote human flourishing—to enable humans to lead excellent lives.”). To take that view seriously requires us to engage with the ways in which the law also *suppresses* human flourishing. For reasons explored below, that essential exercise has proved rare in virtue jurisprudence.

38. See generally, e.g., ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* (Oxford Univ. Press, 1993) (defending “morals legislation” as a way of promoting the virtues of members of society); Timothy Cantu, *Virtue Jurisprudence and the American Constitution*, 88 NOTRE DAME L. REV. 1521 (2013) (arguing, *inter alia*, that modern constitutional jurisprudence on privacy rights and the decline of “traditional families” have undermined the virtues of the American populace).

supports originalist constitutional interpretation.³⁹ And most (if not all) assume or defend some version of the view that compliance with the law is nearly always a marker of virtue.⁴⁰ Perhaps this is unsurprising. For one, Aristotle viewed lawfulness as a virtue, subject to certain intricacies and conditions.⁴¹ Additionally, long before its recent resurgence in secular moral philosophy, virtue ethics found a home in Catholic moral thought, where it was embraced enthusiastically by Thomas Aquinas.⁴² Aquinas also viewed lawfulness as a virtue,⁴³ and his intellectual successors often adopt a relatively conservative Christian perspective.⁴⁴

However, as this Article demonstrates, none of these associations are essential, and in fact they obscure the power of virtue jurisprudence. The relationship between human flourishing and the law is much more complex than most previous literature has acknowledged. And the virtues provide a valuable lens for exploring that relationship, especially once we abandon problematic assumptions that excessively exalt lawfulness. Probing the value of lawfulness also allows virtue jurisprudence to confront the important questions posed by police violence toward minorities. Even in societies regarded as reasonably just,⁴⁵ and even if compliance with the law

39. See generally, e.g., Lee J. Strang, *Originalism and the Aristotelian Tradition: Virtue's Home in Originalism*, 80 *FORDHAM L. REV.* 1997, 2023 (2012) (relying on Aquinas to help ground a virtue-based argument in favor of originalist constitutional interpretation); see also Solum, *supra* note 13, at 521–22 (carving out a prominent role for “original meaning” in his virtue-centered theory of “aretic constitutional formalism”).

40. See *infra* Section II. In centering virtue, however, we are no more bound by these views than we are to Aristotle’s notoriously regressive views of women or slaves. See HURSTHOUSE, *VIRTUE ETHICS*, *supra* note 15, at 2 (noting that “it must be emphasized that those who espouse virtue ethics nowadays do not regard themselves as committed to any of the lamentable, parochial details of Aristotle’s moral philosophy, any more than deontologists inspired by Kant think they are committed to his views on, for example, animals.”).

41. See *infra* Section II.A

42. See *infra* Section II.B. Note that one salient interpretation of Anscombe’s *Modern Moral Philosophy*, the paper credited with reviving virtue ethics, reads Anscombe as defending a form of Christian ethics. See Julia Driver, *Gertrude Elizabeth Margaret Anscombe*, § 5.1, *STAN. ENCYCLOPEDIA PHIL.* (Jul. 21, 2009, rev. Feb. 8, 2018), <https://plato.stanford.edu/entries/anscombe/> [<https://perma.cc/TTS4-YNM9>] (noting that “an alternative reading [of *Modern Moral Philosophy*] is as a *modus tollens* argument intended to establish the superiority of a religious based ethics” and explaining the basis for that interpretation).

43. See *infra* Section II.B.

44. For example, noted Christian scholar John Finnis has written extensively about Aquinas. See, e.g., JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY* (Oxford Univ. Press 1999).

45. The argument presented below does not turn on a judgment about whether the United States (or any other country) is reasonably just because adopting a virtue-centered analysis allows us to move past broad assessments of state legitimacy toward a nimbler approach. See Edmundson, *Law Abidance*, *supra* note 12, at 6 (observing that, relative to typical accounts of the generic duty to obey the law, “[a] virtue-ethical account need not place such stress on the moral credentials of the state; and this is an advantage”).

is virtuous under certain circumstances, the law itself also undermines the capacity of disadvantaged groups to manifest some traditional virtues.⁴⁶ The law's role in reinforcing ingrained inequality ensures that some of its demands impinge on the self-respect of members of those groups. As a result, theorists' consistent demands that everyone respect the law will at times amount to demands for servility. Under conditions of longstanding inequities, a proper measure of self-respect may compel members of disadvantaged groups to resent or even defy the law. In other words, on a compelling understanding of the virtues, and under the facts as they exist in the United States today, the virtues will at times justify law-breaking, and that law-breaking will be *morally good*.⁴⁷

This Article thus explores the potential of virtue jurisprudence to support progressive change in the law, and in particular its promise for addressing longstanding, systemic inequities. In doing so, this Article highlights an advantage of the virtue-jurisprudential framing over the traditional deontic one: under the former, generic duties to obey the law give way to more tailored inquiries about the proper attitude one should take toward the law based on one's specific position. More specifically, this Article articulates a basis for virtuous resistance of the law in self-respect, which manifests differently for members of different groups because of unequal treatment they experience at the hands of the law. This Article therefore offers an internal critique of virtue jurisprudence as it is typically applied, while also suggesting some advantages that virtue jurisprudence provides over alternative theoretical framings.

Section I provides background on both virtue ethics and virtue jurisprudence. It distinguishes two variants of virtue jurisprudence and identifies a common problem in their application: scholars often use virtue jurisprudence to inform the analysis of ideal forms of the law, skipping past the logically prior question of how the law is applied in practice to shape the virtues and vices of its subjects. Section II lays out the virtue of lawfulness as it has been understood historically, identifying its role in codifying presumptions against law-breaking that have impeded a more progressive interpretation of virtue jurisprudence. Section III develops an argument for virtuous law-breaking grounded in the self-respect of members of systemically disadvantaged groups, which I refer to simply as the argument from self-respect. This Section's novel conclusions compel us

46. See *infra* Section III.B.

47. At minimum, conservative scholars of virtue jurisprudence must explicitly contend with the implications of their views for those who stand in a position of disadvantage before the law, something they have not generally done.

to revise our traditional understanding of the virtue of lawfulness. Finally, Section IV draws out the substantial implications of the argument from self-respect, both for virtue jurisprudence and beyond.

I. THE ARETAIC TURN AND THE ARETAIC LEAP

A. *Virtue Ethics*

A brief description of virtue ethics will help ground the argument presented below. As noted in the Introduction, much contemporary writing on virtue ethics derives in some manner from the work of Aristotle, although there are many variations and additional possible influences.⁴⁸ Because of its prominence, I focus on Aristotelian-inspired virtue ethics in this Article. In particular, I draw on a prominent neo-Aristotelian account developed by philosopher Rosalind Hursthouse, which is broadly representative of the virtue ethics movement on key points.⁴⁹

On Hursthouse's view, most virtues are character traits⁵⁰—relatively stable, reliable dispositions of people to act (externally) and react (internally) in a specific way to certain situations. For Hursthouse, an honest person will “avoid . . . dishonest deeds and do . . . honest ones in a certain manner—readily, eagerly, unhesitatingly, scrupulously, as appropriate”;⁵¹ will respond with the appropriate emotions to dishonesty, such as feeling “distressed when those near and dear to them are dishonest”;⁵² and may be “particularly acute about occasions when honesty is at issue” (such as by “noticing, as we have failed to do, that someone is obviously not to be trusted . . . or that we are all allowing someone to be misled”).⁵³ Virtues of this form become deeply embedded in us; they bear on “a person's values, choices, desires, strength or weakness of will, emotions, feelings,

48. See Amaya & Lai, *LAW, VIRTUE & JUSTICE*, *supra* note 13, at 6 (noting that, “[w]hen lawyers rely on virtue ethics, they commonly draw on Aristotelian or neo-Aristotelian versions,” but also that “[o]ther important sources or traditions of virtue ethics [such as Plato, Confucianism, and Hume] have not received equal attention.”). See also HURSTHOUSE, *VIRTUE ETHICS*, *supra* note 15, at 8 (“Michael Slote's recent ‘agent-based’ version of virtue ethics is not at all, he thinks, Aristotelian, but is to be found in the nineteenth-century ethicist Martineau, and some of Christine Swanton's work pays more attention to Nietzsche than to Aristotle.”). Hursthouse herself adopts a neo-Aristotelian base for her theory. See *supra* note 15.

49. Hursthouse is explicit about the Aristotelian underpinnings of her account. See HURSTHOUSE, *VIRTUE ETHICS*, *supra* note 15, at 8.

50. Limited exceptions include friendship and gratitude, which are not necessarily properly understood as traits. See *id.* at 11.

51. *Id.*

52. *Id.* at 11–12.

53. *Id.* at 12.

perceptions, interests, expectations, and sensibilities.”⁵⁴ They often must be cultivated with care, and at any rate take time and maturity to develop.⁵⁵

The list of virtues may vary and is subject to debate.⁵⁶ Plato identified four cardinal virtues: wisdom, justice, fortitude, and temperance.⁵⁷ Aristotle identified several intellectual virtues (such as practical wisdom and intuitive understanding),⁵⁸ and roughly a dozen ethical virtues (such as courage and temperance).⁵⁹ For Aristotle, ethical virtues share a structure; they constitute “a golden mean,” or “condition[s] intermediate . . . between two other states, one involving excess and the other deficiency.”⁶⁰ For example, a courageous person is neither excessively fearful, and therefore cowardly, nor excessively indifferent to danger, and therefore rash. Instead, he “judges that some dangers are worth facing and others are not, and experiences fear to a degree that is appropriate to his circumstances.”⁶¹ Other virtues may not fit this model, however. For example, Lawrence Solum has written at some length about the difficulty of conceptualizing the virtue of justice as a mean.⁶²

A person manifesting the virtues, whatever those may be, “is a morally good, excellent, or admirable person who acts and reacts well, rightly, as she should.”⁶³ Some posit that the virtues are interdependent: to possess any

54. *Id.* (quoting Stephen Hudson, *Human Character and Morality* (1986)).

55. *See id.* at 113–19 (using the example of racism to explore the complex process of inculcating values by training emotional responses).

56. *See id.* at 8 (“Charity or benevolence, for example, is not an Aristotelian virtue, but all virtue ethicists assume it is on the list now.” (parentheses omitted)).

57. Dorothea Frede, *Plato’s Ethics: An Overview*, § 3.2, STAN. ENCYCLOPEDIA PHIL. (Sep. 16, 2013, rev. Dec. 6, 2017), <https://plato.stanford.edu/entries/plato-ethics/> [<https://perma.cc/3DMD-Q8FK>].

58. Richard Kraut, *Aristotle’s Ethics*, § 6, STAN. ENCYCLOPEDIA PHIL. (May 1, 2001, rev. June 15, 2018), <https://plato.stanford.edu/entries/aristotle-ethics/#InteVirt> [<https://perma.cc/9R6K-PKS4>].

59. *See* Martha C. Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, 13 MIDWEST STUDIES IN PHIL. 32, 36–37 (1987) (listing, in addition to the intellectual virtues, ethical virtues from “the most important spheres of experience recognized by Aristotle,” including courage, moderation, justice, generosity, expansive hospitality, greatness of soul, mildness of temper, truthfulness, easy grace, an unnamed form of friendliness, proper judgment, and practical wisdom). For more on the difference between intellectual and ethical virtues, *see* Kraut, *supra* note 58, at § 4.

60. Kraut, *supra* note 58, at § 5.

61. *Id.* at § 5.1.

62. Solum, *The Aretaic Turn in Constitutional Theory*, *supra* note 13, at 513–15 (arguing that “Aristotle found it difficult to fit justice into the schema of virtue as a mean between two opposing vices with respect to a morally neutral affective state such as an emotion or desire” and exploring the possible theoretical implications of that conclusion). *But see* Mark LeBar & Michael Slote, *Justice as a Virtue*, § 1.1, STAN. ENCYCLOPEDIA PHIL. (Mar. 8, 2002, rev. Jan. 21, 2016), <https://plato.stanford.edu/entries/justice-virtue/> [<https://perma.cc/3U6E-ARU7>] (describing Aristotle’s view as distinguishing between the personal virtue of justice and a related but different concept of political justice for constitutions and political arrangements).

63. HURSTHOUSE, VIRTUE ETHICS, *supra* note 15, at 13.

one of them in its proper form is to possess them all.⁶⁴ One common interpretation of the Aristotelian view is that virtue is essential for *eudaimonia*, typically translated as “flourishing” or “happiness.”⁶⁵ *Eudaimonia* refers to a distinctive, objective manner in which humans (as distinctively rational beings) may thrive. Hursthouse perceives “two interrelated claims” in the notion that the virtues are necessary for *eudaimonia*: first, “that the virtues benefit their possessor,” and second, “that the virtues make their possessor good qua human being (human beings need the virtues in order to live a characteristically good human life).”⁶⁶ For Aristotle, achieving *eudaimonia* is the highest good, meaning it is desirable for itself, it is not desirable as a means to some other good, and it is the reason all other goods are desirable.⁶⁷

Notably, a revival in scholarly interest in moral views of this sort prompted some consequentialists and deontologists to take virtue more seriously as well.⁶⁸ Suffice it to say that virtue has proved a useful concept for illuminating a range of salient moral questions,⁶⁹ even for those who do not accept every aspect of virtue ethics, such as a virtue-centered theory of human flourishing.

64. See John Finnis, *Aquinas’ Moral, Political, and Legal Philosophy*, § 4.2.1, STAN. ENCYCLOPEDIA PHIL. (Dec. 2, 2005, rev. Apr. 29, 2020), <https://plato.stanford.edu/entries/aquinas-moral-political/#VirtAlsoSourRathThanConcMoraJudg> [<https://perma.cc/FTF4-VT4L>] (“Aquinas firmly holds the Platonic-Aristotelian thes[is] of the *connexio virtutum*: that to have any of the virtues in its full and proper form one must have all of them. . .”).

65. See HURSTHOUSE, VIRTUE ETHICS, *supra* note 15, at 9–10 (discussing the deficiencies of various English translations of “*eudaimonia*,” including “flourishing,” “happiness,” and “well-being”). Noting well Hursthouse’s concerns with the term, I will use “flourishing” throughout this Article.

66. *Id.* at 20. On a neo-Aristotelian view, possession of the virtues is only part of human flourishing, albeit an essential part. According to Solum,

Human flourishing consists of lives of rational and social activities that express the human excellences. Thus, flourishing is a characteristic of whole lives and not of individual moments.

Flourishing is a function of activity. This means that mental states, such as pleasure or satisfaction are not themselves flourishing – although flourishing may produce such positive mental states. Flourishing requires rational activity, because humans are creatures that reason and can act on the basis of reasons. Flourishing requires social activity, because humans are social creatures who communicate and interact with one another. Finally, flourishing involves activities that express the human excellences or virtues.

Lawrence B. Solum, *Virtue as the End of Law: An Aretaic Theory of Legislation*, in THE FACES OF VIRTUE IN LAW 5, 7 (Amalia Amaya & Claudio Michelon eds., 2020) [hereinafter Solum, *Aretaic Legislation*].

67. Kraut, *supra* note 58, at § 2.

68. HURSTHOUSE, VIRTUE ETHICS, *supra* note 15, at 3 (noting this development and pointing in particular to examples of virtue-centered work in Kantian ethics).

69. See text accompanying *supra* notes 18–19.

B. Moving from Virtue Ethics to Virtue Jurisprudence

All virtue jurisprudence borrows in some manner from a version of the foregoing backstory. For all its diversity, we can divide virtue jurisprudence into two broad categories. The first, which I will refer to as “strong virtue jurisprudence,” views the law as instrumental to the goal of promoting virtue-centered human flourishing (rather than serving to bring about other ends, like preference satisfaction or the protection of rights). That is precisely the view adopted by Colin Farrelly and Lawrence Solum in their early book on virtue jurisprudence,⁷⁰ a view also attributed both to Aristotle and Aquinas.⁷¹ What makes this approach “strong” is its commitment to a central, underlying assumption in virtue ethics about the relationship between the virtues and human flourishing, and its commitment to advancing human flourishing through the law.⁷² Strong virtue jurisprudence posits a clear and direct link between the function of the law and the promotion of virtue.

By contrast, other works of virtue jurisprudence take no position on human flourishing per se, even as they adopt a virtue-based analysis of some facet of the law or legal system.⁷³ I will refer to this approach as “weak

70. See FARRELLY & SOLUM, *Aretaic Theories*, *supra* note 13.

71. Robert P. George, *The Central Tradition—Its Value and Limits*, in VIRTUE JURISPRUDENCE 24, 25 (Colin Farrelly & Lawrence B. Solum eds., 2008) [hereinafter, George, *Central Tradition*] (“I shall focus on the perfectionism of Aristotle and Aquinas, the two thinkers who have most profoundly influenced the tradition.”). George uses “perfectionism” here to refer to the view that the law should help make people moral or virtuous. Thus, another term for what I call “strong virtue jurisprudence” might be “perfectionism.”

72. Other sources noted above also adopt a strong form of virtue jurisprudence. See, e.g., Nesteruk, *Law, Virtue and the Corporation*, *supra* note 32 (urging readers to acknowledge a role for the law “in promoting the moral development of individuals”).

73. One prominent anthology on virtue jurisprudence is explicit about its embrace of this approach:

Legal scholarship on virtue can pursue different aims and take a variety of forms and approaches. It need not adopt a (strictly) virtue-ethical approach to law. Just as it is possible for a philosopher to give an account of virtue without being a virtue ethicist, it is possible for a lawyer to offer a study of virtue in the legal context without rooting it in virtue ethics. A number of chapters in this volume fall into this category. For example, as Michelon makes clear, the focus of his essay is not on the relationship between virtue ethics and law as such but on the relationship of certain character traits, especially the virtue of practical wisdom, and the process of legal decision-making. Similarly, Clark’s project, of which his contribution here forms part, does not involve the application of virtue ethics as a tool within law; instead, the aim is to establish connections between law, community character and human thriving.

Amaya & Lai, LAW, VIRTUE & JUSTICE, *supra* note 13, at 5. Within weak virtue jurisprudence, the basis for incorporating virtue analysis is less clear *ex ante* than it is within strong virtue jurisprudence; the methodological choice to deploy a virtue analysis requires some sort of independent justification beyond an interest in using the law to promote a particular conception of human flourishing. Much weak virtue jurisprudence is weak simply because it does not explicitly commit to being strong; it says nothing at all

virtue jurisprudence” because it does not explicitly embrace the traditional relationship between the virtues and human flourishing. Consequently, weak virtue jurisprudence does not generally or necessarily commit one to any overarching purpose or function of the law.

The distinction matters for present purposes because the argument outlined below applies somewhat differently to strong and weak variants of virtue jurisprudence. Nevertheless, I will presume in what follows that even weak virtue jurisprudence—much like deontological or consequentialist work on the virtues in normative ethical theory—reflects a view that virtue is a useful and important concept for assessing the lives of individuals, both inside and outside of the law.⁷⁴ To deploy virtue-based analysis of the law is to concede that people may manifest character traits that function in some morally beneficial way, and that individuating those traits can be a meaningful exercise. In other words, if the virtues tell us anything meaningful about the proper shape or interpretation of contract law (for example), that is presumably because the virtues also tell us something meaningful about *the people who are subject to contract law*. I will also presume that individual virtue is theoretically prior to the law—it refers to at least some traits that one might possess in a world without law—and thus, regardless of the purpose of the legal system, the law can either aid in promoting virtue or serve as an impediment to realizing it.⁷⁵

about whether its author accepts virtue-based human flourishing as some sort of intrinsic good, and thus it is in fact entirely consistent with an underlying commitment to promoting such an end. *See, e.g.*, Robertson, *supra* note 24, at 743 (purporting to incorporate the virtue of justice—as understood by Aristotle—into antitrust regulation, but making no broader commitments to the individual manifestation of the virtues by members of the public); Bruckner, *supra* note 25 (using the virtues to explain features of bankruptcy law, and noting that some of those features may conduce to human flourishing, but omitting any explicit connection between the form of flourishing in question and the possession of virtues by flourishing individuals); Shaffer, *supra* note 23 (arguing that legal advocates should rely on Aristotle’s conception of the virtue of friendship or friendliness to model their relationships with their clients, but omitting the deeper view that the purpose of that relationship, as with other parts of the law, should be to promote the virtue-centered flourishing of the client or other members of society). It may be that some legal scholars drawn to weak virtue jurisprudence simply pass over the question of the moral foundation for their choice because they lack developed views on normative ethical theory (or virtue ethics more specifically).

74. In other words, I will disregard the vanishingly small possibility that there exists any strand of weak virtue jurisprudence, presently unknown to me, that somehow affirmatively *rejects* the relevance of the moral virtues of individual members of society to its virtue-based analysis of the law. It seems implausible that someone could justify adopting a virtue analysis of some element of legal theory while denying the relevance of virtue for individuals in their lives outside the legal system. For example, it would be difficult to proffer a compelling analysis of the virtues essential to becoming a good judge that simultaneously denies that the virtues are meaningful for the private decision-making of parties who appear before the judge.

75. *See infra* Section III.

This basic conclusion highlights an issue too often passed over in virtue jurisprudence: the actual effect of the law, as it is applied, in shaping the flourishing (or, at the very least, the virtues and vices) of members of society.⁷⁶ We might call this the “aretaic leap.” In the rush to apply virtue analysis to various facets of the law, scholars tend to skip past the relevance of the very thing that inspired their methodology: the actual lives of individuals.⁷⁷ The pattern is especially clear in the case of strong virtue jurisprudence. If the point of the law is to promote a particular form of flourishing among members of society, it would seem impossible to engage in meaningful virtue analysis of the law without reckoning with the tangible effects of the law on different groups operating under the legal system in question, especially to the extent that the system treats some groups substantially better than others.⁷⁸ It may be difficult to pinpoint the primary

76. One way to understand this complaint is by analogy to ideal and nonideal theory. In his work on constitutional theory, Solum describes the distinction as follows:

Ideal normative theory asks the enduring questions of constitutional theory by assuming that institutions and individuals will act as they should act. Nonideal theories relax these idealizing assumptions and ask contextualized questions such as the following: “How should the constitution be interpreted by the judges who actually occupy the bench? Is judicial review justified in current political circumstances? How have the political branches actually responded to the institution of judicial review?”

Solum, *The Aretaic Turn in Constitutional Theory*, *supra* note 13, at 476. Similarly, I am arguing that idealized virtue analysis of the law, disconnected from the realities of the vices imposed on members of society by a biased legal system, is substantially less fruitful than its popularity would seem to suggest.

77. Notably, some virtue jurisprudence does contend with these issues, but, as noted above, it is surprisingly common for scholars to gloss over it. One important exception is Sherman Clark, who adopts something like a version of strong virtue jurisprudence that is particularly sensitive to the implications of the law for individual virtue. As he puts it, “Instead of using ideas of virtue and character as tools within the law – ways of doing law, I see them as potential consequences of law.” Sherman J. Clark, *Neoclassical Public Virtues: Towards an Aretaic Theory of Law-Making (and Law Teaching)*, in Amaya & Lai, *LAW, VIRTUE & JUSTICE*, *supra* note 13. Clark goes on to identify “six overlapping ways in which law and politics, whether intentionally or inadvertently, may have an influence on the sorts of people we become.” *Id.* at 83. They include:

By requiring or prohibiting conduct thought to display or evince traits of character; by requiring or prohibiting conduct that might indirectly engender traits; by facilitating (or undercutting) institutions that provide fora for the articulation and construction of traits of character; by providing (or precluding) opportunities for exemplars to thrive; by providing concrete contexts for discussion and argument about what sort of people we are or want to be; and, perhaps most subtly and most crucially, by facilitating (or stifling) public conversation about character and thriving.

Id. Recent work by Solum constitutes another important exception. See Solum, *Aretaic Legislation*, *supra* note 66, at 15 (arguing that “[a] virtue-centered approach [to legislation] must take into account the effects produced by criminalization of alcohol, drugs, gambling, and prostitution. If prohibition is counterproductive, then human flourishing may best be supported by a regime of decriminalization or legalization, accompanied by programs of education, treatment, and support.”).

78. Solum, for example, has written extensively on the virtues exemplified by a good judge. See *supra* note 22 (identifying three of his articles on the subject); see also Solum, *The Aretaic Turn in Constitutional Theory*, *supra* note 13, at 518–22 (outlining his view of the relationship between virtuous

motivator for the aretaic leap in virtue jurisprudence, but I suspect it follows largely from two misguided assumptions about the relationship between the law and virtue. First, there is a tendency among scholars to work from a strong presumption that compliance with the law is (in general) a marker of virtue.⁷⁹ Perhaps relatedly, there has been a general failure to contend with the possibility that our legal system (which many regard as reasonably just) can make vicious demands to compliance. The argument presented below challenges both of those assumptions.

II. THE VIRTUE OF LAWFULNESS AS A BASELINE

Notwithstanding the countless possible interpretations of the virtues themselves, lawfulness is widely considered a virtue. Legal compliance is especially important for strong virtue jurisprudence because, on the views of key foundational figures, following the law is essential for conditioning people to become virtuous.⁸⁰ High regard for lawfulness is so common that, even though theorists will often recognize some limited class of exceptions, presumptions about the value of lawfulness tend to obscure more complicated aspects of the relationship between the law and *vice*. The

judges and constitutional interpretation). His reasons for doing so appear to include a general commitment both to virtue ethics and virtue jurisprudence, paired with his view that the virtues help explain the practices of judging better than traditional deontological or consequentialist accounts. With respect to the former, *see generally* FARRELLY & SOLUM, *Aretaic Theories*, *supra* note 13 (explaining Solum's view of the general promise of virtue jurisprudence); with respect to the latter, *see* Solum, *Judging*, *supra* note 22, at 200–04 (noting in particular the role of practical wisdom in rendering judgments in accordance with legal rules and the power of a virtue-centered account to explain the possibility that more than one judgment by a judge might be legally correct). He also thinks a virtue-centered analysis helps explain equity—that is, cases where judicial rulings correct an unfair result that may otherwise be compelled by applicable legal rules. *See* Solum, *Judging*, *supra* note 22, at 204–06 (2003). That is fine as far as it goes, but the virtues exhibited by a person *qua* judge—incorruptibility, wisdom, judicial courage, and so forth—serve a very different function from the virtues exhibited by that same person *qua* human. Per strong virtue jurisprudence, the latter are the ultimate end for anyone committed to living a good life (even a person whose job happens to be that of a judge!), while the former are merely instrumental; judicial virtues work to facilitate the proper resolution of disputes within a legal system designed to promote the human flourishing of everyone subject to it. We might refer to judicial virtues, or the virtues of any legal official (such as a good attorney) as “role virtues.” Even on Solum's view, role virtues must play a secondary role in the moral story of society. *See* G. Alex Sinha, *Original(ism) Sin*, 95 ST. JOHN'S L. REV. ___, Section II.B (forthcoming 2021–22) (arguing for this proposition). Are role virtues the best way to cash out the responsibilities of officials within a legal system aimed at promoting human flourishing? It is certainly possible, but not at all obvious. Indeed, as argued in Section III below, some form of equality is essential to human flourishing on a plausible view of the virtues, thus suggesting that orienting judges toward the protection of fundamental rights may stand as a reasonable alternative candidate.

79. *See infra* Section II.

80. *See* George, *Central Tradition*, *supra* note 71, at 32 (noting that Aquinas “agrees with Aristotle that ‘perfection of virtue must be acquired by man by some kind of training’” and quoting Aquinas for the notion that “this kind of training . . . is the discipline of laws.”).

desirability of lawfulness is a theoretical baseline; deviations require special justification.

That is not an accident. Beyond the special role of the law in strong virtue jurisprudence, it seems plausible in the abstract that a general propensity to respect or comply with the law could amount to a form of virtue. Among other benefits, lawfulness may be pacific, and its possessors may avoid certain adverse consequences (especially in the form of punishment meted out by the state).⁸¹ At minimum, we might expect lawfulness to correlate with other virtues even if it does not constitute a virtue itself. Nevertheless, as Section III argues, this view warrants greater pressure than it typically receives because it tends to obscure the relationship between lawfulness and other basic virtues and vices. To establish the basis for applying such pressure, it is worth noting some especially influential views on the subject—Aristotelian and Thomistic versions in particular⁸²—and how those views have shaped contemporary debates about the virtue of lawfulness.

A. Aristotle

Aristotle places significant emphasis on the virtue of justice,⁸³ a key element of which he believed was regard for the law.⁸⁴ According to Richard Kraut, “Aristotle [thought] that justice in its broadest sense can be defined as lawfulness,” and Aristotle had “high regard for a lawful person.”⁸⁵ Kraut

81. I discuss the benefits of lawfulness more fully below. See *infra* Section III.C.1.

82. Aristotle and Aquinas are a natural pair to highlight because of their surpassing historical and contemporary influence on virtue ethics. See Timothy Cantu, *Virtue Jurisprudence and the American Constitution*, 88 NOTRE DAME L. REV. 1521, 1522 (2013) (describing the special significance of Aristotle and Aquinas in advancing virtue ethics within western cultures).

83. See Edmundson, *Law Abidance*, *supra* note 12, at 4 (noting that, for Aristotle, “[j]ustice is the chief virtue”); James W. Guest, *Justice as Lawfulness and Equity as a Virtue in Aristotle’s ‘Nicomachean Ethics,’* 79 REV. POLITICS 1, 1 (2017) (“Aristotle’s inquiry into the human good in the *Nicomachean Ethics* devotes more attention to justice than to any other virtue. . .”).

84. Note, however, that there are some complications in distinguishing between Aristotle’s views of a personal virtue of justice and the justice of a political arrangement. See LeBar & Slote, *supra* note 62; see also Fred Miller, *Aristotle’s Political Theory*, § 3, STAN. ENCYCLOPEDIA PHIL. (Jul. 1, 1998, rev. Nov. 7, 2017), <https://plato.stanford.edu/entries/aristotle-politics/> [<https://perma.cc/ZK6H-E3PW>] (“[I]n the universal sense, ‘justice’ means ‘lawful[n]ess’ and is concerned with the common advantage and happiness of the political community. . . . [I]n the particular sense ‘justice’ means ‘equality’ or ‘fairness’, [encompassing] distributive justice, according to which different individuals have just claims to shares of some common asset such as property.”); William A. Haines, *Aristotle on the Unity of the Just*, 19 MÉTHEXIS 57, 57 (2006) (“In the *general* sense, to have the virtue of justice is to be a lawful person. . . . In the *special* sense, to have the virtue of justice is to be equal or fair.”) (emphasis in original).

85. Solum, *The Aretaic Turn in Constitutional Theory*, *supra* note 13, at 517 (quoting Richard Kraut). See also Haines, *supra* note 84, at 57 (“In the *general* sense, to have the virtue of justice is to be a lawful person.”).

saw these views as based on an assumption that “every community requires a high degree of order that comes from having a stable body of customs and norms, and a coherent legal code that is not altered frivolously and unpredictably.”⁸⁶ Thus, per Kraut, Aristotle would have privileged the comportment of individuals that contributed to the stability of the rules and laws of their communities.⁸⁷ Moreover, as noted above, Aristotle believed the coercive power of the law serves an important function in conditioning the public to be virtuous.⁸⁸

Some have argued that Aristotle could only offer a “qualified endorsement to the idea that obedience [to the law] is a virtue,” noting that he “acknowledges that ancient laws can become absurdly obsolete and, moreover, that the law’s generality and what justice demands in particular cases can diverge.”⁸⁹ Even so, the scales tilt in favor of legal compliance because of the law’s conditioning role and because, for Aristotle, the law “has no power to command obedience except that of habit.”⁹⁰ Such a habit would plainly have the value of reinforcing the stability of the community’s rules.⁹¹ There are complexities and limitations, of course.⁹² But the mere fact that a community’s rules prohibited particular conduct could bear on

86. Solum, *The Aretaic Turn in Constitutional Theory*, *supra* note 13, at 517 (quoting Richard Kraut).

87. *Id.* Similar reasons compel compliance with informal community norms as well. *See id.* at 516.

88. *See* George, *Central Tradition*, *supra* note 71, at 32. *See also id.* at 29 (attributing to Aristotle the view that, “[g]iven the natural tendency of the majority of people to act on passionate motives in preference to reason . . . the law must first settle people down if it is to help them gain . . . some grasp of the intrinsic value of morally upright choosing”—and, more specifically, that “[i]t is precisely inasmuch as the average man is given to passions that . . . he must be governed by fear of punishment”). Note also that Aristotle was heavily influenced by Plato, who arguably took an even stronger view on the duty to obey the law. *See* Julia Annas, *Plato on law-abidance and a path to natural law* 19, 22 in *THE FACES OF VIRTUE IN LAW* (Amalia Amaya & Claudio Michelon, eds. 2020) (arguing that, for Plato, citizens of an ideal city would “think of themselves as *slaves* to their laws” and that “unquestioning obedience” to the law would render them “both . . . ‘rulers’ . . . and ‘ruled’.”) (emphasis in original).

89. Edmundson, *Law Abidance*, *supra* note 12, at 4. *See also* Guest, *supra* note 83, at 15 (“Equity[, which is a correction of the legally just,] thus emerges as a virtue that makes the adjustments necessary to secure the good when simple obedience to the law cannot. In this way it preserves the spirit of justice as lawfulness, which itself was never identified with mere law-abidingness.”).

90. Edmundson, *Law Abidance*, *supra* note 12, at 4 (quoting Aristotle).

91. *See* Miller, *supra* note 84, at § 2 (“Aristotle is also wary of casual political innovation, because it can have the deleterious side-effect of undermining the citizens’ habit of obeying the law”).

92. For a more thorough discussion of Aristotle’s views of justice and equity, see Guest, *supra* note 83.

one's responsibilities,⁹³ which leads to questionable outcomes where a society's laws or norms are seriously problematic.⁹⁴

The Aristotelian position on lawfulness remains influential in contemporary virtue jurisprudence. For example, Solum has drawn on Aristotle to defend the notion of justice as lawfulness,⁹⁵ which he argues is superior to a conception of justice as fairness.⁹⁶ More specifically, Solum claims that “in a well-ordered society, just humans internalize the laws and social norms (the *nomoi*)[, which is to say that] they internalize lawfulness as a disposition that guides the way they relate to other humans.”⁹⁷ Solum attempts to correct for the possibility of societal imperfection. For instance, he claims that, “[i]n societies that are mostly well ordered, with isolated zones of substantial dysfunction, the *nomoi* are limited to those norms that are not clearly inconsistent with the function of law—to create the conditions for human flourishing.” In more dire scenarios, where society is “radically dysfunctional,” “humans are thrown back on their own resources—doing the best they can in circumstances that may require great practical wisdom to avoid evil and achieve good.”⁹⁸ After narrowing the “*nomoi*” to a morally acceptable subset of “positive laws and stable customs and norms,” Solum defines the virtue of justice as lawfulness as a disposition “to act in accord with the *nomoi* . . . in situations . . . where the *nomoi* provide salient reasons for action.”⁹⁹ This is a view we will revisit below.

B. Aquinas

Considering his intellectual importance and continuing influence, it is worth noting that Thomas Aquinas incorporated major elements of

93. See Kraut, *supra* note 58, at § 5.1 (“[A]lthough Aristotle holds that ethics cannot be reduced to a system of rules, however complex, he insists that some rules are inviolable.”).

94. See Solum, *The Aretaic Turn in Constitutional Theory*, *supra* note 13, at 517 (noting that “[t]he Aristotelean view has problematic implications” because “[t]he deeply held norms of some societies may now strike us as wicked.”).

95. See generally Lawrence B. Solum, *Natural Justice: an Aretaic Account of the Virtue of Lawfulness*, in *VIRTUE JURISPRUDENCE* 167 (Colin Farrelly & Lawrence B. Solum eds., 2008) [hereinafter, Solum, *Virtue of Lawfulness*].

96. See *id.* at 179–80. Solum is particularly keen to apply this model to judges because he thinks “justice as lawfulness” supplies a “public standard of judgment” (as opposed to fairness, views about which may differ from judge to judge). *Id.*

97. *Id.* at 167.

98. *Id.* at 167–68.

99. *Id.* at 179.

Aristotle's philosophy into his own.¹⁰⁰ Most importantly for present purposes, Aquinas followed Aristotle's lead on key dimensions of the significance and substance of the virtues.¹⁰¹ But, as a Christian theologian, Aquinas also departed in important respects from Aristotle.¹⁰² Although those departures are largely beyond the scope of this Article, Aquinas looms large not just in virtue ethics generally,¹⁰³ but also in Christian¹⁰⁴ and conservative¹⁰⁵ circles specifically.

Because he accepted much of the relevant Aristotelian framework for his view of virtue, as well as the perfectionist purpose of the law,¹⁰⁶ Aquinas's views on lawfulness are not dissimilar from Aristotle's, at least in the respects relevant here. Once more, there is a strong presumption in favor of compliance with (man-made) law.¹⁰⁷ Indeed, Aquinas saw "sedition

100. See Ralph McInerny & John O'Callaghan, *Saint Thomas Aquinas*, § 4, STAN. ENCYCLOPEDIA PHIL., (Jul. 12, 1999, rev. May 23, 2014), <https://plato.stanford.edu/entries/aquinas/> [<https://perma.cc/Y9ZL-ED5N>] ("[Aquinas] adopted Aristotle's analysis of physical objects, his view of place, time and motion, his proof of the prime mover, his cosmology. He made his own Aristotle's account of sense perception and intellectual knowledge. His moral philosophy is closely based on what he learned from Aristotle. . . .").

101. *Id.* at §§ 12, 12.1 ("Thomas' Moral Doctrine is primarily eudaimonistic and virtue based Thomas' broad account of virtues as excellences or perfections of the various human powers formally echoes Aristotle, both with regard to the nature of a virtue and many specific virtues."). See also Finnis, *supra* note 64, at § 4.1 ("Aquinas accepts Aristotle's notion that every virtue is a mean between too much and too little. . . ."); *supra* note 64 (quoting Finnis as observing that Aquinas "firmly" held the Platonic-Aristotelian view "that to have any of the virtues in its full and proper form one must have all of them").

102. See McInerny & O'Callaghan, *supra* note 100, at § 12.1 (noting that "it is a mistake to think that [Aquinas] simply repeats Aristotle" in part because of "the theological setting of [Aquinas'] work."). See also George, *Central Tradition*, *supra* note 71, at 32 (arguing that, in contrast to Aristotle, Aquinas offers "a peculiarly Christian rationale" for "the legal enforcement of morality").

103. HURSTHOUSE, VIRTUE ETHICS, *supra* note 15, at 3 ("The modern philosophers whom we think of as having put virtue ethics on the map— Anscombe, Foot, Murdoch, Williams, MacIntyre, McDowell, Nussbaum, Slote—had all absorbed Plato and Aristotle, and in some cases also Aquinas.")

104. See Katherine Archibald, *The Concept of Social Hierarchy in the Writings of St. Thomas Aquinas*, 12 THE HISTORIAN 28, 28 (1949) ("The Church, within which Aquinas labored, has long honored him as one of its few supreme philosophers. Less than fifty years after his death he was canonized.") See generally, e.g., Patrick Clark, *Is Martyrdom Virtuous? An Occasion for Rethinking the Relation of Christ and Virtue in Aquinas*, 30 J. SOC'Y CHRISTIAN ETHICS 141 (2010); NICHOLAS AUSTIN, AQUINAS ON VIRTUE: A CAUSAL READING (Geo. Univ. Press 2017); Marcia L. Colish, *St. Thomas Aquinas in Historical Perspective: The Modern Period*, 44 CHURCH HIST. 433 (1975); Thomas F. O'Meara, O.P., *Virtues in the Theology of Thomas Aquinas*, 58 THEOLOGICAL STUD. 254 (1997); Adriana De Giorgi, *Thomas Aquinas Influence on Catholic Church*, CHRISTIANITY GLOB. (Jul. 28, 2019), <https://christianity.global/thomas-aquinas> [<https://perma.cc/QXP5-LWTV>]; Ernest L. Fortin, *Thomas Aquinas as a Political Thinker*, 26 PERSPS. ON POL. SCI. 92 (1997).

105. See, e.g., Lee J. Strang, *Originalism and the Aristotelian Tradition: Virtue's Home in Originalism*, 80 FORDHAM L. REV. 1997, 2023 (2012) (relying on Aquinas to help ground a virtue-based argument in favor of originalist constitutional interpretation).

106. See McInerny & O'Callaghan, *supra* note 100.

107. We may set aside Thomistic views of divine law for the balance of this Article.

as ‘a special kind of sin’” and obedience as ‘a special virtue.’”¹⁰⁸ More specifically, obedience is valuable because it “promotes the common good,” helps to “avoid scandal or danger,” and “provides a means to higher virtue.”¹⁰⁹ Some have interpreted Aquinas to mean that “it is *the obedience itself* that is required by law and that will lead one to virtue.”¹¹⁰ Another scholar observes that “[n]o philosopher since Aquinas . . . has had very much to say in favor of the idea that a disposition to obey the law because it is the law, or to obey the law ‘as it requires to be obeyed,’ is a virtue.”¹¹¹

The key Thomistic exception—which is narrower than it first appears—concerns unjust laws or commands.¹¹² Man-made laws might be unjust because they conflict with the divine law, in which case they “are clearly to be disobeyed”; or they might be unjust because they conflict with the human good, in which case the story is more complicated.¹¹³ Fundamentally, “[i]f the law purports to require actions that no-one should ever do, it cannot rightly be complied with; one’s moral obligation is not to obey but to disobey.”¹¹⁴ By contrast, if man-made law is promulgated improperly in certain key respects—from an improper motive, in a manner marred by procedural deficiencies, or based on a sufficiently flawed view of the human good—the resulting lack of moral authority behind the law may present one with the choice of whether to obey it or not.¹¹⁵ Perhaps controversially, one scholar has argued that Aquinas could countenance a very specific form of civil disobedience: the altruistic disobedience of an unjust system of rule.¹¹⁶

But even if we credit these potential limitations, their general thrust is weak. First, Aquinas would likely be skeptical of forms of law-breaking that do not meet a relatively narrow definition of civil disobedience—namely,

108. Scholz, *supra* note 7, at 449.

109. *Id.* at 457.

110. See Scholz, *supra* note 7, at 457 (citing E.A. Goerner) (emphasis added).

111. Edmundson, *Law Abidance*, *supra* note 12, at 10.

112. See Scholz, *supra* note 7, at 453 (“In deciding to disobey a law, one must first judge it to be unjust.”). Aquinas was also sensitive to the consequences of imposing excessively onerous legal demands on the population, which could generate “resentment” or “even rebellion,” although that observation does not constitute a limitation on the virtue of obedience per se. George, *Central Tradition*, *supra* note 71, at 35.

113. Scholz, *supra* note 7, at 453.

114. Finnis, *supra* note 64, at § 7.5.

115. *Id.*

116. See Scholz, *supra* note 7, at 452. Scholz’s essay responds to an interpretation of Aquinas offered by Katherine Archibald, which (in Scholz’s words) argued that “to do other than obey one’s superior [is] a sin.” *Id.* at 461. Archibald’s argument appears in an article that explores Aquinas’s views on social hierarchy, including his views on the subservience of serfs and women. See generally Archibald, *supra* note 104.

the “public, conscientious, nonviolent refusal to comply”¹¹⁷ with an unjust system. Moreover, Aquinas recognized the possibility that one ought to obey unjust laws or even unjust systems of law when “to do otherwise would do more harm than good.”¹¹⁸ To be justified, therefore, noncompliance must not only be public, conscientious, and nonviolent, but also carefully calculated as a method of last resort for opposing unjust demands, factoring in the detrimental weight that one’s acts of resistance would have for “overall respect for the law.”¹¹⁹ Additionally, Aquinas would arguably have required the basis for disobedience to flow from the one’s conviction that law-breaking served a particular conception of the common good. This limitation rules out “selfish” law-breaking designed to “promote [one’s] own interest or to appease [one’s] own conscience” even if the law being broken “places an unfair burden” on the law-breaker.¹²⁰ In short, we would not expect contemporary invocations of Aquinas to ground a more expansive account of virtuous law-breaking.¹²¹

117. See Scholz, *supra* note 7, at 451. According to Scholz,

The disobedient action must be conscientious because it is only through virtuous reasoning that one may disobey a human law in order to comply with the natural law . . . [It] must be nonviolent because to disobey through violent means would bring about more evil than to obey the unjust law[; and it] must be public, because otherwise this would indicate that one’s actions do not have the common good as the sole purpose.

Id. at 451–52.

118. Scholz, *supra* note 7, at 458. See also *id.* at 460–61 (“[E]ither the system is corrupt or the law is corrupt. If it is the law that is corrupt then the system still works for the common good and the subject ought to continue to obey it. In addition, greater harm might result from doing otherwise.”).

119. *Id.* at 458.

120. *Id.* at 459–60.

121. As noted above, the opposite is quite predictably the case. Aquinas is a popular influence for more conservative political views. See *supra* note 38 (highlighting some examples). Developments since the Black Lives Matter protests in the summer of 2020 may catalyze a shift away from conservative defenses of lawfulness, but that remains to be seen. For example, on January 6, 2021, hundreds of supporters of President Trump broke into the U.S. Capitol, ransacking the Capitol building and assaulting Capitol Police. Marthia Mendoza & Juliet Linderman, *Officers Maced, Trampled: Docs Expose Depth of Jan. 6 Chaos*, AP NEWS (Mar. 10, 2021), <https://apnews.com/article/docs-expose-depth-january-6-capitol-siege-chaos-fd3204574c11e453be8fb4e3c81258c3> (noting both the damage to the Capitol and the injuries inflicted on members of the Capitol Police); Zoe Tillman, Ken Bensinger & Jessica Garrison, *Hundreds Of People Who Joined The Capitol Riot May Never Face Charges*, BUZZFEED NEWS (Mar. 16, 2021), <https://www.buzzfeednews.com/article/zoetillman/capitol-riot-hundreds-not-arrested> (estimating that 800 people breached the Capitol on January 6). Their aim was to stop Joe Biden’s certification as president following his electoral victory in November of 2020. Alex Moe, Adam Edelman & Tom Winter, *Capitol Police Ignored Intelligence Warnings Ahead of Jan. 6 Riots, Watchdog Report Finds*, NBC NEWS (Apr. 15, 2021), <https://www.nbcnews.com/politics/capitol-police-ignored-intelligence-warnings-ahead-jan-6-riots-watchdog-n1264054>. In the first three months following the riot, nearly four hundred participants had been identified and charged “for entering the Capitol or for crimes related to weapons or violence.” Rachel Axon et al., *Capitol Riot Arrests: See Who’s Been Charged Across the U.S.*, USA TODAY (Apr. 16, 2021), <https://www.usatoday.com/storytelling/capitol-riot-mob-arrests/> (last visited April 16, 2021). It is likely that some will seek to to justify the rioters’ unlawful conduct on moral grounds, perhaps by

C. *Law-Abidance Versus Law-Obedience*

William Edmundson offers a more recent variation on the theme of this Section, presenting a nuanced argument that “law-abidance” constitutes a virtue.¹²² According to Edmundson,

The virtue of law-abidance is a complex character trait whose core consists in the actor’s acceptance of a duty to comply with . . . ‘retail’ operations of the legal system, a disposition so to comply, and a disposition to regard the bare unlawfulness of an action as a nontrivial and normally adequate though not necessarily conclusive reason against performing it. The virtue does not, however, comprise a disposition to obey the law qua law, regardless of its moral merits; although it does include a disposition to conform to the not-patently-unjust conventional moral norms of the actor’s society—especially where those norms constitute customary law.¹²³

A key element of Edmundson’s view is a distinction between “retail” operations of the law and “wholesale” ones. Retail operations “are specific interferences with the ongoing stream of conduct by specific measures focused on individuals—such as issuing a subpoena or a summons, revoking a license, making a traffic stop or an arrest or a judicial sale.”¹²⁴ By contrast, wholesale operations primarily involve “prescribing general rules, typically by legislative enactment, administrative rulemaking, or adjudicatory precedent,” and thus “[t]hey are general with respect both to the kind of behavior they concern and the persons they are intended to affect.”¹²⁵ I will follow Edmundson in adopting this distinction below.

Separating retail and wholesale operations of the legal system sets up a further distinction for Edmundson between *law-abidance* and *law-obedience*. For Edmundson, a virtue of obedience requires a disposition to obey the law in a manner that is less discerning than law-abidance.¹²⁶ Edmundson claims that a virtue of obedience would have to derive from a generic duty to obey the law, and therefore would be “ensnared in the

invoking various virtues. This Article is not the proper venue for a comprehensive treatment of such a suggestion. Suffice it to say that the argument for virtuous law-breaking offered below is based on systemic disadvantage and self-respect—factors that do not appear relevant to the conduct of the January 6 rioters. To justify their conduct by appeal to the virtues, they will need to look elsewhere.

122. See generally Edmundson, *Law Abidance*, *supra* note 12.

123. *Id.* at 2.

124. *Id.*

125. *Id.*

126. *Id.* at 3.

controversies attending” such a duty.¹²⁷ Abidance, by contrast, “does not presuppose the existence of any duty to obey the law *qua* law,”¹²⁸ and the law-abiding “need not have a well-settled disposition toward statutory or judge-made law in bulk.”¹²⁹ In moving toward abidance, then, Edmundson seeks to leave behind the generic obligation to obey the law that grounds much of the earlier work in this area.¹³⁰

Shifting from a virtue of obedience to a virtue of abidance appears to open the door to some virtuous law-breaking.¹³¹ However, Edmundson promptly limits that possibility by arguing that those possessing the virtue of law abidance will nearly always comply “with direct orders” issuing from legal authorities, “except in those rare cases in which noncompliance is the only way to initiate review of the justice of a law or official policy.”¹³² In general, law-abiding people “willingly defer to officials as they conduct the state’s retail operations.”¹³³ People may even comply when they “face a direct order to submit to the administration of what they view as a morally flawed law”; at worst, they will “openly and peacefully pursue whatever channels there may be for redress.”¹³⁴ Moreover, “[t]he law-abiding also willingly comply with the not-outrageously-unjust informal norms that make social life tolerable.”¹³⁵

127. *Id.*

128. *Id.*

129. *Id.* at 8.

130. *See infra* text accompanying notes 140–47.

131. Edmundson seems to have in mind a specific form of civil disobedience, what he calls a “petition view,” on which disobedience is “public, nonviolent, and . . . intended as an appeal to officials and fellow citizens to reconsider and rectify what is in fact a serious injustice.” Edmundson, *Law Abidance*, *supra* note 12, at 7. Edmundson believes—incorrectly, I will argue below—that the virtue of abidance can properly account for a petition view of civil disobedience, which renders abidance superior to the more deferential virtue of obedience. Edmundson articulates the trouble with a virtue of obedience as follows:

Obviously, if one has taken the position that obeying the law is a virtue, one is going to have difficulty explaining how disobeying the law might be not only permissible but virtuous. For if obeying is sometimes right and disobeying is sometimes right, it would appear that what is really at work is some virtue to be characterized generally enough to cover both the rightful obeyings and the rightful disobeyings.

Edmundson, *Law Abidance*, *supra* note 12, at 7.

132. *Id.* at 3.

133. *Id.* at 8.

134. *Id.* at 2. Edmundson also claims that the law-abiding (among others) “will normally be entitled to assume that officials with whom they deal act in good faith whenever they act under the color of office.” *Id.* at 8. But “[p]atent bad faith, like other defeating conditions, may relieve the law-abiding of their (defeasible) duty of compliance. Where official corruption is so endemic that connivance is the customary social norm, the law-abiding may be disposed to ‘go along to get along.’” *Id.*

135. *Id.*

Edmundson believes law-abidance rises to the level of a virtue for a variety of reasons, including its plausibility as a disposition, its perceived prominence in ordinary moral education, its ostensible benefits to its possessor, and its propensity to fit with other virtues, such as honesty and fairness.¹³⁶ Nevertheless, for all the distance Edmundson attempts to place between abidance and obedience, both notions credit their possessors for a high degree of deference to the legal system. For example, abidance purportedly differs from obedience in its connection with sociability, which Edmundson sees as a “helpful and healthy trait.”¹³⁷ But, by Edmundson’s admission, to be sociable “is a matter of putting up with others and getting along with them [and] is even, sometimes, a matter of doing what they say to do just because they say so.”¹³⁸ I will return to Edmundson’s view below.¹³⁹

III. SELF-RESPECT, RESENTMENT, AND DEFIANCE

Although the virtue of lawfulness can be understood in a variety of ways, its widespread and almost uncritical acceptance sets a baseline that has anchored theoretical inquiry into the relationship between law and virtue. Law-breaking is *prima facie* vicious—or, at minimum, certainly not virtuous—unless it meets a very specific set of exceptional criteria. As the Introduction noted, however, scholars have engaged at length with the question of whether individuals operate under a generic duty to obey the law (and thus, whether breaking the law generally violates some standing duty).¹⁴⁰ That latter debate continues, in fact, and Edmundson summarizes its recent state as follows:

136. *Id.* at 3.

137. *Id.* at 11.

138. *Id.*

139. Edmundson’s view builds from a rather preliminary sketch of the “virtue of civility” sketched out by Leslie Green. *See id.* at 6. For Green’s account, see LESLIE GREEN, *THE AUTHORITY OF THE STATE* (Oxford Univ. Press 1988) at 263–67. I focus on Edmundson’s view, which is much more developed, but Green’s view presages some of the features of Edmundson’s, noting that “self-restraint” services stability, and may provide a form of social solidarity. *Id.* at 265–66.

140. For a sampling of important contributions to this debate, see ALAN JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* (Princeton U. Press 1979); William A. Edmundson, *State of the Art: The Duty to Obey the Law*, 10 *LEGAL THEORY* 215, 215 (2004) [hereinafter Edmundson, *Duty to Obey*]; ROBERT PAUL WOLFF, *IN DEFENSE OF ANARCHISM* (U. Cal. Press 1998) (1970); M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?* 82 *YALE L.J.* 950 (1973); Rolf Sartorius, *Political Authority and Political Obligation*, 67 *VA. L. REV.* 3 (1981); Joseph Raz, *The Obligation to Obey: Revision & Tradition*, 1 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 139 (1984); Jeremy Waldron, *Special Ties and Natural Duties*, 22 *PHIL. & PUB. AFF.* 3 (1993); Kent Greenawalt, *The Natural Duty to Obey the Law*, 84 *MICH. L. REV.* 1 (1985).

For centuries, political and legal theorists have pondered whether each person is under a general obligation of obedience to the legal norms of the society wherein he or she lives. The obligation at issue in those theorists' discussions is usually taken to be *prima-facie*, comprehensively applicable, universally borne, and content-independent.¹⁴¹

These four elements of the duty at the center of the traditional debate—that it is “*prima facie*, comprehensively applicable, universally borne, and content-independent”—reveal the narrow focus of the dominant discussion and highlight the ways in which a virtue-based analysis can shed much-needed light on new dimensions of the relationship between individuals and the law. The duty to obey is typically understood as *prima facie* in the sense that it is not absolute, although the fact that a course of action is required by law “is not . . . regarded merely as one morally relevant consideration among others but as one that is ordinarily decisive and as one toward which deference is worth cultivating.”¹⁴² The duty is “comprehensively applicable” in that “it attaches to all of a jurisdiction's mandatory laws,” or at least those that compel a particular course of action and are backed by nontrivial penalties for noncompliance.¹⁴³ The duty is “universally borne” because “it purports to apply to each and every one of those to whom the jurisdiction’s mandatory laws are directed and who would be exposed to the possibility of sanction for noncompliance.”¹⁴⁴ And the duty is “content-independent” in that its “existence . . . is not a direct function of the moral merit of the particular law in question.”¹⁴⁵

From the standpoint of human virtue, these parameters screen out the most interesting and relevant considerations. What the virtues demand of any individual—what is courageous or generous or wise—is largely a function of her disposition and circumstances. Moreover, as the following subsection explores, people within large and diverse societies are simply not similarly positioned before the law; the moral force of even the most general legal commands plausibly differs widely across the population. Thus, although there is merit in exploring generic duties of obedience, limiting ourselves to duties that are generic, comprehensively applicable, or

141. Edmundson, *Duty to Obey*, *supra* note 140 (quoting Matthew Kramer).

142. *Id.* at 215–16. Edmundson acknowledges that the debate over the duty to obey the law typically adopts W.D. Ross’ formulation of *prima facie* duty, but Edmundson himself prefers the phrase “*pro tanto* duty.” See *id.* at 215.

143. *Id.* at 216.

144. *Id.*

145. *Id.*

universally borne requires blurring out the details that confront any given individual contending with her relationship to the law. It is particularly interesting that virtue theorists who adopt a strong version of the virtue of lawfulness also pass over this fact, even though their methodology permits them to address it head on. Similarly, the duty to obey the law *as law*—independent of the law’s content—precludes the salient possibility that the virtuousness or viciousness of disobeying laws depends in significant part on what they require.¹⁴⁶

Given the voluminous scholarship on the duty to obey the law, and especially the various bases scholars have advanced for skepticism toward such a duty,¹⁴⁷ the absence of a well-developed, analogous position within the realm of virtue is striking. In contrast to the broad theoretical bases purportedly justifying the duty to obey the law, we can expect numerous, more tailored candidates justifying virtuous resistance of the law. This Section explores one such basis grounded in the self-respect of individuals experiencing systemic disadvantage pegged to ascribed or morally irrelevant characteristics. More specifically, it utilizes self-respect as a foundational moral notion that must be accounted for in any theorist’s schema of the virtues, whether as a stand-alone virtue or as an important component of some other virtue.

A. Systemically Disadvantaged Groups

For present purposes, I will adopt Cass Sunstein’s definition of “systemic disadvantage,” though modest deviations from that definition will not have material implications for the arguments advanced here. For Sunstein,

[A] systemic disadvantage is one that operates along standard and predictable lines, in multiple important spheres of life, and that applies in realms like education, freedom from private and public violence, wealth, political representation, and political influence, all of which go to basic participation as a citizen in a democratic society.¹⁴⁸

146. The presumption that the generic obligation to obey is hefty by default (even if not absolute) begs the question. As Section II suggests, however, many virtue theorists seem to build a similar presumption into their views as well.

147. See WOLFF, *supra* note 140; Smith, *supra* note 140; Sartorius, *supra* note 140.

148. Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 770 (1991).

Many groups in the United States have long histories of confronting systemic disadvantage,¹⁴⁹ though the specific manifestations and implications of those disadvantages vary by group.¹⁵⁰ Sunstein notes that race, sex, and disability discrimination create exactly this type of disadvantage.¹⁵¹ The same is likely true for members of the LGBTQ community, certain religious minorities, and others. Copious literature documents the ways in which different groups encounter and experience such disadvantages.¹⁵²

149. See, e.g., Patrick Sharkey, Keeanga-Yamhata Taylor & Yarnya Serkez, *The Gaps Between White and Black America*, In *Charts*, N.Y. TIMES (Jun. 19, 2020) <https://www.nytimes.com/interactive/2020/06/19/opinion/politics/opportunity-gaps-race-inequality.html> [<https://perma.cc/TT34-M4HR>] (documenting differences between whites and Blacks on numerous axes, including incarceration rates, homeownership rates, household income, life expectancy, educational attainment, and unemployment rates).

150. Simultaneous membership in more than one disadvantaged group may generate an especially distinctive and serious set of challenges, often explored under the label of “intersectionality.” See Anna Carastathis, *The Concept of Intersectionality in Feminist History*, 9 PHIL. COMPASS 304, 305 (2014) (attributing the concept of intersectionality to Kimberlé Crenshaw, who described it initially as “a metaphor [capturing] the way all of these systems of oppression overlap”).

151. Sunstein, *supra* note 148, at 771. For this reason, the specific examples invoked below may not apply to all groups that have a basis in self-respect to resist the law. Nevertheless, the structural similarity in the root of such disadvantage has led some scholars to explore the ways in which invoking efforts to address one base of systemic disadvantage may shed light on addressing others. See, e.g., Kimani Paul-Emile, *Blackness As Disability?*, 106 GEO. L.J. 293 (2018) (using disability law as “an analytical lens for examining race and as a practical means for addressing discrimination and structural inequality” experienced by Black people in the United States).

152. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (The New Press 2012) (documenting many systemic disadvantages faced by Black people in the United States today and arguing for understanding the place of Black people in society as reflecting a “new racial caste system”); CATHERINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 30–31 (Harv. U. Press 1987) (identifying some indicia of systemic disadvantage suffered by women in the United States); Kae Greenberg, *Still Hidden in the Closet: Trans Women and Domestic Violence*, 27 BERKELEY J. GENDER L. & JUST. 198, 201 (2012) (discussing the significant vulnerability of trans women to domestic violence, and linking that vulnerability to mismatches between their legally-recognized gender and their access to “services and benefits”). For literature concerning the systemic disadvantage of people with disabilities (both physical and mental), see Dianne Pothier, *Tackling Disability Discrimination at Work: Toward a Systemic Approach*, 4 MCGILL J.L. & HEALTH 17 (2010); Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197 (2003); Bill Ong Hing, *Systemic Failure: Mental Illness, Detention, and Deportation*, 16 U. C. DAVIS J. INT’L L. & POL’Y 341 (2009). For discussion of disadvantages facing Native Americans, see Erin A. Cech, Jessi L. Smith & Anneke Metz, *Cultural Processes of Ethnoracial Disadvantage Among Native American College Students*, 98 SOCIAL FORCES 355 (2018) (examining ethnoracial bias and inequality toward Native Americans in the United States); Michael J. Leiber, *A Comparison of Juvenile Court Outcomes for Native Americans, African Americans, and Whites*, 11 JUST. Q. 257 (1994) (analyzing court outcomes for white people and Black people relative to Native Americans and noting the general lack of literature on the disadvantages of Native Americans). For disadvantages of religious minorities, see Catherine M.A. McCauliff, *Religion and the Secular State*, 58 AM. J. COMP. L. SUPP. 31 (2010); Daniel P. Tokaji, *Denying Systemic Equality: The Last Words of the Kennedy Court*, 13 HARV. L. & POL’Y REV. 539

Variable manifestations of these disadvantages can (and often do) compound for enhanced effect.¹⁵³ As Sunstein argues, “When combined with social practices, difference has the effect of systematically subordinating the relevant group and of doing so in multiple spheres and along multiple indices of social welfare: poverty, education, political power, employment, susceptibility to violence and crime, and so forth.”¹⁵⁴ These disadvantages may accrue not only across different facets of a person’s life—housing, education, income—but also longitudinally, over the duration of one’s life or across generations within families or communities.¹⁵⁵

A couple further features of such groups are especially relevant for present purposes. First, their disadvantages stem from morally irrelevant characteristics; they are not deserved by members of these groups *as* members of these groups.¹⁵⁶ Second, these disadvantages result both from the aggregate effect of private interactions with prejudiced members of society and from the effects of government policy in general (and the operations of the legal system in particular).¹⁵⁷ Accordingly, I will use the term “systemically disadvantaged group” to refer to any group that meets the following criteria: 1) the group has faced, and continues to face, a substantial level of disadvantage relative to comparable members of better-off groups; 2) the individuating characteristic(s) that designate(s) members of the group or predict their differential treatment—race, sex, sexual orientation, whatever—provide(s) an inadequate moral basis for justifying the differential treatment members of the group actually experience; and 3) the disadvantage experienced by members of the group is traceable in

(2019) (arguing that the results of the 2017–18 Supreme Court term exacerbated systemic disadvantage concerning voting, speech, and religion).

153. See, e.g., Michelle A. Williams & Jeffrey Sánchez, *Racism is Killing Black People. It’s Sickening Them, Too*, WASH. POST (Jun. 4, 2020), https://www.washingtonpost.com/opinions/racism-is-killing-black-people-its-sickening-them-too/2020/06/04/fe004cc8-a681-11ea-b619-3f9133bbb482_story.html [<https://perma.cc/48GE-SHE8>] (arguing that racial discrimination directly contributes to worse health outcomes for Black Americans); Alyssa Fowers & William Wan, *Depression and Anxiety Spiked Among Black Americans After George Floyd’s Death*, WASH. POST (Jun. 12, 2020), <https://www.washingtonpost.com/health/2020/06/12/mental-health-george-floyd-census/?arc404=true> [<https://perma.cc/HD4S-DDEY>] (reporting an increase in anxiety and depression among Black Americans and Asian Americans in the days following the death of George Floyd, even as rates remained flat among whites and decreased among Latin Americans).

154. Sunstein, *supra* note 148, at 771.

155. See generally David Lyons, *Reparations and Equal Opportunity*, 24 B.C. THIRD WORLD L.J. 177 (2004) (tracing centuries of severe discrimination faced by Black people in the United States).

156. See Sunstein, *supra* note 148, at 770–71.

157. I do not mean to foreclose the possibility that the law should do more to regulate private discrimination so much as to draw out a spectrum of scenarios defined by the extent of the direct involvement of the law in perpetuating disadvantage.

nontrivial part to state or federal government (in)action, including through the law.¹⁵⁸

Let us take a specific example of a systemically disadvantaged group. Federal law (and certainly the federal government more broadly) has been complicit for decades in building generations of cumulative disadvantage for Black people in the United States.¹⁵⁹ Many of those disadvantages persist today, as noted above.¹⁶⁰ State law has played—and continues to play—a significant role as well, even as it too must generally purport to be race-neutral.¹⁶¹ This discrimination remains pervasive and serious enough that it has even invited the recent attention of international human rights bodies.¹⁶²

Consider policing, which is addressed primarily under relevant state laws¹⁶³ and constitutes one especially prominent dimension along which Black people face harsher treatment by an element of the legal system.¹⁶⁴

158. The stronger one can characterize a group's disadvantage, the firmer the footing for the argument presented here. Of course, whether a group has been sufficiently disadvantaged—and presently continues to be—may be a contested question, and the ways in which that disadvantage manifests may differ from group to group. I have also left some ambiguity about how much disadvantage is “sufficient”; and even if I had not, there could be close cases at the margins. That is neither here nor there, but the following subsection will help to supply a sharper sense of how to assess the meaning of the term “sufficient.”

159. See Lyons, *supra* note 155, at 182 (arguing that “federal policy supported slavery before the Civil War” and that the federal government neglected to secure substantive equality thereafter by “violat[ing] or fail[ing] to enforce relevant federal law.”). See also Kriston McIntosh, Emily Moss, Ryan Nunn & Jay Shambaugh, *Examining the Black-White Wealth Gap*, BROOKINGS (Feb. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/> [<https://perma.cc/Z9SP-7LEG>] (noting that, “[a]t \$171,000, the net worth of a typical white family is nearly ten times greater than that of a Black family (\$17,150) in 2016” and attributing that differential to “accumulated inequality and discrimination, as well as differences in power and opportunity that can be traced back to this nation’s inception”—a reflection of “a society that has not and does not afford equality of opportunity to all its citizens”).

160. See Sharkey et al., *The Gaps Between White and Black America, In Charts*, *supra* note 149 (documenting these ongoing disadvantages along multiple dimensions).

161. See Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 393–94 (2006) (noting that the Supreme Court applies strict scrutiny, its “most stringent level of judicial review,” to government action that treats individuals differently on the basis of race). Siegel’s article traces the origins of strict scrutiny to First Amendment disputes that arose in the 1950s and 1960s. *Id.* at 355–56.

162. Jamil Dakwar (@jdakwar), TWITTER (Jun. 16, 2020, 2:40 AM), <https://twitter.com/jdakwar/status/1272780978713477120?s=20> [<https://perma.cc/29A4-9QT4>] (reporting that “[t]he UN expert on racism and the . . . UN Working Group of Experts on People of African Descent sent a letter to [the UN Human Rights Council] calling for the establishment of a commission of inquiry on systemic racism and law enforcement in the United States” and sharing images of the letter).

163. See Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 803 (2012) (noting that, although “federal regulation of police conduct outside of the Fourth Amendment and *Miranda* doctrine is considerable[, s]tate constitutions, statutes, and regulations regulate police conduct even more extensively”).

164. For a historian’s account of policing as “protect[ing] white privileges in America,” see Anna North, *How Racist Policing Took Over American Cities, Explained by a Historian*, VOX (Jun. 6,

Numerous studies have shown that police target people of color more frequently and more aggressively than they target whites.¹⁶⁵ For example, Black people (and Latinos) are more likely to be pulled over by police while driving (during the day, in particular—when their skin color is visible to officers); they are more likely to be searched once pulled over; and they are more likely than their white counterparts to be killed by police.¹⁶⁶ These disparities carry over into adjudication and sentencing for criminal offenses. Relative to whites, Black people are not only arrested at higher rates, but also imprisoned at higher rates, and (even controlling for variables like previous criminal record and offense severity) given longer sentences.¹⁶⁷ Black people also face systemic barriers to molding a fairer justice system. For example, they must wait much longer than whites to cast ballots¹⁶⁸ and are more likely than whites to be disenfranchised by both formal and informal forces.¹⁶⁹ This leads to diminished power to effect political change—power that is already limited by default in many cases because Black people constitute a minority in every single U.S. state.¹⁷⁰

2020, 8:00 AM), https://www.vox.com/platform/amp/2020/6/6/21280643/police-brutality-violence-protests-racism-khalil-muhammad?_twitter_impression=true [<https://perma.cc/5HL3-JLQL>].

165. See Radley Balko, *There's Overwhelming Evidence that the Criminal Justice System is Racist. Here's the Proof.*, WASH. POST (Jun. 10, 2020), <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/#Policing> [<https://perma.cc/ZJ5M-BRCF>] (collecting studies).

166. See *id.* See also U.S. Comm'n on Civ. Rts., Transmittal Letter on 2017 Statutory Enforcement Report, Targeted Fines and Fees Against Communities of Color: Civil Rights & Constitutional Implications (Sept. 2017), https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf [<https://perma.cc/SB6H-Y9NP>] (finding “that unchecked discretion or stringent requirements to impose fines or fees can lead and have led to discrimination and inequitable access to justice....”).

167. See Ryan D. King & Michael T. Light, *Have Racial and Ethnic Disparities in Sentencing Declined?*, 48 CRIME & JUST. 365, 366–68 (2019).

168. See Adam Harris, *The Voting Disaster Ahead*, ATLANTIC (June 30, 2020), <https://www.theatlantic.com/politics/archive/2020/06/voter-suppression-novembers-looming-election-crisis/613408/> [<https://perma.cc/FDX2-Y6ER>] (noting that “Black voters, on average, wait 45 percent longer to vote than white voters; Latino voters wait 46 percent longer.”).

169. See Vann R. Newkirk II, *Voter Suppression Is Warping Democracy*, ATLANTIC (July 17, 2018), <https://www.theatlantic.com/politics/archive/2018/07/poll-prri-voter-suppression/565355/> [<https://perma.cc/RS5M-2YPB>] (noting that Blacks and Hispanics are, *inter alia*, substantially more likely than whites to lack identification required by law for voting, to be told incorrectly that they are not listed on voting rolls, to have difficulty finding polling locations, and to have difficulty getting time off from work to cast a ballot).

170. See Sonya Rastogi, Tallese D. Johnson, Elizabeth M. Hoeffel & Malcom P. Drewery, Jr., *The Black Population: 2010*, U.S. CENSUS BUREAU (Sept. 2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf> [<https://perma.cc/2RAT-4JTC>] (noting that, per the 2010 census, the Black population ranges widely from state to state, but does not exceed 37.6% of any state's population, and often constitutes closer to 1%). Note, however, that Black people constitute a bare majority (52.2%) of the population of the District of Columbia. *Id.* See also Press Release, U.S. Census Bureau, 2010 Census Shows America's Diversity (Mar. 24, 2011),

Black people clearly meet the proposed definition of a systemically disadvantaged group. First, they remain seriously disadvantaged in the United States; second, their status as Black people provides no reasonable moral justification for the worse life outcomes they demonstrably encounter; third, the law itself plays a significant role in imposing and reinforcing their disadvantages. I will argue below that groups satisfying these criteria may adopt a uniquely negative attitude toward the law as a whole,¹⁷¹ and, further, that these criteria lower the threshold for such individuals to infer that particular operations of the law discriminate against them.¹⁷² With respect to the second of these criteria, I simply take it as axiomatic that neither skin color nor place of ancestry supplies society with a reasonable basis for systematically providing fewer opportunities or resources to a particular person or group of people. I make similar assumptions about sex, gender, religious views, and sexual orientation. Not everyone will share my assumptions, but those assumptions are not essential to the validity of this Article's broader argument. It is likely that numerous other groups qualify as systemically disadvantaged as well,¹⁷³ but we need not generate an exhaustive list here so long as we recognize that some such groups exist.

B. Virtue and Self-Respect

On a virtue-based analysis, how ought members of a systemically disadvantaged group respond to the demands of the legal system? Surely it depends in large part on the particulars of their situations. For example, it may depend on how they identify vis-à-vis any systemically disadvantaged group, whether they accept that they have been systemically disadvantaged (at least in part by the law), whether they work for the legal system themselves, whether resistance comes with especially high costs given their competing obligations, whether society has conditioned in them a particular attitude toward the law, and so forth—not to mention on which legal demands are at issue. No blanket rule is available, but nor is one necessary. Virtue analysis facilitates nuance, and nuance lends itself to complex results.

https://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn125.html
[<https://perma.cc/CB7F-R853>] (noting that, per the 2010 census, whites made up 72% of the national population while Blacks made up 13%).

171. *See infra* Section III.B.

172. *See infra* Section III.B.

173. *See supra* note 152 (collecting scholarship on a variety of disadvantaged groups).

Yet a powerful and simple claim stands above that complexity: namely, it is incorrect as a matter of virtue to *demand* that members of such groups acquiesce to the law at the level that virtue theorists (especially proponents of the virtue of lawfulness) typically expect. Put another way, it is well within the range of virtuous responses to the law that members of systemically disadvantaged groups resent parts of the law and, in certain situations, actively decline to comply with it.¹⁷⁴ In fact, because the legal system itself plays a role in their systematic disadvantage, to expect such individuals to regard the law favorably may at times be vicious. I will argue that the traditional accounts of when it is acceptable to deviate from the law, often expressed as exceptions to the virtue of lawfulness, cannot fully explain why this is the case.

We can tell the story of virtuous opposition to the law among systemically disadvantaged groups in terms of several widely-accepted virtues (such as self-respect, pride, or righteous indignation) and vices (such as servility). I will use the term “self-respect” to stand in for the moral quality that supports this form of resistance to the law. To be clear, this Article does not seek to develop a novel account of some particular virtue or vice that one must accept as a precondition for the specific brand of virtuous law-breaking contemplated here. I want to make a stronger and broader claim: on any plausible account of human morality that takes the virtues seriously, self-respect must either constitute its own virtue or, as a core moral notion, must be embedded in other virtues. Therefore, under effectively any form of virtue jurisprudence, self-respect will provide a basis in virtue for members of systemically disadvantaged groups to resist portions of the law.¹⁷⁵

I noted above that virtue ethicists disagree both about which qualities amount to virtues and about how to define the virtues they do agree to accept.¹⁷⁶ But a plausible account of the virtues incorporates the notion of self-respect, or some recognition that flourishing individuals recognize their worth as individuals and ask to be treated accordingly.¹⁷⁷ For Aristotle, that

174. I will refer here to a justified posture of “resisting” the law, which encompasses both an attitude of disapproval of the law and (at times) a refusal to comply with it. I address the attitudinal component and the compliance component separately below.

175. That does not mean that members of systemically disadvantaged groups have a sweeping license to violate the law, but rather that some uncontroversial account of virtue will count in favor of their taking a dim view of the law and, depending on the circumstances, may warrant their breaking the law all things considered.

176. See *supra* Section I.A.

177. We can see this quality shade into descriptions of other virtues as well, such as generosity. See HURSTHOUSE, VIRTUE ETHICS, *supra* note 15, at 13 (arguing that one does not “count as mean or even ungenerous” for refusing to allow oneself to be exploited because “any virtue may contrast with

notion manifests through the virtues of pride¹⁷⁸ or righteous indignation.¹⁷⁹ For a Christian-inspired list of virtues, self-worth could be implied by a view of humility as a golden mean lying between excessive pride or arrogance on one hand and excessively low estimates of one's merits on the other.¹⁸⁰ Even theorists who do not adopt wholesale a virtue ethical approach have acknowledged the importance of honoring our self-worth,¹⁸¹ perhaps as a reflection of our inherent dignity.¹⁸² Regardless of the precise label for it, any compelling view of the virtues must find some way to account for the importance of self-respect.

It is difficult to discern in absolute terms what a society owes to each individual within it. But even a generic and relatively thin view of self-respect grounds an individual's expectation that her state (and its legal system) will provide for reasonable parity among its subjects, especially absent morally-relevant differences. *Ex hypothesi*, this is not the situation facing systemically disadvantaged groups. At a general level, the law perpetuates a state of affairs that is unfavorable to members of those groups, and, although the law purports to make neutral claims on each of us, it in fact makes consistently and undeservedly severe claims on them.¹⁸³ At least

several vices or failings, and generosity contrasts not only with meanness or selfishness but also with being prodigal, too open-handed, a sucker.”).

178. See Robert Sokolowski, *Friendship and Moral Action in Aristotle*, 35 J. VALUE INQUIRY 355, 356 (2001) (arguing that “pride comes after the moral virtues and is more like a form of knowledge than a specified disposition to perform. . . . Without pride, the other moral virtues would be incomplete and even incoherent. They would be excellences that are unaware of themselves and hence unable to engage in actions.”).

179. William W. Fortenbaugh, *Aristotle and the Questionable Means-Dispositions*, 99 TRANSACTIONS & PROC. AM. PHILOLOGICAL ASS'N 203, 206 (1968) (“[A] righteously indignant man feels indignation and is said to be pained . . . at unmerited success or misfortune.”)

180. See, e.g., James Kellenberger, *Humility*, 47 AM. PHIL. Q. 321, 326 (2010) (discussing Aquinas's view of humility as a religious virtue). Although certain Christian conceptions of humility might be “presented as self-abasement or experiencing yourself as filth,” *id.* at 331, Aquinas seems to regard it as a restraint on the “inordinate urge for things above us” or a “recognition . . . of our position in relation to other things,” *id.* at 332. Even if one believes that individual members of society are nothing next to the divine, the question before us in this context is the relative worth of different people in the same society. Elsewhere I have argued that humility requires an accurate assessment of one's merits rather than, as others have maintained, ignorance of or false beliefs about one's worth. See G. Alex Sinha, *Modernizing the Virtue of Humility*, 90 AUSTRALASIAN J. PHIL. 259 (2012).

181. See Thomas E. Hill, Jr., *Servility and Self-Respect*, 57 MONIST 87, 87–88 (1973)) (arguing, from a Kantian point of view, that “there are nonutilitarian moral reasons for each person, regardless of his merits, to respect himself” (and thus not to display servility)).

182. See, e.g., JEREMY WALDRON, *DIGNITY, RANK AND RIGHTS* (Meir Dan-Cohen ed., Oxford Univ. Press reprt. ed. 2015) (2012) (arguing that human dignity conveys the notion of high stature or rank shared by all human beings and serves to ground and explain the scope of our rights).

183. Notably, certain groups still face (or until recently still faced) *explicitly* unequal treatment. See Li Cohen, *Trump Administration Erases Health Care Protections for Transgender Patients During Pride Month*, CBS NEWS (June 13, 2020, 8:06 AM), <https://www.cbsnews.com/news/trump-transgender-health-care-protections-erased-pride-month/> [<https://perma.cc/RQ4X-HGVT>] (reporting in

some of the law's demands are therefore pointedly unfair in a manner that may justifiably and accurately lead members of systemically disadvantaged groups to perceive an affront to their self-worth. Moreover, systemic disadvantage *itself* implicates the self-respect of individuals who experience it, even aside from any specific unfair demands of the law. Those two conclusions form the basis for nontrivial resistance to the law, even in a system that may be relatively just overall.

C. *Virtuous Law-Breaking*

As a result of its depth and breadth, systemic disadvantage confounds attempts to reduce it to a comprehensive list of constitutive wholesale operations and retail commands. *Prima facie* skepticism of the law *as a whole* may therefore be justified for systemically disadvantaged groups.¹⁸⁴ But legal commands vary in their implications for the self-respect of members of such groups, and only some reflect direct discrimination or bear a significant propensity for generating inequitable results. There is a difference, for example, between wholesale prohibitions on *mala in se* offenses and *discriminatory enforcement* of those prohibitions (such as through harsher policing and sentencing).¹⁸⁵ The following subsections argue that allocating proper weight to the self-respect of systemically disadvantaged individuals provides a defeasible basis for their noncompliance with the law in at least two different scenarios. The first arises in situations where the law—whether through wholesale or retail operations—makes certain types of unfair demands on them. The second arises in situations where law-breaking may function to draw attention to systemic disadvantage in general.

June of 2020 that “the Trump administration . . . is rolling back Obama-era health care protections for people who are transgender”); Adam Liptak, *Civil Rights Law Protects Gay and Transgender Workers, Supreme Court Rules*, N.Y. TIMES (June 15, 2020, updated June 16, 2020), <https://www.nytimes.com/2020/06/15/us/gay-transgender-workers-supreme-court.html> [https://perma.cc/RV35-MEVR] (reporting that, before June of 2020, when the Supreme Court ruled that the Civil Rights Act of 1964 bars discrimination on the basis of sexual orientation and gender identity, “it was legal in more than half of the states to fire workers for being gay, bisexual or transgender”).

184. This result carries potentially significant theoretical implications that I cannot fully explore in this Article.

185. See Avi Samuel Garbow, *The Federal Environmental Crimes Program: The Lorax and Economics 101*, 20 VA. ENVTL. L.J. 47, 51–52 (2001) (citing Black’s Law Dictionary to explain the difference between a *malum in se* offense—one that is wrong in itself, not *because* it is prohibited by law—and a *malum prohibitum* offense—one that is not wrong in itself but is only wrong because and to the extent that it is prohibited by law).

1. *Resisting Unfair Demands of the Law*

Operations of the law that directly reinforce the harms experienced by members of systemically disadvantaged groups, or capitalize on their disadvantaged state, carry the gravest implications for the self-respect of their members. Three types of legal operations rise to that level: 1) wholesale provisions that, whether intentionally or otherwise, consistently operate to the relative detriment of members of a systemically disadvantaged group;¹⁸⁶ 2) retail operations that are (or reasonably appear to be) levied against people based on the morally or legally irrelevant criteria that constitute group membership;¹⁸⁷ or 3) retail operations that result in harsher outcomes based on morally or legally irrelevant criteria that constitute group membership.¹⁸⁸ These three categories capture legal operations that are distinctively unfair because they are inequitable in effect or application to people who already experience systemic disadvantage. They may even rely for their effect in part on the bare fact of the systemic disadvantage of particular individuals or groups affected by them. For simplicity, I will refer to these sorts of legal operations as “unfair demands,” although they are hardly the only demands of the law that are unfair in some meaningful sense. Beyond inviting *prima facie* skepticism, these unfair demands warrant a stronger and less deferential response than most theorists have historically allowed.

The first level at which we should evaluate the proper response to unfair demands is one of *attitude*, which is distinct from the level at which one decides whether to comply.¹⁸⁹ How should members of disadvantaged groups feel when faced with such demands? Again, a range of responses may be appropriate, not least because the law cultivates dispositions of

186. A notorious example of this type of provision is the vast federal sentencing disparity formerly in effect between drug offenses involving crack cocaine and those involving powder cocaine. See Deborah J. Vagins & Jesselyn McCurdy, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law*, AM. CIV. LIBERTIES UNION (Oct. 2006), <https://www.aclu.org/other/cracks-system-20-years-unjust-federal-crack-cocaine-law> [<https://perma.cc/M8TC-RNTP>]. Another example might be use-of-force guidelines for police that disproportionately result in harm to members of a particular systemically disadvantaged group.

187. An example might be an individual police officer’s demand, when driven by bias, that a driver of color pull over. As noted above, the history of discrimination against certain systemically disadvantaged groups helps to lower the bar to an inference by the target of such a retail demand that the demand reflects some sort of illicit bias.

188. An example might be criminal sentencing decisions that, whether deliberately or not, are harsher toward a defendant in part because of his race. See King & Light, *supra* note 167.

189. By “comply,” I simply mean “do what the law requires, from whatever motive.”

fealty or deference.¹⁹⁰ Fundamentally, however, one reasonable response to *any* unfair demand—even a relatively minor, interpersonal, non-legal one—is *resentment* or *indignation*. Thus, when faced with an unfair legal demand from a system that has historically treated one’s group worse than others, self-respect justifies one in taking offense. As the data cited above suggest, such unfair demands are common.

Recognizing that resentment is an appropriate attitude toward parts of the law for a nontrivial set of the law’s subjects exposes the virtue of lawfulness to serious pressure. Resentment does not conduce to obedience or deference so much (at best) as to grudging compliance.¹⁹¹ Justified resentment provides a reasonable basis for a subject of a legal order to undertake serious moral deliberation about how to proceed, opening the door to a broader range of scenarios in which noncompliance may be likely and even morally appropriate.¹⁹² Aquinas, for example, worried that excessively onerous legal demands may lead to resentment or rebellion.¹⁹³ Beyond undermining the aims of the law, justified resentment creates an especially sharp tension for strong virtue jurisprudence because it suggests the law is positively *counterproductive* in some important respects.¹⁹⁴ But, strictly speaking, resentment of the law does not entail noncompliance; one might resent an unfair demand but still determine it is best to comply.

On a second level, then, the question is whether and when self-respect justifies or requires *noncompliance* with unfair demands of the law. I claim that self-respect will at times provide a basis for virtuous defiance of unfair demands, though it will much more rarely *require* defiance of unfair demands. In fact, one reason why it may be virtuous but not obligatory for a member of a systemically disadvantaged group to break the law is specifically because, for morally inappropriate reasons, *the stakes of breaking the law are often higher for members of such groups*. Although there is no simple formula to apply to discern the proper course of conduct

190. The power of the law to cultivate obedience is precisely what makes it valuable from the perspective of strong virtue jurisprudence. If the law can cultivate virtue, there is little reason to doubt that it can also cultivate vice, such as excessive deference or servility. See Adam D. Reich & Seth J. Prins, *The Disciplining Effect of Mass Incarceration on Labor Organization*, 125 AM. J. SOC. 1303 (2020) (arguing that “[m]ass incarceration may discipline low-wage workers by decreasing their likelihood of participating in organizations through which they might gain economic power individually and collectively”).

191. It is difficult to say the law promotes human flourishing by conditioning people toward virtue if a significant number of the law’s subjects are righteously resentful of the law’s demands.

192. The balance of the present subsection addresses this issue.

193. George, *Central Tradition*, *supra* note 71, at 35.

194. Strong virtue jurisprudence accepts that the aims of the law are to promote virtuous behavior, which is incompatible with threatening them into servility.

with respect to defiance of unfair demands, it is possible to identify some important parameters.

A traditional virtue-driven account of moral deliberation emphasizes the role of practical wisdom (“*phronesis*”), which is essentially the capacity to reason about the nature of one’s options along the different axes established by the various virtues: how, under the present circumstances, would a good person act? In other words, how would competing courses of conduct balance the (at times divergent) demands of generosity, courage, temperance, and so forth? The implications of any course of conduct for the different virtues, even in quotidian scenarios, can be extremely complex, and reasoning well about such matters is itself a marker of virtue.¹⁹⁵

Historically, that sort of nuanced moral deliberation has not been expected of individuals facing the demands of the law; the mere fact that the law requires a course of action has generally been regarded as providing a powerful reason simply to do it. As Edmundson puts it when explaining the typical view of the *prima facie* obligations to obey the law, the reason for action provided by a legal demand is “one that is ordinarily decisive and . . . one toward which deference is worth cultivating.”¹⁹⁶ Although Edmundson does not describe virtue jurisprudence *per se* in that line of text, the typical view of the virtue of lawfulness—the baseline set by the presumption that virtue attaches to some sort of disposition to follow the law—renders his language apt across the board.

Of course, the fact that the law demands something of us does provide powerful reasons to do it, although many of those reasons are largely prudential.¹⁹⁷ Leaving aside the moral content of a particular legal injunction, it can be risky to break the law; depending on the form of law-breaking, one might face the use of force by police, in addition to significant financial, temporal, and reputational costs associated with different forms of legal entanglement. These costs tend to be greater for systemically

195. Hursthouse makes this point by reference to the virtue of generosity, although she also notes that it applies to the other virtues as well:

Each of the virtues involves getting things right, for each involves *phronesis*, or practical wisdom, which is the ability to reason correctly about practical matters. [For example,] in the case of generosity this involves giving the right amount of the right sort of thing, for the right reasons, to the right people, on the right occasions.

HURSTHOUSE, VIRTUE ETHICS, *supra* note 15, at 12–13.

196. See text accompanying *supra* note 142.

197. Depending on how we understand prudence, we might see it as a manifestation of practical wisdom, see *supra* note 195, or as a stand-alone virtue, see, e.g., Feldman, *supra* note 31, at 1431 (incorporating the “virtue[] of prudence” into an analysis of tort law). As I argue below, however, harsh penalties for noncompliance with the law can weigh in favor of compliance for problematic reasons that trade off other virtues.

disadvantaged groups—by assumption, for reasons that are not defensible—distorting the calculations about compliance faced by qualifying individuals. Even without any such distortion, however, it is partly as a result of the possible costs of noncompliance that a disposition toward lawfulness carries certain advantages for its possessor, one of the key criteria for constituting a virtue.¹⁹⁸ Additionally, the law bans certain conduct that we generally and appropriately regard as immoral.¹⁹⁹ And for prohibitions that regulate conduct that would otherwise be morally neutral, the mere fact that the law prohibits such conduct may create expectations of compliance from other members of the community, leading to conflict for even morally minor violations. In short, the virtue of lawfulness is popular in part because it has some plausibility to it.

Nevertheless, even if some disposition toward lawfulness is a virtue, it is hardly the only one. Self-respect is also a virtue (or an essential component of other virtues), and members of systemically disadvantaged groups often face a pronounced tension between the two. When presented with that tension by an unfair demand from the law, they may consider whether to break the law. Suppose a member of a systemically disadvantaged group confronts a choice about whether to comply with a specific legal demand, such as whether to stop walking on a public street so that a police officer can search him. The simplest response might be for him to comply. But, depending on the circumstances, his sense of self-respect may give him a powerful moral reason, anchored in the virtues, not to do so.²⁰⁰

If the circumstances give rise to a reasonable inference that he is being targeted for his race, for example, he may undertake an inquiry into whether compliance is warranted.²⁰¹ In calibrating his response to the demand, he will consider the prudence of complying, assessing whether it is positively dangerous to resist complying; whether he can afford the possible or likely

198. See *supra* text accompanying note 66 (noting that Hursthouse interprets “[t]he standard neo-Aristotelian premise” about the relationship between virtue and *eudaimonia* to encompass the view that “the virtues benefit their possessor”).

199. See *supra* note 185 (distinguishing between *malum in se* and *malum prohibitum* offenses).

200. In some cases, it is not merely prohibitive to defy the law, but positively impossible. If one is given an unduly harsh sentence because of some purportedly-neutral-but-in-fact-discriminatory guideline, it is not clear what defiance even looks like, except perhaps attempting to escape incarceration. Revising these sorts of provisions requires other forms of pressure, such as protest or civil disobedience. See *infra* Section III.C.2.

201. Some might characterize the effect of experiencing justified resentment as providing a “liberty” of sorts: a liberty to contemplate morally justified law-breaking. I think the better characterization of the situation is as a penalty: a reasonable level of self-respect, combined with his situation, compels him to confront a difficult dilemma with potentially costly consequences regardless of his choice.

penalties of resistance, even if physical danger is not a factor; and whether, all things considered, it is “worth it” to resist.²⁰² Other virtues may be relevant too. Suppose he has a child in tow; as a father, he must weigh not just his obligations to shield her from physical harm and the deprivation of his presence, but also the lessons his choice will hold for her both about lawfulness and about self-respect. It might, in fact, be courageous to resist, or it might be rash. It might be wise, or it might be foolish.

For the systemic reasons identified above, the prudential scales may be tilted against noncompliance, but that is hardly a foregone conclusion.²⁰³ The balance will also depend in part on whether (and to what extent) we regard lawfulness as a free-standing virtue. Notably, the clear, principled basis for resistance offered here—limited to specific types of legal mandates as applied to disadvantaged groups—entails only relatively minor damage to a general preference for lawfulness. Perhaps more importantly, even when it is prudent to comply with an unfair demand from the law, that verdict is not driven by unanimous alignment of the virtues. Self-respect provides a defeasible reason to resist unfair demands of the law; when that reason is properly defeated by other considerations, the individual who elects to comply does the right thing, all things considered. But she must trade off some measure of self-respect to get there. Here is where it is especially relevant that the costs of noncompliance may be particularly high for members of certain systemically disadvantaged groups. Not only is the fact that such costs are higher an affront to the self-respect of members of those groups, but the higher costs of resistance perversely weigh against the prudence of a key form of self-respecting response. Such unfair demands are truly vicious, exacting an obscene cost that the legal system ought not to impose on anyone, especially if its purpose (per strong virtue jurisprudence) is to condition virtuous behavior.²⁰⁴

2. *Protesting Systemic Disadvantage*

Unfair demands of the law, as defined above, are particularly sharp manifestations of the broader systemic disadvantage experienced by

202. This example consists of a questionable retail demand, but we could run a similar thought experiment with a wholesale legal demand that is purportedly neutral but typically discriminatory in application.

203. *See supra* Section III.A. That is not necessarily true of all systemically disadvantaged groups, however.

204. In other words, vicious demands to compliance conflict directly with the purpose of a legal system designed to promote the virtues. Even leaving the virtues aside, however, one might be able to reject these sorts of legal demands by appeal to some notion of fairness.

members of certain groups. If self-respect justifies resistance to unfair demands of the law, it also justifies the possibility of defying provisions of the law (whether unfair or not) to force a societal reckoning with systemic disadvantage. Once again, the variables that shape a moral judgment about when and how to do that will vary based on the group, but the greater and more longstanding the disadvantage, and the more infeasible it is to generate change through other means (such as voting), the more justifiable it is to contemplate violating the law for the purpose of promoting equality for members of one's group. In short, self-respect offers a valid basis in virtue for seeking to eliminate one's own systemic disadvantage, and a defeasible consideration in favor of violating even reasonably fair demands of the law to accomplish that goal. This form of legal defiance amounts roughly to civil disobedience, although that term typically carries certain implications and qualifications that I reject.²⁰⁵

Once again, much of the literature on civil disobedience arises in the context of broader theoretical debates about state legitimacy and the *prima facie* duty to obey the law.²⁰⁶ Certain prominent definitions of "civil disobedience" incorporate moral limitations that sharply cabin the extent to which resistance might be justified. In Section II, we noted one influential characterization of civil disobedience as "public, conscientious, nonviolent refusal to comply with the law."²⁰⁷ Edmundson endorses a similar "petition" view of civil disobedience that he attributes to John Rawls and others, on which one might act rightly in disobeying the law "if, but only if, her actions are public, nonviolent, and are intended as an appeal to officials and fellow citizens to reconsider and rectify what is in fact a serious injustice."²⁰⁸ According to Edmundson, more disruptive or surreptitious forms of law-breaking—"sabotage, terrorism, and furtive noncompliance"—are incompatible with this view, at least in "reasonably just legal systems."²⁰⁹

These limitations on the "proper" forms of law-breaking in the civil disobedience context may seem relatively reasonable in the abstract, but *ex ante* blanket prohibitions on methods of protest are difficult to justify on a virtue-based analysis even if more extreme methods are rarely justified by the virtues themselves. Whether and how to defy the law to protest systemic

205. One could resist an unfair demand specifically to draw attention to its unfairness, but, as the preceding subsection argues, that is not the only valid reason for resisting an unfair demand.

206. See Edmundson, *Law Abidance*, *supra* note 12, at 7 (noting some of the key literature on civil disobedience).

207. See *supra* text accompanying note 117.

208. See Edmundson, *Law Abidance*, *supra* note 12, at 7. Edmundson believes that the virtue of law-abidance is compatible with a "petition" view of civil disobedience. *Id.* at 9.

209. See *id.* at 7.

injustice is an especially complicated moral judgment, taxing practical wisdom because weighty factors pull in different directions. Initial moral judgments about participating in protests are at best approximate both because effective protest often requires collective action, and because protests may trigger provocative or even violent responses. As a result, it is difficult to create and adhere to a careful plan when participating in protests of any significant size.

But where systemic disadvantage has persisted for decades or longer, and less disruptive mechanisms for raising awareness of the issue of inequality have proved ineffective, considerations of self-respect could well count in favor of defying the law in an increasingly raucous manner. That is especially plausible where the response of law enforcement to peaceful forms of protest is violent, as it has been for recent Black Lives Matter protests.²¹⁰

210. Recent Black Lives Matter protests encountered aggressive police responses around the country, with officers deploying tear gas, batons, pepper balls and more, even when the protests themselves were peaceful. See Adam Gabbatt, *Protests About Police Brutality Are Met With Wave of Police Brutality Across US*, GUARDIAN (June 6, 2020, 4:00 AM), <https://www.theguardian.com/us-news/2020/jun/06/police-violence-protests-us-george-floyd> [<https://perma.cc/7PSA-3GM5>] (reporting that “police brutality,” including “[u]se of teargas, batons, pepper spray, fists, feet and vehicles against protestors” has prompted “lawsuits and international condemnation,” and noting that these “actions have left thousands of protesters in jail and injured many others, leaving some with life-threatening injuries”); Meg Kelly, Joyce Sohyun Lee & Jon Swain, *George Floyd Death Protests: Police Partially Blinded Eight People on the Same Day of Protests*, WASH. POST (July 14, 2020), <https://www.washingtonpost.com/investigations/2020/07/14/george-floyd-protests-police-blinding/?arc404=true> [<https://perma.cc/WP2D-RWNL>] (reporting on a dozen protestors, journalists or passersby who were partially blinded after police fired projectiles that hit them in the eye). Among the most notorious incidents was the forceful dispersion of peaceful protestors near the White House for a presidential photo op at a church nearby. See Rick Noack, *How the Clearing of Lafayette Square Made the White House Look a Bit More Like the Kremlin*, WASH. POST (June 11, 2020), <https://www.washingtonpost.com/world/2020/06/11/how-clearing-lafayette-square-made-white-house-look-bit-more-like-kremlin/> [<https://perma.cc/62ZW-UCAK>] One attorney began maintaining a public spreadsheet of links to videos of police apparently deploying excessive force in response to these protests, accumulating approximately 1,500 discrete entries in the first two months of the protests. See Greg Doucette, *George Floyd Protest – Police Brutality Videos on Twitter*, GOOGLE DOCS, <https://docs.google.com/spreadsheets/d/1YmZeSxpz52qT-10tkCjWOwOGkQql7Wd1P7ZM1wMW0E/edit#gid=0> [<https://perma.cc/3UCJ-LXCK>] (last visited July 30, 2020). Months after the protests subsided, the New York Times gained access to “reports by outside investigators, watchdogs and consultants analyzing the police response to [Black Lives Matter] protests in nine major cities, including four of the nation’s largest.” Kim Barker, Mike Baker & Ali Watkins, *In City After City, Police Mishandled Black Lives Matter Protests*, N.Y. TIMES (Mar. 20, 2021), <https://www.nytimes.com/2021/03/20/us/protests-policing-george-floyd.html#click=https://t.co/evwGRrj5YK> [<https://perma.cc/NZR6-U47S>] These “reports repeatedly blamed police departments for escalating violence instead of taming it . . . [concluding that they] often treated all protesters the same, instead of differentiating between peaceful protesters and violent troublemakers.” *Id.*

Although self-respect establishes a moral basis for making oneself heard in search of equality, considerations of self-respect might properly give way to other factors once again. Contemplating any form of protest will involve weighing the anticipated effect of that protest on the goal of advancing one's message,²¹¹ the costs of being subjected to violence by the police²¹² or by hostile private citizens,²¹³ and the implications of one's methods for the interests of other people.²¹⁴ As with resistance to unfair demands, prudence thus factors in the likely response of law enforcement, which protestors have every reason to expect will differ to some extent based on the message of the protests.²¹⁵ And virtues such as generosity and

211. See Kim Parker, Juliana Menasce Horowitz & Monica Anderson, *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement*, PEW RES. CTR. (June 12, 2020), <https://www.pewsocialtrends.org/2020/06/12/amid-protests-majorities-across-racial-and-ethnic-groups-express-support-for-the-black-lives-matter-movement/> [<https://perma.cc/BRA6-9ZMA>] (summarizing polling from several weeks into the 2020 Black Lives Matter protests showing that approximately “[t]wo-thirds of U.S. adults say they support the movement”).

212. See *supra* note 210 (collecting sources discussing police use of force against Black Lives Matter protestors all around the country).

213. See, e.g., Neena Satija, Emily Davies & Dalton Bennett, *Amid Massive Demonstrations, Vehicles Striking Protesters Raise Disturbing Echoes of 2017 Charlottesville Attack*, WASH. POST (June 15, 2020), <https://www.washingtonpost.com/investigations/2020/06/15/cars-ramming-protests/> [<https://perma.cc/2T9N-4YCQ>] (cataloging at least 19 instances in which private citizens deliberately drove cars into protestors).

214. See KIRO 7 News Staff, *Businesses Damaged, Looted During Protest on Capitol Hill*, KIRO 7 (July 23, 2020, 12:54 PM), <https://www.kiro7.com/news/local/businesses-damaged-looted-during-protests-capitol-hill/4HWBWRUF65OFKPP3G36GZDU/> [<https://perma.cc/586M-Y4SN>] (reporting on damage to private businesses that occurred during a protest in Seattle, Washington). Some prominent cases of property damage appear to have been caused by provocateurs rather than protestors, however. See Doha Madani, *'Umbrella Man' Aimed to 'Incite Violence' During George Floyd Protests, Police Say*, NBC NEWS (July 28, 2020 11:11 PM, updated Jul. 28, 2020 11:19 PM), <https://www.nbcnews.com/news/nbcblk/umbrella-man-aimed-incite-violence-during-george-floyd-protests-police-n1235148> [<https://perma.cc/T9AN-J3UQ>].

215. The frequency of documented police violence against Black Lives Matter protestors aligns with surveys of police attitudes toward racial justice issues generally. Surveys have shown, at minimum, that majorities of police regard protests of police violence toward Black people as reflecting “anti-police bias,” and only a very small minority of white officers—much smaller than the share of whites as a whole—see a need for the country to take additional steps to ensure equal rights for Black people. See Drew Desilver, Michael Lipka & Dalia Fahmy, *10 Things We Know About Race and Policing in the U.S.*, PEW RES. CTR. (June 3, 2020), <https://www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/> [<https://perma.cc/G2W6-QM9X>]. There have also been reports of police treating white or white supremacist protestors more favorably, both during the 2020 Black Lives Matter protests and before. See, e.g., Mara Hvistendahl & Alleen Brown, *Armed Vigilantes Antagonizing Protesters Have Received a Warm Reception from Police*, INTERCEPT (June 19, 2020, 1:55 PM), <https://theintercept.com/2020/06/19/militia-vigilantes-police-brutality-protests/> [<https://perma.cc/7JYH-Y4GS>] (noting a “long history of vigilantes working with police and government officials to oppress Black and Indigenous people,” and reporting on several recent instances where police purportedly treated counter-protestors more favorably, including referring to them as “armed friendlies”); Sam Levin, *California Police Worked With Neo-Nazis to Pursue 'Anti-Racist' Activists, Documents Show*, GUARDIAN (Feb. 9, 2018, 7:00 AM),

kindness will likely count against sacrificing the property and physical safety of bystanders or other members of the community, even as they count in favor of taking effective measures to improve the situations of future members of one's own disadvantaged group.

Thus, each mode of protest bears on the virtues in its own way. More dangerous or damaging forms of law-breaking must clear a higher moral bar before they are justified and will therefore be warranted less frequently because they implicate weightier factors that operate to offset the demands of self-respect. For example, it will be easier to justify violating a wholesale curfew meant to clear the streets of a city after several nights of protests²¹⁶ than to justify private property damage. The former does not necessarily implicate the interests of members of the community in the same way as the latter. But it is difficult to see how one could justify a blanket rule prohibiting all forms of property damage,²¹⁷ and there may be a relevant difference between damaging private property (say, a neighborhood store) and public property (say, a police car). After all, it is far from clear that a virtuous orientation toward one's community entails symmetrical attitudes toward one's neighbors and toward an arm of the legal system that helps to reinforce systemic disadvantage—especially where the conduct of the latter is the subject of the protests in the first place.²¹⁸ In any event, the lack of bright-line rules reflects the complex reality of moral decision-making, and the give-and-take of competing virtues realistically renders that feature of moral deliberation.

<https://www.theguardian.com/world/2018/feb/09/california-police-white-supremacists-counter-protest> [<https://perma.cc/F854-4J9D>] (reporting that “police investigating a violent white nationalist event worked with white supremacists in an effort to identify counter-protesters and sought the prosecution of activists with ‘anti-racist’ beliefs,” and observing that the officers express[ed] sympathy with white supremacists and tr[ie]d to protect a neo-Nazi organizer’s identity”). Asymmetrical policing of protests, which disproportionately raises the costs of protesting certain systemic disadvantages, provides another example of the legal system operating with vicious effect.

216. See, e.g., Spectrum News Staff, *30 Arrested Following Rochester Protest Condemning Curfew, Mayor, RPD*, SPECTRUM NEWS: ROCHESTER (July 30, 2020), <https://spectrumlocalnews.com/nys/rochester/public-safety/2020/07/16/protests-in-rochester--condemning-curfew--mayor-warren--rpd> [<https://perma.cc/M6CR-NV88>] (reporting on arrests made after protestors—who appear to have been protesting peacefully but were in violation of a city curfew—refused to disperse).

217. See R.H. Lossin, *In Defense of Destroying Property*, NATION (June 10, 2020), <https://www.thenation.com/article/activism/blm-looting-protest-vandalism/> [<https://perma.cc/6FHW-VUXW>] (asking, “what if property destruction is more than an understandable lapse of judgment and loss of control? What if it is not a frustrated, emotional reaction but a reasonable and articulate expression in itself?”).

218. As noted above, this is a key target of ongoing Black Lives Matter protests. See Buchanan *et al.*, *supra* note 4 (characterizing the motivations of the protestors).

D. The Limitations of Lawfulness

The foregoing demonstrates that virtuous law-breaking eludes simple formulas. More specific guidelines require not only more definite interpretations of the virtues themselves but also more detailed descriptions of the scenarios in which law-breaking may be justified. But it is also apparent that grounding the possibility of virtuous resistance to the law in self-respect—even when focusing specifically on systemically disadvantaged groups, as I have done—provides a basis for resisting the law that conflicts on a fundamental level with typical interpretations of the virtue of lawfulness. I do not mean that a superior interpretation of the virtue of lawfulness will never conflict with considerations of self-respect, for that is surely false. Tension among the virtues is common. Rather, I mean that the tension between the traditional virtue of lawfulness and the virtue of self-respect is too deep to be reconciled well; the exact same attitude that one labels virtuous the other labels vicious. Moreover, although the various forms of the virtue of lawfulness discussed above build in exceptions, especially for particularly unjust commands emanating from particularly unjust systems, the resistance justified by self-respect does not align well with those exceptions.

Both Aristotle and Aquinas placed a premium on broad respect for the law because of its essential conditioning effect, and Aquinas at minimum frowned on self-serving resistance to the law.²¹⁹ It is unclear if either would accept any meaningful measure of civil disobedience.²²⁰ Moreover, it is difficult to imagine that many theorists writing on the virtue of lawfulness would regard the current U.S. legal system as wholly corrupt or unjust; under such conditions, many would encourage compliance even with flawed legal commands out of an interest in sustaining the system as a whole. By contrast, I have argued that there is a basis in virtue (albeit one often offset by other considerations) for a significant subset of the population to resent and possibly defy certain unfair demands placed upon them by the law, and to contemplate breaking reasonable legal provisions in service of compelling structural change to level an uneven playing field.²²¹ I think that

219. See *supra* Section II.A–B.

220. See *supra* Section II.A–B.

221. Recall that Solum defends an Aristotelian-inspired view of the virtue of justice as lawfulness, which defines a disposition to comply with those laws and social norms that are not inconsistent with human flourishing, in situations where such laws or norms provide “salient reasons for action.” See *supra* text accompanying note 99. By limiting his selection of “*nomoi*” to those that are not inconsistent with human flourish, Solum may open the door to the possibility that his favored disposition to obey the law does not extend to the unfair demands of the law I have identified above. His view is

conclusion stands even if we ultimately determine that our present system is relatively just, although no such judgment is required either way.

Edmundson's view of law-abidance as a virtue is also insufficient to capture the resistance contemplated above. Recall that he separates wholesale and retail operations of the law; although he does not require overwhelming enthusiasm for wholesale operations "in bulk," he claims that the law-abiding labor under "much more stringent constraint[s] . . . with respect to retail operations."²²² Outside the context of completely corrupted systems,²²³ Edmundson accepts civil disobedience only in the narrow Rawlsian sense.²²⁴

described at a level of generality that makes it impossible to be sure, but I am skeptical he would go so far. After all, my account claims it could be *morally good* for individuals to resist pointedly unfair demands of the law, even when those demands are not particularly onerous. Moreover, his view does not seem to make space for resistance of *fair* demands of the law when demanded by considerations of self-respect. One other point bears emphasis here: although Solum's view defines a particular conception of the virtue of justice, both Solum and Hursthouse have cautioned against over-emphasizing the virtue of justice at the expense of other important virtues. See HURSTHOUSE, *VIRTUE ETHICS*, *supra* note 15, at 6 (arguing that "it has become all too common to allow a vague concept of justice and rights to encompass large areas of morality that virtue ethicists believe are better dealt with in terms of other, more concrete, virtues."); Solum, *Virtue of Lawfulness*, *supra* note 95, at 172 ("Justice is not the only human virtue. Indeed, one of the chief insights of virtue ethics in general and virtue jurisprudence in particular is the realization that not all of the work of morality needs to be done by the virtue of justice.") I have barely addressed the virtue of justice in this Article, focusing instead on the fundamental notion of self-respect. I take this to be an advantage of my approach, which attempts to bring overlooked elements of virtue-centered human flourishing back into the picture.

222. Edmundson, *Law Abidance*, *supra* note 12, at 9. Among other things, he expects that subjects of the law will grant officers of the legal system a presumption of good faith in officially making retail demands. *Id.* at 8, note 16 ("The law-abiding, and others, will normally be entitled to assume that officials with whom they deal act in good faith whenever they act under the color of office.") Edmundson recognizes "patent bad faith" as a "defeating condition," which "may relieve the law-abiding of their (defeasible) duty of compliance." *Id.* Specifically, "[w]here official corruption is so endemic that connivance is the customary social norm, the law-abiding may be disposed to 'go along to get along.'" *Id.* But many of the unfair retail demands that warrant resentment and possible defiance are not issued in patent bad faith; they reflect systemic biases or personal biases made manifest through officers of the legal system who believe they are acting in good faith. More generally, the attitude that Edmundson seems to favor toward retail operations is unduly submissive for members of systemically disadvantaged groups, even in circumstances where they elect to comply. Although he insists that to be law-abiding is not the same as being pusillanimous, he claims that "[t]he fully virtuous law-abiding actor . . . willingly submits to the direct orders of legal officials, welcoming the fact that—however burdensome—his cooperation manifests and reinforces a wholesome solidarity with them." *Id.* at 13.

223. See Edmundson, *Law Abidance*, *supra* note 12, at 8, note 16 ("Where official corruption is so endemic that connivance is the customary social norm, the law-abiding may be disposed to 'go along to get along.'")

224. According to Edmundson:

But the law-abiding may indeed engage in civil disobedience in the 'proper' and 'narrow' sense defined by the petition view. A law-abiding person may, in my view, enjoy 'soft' drugs recreationally and may serve modest amounts of alcohol to minors on family occasions. But she will not slip away from a mass arrest, even if she might do so safely. A law-abiding person may harbor fugitive slaves. But she will either comply with or openly defy an official seeking personally to enforce a judicial order to surrender a fugitive slave. She might furtively disobey

The view I have defended clearly conflicts with Edmundson's. Self-respect contemplates resistance to certain unfair retail demands of the law as much as unfair wholesale demands. Retail operations are the tip of the sword for a discriminatory system that purports to be neutral. They can be every bit as unfair as wholesale demands, and, because they single out individuals or small groups, they can be especially humiliating and degrading.²²⁵ Cultivating Edmundson's level of deference toward retail operations cannot be reconciled with the demands of self-respect, at least not for members of systemically disadvantaged groups. Moreover, self-respect counts in favor of a wider range of legal resistance for the purposes of protest.²²⁶

One might worry that the argument from self-respect erodes the comforting notion that lawfulness offers a steady proxy for virtue. To the limited extent that conclusion might tend to destabilize the legal system, however, the problem lies not in the individuals who hold a legitimate basis to resist the law but rather in the system itself. A sufficiently fair system would not extract compliance viciously from its subjects. In short, if the foregoing argument about self-respect is compelling, the virtue of lawfulness needs to be recalibrated or discarded.

IV. IMPLICATIONS OF THE ARGUMENT FROM SELF-RESPECT

Although I have endeavored to illuminate only a single virtuous basis for resisting the law—albeit a powerful one—the implications of the foregoing argument are substantial. First, the example of systemic disadvantage highlights the problem with the Aretaic leap.²²⁷ The power of the legal system to impose costs on its subjects ensures that its anticipated reactions to our conduct go to the heart of our prudential calculations about how to act. When the system operates unevenly based on morally irrelevant criteria, as it so often does, it puts its thumb on the scales in our calculations about how to attain virtue and avoid vice in complying with the law. The preceding Section specifically explores the law's power to condition and

a statute forbidding *malum prohibitum*, if disobedience is widespread or customary, but she will not covertly defy an administrative prerogative. Her defiance exhibits law-abidance only if it takes the form of a petition.

See Edmundson, *Law Abidance*, *supra* note 12, at 9–10. Edmundson favorably quotes Joel Feinberg for the notion that civil disobedience is “a violation of the law without loss of respect for the law.” *Id.* at 9. But, according to the view defended here, certain subjects of the law may *properly* lose respect for the law.

225. Resisting unfair demands need not be a last-resort method of petition, on my view.

226. Compare *supra* Section II.C, with *supra* Section III.C.2.

227. See *supra* Section I.B.

compel servility.²²⁸ That result raises a severe problem for strong virtue jurisprudence, according to which the function of the law is to facilitate our virtue-based flourishing. Even for weak virtue jurisprudence, however, the fact that the law makes vicious demands explains why, for so many substantive areas of the law, it is fruitless to explore what a virtue-centered analysis would say in a vacuum. Instead, theorists must contend with how the law is applied to gain a full appreciation for the relationship between law and virtue.²²⁹ One purpose behind advancing the argument above is thus to redirect and refocus the rapidly growing area of virtue jurisprudence toward non-ideal theory.

A second significant feature of the argument from self-respect is that it helps to capture the richness of actual moral decision-making before the law. Virtue ethics is an appealing methodology in part because balancing the competing (and perhaps incommensurate) demands of the various virtues is part of what makes moral decision-making in the real world so difficult. The argument above identifies the possibility of an uncomfortable tension arising between the virtue of self-respect and other virtues—for example, when the harsh response expected of the legal system compels someone to comply with a humiliating retail demand. Notably, typical accounts of the virtue of lawfulness mask this complexity by venerating lawfulness itself, thereby obscuring the actual intricacy of these choices.

Similarly, the argument from self-respect also highlights the advantage of a virtue-centered framing over the framing of the generic duty to obey the law. The argument from self-respect allows us to make distinctions—elusive to the generic obligation to obey—based upon the obvious truth that people are positioned differently before the law in morally relevant respects. Members of advantaged groups do not possess the same basis in self-respect for resisting the law. It is possible that, at times, some of them face demands from the law that are improper or in some sense unfair. It is therefore worth exploring what the virtues would direct them to do in such instances. But their historical advantages relative to other groups ground different inferences about the intent and effect of the legal demands they face, even when those demands seem questionable on their face. Similarly, members of advantaged groups possess reasons to protest the systemic disadvantage of the groups that face it. But the moral explanation for why their protests might constitute an expression of virtue—their solidarity with less-advantaged compatriots, for example—is fundamentally different from the

228. It is certainly conceivable that the law imposes vice in other ways as well.

229. This underscores the significance of my claim that any plausible view of the virtues must account for self-respect.

reasons of self-respect that undergird protests by members of affected groups.²³⁰

Third, the argument from self-respect exemplifies the radically underappreciated progressive power of virtue jurisprudence, a methodology that is often deployed in defense of conservative objectives. Beyond exalting lawfulness generally, as explored in Section II, virtue analysis is a popular vehicle for justifying the use of the law to regulate private conduct that various theorists regard as immoral.²³¹ Recall that others have also argued that virtue jurisprudence, when applied to theories of adjudication, would support originalist constitutional interpretation.²³² But, notwithstanding its popularity in conservative circles, there is nothing inherently conservative about virtue jurisprudence itself. Indeed, the inequities perpetuated by the legal system cast doubt on these conservative applications of virtue theory, perhaps because they neglect to contend with the law as it is in fact applied. For example, it is difficult to see how the virtues would provide an unalloyed endorsement of a method of constitutional interpretation that ennobles or gives effect to the biases of the Framers against individuals who, centuries later, have clearly clustered in systemically disadvantaged groups.²³³

Fourth, and relatedly, considerations of self-respect suggest a strong connection between promoting virtue-centered human flourishing and promoting equality. Under strong virtue jurisprudence, promoting the virtues has at times been understood as an alternative to promoting other ends, including individual rights and privileges.²³⁴ Farrelly and Solum have explicitly suggested that strong virtue jurisprudence views “the fundamental concepts of legal philosophy” as being concerned with “virtue and excellence” rather than salient alternatives, including equality.²³⁵ But a system that perpetuates certain inequalities directly undermines the flourishing of its subjects, demanding vicious servility in exchange for

230. Yet another advantage that the virtues provide is the possibility of assessing the moral side of law-compliance by looking at factors beyond the legitimacy of the state. See Edmundson, *Law Abidance*, *supra* note 12, at 6 (observing that, relative to typical accounts of the generic duty to obey the law, “[a] virtue-ethical account need not place such stress on the moral credentials of the state; and this is an advantage”).

231. See GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY*, *supra* note 38; Cantu, *Virtue Jurisprudence and the American Constitution*, *supra* note 38.

232. See Solum, *The Aretaic Turn in Constitutional Theory*, *supra* note 13; Strang, *Originalism and the Aristotelian Tradition: Virtue's Home in Originalism*, *supra* note 39.

233. See G. Alex Sinha, *Original(ism) Sin*, 95 ST. JOHN'S L. REV. ____ (forthcoming 2021–22) (considering virtue-based arguments for and against originalist constitutional interpretation).

234. See FARRELLY & SOLUM, *Aretaic Theories*, *supra* note 13, at 2 (discussing and defending this view).

235. See FARRELLY & SOLUM, *Aretaic Theories*, *supra* note 13, at 2–3.

stability. This conclusion counts in favor of a more nuanced form of virtue jurisprudence that takes seriously the aims of traditional rights-based theories on the possibility that the two methodological approaches dovetail in significant ways.

CONCLUSION

The growing popularity and importance of virtue jurisprudence is undeniable, but its scattershot application, its focus on ideal theory, and its conservative presumptions about the relationship between individuals and the law have all colluded to hide its potential. Virtue jurisprudence is both powerful and plastic, and it is backed by a rich philosophical tradition. It is a methodology that should be adopted more widely to identify and explore the deficiencies in the law. As the foregoing suggests, it holds a particular and underappreciated promise for theorists working on systemic disadvantage and other forms of harm imposed by the legal system itself.