Juridification and Regulating the Modern Lawyer

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Abstract

To say that lawyers are everywhere is only a slight exaggeration, yet the legal ethics regimes tasked with regulating the profession do not contemplate most of what modern lawyers do. As this Article explains, a major reason for this is juridification, a process describing (i) the sheer growth in the volume and increasing specificity of new laws, (ii) the increase in the authority and reach of judicial dispute resolution, and (iii) the proliferation of law-like procedures and legalistic decision-making in non-juridical organizations. Interestingly, this expansion of lawyer influence occurred against the backdrop of a countertendency in lawyer regulation. Legal ethics regimes self-consciously moved away from expansive, aspirational rule-setting to—with the advent of the American Bar Association's Model Rules of Professional Conduct ("Model Rules") —narrow rules that articulate only minimum standards of conduct. Put simply, at the very same time that lawyers began suffusing more and more of public life, the legal profession's regulatory apparatuses became more insular. I argue that these two forces—juridification and the retreat of legal ethics to minimum dictates—have rendered legal ethics regimes largely unresponsive to a significant proportion of lawyerly activity, including activity with great capacity to produce social harm. I conclude by suggesting some interventions.

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INTRODUCTION

In the 1939 film *Jesse James*, Henry Hull's character—a chain-smoking newspaperman named Major Rufus Cobb—goes on a now-classic diatribe about lawyers.[1] Complaining that society has gotten too polite, Cobb exclaims:

> "[I]t's the lawyers . . . a-messin' up the whole world. Ten years ago, we didn't have no lawyers and we got along fine. . . . But look at it today. Here in Liberty [Missouri], we got hundreds of lawyers, thousands of 'em, as far as the eye can see, nothin' but lawyers."
>
> [Cobb's niece, Zeralda Cobb, interjects to remind him that there are only two lawyers in their entire town of Liberty.]
>
> "Two? Is that all?" Cobb asks. "Then they run around too much."[2]

In his own crude way, Rufus Cobb happened upon an insight that serious scholars of the legal profession have advanced in recent years: lawyers' influence has reached near-ubiquity.[3] As an empirical matter, the sheer number of lawyers has indeed grown substantially; according to annual surveys administered by the

1. JESSE JAMES (20th Century Fox 1939).
2. *Id.*
3. *See* Marc Galanter, *More Lawyers than People*, *in* THE PARADOX OF PROFESSIONALISM: LAWYERS AND THE POSSIBILITY OF JUSTICE 68 (Scott L. Cummings ed., 2012). Galanter explains that "in the United States – and elsewhere – entered a period of unprecedented growth on a number of dimensions – the amount of litigation, the number of lawyers, the density of legislation and regulation, expenditures on law, and its presence in public consciousness. I think it is fair to refer to this growth as legalization." *Id.*

American Bar Association ("ABA"), the number of "licensed, active attorneys" in the United States has increased by 15.2% in the decade between 2008 and 2018.[4] Some work in non-practicing capacities, as suggested by the well-worn meme of the "recovering lawyer."[5] But lawyers also exert greater influence outside law firms in their *distinct capacity as lawyers*. Indeed, the growth of the in-house lawyer in settings as diverse as corporations, government agencies, and non-profit organizations has attracted considerable scholarly attention of its own.[6] Like the lawyers of Rufus Cobb's imagination, modern lawyers are, as a matter of fact, running around more.

Yet, the expansion of lawyers' professional influence only tells part of the story. The domain of law has itself expanded too, as part of a broad phenomenon that legal theorists call *juridification*.[7] Juridification is often used to describe what John Gardner has called "the proliferation of law,"[8] or what Kerry Rittich has explained as the "growing eminence of law and rights."[9] Juridification's causes are varied, but it is occurring in at least three respects. First, the sheer volume of codified laws and regulations has grown substantially—certainly in the United States, but also in countries like Germany—and with ever-increasing scope.[10] Accompanying this expansion is an increased complexity and specification of the law.[11] Second, judicial systems became the locus of activity that was previously the exclusive domain of non-judicial institutions such as legislatures; for instance, central questions of economic and social rights. As Ran Hirschl describes, the "reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies" is "arguably

4. *New ABA data reveals rise in number of U.S. lawyers, 15 percent increase since 2008,* A.B.A. (May 11, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2018/05/new_aba_data_reveals/ [https://perma.cc/99ZG-UJWU].

5. Elizabeth Edwards famously described herself as a "recovering lawyer" in a 2004 interview with The New York Times. *See* Deborah Solomon, *Running Mate*, N.Y. TIMES (Sept. 5, 2004), https://www.nytimes.com/2004/09/05/magazine/running-mate.html [https://perma.cc/VXL6-YB2M]; *see also* Barbara A. Spellman, *Reflections of a Recovering Lawyer: How Becoming a Cognitive Psychologist – And (In Particular) Studying Analogical and Causal Reasoning – Changed My Views About the Field of Psychology and Law*, 79 CHI.-KENT L. REV. 1187 (2004).

6. Scholars such Larry Ribstein, Omari Scott Simmons, and James Dinnage tracked the rise of in-house counsel in corporate settings, where lines are increasingly blurred between lawyers as legal advisors and lawyers as businesspeople. *See* Larry Ribstein, *Delawyering the Corporation*, WIS. L. REV. 305 (2012); Omari Scott Simmons, *The Under-Examination of In-House Counsel*, 11 TRANSACTIONS: THE TENN. J. BUS. L. 145 (2009); Omari Scott Simmons & James D. Dinnage, *Innkeepers: A Unifying Theory of the In-House Counsel Role*, 41 SETON HALL L. REV. 77 (2011).

7. *See, e.g.*, Kerry Rittich, *Enchantment of Reason/Coercions of Law*, 57 U. MIA. L. REV. 727, 727 (2003) ("[I]t is already clear that the process of juridification has changed how we think and talk about ourselves and reconceived the options for social ordering.").

8. John Gardner, *The Twilight of Legality*, 43 AUSTRALASIAN J. OF LEGAL PHIL. 1, 5 (2019).

9. Rittich, *supra* note 7, at 727.

10. *See* Daniel Martin Katz, Corinna Coupette, Janis Beckedorf & Dick Hartung, *Complex Societies and the Growth of Law*, 10 SCI. REP. 18737 (2020).

11. *See generally* Daniel Martin Katz & M.J. Bommarito II, *Measuring the Complexity of the Law: the United States Code*, 22 A.I. L. 337 (2014).

one of the most significant phenomena of late twentieth and early twenty-first-century government."[12] Third, in addition to—or perhaps because of—the expansion of law and legal systems, there is a commensurate proliferation in what I term "legalistic decision-making." In this frame, activities that would have previously been governed by ordinary principles take the form of quasi-legal determinations, often replate with quasi-legal procedure. This is particularly true of public policymaking processes but is observed in settings as varied as corporations and educational institutions. One popularly recognized by-product of the expansion of legalistic decision-making is the predominance of legal language and rights-based discourse but also the proliferation of legal-procedural mechanisms in non-judicial institutions such as corporations.[13]

As this juridification occurs, the legal profession naturally takes on a more significant role as an interlocutor of certain social and political rights and obligations. As a historical matter, the legal profession's expansion in the twentieth century was one of both size and influence. The sheer number of lawyers in the United States increased significantly during this period, but much more interesting is the scope of activities that have come under lawyers' purview.[14] Where in the early 20th century, lawyering was traditionally conceived of as direct client representation in adjudicative or transactional settings, lawyers in an increasingly juridified society occupy more varied roles as advisors, counselors, advocates, lawmakers, policymakers, regulators, and the like.[15] Put simply, a juridified world re-casts lawyers as lead characters in events in which they would have otherwise played a supporting role.

Of course, individuals trained as lawyers have been involved in numerous types of non-legal activity—from policy advocacy, to business leadership, to presidential politics. The scope expansion I am discussing in this Article refers primarily to the phenomenon of more individuals occupying traditionally non-legal spaces in their distinct capacity as lawyers. One illuminating example is lawyering in the field of national security, which has attracted recent attention in Craig Jones' book *The War Lawyers*[16] and Oona Hathaway's recent article "National Security Lawyering in the Post-Cold War Era: Can Law Constrain

12. Ran Hirschl, *The Judicialization of Politics*, *in* OXFORD HANDBOOK POL. SCI. (Robert F. Goodin ed., 2011).

13. Rittich, *supra* note 7, at 727 ("The growing eminence of law and rights must count among the most salient characteristics of our time."); *see also* JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART 7 (2021).

14. *See Legal Profession Statistics,* A.B.A. (Aug. 5, 2019), https://www.americanbar.org/about_the_aba/profession_statistics/ [https://perma.cc/68N2-QWDC].

15. Some of this is observation, as there have not been empirical studies of the sprawl of lawyer jobs. But for a discussion of the legal profession that makes largely the same point in the context of specialization, see generally Michael S. Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C. L. REV. 1003 (1994).

16. CRAIG JONES, THE WAR LAWYERS (2021).

Power?"[17] Both scholars describe lawyers as increasingly central to decision-making about everything from when to engage in warfare, to the legality of specific types of military actions to the propriety of domestic and international surveillance.[18] Governments may recognize the legitimacy-cultivating function of cloaking decision-making in legal language. It also suggests a defensive awareness of ongoing juridification, as governments will involve lawyers in non-legal decision-making, perhaps because they recognize that even these types of decisions are increasingly subject to distinctly legal challenges. The proliferation of corporate general counsel and Chief Legal Officers tells the same story; the law's size, complexity, and reach have expanded the market for *ex ante* legal advice so significantly that more and more corporate activity requires threshold legal analysis.[19]

This poses a major problem for legal ethics. As an initial matter, legal ethic regimes are notoriously parochial and tend to contemplate a narrow lawyer-client relationship.[20] As a consequence, the rules are insufficiently responsive to complex legal-ethical challenges. While this narrowness has been true of legal ethics since the advent of meaningful lawyer regulation, the introduction of the ABA's *Model Rules* in 1983 ushered in a regime that was largely designed for a discrete industry and not for a profession with a salient public role.[21] The *Model Rules* jettisoned the open-ended, aspirational guidelines that were typical of earlier professional responsibility rules in favor of ever-narrowing quasi-criminal codes of conduct and accompanying sanctions that function as a set of "minimum standards."[22] This countertendency to juridification, which I term here "professionalization", is easily summarized as follows: at the same time that

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17. Oona Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Power?*, 68 U.C.L.A. L. REV. 2 (2021).

18. *See generally* Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons,* 83 N.C. L. REV. 411 (2005); *see also* David McGowan, *Some Realism about Parochialism: The Economic Analysis of Legal Ethics,* 8 LEGAL ETHICS 117 (2005).

19. Hadfield noted as early as 2010 that:

> most corporate work is before-the-fact, everyday advice on what contracts to sign, which regulations apply, how conduct is likely to be interpreted by enforcement authorities or in the event of litigation, what the options are for modifying the extent of legal liability, how to manage a dispute before it becomes a lawsuit, and so on.

Gillian K. Hadfield, *Higher Demand, Lower Supply: A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 132 (2010). Marc Galanter builds on this by explaining that "an increasing portion of legal services are supplied to corporations, governments, and other institutional actors." *See* Galanter, *supra* note 3.

20. A quick glance at the *Model Rules* makes clear that it is designed with the dyadic lawyer-client relationship in mind. But scholars have too remarked on the regulatory field's narrowness. *See, e.g.*, Barton, *supra* note 18, at n. 160 ("The bulk of the Rules govern the lawyer-client relationship.").

21. Barton, *supra* note 18, at 414.

22. *Id.*

lawyers began suffusing more and more of public life, the legal profession's regulatory apparatuses turned more insular.

With this established, this Article makes three contributions: one theoretical, one legal, and one normative. In Part I's theoretical contribution, I intervene in the literature and propose a reconceptualization of juridification as an umbrella phenomenon that encompasses three related processes: (1) legal expansion, which refers to the growth of law and its complexity; (2) judicialization, a term borrowed from the political science literature that describes the increasing preeminence of courts as sites for resolution of social and political disputes; and (3) proceduralization, which refers to what Harry W. Arthurs and Robert Kreklewich call "the penetration of law and legalism into domains previously governed by other forms of social ordering."[23] In Part II's legal contribution, I discuss the phenomenon of professionalization and argue that the highly professionalized modern legal ethics has three specific shortcomings: (1) it relies too heavily on specific rules that function as narrow, minimum standards; (2) it is limited in scope; and (3) it over-emphasizes trial settings, which represent a decreasing proportion of legal service engagements. In Part III's normative contribution, I propose two interventions that take the first step toward resolving legal ethics' shortcomings.

I. RE-THEORIZING JURIDIFICATION

Jurgen Habermas offered the first full treatment of juridification in the second volume of *A Theory of Communicative Action*.[24] His concept of juridification—*verrechtlichung*[25]—was highly influenced by three related ideas: (1) Karl Marx's *realabstraktion*, which critiqued how social relations came to be dominated by universalist logic,[26] (2) Max Weber's rationality thesis, which articulated an evolutionary model of legal authority from religious-charismatic to formal-rational, wherein the emergent formal law expands to structure the relationship between the state and the market,[27] and (3) the German theorist Otto Kircheimer's review of "legalism," which contemplated how "the reduction of political conflicts to legal questions" would undermine working-class power.[28] The common thread between these three ideas is the view that law has a certain totalizing power and

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23. Harry W. Arthurs & Robert Kreklewich, *Law, Legal Institutions, and the Legal Profession in the New Economy*, 34 OSGOODE HALL L.J. 1, 18 (1996).

24. JURGEN HABERMAS, 2 THE THEORY OF COMMUNICATIVE ACTION 317 (1981); *see also* Klaus Eder, *Critique of Habermas' Contribution to the Sociology of Law*, 22 LAW & SOC. REV. 5 (1988).

25. HABERMAS, *supra* note 24.

26. It is important to note that Marx may not have actually used this term—New Marx scholars make this point forcefully, though it has come to be used in subsequent literature to describe the same idea. *See* Alberto Toscano, *The Open Secret of Real Abstraction*, 20 RETHINKING MARXISM 273 (2008).

27. For a discussion of how Habermas's "notion of juridification combine[d] two conceptual sources," see Daniel Loick, *Juridification*, *in* THE CAMBRIDGE HABERMAS LEXICON 208 (Amy Allen & Eduardo Mendieta eds., 2019).

28. *Id.*

tends to colonize the social relations it interacts with. To Habermas, juridification involved the subordination of social activity to law and its associated hyper-rational processes.[29] Habermas argued that juridification was central to the development of the modern welfare state, which relied on legal institutions to enshrine the social rights it guaranteed politically.[30]

Despite its rich origins in the sociology of law, the juridification literature has come to be frustratingly ambiguous. Legal theorists have used juridification to describe vastly different processes. To many, it involves the increase of formal and enforceable law.[31] Indeed, this was even the starting point for Habermas's view; he wrote that the "expression 'juridification' refers quite generally to the tendency toward an increase in formal (or positive, written) law that can be observed in modern society."[32] To others, juridification is less about quantifiable increases in the positive law and more about the expansion of the law's power and influence.[33] The widening scope of judicial authority as well as the increasing public salience of lawyers are two examples of juridification under this view. In some of the more expansive definitions, juridification is described as something akin to the law's enduring reach outside of judicial settings. For instance, Arthurs and Kreklewich describe juridification as the "process of extrapolating expectations of lawfulness and fairness from state courts to other public agencies, and from the state sphere to private institutions."[34] The inconsistency in these definitions led Gunther Teubner to describe juridification as "designat[ing] so many diverse phenomena that it must be carefully delimited before any sensible pronouncements can be made about it at all."[35]

Taken together, these varied definitions create at least two problems for the literature. First and most importantly, the definitional issues all but ensure that significant proportions of the scholarship are speaking past one another. Take the normative "debates" as one example. Formulations of juridification as the rapid production of laws are often accompanied by critiques of juridification as a vehicle for over-regulation and excessive state intervention.[36] John Gardner's *Twilight of Legality*, for instance, lamented the "massive but pathetic display of legislative machismo" as undermining the rule of law because it would necessarily

29. *See generally* Mathieu Deflem, *Law in Habermas' Theory of Communicative Action*, 20 PHIL. & SOC. CRITICISM 1 (1994).

30. *See generally* John Tweedy & Alan Hunt, *The Future of the Welfare State and Social Rights: Reflections on Habermas*, 21 J. L. & SOC'Y 288 (1994).

31. Gardner, *supra* note 8, at 5–6.

32. HABERMAS, *supra* note 24, at 358.

33. Arthurs & Kreklewich, *supra* note 23, at 18.

34. *Id*. at 29–30.

35. Gunther Teubner, *Juridification Concepts, Aspects, Limits, Solutions*, *in* JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST AND SOCIAL WELFARE LAW 4 (Gunther Teubner ed., 1987).

36. Gardner, *supra* note 8, at 2.

demand selective—if not sporadic—enforcement.[37] At the very same time, some of the literature explaining juridification as the extension of juridical influence to previously "non-legal disputes" sees the process as the result of a preference by the polity for law's perceived clarity and even rigor.[38] The key insight is that these contributions are not necessarily in disagreement as their normative conclusions might suggest. Rather, they are discussing markedly different processes under the same label.

Here, I reconcile the confusion in the literature by reinterpreting juridification as an umbrella phenomenon for three distinct processes: legal expansion, judicialization, and proceduralization. The first, legal expansion, is shorthand for what is empirically observable: the sheer number of laws and regulations has increased and the field of regulated activity is larger as a result.[39] The second, judicialization, refers to two subprocesses: the expansion of court jurisdiction (resulting in part from legislative expansion), and the harder to quantify, but nevertheless growing, salience of courts as the site for the resolution of previously non-legal processes (e.g., political dispute).[40] The third, proceduralization, also refers to the rise of legalistic decision-making, wherein non-legal activity comes to resemble legal process. Figure 1 below illustrates the framework.

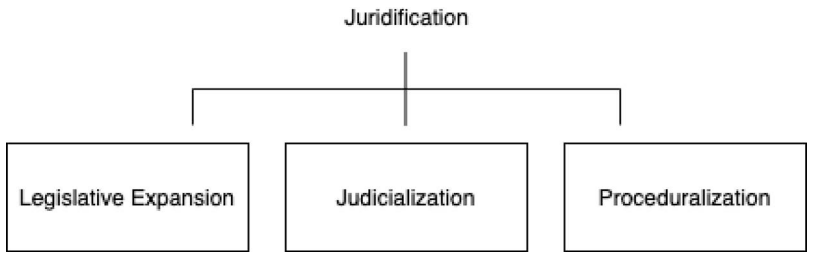

FIGURE 1

The benefit of this framework is two-fold. First, in treating juridification as an umbrella term and inclusive of subprocesses, the framework allows for the relevant literature—including those focused on a single subprocess—to be considered together. Absent a framework that integrates these literatures, scholars may be inclined to engage some texts at the expense of others. Second, the framework accommodates related concepts from cognate disciplines (e.g., judicialization).

37. *Id.* at 3.

38. *See, e.g.*, GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS 27 (2011) (describing how Americans desire the "the purity, clarity, and efficiency of judicial rulings and barely tolerat[e] the gray ambiguity and frustrating inefficiency of the political process").

39. Katz et al., *supra* note 10.

40. *See, e.g.*, John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 L. & CONTEMP. PROBS. 41 (2002).

These literatures are often longer standing and better developed than the legal scholarship on the same subject and thus merit attention in any discussion of juridification.

The literature is also conspicuously silent on the effect of juridification processes on regulating the legal profession. Indeed, lawyer regulation hardly arouses the interest of theorists. One possible reason for this is that the field of legal ethics is rather bisected. As William H. Simon explains, there are "two prevailing conceptions" of legal ethics in the literature.[41] The first is chiefly concerned with the "disciplinary rules of the codes" and the technical processes associated with regulating law as a profession.[42] The second conception of legal ethics involves discussion of the ethical and moral behavior of lawyers as individuals, including "constraints of role on self-expression and the legitimacy of requiring the individual lawyer to perform actions in role that conflict with her personal values."[43] Though legal ethics pedagogy tends to fixate on the former conception, the latter attracts the most scholarly attention, perhaps because it more obviously intersects with a rich and substantial literature about the relationship between law and morality. By contrast, few scholars have applied legal-theoretical concepts to a treatment of the legal profession as its own social and political phenomenon, independent of the actions of individual lawyers. Rather, the literature about the legal profession and lawyer regulation tends to conduct what Simon calls "exegesis" of the relevant disciplinary codes.[44] Indeed, scholars of legal ethics have written extensively on self-contained issues, such as confidentiality,[45] but considerably less about the myriad legal-ethical issues that fall outside of the proscribed rules.

A. JURIDIFICATION AS 'LEGAL EXPANSION'

The first of juridification's subprocesses is legal expansion. Legal expansion happens in at least two ways: (1) more law is produced, in the form of legislation, regulations, and case law, and (2) that law tends to be more complex and differentiated.[46] The result is a network of legal rights and obligations that is sprawling, overlapping, and interdependent. American legal scholars have long anticipated the law's expansion. In the early 1980s, Guido Calabresi and Ellen Ash Peters wrote of "statutorification," understanding that the American legal system shifted in the latter half of the twentieth century from reliance on *ad hoc* adjudication to

41. William H. Simon, *The Trouble with Legal Ethics,* 41 J. LEGAL EDUC. 65, 65 (1991).

42. *Id.*

43. *Id.*

44. *Id.* at 67.

45. *See, e.g.*, William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptation of Evasion and Apology,* 23 L. & SOC. INQUIRY 243 (1998); Stephen Pepper, Commentary, *Why Confidentiality?*, 23 L. & SOC. INQUIRY 331 (1998); William H. Simon, *Attorney-Client Confidentiality: A Critical Analysis*, 30 GEO. J. LEGAL ETHICS 447 (2017).

46. John Gardner describes the example of England and Wales between 1997–2006, where over 3,000 new *criminal* laws were enacted and correspondingly few were repealed. *See* Gardner, *supra* note 8, at 2–3.

statutes and regulations as the law's primary source.[47] Since then, the proliferation of statutes and regulations has been demonstrated empirically: Coupette, et al. found that U.S. federal statutes grew monotonically (four percent between 1998 and 2008 and two percent from 2009 to 2018) in a twenty-year period, with the number of federal regulations increasing at an even faster rate.[48]

The increasing production of laws and the increasing complexity of those laws are inextricable. Occasionally, commentators will focus on the former at the expense of the latter.[49] The problem with only paying attention to the increase in the law's volume is that this approach fails to capture the changing role of law in modern society. Where the stylized conception of the American legal system imagines a model of laws as external constraints, a more responsive legal theory recognizes that the law is just as frequently about giving structure to social relationships. The external constraint model imagines that law functions on the outer bounds of social activity and is implicated only when the actions of one of the actors in the arena bumps up against one of the boundaries. The external constraint model imagines tort law to matter when, say, accidents occur. Thinking of the law under the more dynamic model of internal structuring rules, however, recognizes that law—to use Robert H. Mnookin and Lewis Kornhauser's metaphor[50]—casts a shadow on the activity it governs even where disputes are not present. Tort law, for example, becomes highly salient in the context of a dispute, but the looming specter of negligence lawsuits will generally prompt sophisticated businesses to purchase insurance *ex ante*. Importantly, this does not mean that the content of the law influences the activity of a given actor in this frame. Rather, it recognizes the extent to which the relationships and collisions within the frame are undertaken in response to legal requirements. Returning to the example of tort law, the internal structuring model recognizes tort law as mattering when accidents occur but also governing certain *ex ante* behaviors, like risk mitigation practices and even personnel decisions. This is especially clear in concrete examples: corporations and governments engaged in activity that could plausibly arouse negligence claims will purchase insurance, hire risk officers, and take precautions necessary to limit legal exposure.[51]

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47. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1–2 (1982); Ellen Ash Peters, *Common Law Judging in a Statutory World: An Address*, 43 U. PITT. L. REV. 995 (1982).

48. Corinna Coupette, Janis Beckedorf, Dirk Hartung, Michael Bommarito & Daniel Martin Katz, *Measuring Law Over Time: A Network Analytical Framework with an Application to Statutes and Regulations in the United States and Germany* 12 (2021), https://arxiv.org/pdf/2101.11284 [perma.cc/7BE9-8TKV].

49. *See, e.g.*, Gardner, *supra* note 8.

50. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950, 950 (1979).

51. *See, e.g.*, Simon Halliday, Jonathan Ilan & Colin Scott, *The Public Management of Liability Risks*, 31 OXFORD J. L. STUD. 527, 529, 538–39 (2011); Donald Pagach & Richard Warr, *The Characteristics of Firms that Hire Chief Risk Officers*, 78 J. RISK INS. 185 (2011) (noting the growing prominence of enterprise risk management); *see also* Brian W. Nocco & René M. Stulz, *Enterprise Risk Management: Theory and Practice*, 18 J. APPLIED CORP. FIN. 8 (2006).

The causes for the law's increased volume and complexity are highly varied. One plausible explanation is that the law is bound to be complex and occasionally incoherent because it is not designed by well-coordinated central planners but is instead created in contested political arenas among heterogeneous interests.[52] As a result, the law is overproduced to satisfy stakeholders. As one example, consider Paul H. Robinson and Michael T. Cahill's examination of the Illinois and Kentucky criminal statutes.[53] The authors found an increase in specialized laws aimed at criminalizing behavior that was already well-covered by pre-existing laws.[54] Robinson and Cahill marshal the example of a statute criminalizing "delivery container theft" in Illinois; the state's general theft statute already makes such behavior illegal, but special interest groups—perhaps a delivery container lobby?—succeeded in securing special statutory protections.[55] Perhaps as frequently as lobbyists, legislators themselves pursue strategies that promote the accumulation of legal provisions. Recent scholarship has established that legislators will frequently circumvent procedural roadblocks by "tagging" legislation with additional provisions that likely would have been standalone legislation in past decades.[56] This practice all but ensures that the ultimate legislation is expansive and complex.

These explanations—though true—are somewhat unsatisfying because they tend to view legal expansion and its resulting complexity as an accident of legislative processes. Instead, legal complexity is fundamentally a response to law intervening in dynamic social activity. As Katz, et al. explain, "[l]awmakers create, modify, and delete legal rules to achieve particular behavio[]ral outcomes, often in an effort to respond to perceived changes in societal needs."[57] Sometimes, the target activity demands intricate laws. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010's provisions regulating over-the-counter derivatives markets are well-elaborated because of how highly technical the financial instruments themselves are.[58] Other times, lawmakers use

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52. Here, I refer both to the common law, which is developed over time, and the lawmaking process of legislatures.

53. Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633 (2005).

54. *Id*. at 637–39.

55. *Id*. at 637–38.

56. Andreu Casas, Matthew J. Deny & John Wilkerson, *More Effective Than We Thought: Accounting for Legislative Hitchhikers Reveals a More Inclusive and Productive Lawmaking Process*, 64 AM. J. POL. SCI. 1 (2020); Glen S. Krutz, *Tactical Maneuvering on Omnibus Bills in Congress*, 45 AM. J. POL. SCI. 210 (2001).

57. Katz et al., *supra* note 10, at 1.

58. For instance, *Dodd Frank* contains the "Volcker Rule," which includes a provision that regulates, among other things, derivatives. Some scholars have noted that the complexity of the rule is related to the complexity of its target activity. *See, e.g*., Kimberly D. Krawiec & Guangya Liu, *The Volcker Rule: A Brief Political History*, 10 CAP. MKTS. L.J. 507, 508 (2015) (noting the "complexity of the rule and the activities it seeks to regulate"). *But see* Chester S. Spatt, *Complexity of Regulation*, 3 HARV. BUS. REV. 1 (2012), which takes the opposite view:

> While I recognize that to some degree complexity in financial structure breeds complexity in regulation, often the causality is reversed. Complexity in regulation leads to complexity in financial

legislation to accomplish broad programmatic agendas. Returning to the Dodd-Frank example, it has been called a "likely candidate for the biggest law ever,"[59] but many scholars have likened it to the New Deal both because of its omnibus character and because of its self-conscious attempt to stabilize the *entire* financial system.[60]

As another example of expanding complexity, consider the Internal Revenue Code ("Tax Code"). The Tax Code is notoriously complex; surveys have demonstrated that taxpayers think of it as too complicated, [61] and no less than a dozen academic articles are dedicated solely to the issue of tax complexity.[62] Deborah L. Paul identifies three forms of statutory complexity: (1) complication, (2) intractability, and (3) incoherence.[63] Complication is what most think of when they consider the Tax Code; the document, downloadable from the government website that hosts the entire U.S. Code, is a 7,065 page file.[64] That sheer size and scope are further complicated by the detail of the provisions contained in the law. Intractability refers less to the size than to the difficulty of evaluating and applying a given provision.[65] Consider the following example: Section 7701 (o) of the Tax Code codified the common law Economic Substance Doctrine and simply requires that a transaction be set aside for tax purposes if it does not meaningfully change the taxpayer's financial position and if it does not have a

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structures and systems, particularly in light of the efforts of market participants to mitigate the costs and complications induced by regulation, including attempts to engage in regulatory arbitrage.

59. Patrick A. McLaughlin, Oliver Sherouse, Mark Febrizio & M. Scott King, *Is Dodd-Frank the Biggest Law Ever?* 7 J. FIN. REG. 149, 174 (2021).

60. *See, e.g.*, Saule T. Omarova, *The Dodd-Frank Act: A New Deal for a New Age?*, 15 N.C. BANKING INST. 83, 84 (2011).

61. *See, e.g.*, Courtney Coren, *Tax Poll: Most Americans Say Tax Code Is Too Complicated*, NEWSMAX (Apr. 11, 2013) ("A Quinnipiac University poll of 1,711 registered voters released Thursday found that 64 percent of respondents believe their tax returns are too confusing to figure out on their own and they end up hiring someone to prepare them."); *see also* J.B. Ruhl & Daniel Martin Katz, *Measuring, Monitoring, and Managing Legal Complexity*, 101 IOWA L. REV. 191 (2015).

62. With thanks to Daniel Martin Katz and J.B. Ruhl for compiling the following articles, see Michelle Arnopol Cecil, *Toward Adding Further Complexity to the Internal Revenue Code: A New Paradigm for the Deductibility of Capital Losses,* 99 U. ILL. L. REV. 1083 (1999); Steven A. Dean, *Attractive Complexity: Tax Deregulation, the Check-the-Box Election, and the Future of Tax Simplification*, 34 HOFSTRA L. REV. 405 (2005); Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 VA. TAX REV. 645 (2003); James S. Eustice, *Tax Complexity and the Tax Practitioner*, 45 TAX L. REV. 7 (1989); Stanley A. Koppelman, *At-Risk and Passive Activity Limitations: Can Complexity Be Reduced?*, 45 TAX L. REV. 97 (1989); Susan B. Long & Judyth A. Swingen, *An Approach to the Measurement of Tax Law Complexity*, 8 J. AM. TAX. ASS'N. 22 (1987); Edward J. McCaffery, *The Holy Grail of Tax Simplification*, 1990 WIS. L. REV. 1267 (1990); John A. Miller, *Indeterminacy, Complexity, and Fairness: Justifying Rule Simplification in the Law of Taxation*, 68 WASH. L. REV. 1 (1993); Deborah L. Paul, *The Sources of Tax Complexity: How Much Simplicity Can Fundamental Tax Reform Achieve*?, 76 N.C. L. REV. 151 (1997); *see also* Ruhl & Katz, *supra* note 61.

63. Paul, *supra* note 62, at 154.

64. United States Code, Public Law 118-39, OFF. OF THE L. REVISION COUNS. (2024), https://uscode.house.gov/download/download.shtml [https://perma.cc/LK5S-C7G5].

65. *See* Paul, *supra* note 62, at 159.

substantial purpose.[66] Unlike, say, the transfer pricing provisions of Section 482,[67] 7701(o) involves few sentences with little specificity, and makes no significant cross-references to other laws for interpretive purposes.[68] Yet it is highly dense. Indeed, recent scholarship has demonstrated that 7701(o)'s codification contributed to yet more confusion in tax practice.[69] That is an example of tax complexity that exists beyond the somewhat superficial manner in which observers might look for complications. Incoherence is where "interpretation of the law is more difficult because the competing purposes embodied in the regime favor inconsistent interpretations."[70] The Tax Code has numerous such examples.

Sticking with this example, consider how the complexity outlined above substantially increases the need for lawyers. More legal complication means more demand for lawyers with specialized training to understand, analyze, and ultimately advise about said legal complications. For so-called "sophisticated" clients, the traditional cost-benefit calculus of retaining legal services becomes skewed; even relatively easy-to-understand legal provisions that are nevertheless long and excessively detailed might be worth hiring lawyers for, as the sheer volume of information increases the risk that untrained clients might miss information that later results in a significant tax penalty. Importantly, complication also means that *ex ante* legal advice is more highly valued. In the stylized legal system, lawyers exist to advise on high stakes matters, aid transactions, and act as representatives in dispute settlement processes. In a context of legal complications, lawyers may be relied upon to advise as to whether an activity is *ex ante* compliant, because (1) the scope of the applicable law has broadened to regulate more of the client's activity, and (2) the degree of detail and differentiation of rules increases the possibility of inadvertent non-compliance.[71]

Where there is intractability or incoherence there is a similar need for professional skills. Take the example of Section 7701(o) of the Tax Code once again. Though the provision demands that transactions must have economic substance to be respected for tax purposes, the absence of meaningful guidance and examples requires that substantial legal research be conducted to determine how a given tax approach is likely to be treated by the Internal Revenue Service or future courts. This typically means consulting case law, which will itself be complex; at a minimum, a case about Section 7701(o) will synthesize prior case law,

66. *See* Benjamin Alarie & Abdi Aidid, *Predicting Economic Substance Cases with Machine Learning*, 22 J. TAX. PRAC. & PROC. 35, 37–38 (2020).

67. 26 U.S.C. § 482.

68. *See* 26 U.S.C. § 7701(o)(1)(a).

69. *See* Amandeep S. Grewal, When Is the Economic Substance Doctrine 'Relevant' to a Transaction? (Aug. 17, 2022) (Univ. Iowa Legal Studies Rsch. Paper No. 2023-29) (available at: https://ssrn.com/abstract=4193230) ("Although styled as a clarification, Section 7701(o) has sown further confusion into the tax law.").

70. Paul, *supra* note 62, at 162.

71. Consider the Volcker Rule once more. When introduced, lawyers would, hypothetically, be consulted to provide advice on the new regulations and explain its complexity.

analyze corporate tax planning activities, and present a judgment, the scope and applicability of which may vary widely depending on the relative salience of certain facts, the procedural posture, or the applicable doctrine.[72] Even if this happened to be straightforward, case law is interpretable according to principles that are generally inaccessible without a legal education (e.g., *stare decisis*). Taken together, legal expansion that increases the size and complexity of the law creates a comprehension gap between lawyers and laypeople that makes clients in complex legal systems dependent on professional interlocutors.

In some circumstances, the legislation itself expressly contemplates the lawyer as its interlocutor. Two notable, but radically different, examples are the Violence Against Women Act of 1994 ("VAWA"),[73] and the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley," also known as Public Company Accounting Reform and Investor Protection Act).[74] VAWA, which was drafted "in close cooperation"[75] with the National Organization for Women's Legal Defense and Education Fund, recognized that advocates for women's health and safety were "shift[ing] their focus from grass roots efforts to help battered women and their children leave abusive partners" to "advocating for legal remedies to assist battered women."[76] Accordingly, the legislation: (1) expanded criminal law protections for victims of domestic violence, (2) expanded the restraining order and civil protection regimes, and (3) committed substantial monies to funding legal services, the vast majority of which went to "law school clinics, legal services offices, and bar associations" across the United States.[77] VAWA's funding for legal services even dwarfed its funding for shelters.[78] The new provisions necessarily made lawyers more central to strategies to protect victims, for instance, by making civil protection and restraining orders the most immediately available relief for battered women.[79]

In an entirely different context, Sarbanes-Oxley also depended on lawyers to achieve its legislative objective of reducing corporate accounting malfeasance through controls, auditing standards, and new penalties.[80] Section 307

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72. *See, e.g.*, Reddam v. Comm'r of Internal Revenue, No. 22557–08, 2012 WL 1215200 (T.C. Apr. 11, 2012).

73. 42 U.S.C. § 13925(a) (expired 2019) (reauthorized 2022). VAWA's provisions creating a federal cause of action for victims of gender-based violence attracted particular resistance and were eventually struck down by the Supreme Court in *U.S. v. Morrison*. United States v. Morrison, 529 U.S. 598 (2000).

74. 15 U.S.C. § 7201.

75. Nancy Whittier, *Carceral and Intersectional Feminism in Congress: The Violence Against Women Act, Discourse, and Policy*, 30 GENDER & SOC'Y 791, 792 (2016).

76. Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 J. GENDER, SOC. POL'Y & L. 499, 499 (2003).

77. *Id.* at 502–03.

78. *Id.*

79. *See generally* Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 NW. U. L. REV. 827 (2004).

80. *See generally* Roger C. Cramton, George M. Cohen & Susan P. Koniak, *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725 (2004).

of Sarbanes-Oxley gives the U.S. Securities and Exchange Commission ("SEC") the authority to impose its "minimum standards of professional conduct"[81] upon lawyers practicing before the agency, and

> requires the [SEC] to adopt rules 'requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof).[82]

This effectively gave lawyers responsibilities similar to auditors; rather than enabling securities transactions or rendering legal advice, lawyers were now empowered to serve in what John C. Coffee and others have called a "gatekeeping" function.[83] This means that a given corporate action might not even take place if it does not meet a lawyer's approval.[84]

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81. Robert N. Rapp, *Commentary: Sarbanes-Oxley and SEC Standards of Professional Conduct*, 57 CASE W. RSRV. L. REV. 365 (2007).

82. Peter J. Henning, *Sarbanes-Oxley Act § 307 and Corporate Counsel: Who Better to Prevent Corporate Crime?*, 8 BUFF. CRIM. L. REV. 323, 324 (2004) (quoting from Sarbanes-Oxley, 15 U.S.C. § 7245 (2002)).

83. *See generally* John C. Coffee Jr., *Gatekeeper Failure and Reform*: *The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301 (2004). Thus far, my account of legal expansion suggests that lawyers' influence increases as a necessary by-product of law's growing size and complexity. But legal expansion also changes the dynamics of the market for legal services in ways that further entrench lawyers. As we know from economics literature, law is one of the canonical examples of a *credence good*. *Id.* Credence good markets are where the information asymmetry so favors the seller that buyers find it virtually impossible to determine whether they (1) need the product, or (2) whether the product is of desirable quality. *Id*. Professional service professions with highly trained specialists will frequently create credence good problems. For instance, a dermatologist will diagnose a skin condition and also recommend a course of treatment. Absent equivalent training, the patient's knowledge of dermatology is probably too limited to meaningfully evaluate whether the dermatologist is correct or if the treatment is necessary. In the extreme, this creates significant room for fraud and abuse; imagine a doctor over-diagnosing in order to recommend unnecessary treatments that are nevertheless profitable for her practice. But even without bad faith, the patient is at an information disadvantage that significantly limits her ability to challenge her diagnosis and prescription. Further, she is not well-positioned to evaluate whether she got her money's worth from the dermatologist. The same dynamic exists in the market for legal services. In a given lawyer-client interaction, assuming clients have layperson-level knowledge, lawyers will have information advantages that accrue precisely because of the volume and complexity of law.

84. At this juncture, it is worth clarifying that whether lawyers exploit unwitting clients in *credence good* transactions is beyond the scope of this Article. Rather, the point I make here is that the information advantage that lawyers enjoy as a result of legal expansion all but ensures that non-specialist clients will rely on lawyers without great scrutiny. A second clarification: this Article does not explore the common refrain among some members of the public that lawyers purposely complicate laws to maintain their professional relevance. Whether this is true or not is beyond the scope of this Article, but that explanation does not account for the trend towards more law and more complex law. Indeed, lawyers have been over-represented in U.S. lawmaking institutions since the founding of the Republic; Alexis de Tocqueville famously described the legal profession as "America's aristocracy." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, Chapter XVI (1835). As Adam Bonica explains, at that time, lawyers were just "0.4 percent of the voting age population," but "accounted for 39 percent of seats in the House and 56 percent of seats in the Senate." Adam Bonica, *Why Are There So Many Lawyers in Congress?*, 45 LEGIS. STUD. Q. 253, 253.

B. JURIDIFICATION AS 'JUDICIALIZATION'

A second, related subprocess of juridification is known as "judicialization." Where legal expansion contemplates the increase in the volume and complexity of law, judicialization is about the elevation of judicial and other adjudicative institutions as the primary sites for resolving what Ran Hirschl calls "core moral predicaments, public policy questions, and political controversies."[85]

Before proceeding, it is worth identifying the relationship between judicialization and my prior discussion of legal expansion. In short, legal expansion is a necessary pre-condition for judicial institutions to have the substantial influence that they enjoy today. Alec Stone Sweet offers a helpful theoretical outline of the judicialization process:

> Contracting and other forms of rulemaking (constitutional, regulatory, commercial, and so on) create a social demand for third-party dispute resolution (TDR); to the extent that this demand is supplied, more contracting, or interactions within the rules, will be stimulated. Given certain conditions, a feedback loop will be constructed, connecting two variables: (a) rulemaking, and contracting under rules, and (b) TDR. If the judge gives reasons for her decisions, and if those who contract and use TDR consider these reasons to have some precedential value, then a second (causally related) feedback loop will emerge, linking (c) the lawmaking that issues from TDR with how future legislating, contracting, and disputing takes place. Once forged, these feedback mechanisms will constitute a "virtuous circle" . . . a system of governance that places those who would use TDR under the authority of the judge's lawmaking, as that lawmaking evolves.[86]

Stated differently, judicialization results from a series of feedback effects that take place once an adjudicative body establishes some authority in a system. Rulemaking occurs, creating a greater need for dispute resolution, which then supplies rules back to stakeholders in the form of precedent. Those rules, then, structure how future activity is conducted as well as how future rules are made (e.g., laws are drafted to be consistent with court rulings). The result is that courts enjoy somewhat of a supervisory authority. For one stylized but illustrative example, imagine a new piece of federal consumer protection legislation is enacted. That legislation might end up in the courts because of direct challenges to its lawfulness or because a dispute arises under a provision of the statute. In either case, courts will supply information to the law's stakeholders (e.g., anyone who is subject to the statute) about how that statute ought to be interpreted and what its parameters are. That information structures the behavior of, say, sellers of consumer products regulated by that statute. At the same time, it structures the

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85. Ran Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, 75 FORDHAM L. REV. 721, 721 (2006).

86. Alec Stone Sweet, *The European Court of Justice and the Judicialization of European Governance*, 5 LIVING REVS. EUR. GOVERNANCE 2, 4 (2010).

behavior of legislators who might wish to create future consumer protection legislation. This feedback loop means that wherever the law expands, courts exercise influence beyond their simple dispute resolution authority.[87]

Importantly, though judicial review is a driver of judicialization, especially in post-World War II democracies, judicialization is not simply the expansion of judicial review.[88] Expansive judicial review may abet judicialization by enabling judges to intervene in more legislative activity, but judicialization refers more accurately to a repositioning of courts as instruments for achieving social and political objectives *in addition to* ordinary dispute resolution. The litmus test for whether a given action is indicative of judicialization is not whether a given court is asserting broad jurisdiction; rather, it is whether the court is playing a role that a non-juridical institution would have played in the past. Consider the rise of strategic impact litigation. *Brown v. Board of Education*, as one example, involved an organized civil rights effort to mount a "concerted campaign of individual rights litigation to persuade a court to undertake a major change in public policy that legislatures and executives have refused."[89] Since *Brown*, scholars have noted such litigation has become a default strategy for social movement organizing as diverse as environmental campaigns to racial justice advocacy.[90] The rise of strategic litigation is not limited to these causes, though; corporations are using courts affirmatively to effectuate long-term policy goals, as well.[91]

One compelling explanation for courts becoming the site for more and more political activity lies in their counter-majoritarian nature. As much as the lawyers in *Brown* recognized that convincing a nine-member Supreme Court was more feasible than convincing majorities from both houses of Congress (or even worse, legislatures in all fifty states), interest groups understand that a favorable judicial

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87. Identifying the historical origins of judicialization in the United States is no easy task because the baseline level of judicialization is rather high relative to other countries where the same processes are occurring. One way to navigate this difficulty is to distinguish between the mere expansion of judicial review and judicialization. John Ferejohn identifies three ways that judicialization manifests: (1) courts, through their judicial review powers, become increasingly willing to "impos[e] substantive limits on the power of legislative institutions", (2) courts "increasingly become places where substantive policy is made," and (3) courts become "increasingly willing to regulate the conduct of political activity itself-whether practiced in or around legislatures, agencies, or the electorate-by constructing and enforcing standards of acceptable behavior for interest groups, political parties, and both elected and appointed officials." John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 L. & CONTEMP. PROBS. 41, 41 (2002).

88. Torbjörn Vallinder, *The Judicialization of Politics. A World-Wide Phenomenon: Introduction*, 15 INT'L POL. SCI. REV. 91, 91–95 (1994).

89. Martin Shapiro, *Juridicalization of Politics in the United States*, 15 INT'L POL. SCI. REV. 101, 104 (1994).

90. *See, e.g.*, David S. Meyer & Steven A. Boutcher, *Brown v. Board of Education and Other Social Movements*, 5 PERSPS. ON POL. 81, 81 (2007).

91. This is also observable in the rise of amicus briefs in appellate litigation. *See, e.g.*, Jeanna Becker Kane, *Lobbying Justice(s)? Exploring the Nature of Amici Influence in State Supreme Court Decision Making*, 17 STATE POL. POL'Y Q. 251, 257 (2017) ("Amicus curiae filings in products liability law tend to be dominated by business and corporate interests arguing for limited tort liability.").

decision is a relatively resource-efficient pursuit.[92] The outcomes generated by strategic litigation themselves further entrench courts. This sometimes happens directly when courts assert medium-term supervisory authority to ensure harms are adequately ameliorated, such as how in the historic *Floyd v. City of New York* case concerning the legality of the New York City Police Department's "stop-and-frisk" policy, the court bifurcated the opinion into separate "liability"[93] and "remedial"[94] decisions. The remedial decision included, among other things, an independent monitor tasked with overseeing police reform efforts.[95] The monitor—naturally—was himself monitored by the court.[96]

Much as in legal expansion, the social role of lawyers grows in the context of judicialization.[97] Lawyers' influence accrues as a result of judicialization in three related respects. First, as the court becomes the site of resolution, lawyers are positioned as the brokers of judicial attention. This is largely self-explanatory; lawyers are necessary to bring lawsuits and to manage litigation in general, and, in fact, have a monopoly on the provision of legal services that involves interacting with courts. Second, lawyers become translators of a growing category of social and political rights that, because of judicialization, are being expressed in legal terms and contested in adjudicative settings. Take, as one example, the role of lawyers in public interest litigation. These cases are not simply about winning cases in the traditional sense.[98] Instead, these cases aspire to rulings from courts that result in socially and politically desirable outcomes.[99] Lawyers advising on

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92. Shapiro makes a similar point:

> The judicial process is developed as an alternative to the more explicitly political processes of partisan electoral politics and interest group lobbying. A non-elected, "independent" and "neutral" court steps in to correct a "failure" or "pathology" of the democratic process. The substitution of judicial policy making for legislative/executive policy making is legitimated in part by the invocation of minority rights against majority will and in part by the argument that in certain rare instances democracy is not self-correcting without judicial intervention.

Shapiro, *supra* note 89, at 103–04.

93. *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

94. *Floyd v. City of New York*, 959 F. Supp. 2d 668 (S.D.N.Y. 2013).

95. *Id.* at 676 ("I am appointing an independent monitor . . . to oversee the reform process. I have chosen Peter L. Zimroth to serve as Monitor.").

96. *Id.*

> Because of the complexity of the reforms that will be required to bring the NYPD's stop and frisk practices into compliance with the Constitution, it would be impractical for this Court to engage in direct oversight of the reforms. As a more effective and flexible alternative, I am appointing an independent monitor (the 'Monitor') to oversee the reform process.

Id.

97. Here, a clarification: judges are lawyers, but this Article excludes them and conceives of lawyers as representatives.

98. *See* Scott L. Cummings & Deborah Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 609 (2009) (noting that recent scholarly accounts explain that such "litigation is shaped by clients and community activists and the objective is political transformation, not doctrinal victory").

99. *See id.*; *see also* Thomas M. Hilbink, *You Know the Type. . .: Categories of Cause Lawyering*, 29 L. & SOC. INQUIRY 657, 683 (2004). For a discussion of cause lawyering in a context outside of the United States,

cases about, hypothetically, racial inequality in schools after *Brown* would be making choices not simply about how to win the case but weigh the likelihood of *ex post* enforceability and deciding whether to seek relief in the form of a general or specific standard. By virtue of their training and skills, lawyers are uniquely positioned to assess and advise on these implications; in the context of impact litigation, this means deep involvement in planning movement strategy and public policy. As Mark Tushnet observes, lawyers' interests in the cases immediately following *Brown* were also inextricably bound up with broad social and political objectives.[100] For instance, Tushnet explains that lawyers were pursuing relief in the form of a

> simple and easily understood rule, parallel to the rule condemning state laws mandating the separation of children by race. The reason . . . is that favorable rulings that take the form of general standards are not nearly as useful to the cause lawyers, who typically have relatively limited resources and cannot afford to litigate the kinds of fact-intensive cases that standards (rather than rules) favorable to them generate.[101]

The broader takeaway from Tushnet's example here is that judicialization creates conditions for lawyers to shift from an assistive role to a much more active participatory and stakeholder role. This does not simply happen by lawyers encroaching (though scholars would do well to consider the extent to which judicialization might undermine lawyers' fidelity to their clients). Nor does it necessarily occur only because the machinery of the courts demands that interactions be mediated through duly licensed attorneys. These factors contribute to the picture of judicialization, of course, but are helped along by a broader shift toward adjudicated relief as a more widely shared objective.

Lawyers are further entrenched because case outcomes in these strategic lawsuits are expressed in narrow legal terms. Cases rarely, if ever, announce absolute rights, such that non-lawyer stakeholders would have clarity as to what future behaviors are necessarily permitted or constrained. An appellate decision delivering victory to a plaintiff, for instance, will not typically condemn the defendant outright; instead, courts will find facts and affirm substantive legal or procedural principles that effectively translate to a full or partial vindication of the plaintiff's rights. Examples abound in the U.S. Supreme Court. Consider, for instance, the 1993 landmark case of *Shaw v. Reno*.[102] There, the Court confronted a highly politicized factual context: white residents of North Carolina challenged the state's redistricting efforts because the electoral map created unusual districts

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see generally RICHARD L. ABEL, POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980–94 (1995).

100. Mark V. Tushnet, *Litigation Campaigns and the Search for Constitutional Rules*, 6 J. APP. PRAC. & PROCESS 101, 101 (2004).

101. *Id.*

102. Shaw v. Reno, 509 U.S. 630 (1993).

that were designed only to create African American majorities.[103] The appellants stated that the electoral map violated the Equal Protection Clause of the Fourteenth Amendment.[104] After a district court dismissed the action "for failure to state a constitutional claim," a 5-4 majority of the Supreme Court held that the appellants did properly allege a Fourteenth Amendment claim, thus remanding the case to the district court for reconsideration.[105] As Frank R. Parker summarizes:

> The majority ruled that although the state's redistricting plan was race-neutral on its face, the "extremely irregular" shapes of the districts "rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race" . . . This made the plan a racial classification, triggered the strict scrutiny standard of review, and shifted the burden to the state to prove that the plan "is narrowly tailored to further a compelling governmental interest."[106]

Consider the *Shaw* decision from the perspective of a non-specialist. Four distinct legal maneuvers occur here. First, the Court assesses the facts to determine if race was a factor. The rest basically demands specialized training: once race is established as a factor, the Court identifies the appropriate standard of review (here, strict scrutiny), shifts the burden of proof, and then applies the nebulous strict scrutiny standard to the state's actions (which themselves were quite contested).[107] The significance of this is not just the legal complexity, though that certainly makes lawyers indispensable to the action. The key in this example is that *the Court's landmark ruling does not respond to the initial plaintiff's desires.* Instead, the Court negotiates an outcome through its substantive rules and procedural mechanisms. Lawyers are tasked with understanding and translating that material back to their clients and the wider community. Indeed, cases involving popular rights are routinely reduced to legalisms. In *Daimler AG v. Bauman*, for instance, the plaintiffs sought redress for human rights abuses, but the case was ultimately resolved on personal jurisdiction grounds.[108] Cases are terminated on civil procedure grounds fairly regularly, but what is most significant about this kind of resolution is that the technical legal resolution affects all substantive claims going forward. Also, because litigation begets litigation, lawyers become yet more entrenched when the rules announced as part of the various impact litigations become contested. This is particularly true in situations wherein results that would have been previously expressed socially and politically become narrow legal victories. A canonical example of this is the ever-present constitutional

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103. Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA,* 59 WM. & MARY L. REV. 1559, 1560 (2018).

104. *Shaw*, 509 U.S. at 630.

105. Frank R. Parker, *Shaw v. Reno: A Constitutional Setback for Minority Representation*, 28 POL. SCI. & POL. 47, 47 (1995).

106. *Id.*

107. *Shaw*, 509 U.S. at 630.

108. Daimler AG v. Bauman, 571 U.S. 117, 121–22 (2014).

litigation about the legality of affirmative action in higher education.[109] The nature of the relief issued in those cases was particularly vulnerable to legal challenge; indeed, the cases almost invited legalized responses from organized counter-interest groups.[110] The political contest thus becomes one between lawyers.

To illustrate this more clearly, consider a stylized model of pre-juridification policy advocacy. In this primordial model, the dispute originates in the community and then becomes attached to a certain social or political right. The nature of that right will dictate the institutional levers that aggrieved parties will try to access. Take, for instance, conservationists who wish to stop corporate polluting. Whether corporate pollution is illegal is just one of the considerations for policy advocates and, at best, would be one of several strategies—the leading ones involving the traditional venues of representative politics or political/community action. Compare this with how juridification has changed the same sort of policy advocacy. In this stylized model of social and political dispute resolution in the context of judicialization, lawyers are involved sooner in the process than in the pre-juridification model. At the first stage, a dispute arises in the community that implicates a social or political right. The dispute may be resolved through ordinary social relations, but, if a party wishes to invoke legal process, then the dispute is re-framed as a legal issue. Lawyers are involved in this process and work to attach their clients' grievances to a recent judicially- or statutorily-created right, then navigate those clients through the legal process.[111]

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109. *See generally* Tomiko Brown-Nagin, *Elites, Social Movements and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005).

110. Daniel Lipson writes compellingly about how the classification exercises in these cases made them vulnerable to challenge. Daniel Lipson, For Whom Does the Affirmative Action Bell Toll? The Legal Deconstruction of Racial Classifications in Post-Civil Rights America (Aug. 11 2010) (unpublished paper) (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1657283)

> The Supreme Court's decision in *City of Richmond v. J. A. Croson Co*. (1989) case paid particular attention to the government policy's choice of recipients, as the city of Richmond, Virginia, instituted a set-aside procedure that was designed to award contracts to a wide array of non-white groups including Eskimos even though none were known to live in Richmond. As La Noue and Sullivan point out, affirmative action is vulnerable to challenge if exposed for-masking important differences within the categories.

111. Though the literature primarily attributes judicialization to a combination of substantive changes in the law and strategic shifts in groups' organizing models, Martin Shapiro argues that judicialization is as much a function of the composition of the American judiciary as it is the result of the law enabling judges to exercise broad power. Martin Shapiro, *The United States*, *in* THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjorn Vallinder eds., 1995) Shapiro explains:

> The American judiciary is recruited very largely from among middle-aged, successful private practitioners who have been deeply and directly involved in private enterprise, who typically have little or no experience in government, and who typically have built some substantial portion of their success on representing interests heavily regulated by government. The American judge usually comes to the bench after a life of deep and direct involvement in the private sector, generally representing private clients against government rather than vice versa. American judges thus bring to the bench a wealth of knowledge of the everyday affairs of the private sector that their continental counterparts certainly do not have and their English counterparts have in far less abundance. In addition, they bring the perspectives of the governed rather than those of the governors.

C. JURIDIFICATION AS 'PROCEDURALIZATION'

In addition to legal expansion and judicialization, a third subprocess of the broader phenomenon of juridification is proceduralization.[112] I use the term proceduralization here to refer to the rise of legalistic decision-making, wherein non-legal activity comes to resemble legal process. Where legal expansion accounts for the growth of the law and legal complexity, and where judicialization accounts for the pre-eminence of courts, proceduralization explains what Arthurs and Kreklewich call "the penetration of law and legalism into domains previously governed by other forms of social ordering."[113]

The tendency to proceduralize is closely related to the other subprocesses of juridification (legal expansion and judicialization). Consider the following stylized rendering. First, the advent of new laws and the increasing complexity of those laws creates compliance pressure on institutions.[114] The expansive judicial oversight and the ever-present specter of litigation may similarly incentivize institutions to prioritize risk management. This may help explain institutional responses; for instance, it stands to reason that increased litigation risk would prompt institutions to respond by systematizing practices in ways that are predictable and auditable. As a result, institutions may be pushed to pursue their core activities in a defensive manner.

The canonical example of this form of proceduralization is the modern administrative agency. The best evidence of this is the extent to which administrative agencies are replate with complex procedures that often mirror judicial decision-making. Even leaving aside formal administrative dispute resolution tribunals,

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Id. There are challenges with Shapiro's claim that the special composition of the American judiciary is responsible for judicialization. The first and most obvious objection is that judicialization is indeed a global phenomenon. In the very same special issue of the *International Political Science Review* that Shapiro's contribution appears, so too do essays by political scientists such as Torbjorn Valinder, Chrstine Landfried and C. Neal Tate, with such titles as "Judicialization of Politics: A World-Wide Phenomenon," "Judicialization of Politics in Germany" and "Judicialization of Politics in the Phillipines and Southeast Asia," respectively. Moreover, Shapiro's view here suggests that judges are themselves active drivers of judicialization, or to use his language, "the crucial cause." This claim merits some closer interrogation. Judges are limited to matters that are brought before them by litigants. By the time matters come before judges, the work of selecting the courts as the appropriate site for resolution of the dispute has already been done. In other words, the phenomenon of judicialization is less about what courts do, and more about what courts have *become* (i.e. the locus of political and social negotiation).

112. The term has been used elsewhere before. *See generally* Julia Black, *Proceduralizing Regulation: Part I*, 20 OXFORD J. LEGAL STUD. 597 (2000).

113. Harry W. Arthurs & Robert Kreklewich, *Law, Legal Institutions, and the Legal Profession in the New Economy*, 34 OSGOODE HALL L.J. 1, 18 (1996).

114. This has been studied in the context of the aforementioned Dodd-Frank Act, wherein the new 2010 laws led to significant increases in banks' "non-interest expenses," including "salary expenses from hiring new workers and in non-salary expenses such as auditing, consulting, and legal fees." Thomas L. Hogan, *Costs of Compliance with the Dodd-Frank Act*, BAKER INST. FOR PUB. POL. CTR. (Sept. 6, 2019), https://www.bakerinstitute.org/research/dodd-frank-costs-compliance#:~:text=The%20Dodd%2DFrank%20act%20roughly,in%20proportion%20to%20new%20regulations [https://perma.cc/YN65-5J43]; *see also* Thomas L. Hogan & Scott Burns, *Has Dodd–Frank affected bank expenses?*, 55 J REGUL. ECON. 214 (2019).

processes for everything from obtaining benefits to providing services increasingly involve quasi-legal standards and multi-step tests; for example, determinations in New York City schools about who is entitled to special education under an Individual Education Plan ("IEP") involve complex procedures and mandatory documentation.[115] There are also specialized procedures for when IEPs can be amended, procedures for obtaining consent, and procedures for obtaining review and expediting review.[116] If problems arise, parties have familiar due process tools like mediation, hearings, and appeal procedures to resolve disputes.[117] Unsurprisingly, there is a whole industry of special education lawyers focused on representing children and parents in these processes, and according to rules promulgated by New York's Board of Regents, hearing officers *must* be lawyers with at least one year of experience.[118]

Before proceeding, a conceptual clarification is needed: proceduralization is distinct from legal expansion and judicialization because it describes the proliferation of procedure and law-like decision-making. In an organizational context, this means that internal organizational structures might be increasingly governed by legal norms. Just as often, it is evident in the presence of new institutions that we traditionally associate with the juridical world, such as dispute settlement mechanisms. Proceduralization is also observable in how organizations increasingly rely on compliance measures for legitimacy-cultivation purposes.

Proceduralization is not only apparent in such hyper-localized examples as New York City schools, but also in macro-settings like international organizations. Consider, as one example, the World Trade Organization ("WTO"). Debra Steger and J.H.H. Weiler's works on the WTO demonstrate how the organization, initially designed for diplomatic practice, has effectively become a hybrid legislative-adjudicative body.[119] Practically, this meant the advent of dispute resolution processes and compliance mechanisms that supplanted norms underpinning diplomacy.[120] Weiler notes that by proceduralizing in this way, the WTO failed to anticipate that it was importing a "legal culture," as well.[121] Steger and Weiler

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115. *See generally Special Education Standard Operating Procedure*, N.Y.C. DEP'T OF EDUC. (Nov. 16, 2021), https://infohub.nyced.org/docs/default-source/default-document-library/specialeducationstandardoperatingproceduresmanualmarch.pdf?sfvrsn=4cdb05a02 [https://perma.cc/7KSL-4YC2].

116. *Id*. at 8. For instance, regarding consent, the document reads that "for a school-age student, initial evaluation or requested reevaluation must be completed within 60 days of provision of parental consent." *Id*. Note that this is just one of a number of timelines which must be mandatorily complied with in order for parents to achieve objectives under the IEP.

117. *Id*. at 117.

118. Reema Amin, *With vote, NY Regents try to ease backlog of special education complaints. Advocates say it's just a start*, CHALKBEAT N.Y. (Mar. 15, 2021), https://ny.chalkbeat.org/2021/3/15/22332767/ny-regents-backlog-special-education-complaints [https://perma.cc/3NWJ-NWNE].

119. Debra P. Steger, *The Rule of Law or the Rule of Lawyers?*, 3 J. WORLD INV. 769 (2002); *see also* J.H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 J. WORLD TRADE 191 (2001).

120. Steger, *supra* note 119, at 769.

121. Weiler, *supra* note 119.

both argue that the more law-like procedures permeate through an organization, the greater influence lawyers will ultimately exercise.[122] Weiler in particular notes that importing legal culture has its negatives; he explains:

> Juridification is a package deal. It includes the rule of law and the rule of lawyers. It does not affect only the power relations between members, the compliance pull of the agreements, the ability to settle disputes definitively, and the prospect of authoritative interpretations of opaque provisions. It imports the norms, practices, and habits—some noble, some self-serving, some helpful, some disastrous, some with a concern for justice, some arcane and procedural—of legal culture. It would be nice if one could take the rule of law without the rule of lawyers. But with one, you get the other. The WTO moved to the rule of law without realizing that the accompanying legal culture is as integral as the compliance and enforcement dimensions . . . .[123]

Weiler's observation here is about the WTO, but the insights are hardly WTO-specific. Much like the example of special education procedures in New York City schools discussed above, nearly every effort to institute law-like procedures increases the demand for lawyers to help individuals navigate them.

Though the proceduralization of administrative agencies and international organizations perhaps best illustrates the phenomenon, proceduralization also occurs in non-governmental settings. These effects are particularly observable in private businesses. Sometimes, proceduralization in business is the result of specific legislative requirements, such as Sarbanes-Oxley's compliance provisions.[124] Other times, businesses voluntarily adopt quasi-legal procedures.[125] John W. Cioffi observes this tendency in corporate governance.[126] There, proceduralization is apparent in the proliferation of mandatory disclosure rules and binding intracompany agreements, which replace convention and best practices.

As another example, consider how the modern corporate employment setting will handle complaints of, for instance, sexual misconduct by employees. In the stylized, pre-juridification model, employers who become aware of allegations may pursue a range of actions, including investigating and reprimanding (or declining to reprimand) the accused and referring the case to authorities. Today's workplaces, by contrast, may have policies that resemble statutes or regulations in detail and with complexity.[127] Larger private entities may even establish an

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122. *Id*. Weiler makes this point especially clear in his discussion of the introduction of an Appellate Body to the WTO.

123. *Id*.

124. Peter J. Henning, *Sarbanes-Oxley Act § 307 and Corporate Counsel: Who Better to Prevent Corporate Crime?*, 8 BUFF. CRIM. L. REV. 323, 324 (2004) (quoting from Sarbanes-Oxley).

125. Examples may include employee discipline procedures.

126. John W. Cioffi, *Adversarialism Versus Legalism: Juridifcation and Litigation in Corporate Governance Reform*, 3 REGUL. & GOVERNANCE 235, 236 (2009).

127. As one example, consider Bank of America's 2021 Code of Conduct. BANK OF AMERICA, 2021 Code of Conduct, https://d1io3yog0oux5.cloudfront.net/bankofamerica/files/pages/corporate-governance/governance-

ombudsperson, an office with the imprimatur of quasi-legal authority and charged with investigating and ameliorating wrongdoing.[128] The delegation of this kind of investigatory authority from management to a quasi-juridical, standalone institution suggests a desire to make the setting more law-like, so to speak.

One of the understudied effects of proceduralization has been the increasing willingness on the part of law enforcement and judicial authorities to partner with non-legal institutions to discharge core juridical duties such as investigation and enforcement. One peculiar manifestation of this is the rise of the corporate internal investigation, a subject that has attracted little attention from legal ethics scholars.[129] Internal investigations are commenced by firms where some allegation of misconduct is made or "whenever the company learns that it may be implicated in some form of wrongdoing."[130] Often, internal investigations are launched in response to true regulatory scrutiny.[131] A publicly traded corporation that is concerned about being investigated by the SEC, for example, may commence an internal investigation to gather information about the alleged wrongdoing.[132] Sometimes the findings of these investigations are crucial for investors; indeed, corporations sometimes note the fact of an internal investigation—if not the content of it—in their quarterly and annual reporting (*e.g.*, Form 8-K).[133]

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library/code-of-conduct/2021+ADA+Code+of+Conduct+%28English%29.pdf [https://perma.cc/ELD6-33UD] (last visited Feb. 16, 2024).

128. Ombudspeople occupy an interesting space in legal authority given that they do not have the ability to bind but investigate and resolve complaints by suggesting next steps. For a good discussion about the evolving role, see Milan Remac, *Standards of Ombudsman Assessment: A New Normative Concept*? 9 UTRECHT L. REV 3, 62 (2013).

129. *See, e.g.*, Dennis J. Block & Nancy E. Barton, *Internal Corporate Investigations: Maintaining the Confidentiality of a Corporate Client's Communications with Investigative Counsel*, BUS. LAWYER 5, 6 (Nov. 1979); Robert S. Bennett, Alan Kriegel, Carl S. Rauh & Charles F. Walker, *Internal Investigations and the Defense of Corporations in the Sarbanes-Oxley Era*, BUS. LAWYER, 55, 57 (Nov. 2006); Kevin H. Michels, *Internal Corporate Investigations and the Truth*, 40 SETON HALL L. REV. 83, 87–88 (2010); Bruce A. Green and Ellen S. Podgor, *Unregulated Corporate Internal Investigations: Achieving Fairness for Corporate Constituents*, 54 B.C. L. REV. 73, 78–80 (2013).

130. Bennett et al., *supra* note 129.

131. *See, e.g.*, THE KRAFT HEINZ CO., CURRENT REP. (Form 8-K) (May 2, 2019).

132. *See, e.g.*, Jessica Miley, *Coinbase Launches Internal Investigation After Bitcoin Cash Insider Trading Claims Emerge*, INTERESTING ENG'G (Dec. 20, 2017), https://interestingengineering.com/coinbase-launches-internal-investigation-after-bitcoin-cash-insider-trading-claims-emerge [https://perma.cc/5R4X-GAYV].

133. As one example, see GUESS?, INC.'s July 2018 Form 8-K, which shares the results of an investigation. GUESS?, INC., CURRENT REP. (Form 8-K) (June 11, 2018). Note that similar disclosures can result from government investigations. *See* David M. Stuart & David A Wilson, *Disclosure Obligations Under the Federal Securities Laws in Government Investigations,* BUS. LAWYER, 973, 986 (Aug. 2009).

> Some events arising in an investigation that might require disclosure through Form 8-K are (1) the resignation or removal of a director or certain officers; (2) the conclusion that previously issued financial statements should no longer be relied upon because of an error in the financial statements; (3) the resignation or dismissal of the company's auditor; and (4) entry into a 'material definitive agreement' with a government agency to conclude an investigation.

Id.

The proceduralization here is most evident in the manner in which these internal investigations are conducted. Even those conducted to excavate a company from a public relations scandal resemble legal processes. Witnesses—often company employees—are interviewed.[134] Documents are shared between parties, and even though there is no court-supervised discovery, lawyers conduct extensive confidentiality reviews so as not to inadvertently waive privilege or prejudice future proceedings.[135] As with every one of these examples, internal investigations increasingly involve external counsel.[136] Internal investigation is so common that sophisticated law firms have practices dedicated to handling internal investigations, often staffed with former regulators and prosecutors.[137] The internal investigation is but one of many examples of proceduralization in private settings.

II. THE PROFESSIONALIZATION OF LEGAL ETHICS

As Part I describes, juridification—and its subprocesses of legal expansion, judicialization, and proceduralization—dramatically elevates the significance and public salience of lawyers. Lawyers necessarily become interlocutors for an ever-growing range of activity, much of which was previously the exclusive domain of non-legal professionals. The consequences of juridification for lawyers can be summarized as follows: (1) as law grows more voluminous and becomes more complex, lawyers become more indispensable; (2) as courts become more central to social and political dispute resolution and policymaking, lawyers become necessary both as vehicles for entry into the litigation arena as well as strategic advisors; and (3) as non-legal institutions continue to adopt quasi-legal procedure, lawyers lead decision-making and take up positions as institutional actors rather than auxiliaries. This ever-broadening influence has meant that lawyers' work and influence has far outpaced the regimes tasked with regulating them. Put more starkly, juridification renders the already weak legal ethics regimes virtually impotent.

As I explain in this Part, this poor responsiveness is compounded by what I term here "professionalization," a countertendency to juridification that saw the profession transition from a homogenous, hyperlocal guild or confraternity to a lucrative multi-jurisdictional industry and replace its broad rules with narrow

134. *See* Green & Podgor, *supra* note 129, at 92.

135. For a helpful overview of some techniques, see Jason Day & T. Markus Funk, *Protecting Privilege in Internal Investigations*, PERKINS COIE LLP (2018), https://www.perkinscoie.com/images/content/2/4/248417/Protecting-Privilege-Internal-Investigations-White-Paper.pdf [https://perma.cc/NH4Z-J7C9].

136. *See* Robert F. Hoyt & Joseph K. Brenner, *Investigating the Investigators*, LITIG. 43 (Summer 2004).

137. *See, e.g.*, *Internal Investigations*, PAUL WEISS, https://www.paulweiss.com/practices/litigation/internal-investigations [https://perma.cc/GP4U-2DNS] (last visited Feb. 16, 2024); *White Collar Defense and Investigations*, COVINGTON, https://www.cov.com/en/practices-and-industries/practices/litigation-and-investigations/white-collar-defense-and-investigations [https://perma.cc/WX2C-KW66] (last visited Feb. 16, 2024); *Internal Investigations*, DEBEVOISE, https://www.debevoise.com/capabilities/practice-areas/white-collar-regulatory-defense/internal-investigations/?tab=professionals [https://perma.cc/BVM4-WUXP] (last visited Feb. 16, 2024).

rules that can be only described as minimum standards.[138] Professionalization creates three distinct problems with legal ethics. First, legal ethics rules are unnecessarily narrow, which discourages the kind of wide-ranging ethical deliberation needed to respond to new contexts. Second, legal ethics rules are unnecessarily limited in scope, such that they do not contemplate those new contexts that lawyers find themselves in as juridification continues. Third, legal ethics rules rest on an outmoded model of trial lawyering, such that a disproportionate number of the rules—and, accordingly, regulators' enforcement priorities—are focused on lawyers' interactions with tribunals. The consequence is poor responsiveness to the dynamic lawyering that a juridified world demands.

A. BACKGROUND: FROM ASPIRATIONS TO MINIMUM STANDARDS

A review of the history of the three main documents of legal ethics regulation in the United States—the ABA's 1908 *Canons of Professional Ethics* (the "*Canons*"), the 1969 *Code of Professional Ethics* (the "*Code*"), and today's *Model Rules*—demonstrates a concerted effort by generations of drafters to keep up with a changing profession. James Altman explains that the *Canons* were influenced by George Sharswood's 1854 lectures on legal ethics.[139] Sharswood's view of professional responsibility was a distinctly moral vision; he believed that there was "no profession, after that of the sacred ministry, in which morality [was] more imperatively necessary than that of the law."[140] The *Canons* reflected this approach. Not only were its prescriptions highly moralistic, but they were also highly general and aspirational. In fact, the *Canons* conceded in the very first sentence that it could never "particularize all the duties of the lawyer" and encouraged its readers to think of it as a mere guide.[141]

The next iteration, the *Code*, was a compromise. Geoffrey Hazard, the influential legal ethicist who also served as one of the later drafters of the *Model Rules*,[142] argued that early efforts to codify legal-ethical guidelines were well-meaning, but failed to strike the appropriate balance between minimum standards

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138. *See* Barton, *supra* note 18, at 414.

139. James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2400.

> There were three main texts they consulted in drafting the Canons: (1) a section-by-section compilation of the codes of ethics adopted by eleven state bar associations over the score of years from 1887, when the Alabama State Bar Association adopted the first such code; (2) George Sharswood's Essay on Professional Ethics ('Sharswood's Ethics'); and (3) David Hoffman's Fifty Resolutions in Regard to Professional Deportment ('Hoffman's Resolutions').

Id.

140. BRUCE A. KIMBALL, "THE TRUE PROFESSIONAL IDEAL" IN AMERICA: A HISTORY 147 (1992).

141. CANONS OF PROF'L ETHICS pmbl. (1908).

142. To avoid confusion with the similarly named *Model Code* and other similar documents, I will continue to refer to the American Bar Association's *Model Rules of Professional Conduct* with the italicized "*Model Rules*."

of conduct and "higher principles of legal ethics."[143] Moreover, as Hazard also notes, courts and disciplinary committees were treating the open-ended ethics guidelines as black-letter rules, leading to uneven application and little predictability.[144] Among the organized bar, there was a virtual consensus that the *Code* was inadequate,[145] perhaps best evidenced by the fact that the document was revised nine times in just ten years.[146]

Central to these redrafting efforts was a growing recognition that a modernizing legal profession needed meaningful mechanisms for standardization and enforcement.[147] Three changes were particularly important. First, the legal profession grew significantly. Between 1970 and 1980, the number of active lawyers grew an average of 5.4% per year compared to an average of just 1.4% in the decade prior.[148] Second, large corporate firms became commonplace and were increasingly popular destinations for new law graduates.[149] Third, the profession diversified.[150] The *Code*'s vision of a legal profession as a homogenous fraternity was at odds with the tides of demographic change, the proliferation of multijurisdictional practice, and the increased presence of internationally-trained lawyers.[151]

It was against this backdrop that the *Model Rules* were introduced in 1983. The document, which was the result of six years of committee deliberation involving

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143. Geoffrey C. Hazard Jr., *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEV. ST. L. REV. 571, 572–73 (1981) ("This original conception of the Code was an intelligent experiment—an attempt to legislate rules of minimum conduct while at the same time expounding higher principles of professional ethics. But this experiment has turned out to be a failure, with very adverse consequences for the practicing lawyer.").

144. *Id*. at 573.

145. *See* Don J. Young & Louise L. Hill, *Professionalism: The Necessity for Internal Control*, 61 TEMPLE L. REV. 205, 208 (1988).

146. MODEL CODE OF PROF'L RESPONSIBILITY preface (1980) [hereinafter MODEL CODE].

147. For example, Melissa Mortazavi explains that:

> [a]s the preface to the Model Code makes explicit, the Model Code was drafted in direct response to contemporary practice. It noted that the-changed and changing conditions in our legal system and urbanized society require new statements of professional principles. New demographics of people were joining or about to join the profession in force. The-[r]ecruitment into the profession was affected by programs reaching out to racial minorities and women, whose assimilation into law practice became both a norm of public policy and a legal duty. The profession was also growing quickly in size, partially in response to the expansion of the administrative state.

Melissa Mortazavi, *The Cost of Avoidance: Pluralism, Neutrality, and the Foundations of Modern Legal Ethics*, 42 FLA. ST. U. L. REV. 151, 159 (2014).

148. *ABA National Lawyer Population Survey: Historical Trend in Total National Lawyer Population, 1878 - 2019*, A.B.A. (2022), https://www.americanbar.org/content/dam/aba/administrative/market_research/total-national-lawyer-population-1878-2022.pdf [https://perma.cc/XAP9-DDHB].

149. *See* MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 57 (1991) (describing the significant increase in law firms throughout the mid-20th century and noting how the increased competition and emergence of meritocracy in firm recruiting led to "changes in the social composition of new recruits . . . the social exclusiveness in hiring . . . receded into insignificance").

150. *See* SUSAN EHLRICH MARTIN & NANCY C. JURIK, DOING JUSTICE DOING GENDER: WOMEN IN LEGAL AND CRIMINAL JUSTICE OCCUPATIONS 112 (2007).

151. *Id*.

prominent lawyers and academics,[152] jettisoned the open-ended, moralistic guidelines of the *Canons* and the *Code* in favor of specific black-letter rules for lawyer conduct. In this sense, the *Model Rules* resemble criminal statutes in both form and substance. They read as strict prohibitions on certain behaviors and contemplate discipline where violations occur. Effectively gone are the broad moral guidance-type statements that characterized previous ethics codes, leading some commentators to openly wonder whether the "ethics" in legal ethics remains appropriate. As one example, Shaffer compared ethics rules for attorneys to "the motor vehicle code – as an administrative regulation having very little to do with being righteous and an attorney simultaneously."[153] And though legal ethics scholarship has been highly critical of the shift from aspirations to minimum standards,[154] it is important to recognize that the *Model Rules*' predecessor documents did not lay a meaningful foundation for regulating lawyer conduct, either. Aspirational statements do not lend themselves to enforcement, and even where there were more specific rules, they were administratively impracticable. This was widely understood before the advent of the *Model Rules*; Anthony Amsterdam criticized the *Canons* in particular as "vaporous platitudes . . . which have somewhat less usefulness as guides to lawyers in the predicaments of the real world than do valentine cards as guides to heart surgeons in the operating room."[155]

B. THE PROBLEMS OF PROFESSIONALIZATION

With this history established, it is worth outlining the contours of professionalization. First, a note on the relationship between juridification and professionalization. Though I present these as two forces trending in opposite directions (juridification toward expansion of legal rights and obligations, professionalization toward minimalism), juridification and professionalization have a reciprocal influence. As an initial matter, even though professional legal regulatory apparatuses appear disinterested in acknowledging lawyers' expansive role in a juridified world, the process by which they achieve this regulatory minimalism is itself indicative of increased juridification. The story I tell above about how regulators eschewed aspirational and philosophical statements in favor of formal rules is consistent with the inexorable trend toward legalism. Indeed, there is an open question as to whether juridification is always accompanied by a sort of narrowing; perhaps the proliferation of formal legal rules depoliticizes certain areas of social life by relocating their center of gravity from the contested yet accessible

152. *See generally* Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 40 (1989).

153. Thomas L. Shaffer, *On Religious Legal Ethics*, 35 CATH. LAW. 393 (1994).

154. In addition to the examples throughout this article, see also Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. CAL. L. REV. 1273 (1997).

155. Norman W. Spaulding, *The Artifice of Advocacy*, *in* LAW AND LIES: DECEPTION AND TRUTH TELLING IN THE AMERICAN LEGAL SYSTEM 81, 100 (Austin Sarat ed., 2015).

political arena to the highly specialized, fortified, and technocratic world of law and adjudication.

The discussion below explores the three main problems of professional legal ethics as we understand it. First, the rules upon which legal ethics regimes rely are exceedingly narrow. The rules do not have the flexibility necessary to either properly regulate the legal profession or guide attorney behavior. Second, the rules are limited in scope. This means that they do not cover a significant proportion of lawyer activity. As a result of juridification, lawyers are involved in a greater share of public life. As with the examples discussed in the previous Part, this includes areas that are traditionally "non-legal." The rules do not speak to this growth in any meaningful way. Third, and relatedly, legal ethics regimes are built around an outmoded conception of the trial lawyer. Not only do a substantial proportion of the rules specifically address interactions with tribunals in the context of active litigation, but they fail to anticipate other forms of lawyering. Even if the only lawyers that existed were litigators, the rules would still be inadequate because they do not contemplate other forms of dispute resolution.

1. PROBLEM I: THE RULES ARE EXCEEDINGLY NARROW

The first problem with highly professionalized legal ethics rules is that the rules themselves are exceedingly narrow. An examination of the *Model Rules* reveals that most of its commands take the form of prohibitions on specific conduct. As it happens, specific minimum standards exist only for behaviors for which it is hard to imagine significant disagreement. Difficult topics that the *Modul Rules* do cover—for instance, what constitutes proper "candor" before a tribunal—are still presented in the form of broad standards.[156] Simpler ethical questions, such as whether a lawyer should ever appropriate a client's property without consent, necessarily receive quick treatment in the form of an express prohibition.[157]

Granted, the arguments in favor of this form of rule design are compelling in certain contexts. Specific prohibitions promote predictability for lawyers who might confront legal-ethical problems as a matter of daily practice. Just as importantly, specific prohibitions give regulators a practicable set of rules by which to impose discipline if necessary. This brings down enforcement costs; if most violative conduct is clearly violative, then enforcement demands less onerous investigation and adjudication.[158] Relatedly, specific prohibitions also reduce error costs, as broad standards create more room for sub-optimal outcomes that reduce the rules' deterrent effects.[159] But even with this established, three consequences flow from the rules as minimum standards. First, the rules do not

156. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2023) [hereinafter MODEL RULES].

157. MODEL RULES R. 1.15(a).

158. *See* William Landes & Richard Posner, *The Economics of Anticipatory Adjudication*, 23 J. LEGAL STUD. 683 (1994).

159. *Id*. at 684–86.

promote meaningful "ethical deliberation."[160] As highly specified commands and prohibitions, the *Model Rules* demand what Heidi Li Feldman calls a "technocratic" analysis from their subjects.[161] Individuals trying to understand how to behave under the rules, then, might conduct the same form of legal analysis that lawyers will apply to other statutes and regulations. As Barton also explains:

> Black letter rules trigger a particular mode of thinking-or heuristic-in lawyers: we are trained to read carefully and to analyze rules to find (as precisely as possible) the boundary between legal and illegal behavior. When lawyers apply this same boundary-seeking process to issues of ethics or professional responsibility, the search for the border between permitted and proscribed behavior frequently displaces any consideration of the more general ethical question: "is this the right thing to do?"[162]

Elsewhere, Li Feldman makes the point with a more specific reference to "statutory codes of professional ethics": "statutory codes of professional ethics seem to trigger in lawyers dispositions that, at worst, run counter to ethical dispositions, and, at best, make them appear superfluous. The extent and strength of this tendency may be debatable, but its existence is clear."[163] Importantly, this tendency toward technocratic analysis of the *Model Rules* does not necessarily mean that lawyers are behaving less ethically. Rather, it means that the sort of deliberation that they undertake is oriented toward identifying boundaries. "Best practices," then become about sanctions-avoidance and not maximizing ethicality. In this context, the purpose of a given rule is abstracted away. Rather than recognize that the conflict-of-interest rules contained in Rules 1.7 and 1.8 are about promoting diligent representation without encumbrances, for instance, lawyers engaging in technocratic analyses of the rules may avoid only technical conflicts without regard to those that affect their clients' interests but escape the rules' strict terms. To the extent that regulators expect lawyers to aspire to ethicality and *not* engage in technocratic analyses of the ethics rules, they promote a disjuncture between the reasoning processes that make one an effective lawyer and the reasoning processes that make one an ethical lawyer. Promulgating rules that read like traditional statutes yet push lawyers to reach higher standards than the rules themselves articulate calls for discontinuous reasoning.

Some rules demand more complicated inquiries but nevertheless encourage technocratic analysis. Take, for instance, the rules governing confidentiality of

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160. Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 885 (1996).

161. *Id.*

162. Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons,* 83 N.C. L. REV. 411, 423–24 (2005).

163. Feldman, *supra* note 160, at 931.

information. Rule 1.6(a) reads that a "lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."[164] The statement begins first with a strict prohibition ("lawyer shall not reveal information . . .") followed by criteria under which that prohibition can be disregarded (if there is "informed consent" or impliedly authorized disclosure). Paragraph B then goes on to list further circumstances wherein the lawyer *may* disclose private information:

> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
>
> (4) to secure legal advice about the lawyer's compliance with these Rules . . .[165]

Here, the rule follows a framework somewhat familiar to lawyers who work with statutes—a statement amounting to a strict prohibition followed by a series of exceptions that effectively undermine the prohibition. The exceptions have some inherent ambiguities, also. For instance, under Rule 1.6(b)(2) and (3), lawyers may disclose information to "prevent the client from committing a crime or fraud" or "prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services."[166]

At worst, lawyers engaging in the technocratic analysis warned by Li Feldman might begin and end their inquiry with whether or not one of the exceptions contained in Rule 1.6(b) is present, ignoring any semblance of purposive interpretation. Recall that the purpose of confidentiality is to facilitate the exchange of all pertinent information between lawyer and client and to create conditions for lawyers to advocate with partisan zeal.[167] These exceptions represent the outer limit of the principle and serve to protect lawyers from aiding and abetting clients who

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164. MODEL RULES R. 1.6(a).

165. MODEL RULES R. 1.16(b).

166. MODEL RULES R. 1.6(b)(2), (3); *see also* Douglas R. Richmond, *Lawyers' Duty of Confidentiality and Clients' Crimes and Frauds*, 38 GA. ST. U. L. REV. 493, 497 (2022).

167. Dru Stevenson, *Against Confidentiality*, 48 U.C. DAVIS L. REV. 337, 337 (2014) ("The conventional wisdom is that strict confidentiality rules are necessary to foster client-lawyer communication, thereby providing lawyers with information they need for effective representation.").

abuse their representation in bad faith. Yet the black-letter nature of these rules encourages lawyers to think of the exceptions as the exhaustive list of situations where a lawyer should make disclosures. Now consider a legal-ethical problem that emerges in a context not expressly contemplated by the list of exceptions. Imagine a criminal defense lawyer is representing a client accused of harassment. As part of the discovery process, the client learns his alleged victim's home address, as well as the addresses of family members of the alleged victim. The lawyer is reasonably certain the client has an inclination to stalk his alleged victim based on words and actions observed during the lawyer-client relationship. Later, the prosecution accuses the lawyer's client of having made contact with the alleged victim. In this case, Rule 1.6 does not counsel the lawyer to disclose that he believes his client stalked the alleged victim because of the limited nature of the exceptions; however, if the principle underlying the rule is germane to the lawyer's analysis, then disclosure makes sense to protect the lawyer from the client's wrongdoing and protect the alleged victim from harm.

Ethics rules are particularly vulnerable to negative consequences associated with this form of quasi-evasive technocratic analysis. This is because, although state bar authorities regulate lawyer conduct, a host of other statutes also include provisions that ostensibly regulate lawyers.[168] In fact, close consideration of the procedural rules of adjudication reveals both that the rules tend to be aimed at encouraging and discouraging certain types of lawyer behavior, and that lawyers are uniquely responsible for compliance with these procedural rules. Put differently, procedural rules are already about prohibiting certain lawyer conduct. One piece of evidence for this is to consider where liability falls when procedural violations occur. In a civil adjudication, a lawyer who abuses procedure is vulnerable to individual sanctions, yet courts do not tend to penalize clients personally where these procedural violations occur (so long as the procedural violation is manifestly attributable to a lawyer).[169] Even in situations that do not demand legal sanctions, a significant reputational sanction is in play: judges may criticize counsel and clients may dispense with their lawyer or encourage others not to retain that lawyer in the future. Even where neither of these sanctions is available, these failures nevertheless reflect poorly on lawyers and place their competence into question. Examples include lawyers who fail to properly calculate statutes of limitations and lawyers who mount frivolous or unjustified challenges.

In some cases, substantive law statutes will even modify legal ethics rules or altogether supplant them. Consider the *Model Rules* governing "frivolous pleadings, litigation-delaying tactics, and discovery misconduct."[170] Andrew Perlman

168. See discussion of FRCP 11 below. *Infra* notes 170–75.

169. However, clients are penalized in the broader sense because sanctions against their lawyers are almost certainly a setback for their case.

170. Andrew Perlman, *The Parallel Law of Lawyering in Civil Litigation*, 79 FORDHAM L. REV. 1965, 1971 (2011).

describes how these rules are, in practice, irrelevant to parties in litigation because of the much more robust Rule 11 and Rule 26 from the Federal Rules of Civil Procedure ("FRCP").[171] FRCP 11 provides, in relevant part, that lawyers submitting a "pleading, written motion, or other paper" to the court must certify that the claims contained therein are not, among other things, frivolous.[172] FRCP 11 has been of particular interest to civil procedure scholars because it contemplates personal sanctions against non-compliant lawyers and enables the opposing party to move for said sanctions and for courts to impose sanctions on its own initiative.[173] Now consider Model Rule 3.1, which reads:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.[174]

In the context of federal litigation, Model Rule 3.1 is effectively rendered impotent by FRCP 11. Not only does FRCP contemplate immediate sanctions, but these sanctions can also be issued by the judge as part of the present litigation.[175] This means that the client's case—which the lawyer presumably hopes will succeed—can be jeopardized by the lawyer's legal-ethical violation. For the disciplinary code provision to be enforced against the lawyer, the state bar regulator would have to become aware of the violation. But short of state bar authorities monitoring the day-to-day of all cases, how precisely could this happen? The prospective complainants—namely the judge, the opposing counsel, and the client—all have little reason to pursue disciplinary charges against the lawyer. The judge has little reason to because she is empowered to impose a sanction directly. The opposing counsel similarly prefers Rule 11 sanctions—in theory—because it has the dual benefit of throwing the opposing lawyer into momentary disrepute *and* potentially creating a litigation advantage. Given that clients do not recover damages from bar authorities for harms stemming from legal-ethical violations, aggrieved clients might pursue bar charges only where they grow so disaffected

171. *Id.*

172. FED. R. CIV. P. 11.

173. *See* FED. R. CIV. P. 11(c)(2) (describing how motion for sanctions can be made); *see also* FED. R. CIV. P. 11(c)(3) ("On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b)."). For examples of scholarship about Rule 11, see Jeffrey A. Parness, *Sanctioning Legal Organizations Under the New Federal Civil Rule 11: Radical Changes Loosen More Unforeseeable Forces*, 14 REV. LITIG. 63 (1994); Jeffrey A. Parness, *Disciplinary Referrals Under New Federal Civil Rule 11*, 61 TENN. L. REV. 37 (1993); Samuel J. Levine, *Seeking a Common Language for the Application of Rule 11 Sanctions: What is 'Frivolous'?*, 78 NEB. L. REV. 677 (1999).

174. MODEL RULES R. 3.1.

175. FED. R. CIV. P. 11(3).

by their lawyer's performance that they want to see the lawyer personally punished. Given that the client is typically implicated in any decision to bring a "frivolous" lawsuit, this seems unlikely in the context of Model Rule 3.1.

FRCP 37 tells a similar story. The rule provides, in relevant part, that "a party may *move* for an order compelling disclosure or discovery" where they have already "in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action."[176] In other words, FRCP 37 gives lawyers judicial recourse against an opposing counsel that is not cooperating in discovery. Like FRCP 11, FRCP 37 provides for sanctions against offending lawyers.[177] Sanctions can even include contempt of court citations.[178] Interestingly, the sanctions available in FRCP 37 are wide-ranging and some are directly punitive to clients.[179] Consider the following provision, available in FRCP 37(b)(2). Lawyers who disobey a discovery order may be subject to the following further orders:

> (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
>
> (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
>
> (iii) striking pleadings in whole or in part;
>
> (iv) staying further proceedings until the order is obeyed;
>
> (v) dismissing the action or proceeding in whole or in part;
>
> (vi) rendering a default judgment against the disobedient party; or
>
> (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.[180]

Note that each of the seven possibilities for further orders contemplated by FRCP 37(b)(2) are detrimental to the litigant's interests. In sum, not complying with discovery orders means that the litigant risks (1) allowing adverse facts to be established, (2) being prevented from disputing claims, (3) having their pleadings ignored, (4) having their case paused, (5) having some of or the *entire action*

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176. FED. R. CIV. P. 37 (emphasis added).

177. *See, e.g.*, FED. R. CIV. P. 37(d)(3).

> Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)—(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

Id.

178. FED. R. CIV. P. 37(b)(1) ("If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court.").

179. *See generally* FED. R. CIV. P. 37.

180. FED. R. CIV. P. 37(b)(2).

dismissed, (6) having the case resolved against them, and (7) being cited for contempt of court. Later provisions also allow courts to order the "disobedient" party to pay "the reasonable expenses, including attorney's fees, caused by the failure."[181] Courts will also permit that juries learn of the litigant's non-compliance. Each of these sanctions can arise out of actions—i.e. managing discovery—that clients trust entirely to their lawyers. Now consider Model Rule 3.4, which, among other provisions, states that "a lawyer shall not . . . make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party."[182] This is a similar command to FRCP 37(b), yet FRCP 37(b) not only explicitly describes available sanctions but ensures that lawyers and their clients incur a financial (expenses and attorney's fees), legal (contempt citations), and strategic penalty for noncompliance.[183]

This subject matter overlap might facilitate some rule arbitrage, wherein a lawyer trades for the ethical rule that is least onerous. This is particularly true when lawyers engage in technocratic analyses of legal ethics rules. Indeed, the non-ethics rules (*e.g.*, the ones that emanate from substantive law statutes or procedural rules) operate much more immediately on lawyers because, unlike legal ethics rules, for which enforcement possibilities are somewhat remote, violations threaten a client's case and can produce immediate consequences for a lawyer's reputation and bottom-line.[184] But these rules—such as the civil procedure violations or the tax disclosure violations—are not designed with lawyers' ethicality in mind, but to serve their statutory purpose, such as promoting efficient adjudication or maximizing tax revenue. In the context of juridification, and particularly the subprocess of legal expansion, lawyers can reasonably anticipate more substantive law statutes that include provisions governing lawyers.[185]

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181. FED. R. CIV. P. 37(b)(2)(C).

182. MODEL RULES R. 3.4.

183. FED R. CIV. P. 37.

184. Given that the Rules of Civil Procedure only operate on litigants and do not govern lawyer conduct when outside of a given litigation.

185. One of the primary reasons that narrow legal ethics rules fail to promote ethical deliberation is because of the *Model Rules*' divergence from ordinary morality. An oft-cited subset of the critical literature takes this position. In the context of legal ethics, the argument tends to go as follows: by articulating minimum standards of conduct, typically expressed in legalistic terms, the lawyer is discouraged from thinking of herself as a moral agent, particularly where her own judgment counsels a different verdict than the rules. As a result, legal ethics becomes an exercise in sanctions-avoidance. As an initial matter, the legal ethics rules contained in the *Model Rules* are indeed drafted to read like black-letter legal rules, and, as such, studiously avoid making statements about rightness or wrongness. There is some limited empirical support for the intuition that the legal ethics rules do not track ordinary morality. In a recent study, Stephen Galoob and Su Li used fact scenarios sampled from the Multistate Professional Responsibility Examination ("MPRE") to survey 122 lay participants, finding that the participants' judgments about the proper ethical response frequently differed from the actions demanded by the *Model Rules*. Stephen Galoob & Su Li, *Are Legal Ethics Ethical? A Survey Experiment*, 26 GEO. J. LEGAL ETHICS 481 (2013). One charitable reading of the shift towards professionalization is to conceive of the *Model Rules* as a search for a Fullerian internal morality. There is actually strong evidence for this claim: Fuller was the co-author of a 1958 report for the ABA that David Luban credits with influencing the 1960s redrafts. David Luban, *Calming the Hearse Horse: a Philosophical Research Program for Legal Ethics*, 40 Md. L. Rev. 451, 453–54 (1981).

2. PROBLEM II: THE RULES ARE LIMITED IN SCOPE

Exceedingly narrow legal ethics rules make it more difficult to engage in constructive ethical deliberation and provide little in the way of helpful contextual guidance. But what about situations not contemplated by the rules at all? Indeed, as a result of juridification, the profession is now everywhere. Lawyers are involved in direct representation of clients but also impact litigation, in-house corporate or executive branch advising, as well as taking up roles where their legal background is an asset but not strictly required, such as in policymaking or non-profit leadership. These are just a few examples among many. Legal ethics rules did not anticipate this professional sprawl, nor did state bar authorities meaningfully adapt. As a result, legal ethics rules are *completely silent* on an ever-growing proportion of lawyerly duties. This creates all manner of problems, some of which are a garden variety—such as whether a licensed attorney should identify themselves as such when working in non-legal capacities.

Even a cursory glance at the *Model Rules* reveals its limited coverage. The document has eight categories of rules:

I. Client-Lawyer Relationship
II. Counselor
III. Advocate
IV. Transactions with Persons other than Clients
V. Law Firms and Associations
VI. Public Service
VII. Information About Legal Services
VIII. Maintaining the Integrity of the Profession[186]

Taken together, these categories appear wide-ranging, but only if one conceives of the legal profession as principally about representing clients before tribunals or ushering clients through transactions. The *Model Rules* do not even meaningfully account for innovations in this traditional framework. For instance, as Nancy J. Moore observes, the various rules purporting to regulate attorney conflicts of interest do not substantively address how lawyers ought to conduct themselves in class action lawsuits.[187] This is true even though class actions are noted for producing particularly thorny ethical issues.[188]

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186. *See generally* MODEL RULES.

187. *See generally* Nancy J. Moore, *Who Should Regulate Class Action Lawyers?* 5 U. ILL. L. REV. 1477 (2003).

188. *See* Eli Wald, *Class Actions' Ethical "KISS": The Class Action Lawyer's Client Is the Class*, 74 HASTINGS L.J. 1434, 1435 (2023). In class actions:

> [f]undamental questions—does a lawyer represent both the class and the class representative, can a class representative or absent class member sue the class action lawyer for malpractice, how should

Legal ethics rules have so little to say about class actions that courts have effectively discarded them when considering ethical issues in representative litigation. In *In re Agent Orange Product Liability Litigation*, the Second Circuit stated that "the traditional rules that have been developed in the course of attorneys' representation of the interests of clients outside of the class action context should not be mechanically applied to the problems that arise in the settlement of class action litigation."[189] Similarly, in *In re Corn Derivatives Antitrust Litigation*, Judge Adams of the Third Circuit wrote in concurrence that "courts cannot mechanically transpose to class actions the rules developed in the traditional lawyer-client setting."[190] Class actions are hardly the only category of traditional lawyer-client arrangements that are not contemplated by the *Model Rules*. The *Model Rules* fail to account for practice settings that are rather common in a juridified world, including, for instance, private domestic and international arbitrations, or any alternative dispute resolution ("ADR") for that matter. Unlike legislation that becomes outdated and is vulnerable to a protracted political process, the *Model Rules* are frequently amended; the failure to address these elements of legal practice is thus a curious omission.

These examples—class actions and ADR—are ignored by the *Model Rules* (and, accordingly, state bar regulators) despite fitting the traditional legal practice frame that the rules purport to govern. What about situations beyond that traditional framework—for instance, lawyers working in non-legal roles but relying on their training and credentials? One illuminating example is lawyering in the field of national security, which has attracted recent attention in Craig Jones' book, *The War Lawyers*,[191] and Oona Hathaway's recent article, "National Security Lawyering in the Post-Cold War Era: Can Law Constrain Power?"[192] Both scholars describe lawyers as increasingly central to decision-making about everything from when to engage in warfare, to the legality of specific types of military actions, to the propriety of domestic and international surveillance.[193]

Hathaway focuses on executive branch lawyers who advise on all manner of national security decisions.[194] Although she does not label it as such, she does account for ongoing juridification; one of the background tensions in Hathaway's

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a lawyer communicate with absent class members— currently remain unsettled, decided differently by courts throughout the United States. This chaotic situation stems from a central disagreement regarding the identity of the class action lawyer's client.

Id.

189. *In re* "Agent Orange" Prod. Liab. Litig., 800 F.2d 14 (2d Cir. 1986).

190. *In re* Corn Derivatives Antitrust Litig., 748 F.2d 157 (3d Cir. 1984).

191. CRAIG JONES, THE WAR LAWYERS: THE UNITED STATES, ISRAEL, AND JURIDICAL WARFARE (2021).

192. Oona Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Power?*, 68 UCLA. L. REV. 2 (2021).

193. *Id*. at 7; JONES, *supra* note 191.

194. Hathaway, *supra* note 192, at 12–14.

discussion is that lawyers are being relied upon for high-stakes determinations.[195] Hathaway explains that lawyers are also doing this with little meaningful oversight.[196] The stakes are high; not only are lawyers advising on "matters of life and death," but they are doing so from a largely unscrutinized position.[197] This lack of oversight manifests in several ways, such as the refusal by courts to "address many of the most important national security law questions" or Congress' "limited oversight on legal reasoning in the national security arena." [198] For Hathaway, this creates a significant rule of law problem, particularly because there is little in the way of substantive law to constrain national security lawyering.[199] She identifies four possible sources of constraints: courts, Congress, other states (who may refuse to cooperate), and a combination category of media and "advocacy organizations."[200] These four categories of constraints surely limit power but do nothing to constrain the specific problem of national security lawyering. For Hathaway, the key question is "whether the institutional structures within which they operate are adequate to protect the rule of law in the national security arena."[201] Here, Hathaway thinks of lawyers principally as communicators and interpreters of the law's content. Even where lawyers arrive at interpretations that may be "reviled,"[202] such as John Yoo's widely discredited legal justification for torture,[203] the possibility of holding lawyers responsible in their distinct capacity as lawyers does not figure into any of Hathaway's accountability proposals.

Accepting that legal ethics is beyond the scope of Hathaway's intended discussion, it is still worth considering the significance of its omission. Juridification, as we discussed, elevates the role of the lawyer to one that is co-extensive with central decision-makers. At a minimum, it elevates lawyers beyond their assistive roles as counsel. The only reason that lawyers in the national security context enjoy the privileged position that Hathaway describes is because they are understood to possess a special skill—or, at least, a special qualification—that enables them to make contributions that are particularly relevant to policy questions that

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195. *Id*. at 102. For instance, Hathaway writes that:

> The Obama administration heavily relied on consensus-driven decision making [from lawyers]. It did so in large part to ensure it would not repeat the mistakes of the administration that preceded it no longer could White House staff seek out favored lawyers in an agency to bless a desired course of action with an implausible legal opinion. It succeeded at addressing this danger. In the process, however, it adopted a set of practices with pathologies of its own.

Id.

196. *Id*. at 58 (noting that "the unique context of national security lawyering . . . effectively guarantees little to no external oversight.").

197. *Id*. at 6–7.

198. *Id*. at 12.

199. *Id*. at 12.

200. *Id*. at 7–8.

201. *Id*. at 9.

202. *Id*. at 55.

203. *See generally* David Luban, *The Defense of Torture*, THE N.Y. REV. OF BOOKS (March 15, 2007), https://www.nybooks.com/articles/2007/03/15/the-defense-of-torture/ [https://perma.cc/XRZ9-4PNG].

are increasingly proceduralized. If being a lawyer is what gets these individuals invited into the room, then, it stands to reason that they should be constrained by their professional obligations. Of course, legal ethics regimes have little to say to national security lawyers. The scope problems that I discuss in this section are particularly pronounced here; legal ethics rules, especially the *Model Rules*, do not even recognize the kind of advising described by Hathaway as lawyering, let alone as activities that implicate the quasi-criminal disciplinary rules.

3. PROBLEM III: THE RULES CONTEMPLATE THE PREDOMINANCE OF TRIALS

In addition to resting on narrow rules with limited coverage, a third major problem for legal ethics in a juridifying context is that the rules depend largely on an outmoded conception of the trial lawyer. If juridification involves an absolute growth of the law (legal expansion), a greater significance of courts (judicialization), and an increase in law-like decision-making (proceduralization), then it stands to reason that lawyers' influence reaches beyond the dyadic dispute resolution process. Yet, the *Model Rules* and their progeny appear to treat this form of dispute resolution as template. The consequences of this are two-fold. First, using litigation as a template leads to a peculiar form of legal ethics where the rules are fixated on deference to courts. Second, it means that areas of litigation that do not occur in front of a tribunal—most notably settlement and, in the criminal context, plea bargaining—escape regulation.

The notion of the "vanishing trial" takes its name from a report prepared for the ABA Litigation Section's Civil Justice Initiative by Marc Galanter.[204] Galanter analyzed federal civil case data to find a steep decline in the number of trials.[205] Galanter's study did not actually prove that litigation was declining at all. Keen observers will note that Galanter's study actually demonstrated ample evidence of juridification—and specifically, of judicialization.[206] The same data revealed that although trials dropped steeply, the number of resolved cases in federal district courts increased from 50,000 to over 250,000.[207] The takeaway here is that the trial is dislodged as the primary mechanism for case resolution, its place being taken by procedural maneuvers such as summary judgment or settlement. In this context, judges shift from simple adjudicators to "case managers," taking an active role in everything from managing timelines, to evidence, to making interlocutory determinations about whether cases should proceed.[208] This has become particularly common in the federal judicial system with the rise of

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204. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMP. L. STUD. 459, 459 (2004).

205. *Id.*

206. *Id.* at 460; *see also* John Lande, *'The Vanishing Trial' Report*, DISPUTE RES. MAG. 19 (Summer 2004) (observing that "Galanter's report could just as well have been titled, 'The Amazing Success of Judicial Case Management'").

207. Mark W. Bennett, *Judges' View on Vanishing Civil Trials*, 88 JUDICATURE 306, 306 (2005).

208. Lande, *supra* note 206, at 20.

complex, expensive lawsuits with significant document discovery.[209] But even as this happens, more and more of a given litigation happens privately between parties. Case discovery matters are one example where courts are empowered to make decisions about the appropriate amount of discovery, but because cases will often turn on these issues, the parties much prefer to negotiate it between themselves.[210] As a result, the pre-trial process becomes much higher stakes. For our juridification analysis, this is important; it demonstrates that the vanishing trial does not itself mean a decline in legal process. Quite the contrary, it means that what was previously routine procedure is now theoretically more outcome-determinative.

Even before litigants are involved in a high-stakes pre-trial process, however, civil disputes are in motion. Communication between parties to an adversarial litigation can occur independent of any court-mediated processes; for instance, parties will negotiate timelines and the scope of discovery.[211] Parties can also negotiate settlement on a case's substantive terms at any point of their choosing. When one considers case preparatory work (e.g. depositions, legal research, case strategy discussions), it becomes readily apparent that much of what we conceive of as traditional litigation is subterranean and invisible to court observers. Returning to legal ethics, a close examination of the *Model Rules* suggests that regulators are not capturing this shift away from the trial.[212] In fact, the rules barely accommodate the subterranean nature of civil disputes captured above. With specific respect to settlement, legal ethics frameworks are so conspicuously absent that James J. Alfini lamented that "this important aspect of our litigation process is in a state of anarchy."[213]

Aside from the *content* of legal ethics rules not capturing the shift away from trial, there is some limited empirical evidence that legal ethics rarely interacts

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209. Edith Beersden, *Discovery Culture*, 57 GA. L. REV. 981, 988 (2023). A major development in litigation is:

> the increasingly managerial role assumed by judges in the federal system. The increase in both caseloads and case complexity in the federal judicial system in the second half of the twentieth century has made it necessary for judges to take on increasingly managerial responsibilities, while adjudicating cases (or presiding over jury trials) only infrequently.

Id.

210. Beersden makes a similar point:

> The judicial system sets up the battleground—a venue, an assigned judge, and some indication of a timeline—and the parties stage their discovery processes against this backdrop. It is they—the parties and their legal representatives—who decide what actually happens in the discovery phase, with very limited supervision by the court.

Id. at 983.

211. I limit this claim to simply say that parties need not seek leave of the court to speak to one another, for instance.

212. The exception are the rules governing fairness towards opposing parties and counsel. However, these are rather restrained. *See generally* MODEL RULES.

213. James J. Alfini, *Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1*, 19 N. ILL. UNIV. L. REV. 255, 256 (1999).

with real-world settlement.[214] Michael L. Moffitt looked at data from ten jurisdictions to find that "there were more than sixteen thousand reported court opinions stemming from cases involving alleged legal malpractice cases over the past decade. Of those, however, fewer than one percent related in any way to allegations of settlement malpractice."[215] There were also few complaints to regulators relative to how much settlement activity lawyers assisted with: "less than 1.5 percent of the almost eight thousand disciplinary actions against lawyers stemmed from the lawyers' settlement advice or conduct."[216] Moffit's findings raise two questions. First, is the absence of complaints about lawyers in settlement a function of the fact that clients are generally satisfied? The literature suggests that the answer is no; if clients complain, as Moffit says, about "virtually every other aspect of lawyers' conduct," then it stands to reason that a substantial minority of these claims, at least, would arise in the settlement context.[217] Moffitt suggests that a partial answer lies in the fact that clients are not well-positioned to monitor their lawyers' performance in settlement negotiations, either because of the credence good problem discussed above or because of deference to lawyers on account of professional status or perceived expertise.[218] (It also bears emphasis that clients are not well-positioned to monitor their lawyers because, often as consumers, they are bought into a division of labor that contemplates the lawyer performing the legal functions and the client purchasing the services without having to participate actively.)

Legal ethics regimes play a part here, however, as they do not equip dissatisfied clients or interested regulators with information about what ethical lawyering might mean in the settlement context. Indeed, settlement is effectively unregulated. Granted, some provisions of the *Model Rules* discuss settlement[219] but usually as a contextual example. For instance, Rule 1.4 requires that there be "reasonable communication between the lawyer and the client" for "the client to effectively participate in the representation."[220] Naturally, this extends to settlement. Lawyers adhering to this rule should keep their clients informed of opposing parties' settlement offers.[221] Similarly, Rule 1.2(a) states that "a lawyer shall

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214. Michael Moffitt, *Settlement Malpractice*, 86 UNIV. CHI. L. REV. 1825, 1828 (2019).

215. *Id.*

216. *Id.* at 1829.

217. *Id.*

218. *See generally id.*; Moffit notes that lawyers are in the following "luxurious position": "The current legal malpractice system makes it harder for clients to bring successful complaints about their lawyers' settlement conduct than in other lawyering contexts—even though we live in the 'age of settlement.'" *Id.* at 1832.

219. MODEL RULES R.1.4.

220. MODEL RULES R. 1.4 cmt. 1.

221. *See* MODEL RULES R. 1.4 cmt. 2.

> For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer.

Id.

abide by a client's decision whether to settle a matter."[222] But these are not settlement rules, *per se*. Neither rule purports to guide lawyers as to proper conduct during negotiations. The thinness of settlement ethics is especially apparent when one considers how robust the rules implicating tribunals are by comparison.[223]

The arguments in favor of leaving settlement unregulated by legal ethics are manifold. One compelling argument in favor of the *status quo* is that the unfettered nature of settlement discussions is conducive to mutually beneficial case resolution. If the purpose of settlement is to avoid protracted adjudication, then it stands to reason that settlement discussions should not be particularly proceduralized. Yet even this fails to contend with the fact that most litigation is settled. To leave settlement largely unregulated is to yet again turn a blind eye to an already substantial share of lawyering tasks. The criminal law is largely outside the scope of this Article, but plea bargaining is another example of an area of legal practice that is untouched by legal ethics, despite it predominating the relationship between prosecution and defense.

Consider ADR. The same year that the ABA promulgated the *Model Rules*, the Supreme Court dramatically expanded the use of arbitration in the case *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[224] and expanded it even further in the following year in a case called *Southland Corp. v. Keating*.[225] Taken together, the two cases helped to increase the availability of arbitration. In the model setting, two parties agree to an arbitration clause to expedite adjudication and resolve their dispute in an ostensibly more conciliatory setting. (Of course, it is unclear whether this actually occurs in practice.) But some of arbitration's popularity is owed to its presence in consumer contracts, many of which involve no bilateral negotiation (*e.g.*, credit card agreements).

The *Model Rules* only address ADR in three regards. The first and most extensive treatment of ADR occurs in the rules relating to conflicts of interest. Model Rule 1.12 prevents former arbitrators from later representing one of the parties to that arbitration.[226] Rule 2.4 covers disclosures that lawyers must make if serving as arbitrators.[227] For instance, the *Model Rules* "require[] a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them."[228] Note that these *Model Rules* do not focus on how lawyers should comport themselves in an arbitration, nor do they focus on how arbitrators should comport themselves in an arbitration. Instead, it advises lawyers *who are serving as arbitrators* about avoiding conflicts. Some broader *Model Rules* do not specifically address ADR but are applicable. Rule 1.0, which clarifies terminology, states:

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222. MODEL RULES R. 1.2(a).
223. This is clear from a landscape view of the *Model Rules*. *See generally* MODEL RULES.
224. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).
225. *See* Southland Corp. v. Keating, 465 U.S. 1, 15–16 (1984).
226. MODEL RULES R. 1.12.
227. MODEL RULES R. 2.4.
228. MODEL RULES R. 2.4 cmt. 3.

> "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.[229]

This definition, added as part of the Ethics 2000 Commission's revisions, "recognizes the growing significance of arbitration in America's legal system and the impact of arbitration on society and individual rights."[230] Once more, however, a close examination of the *Model Rules* reveals that rather than offer ethics rules *for* ADR, the existing rules are extended. In other words, ethics rules designed for traditional litigation are simply layered atop ADR in the hopes that the contexts are not too different. This often strains interpretation.

Outside of arbitration, few other forms of ADR are governed by any ethical rules. Consider the example of mediation. Mediation has grown significantly in popularity in the United States and across the globe.[231] Despite this, mediators are "generally unregulated,"[232] and "may only be 'required' to follow ethical rules if they are affiliated with an organization that has its own ethical rules."[233] For instance, mediators working under the aegis of federal judges will be subject to various court procedures. Rule 2.4 of the *Model Rules* governs lawyers "serving as third-party neutral[s]," which includes mediation.[234] But the rule is circumspect and only requires that the lawyer-mediator "inform unrepresented parties that the lawyer is not representing them," and clarify any confusion about the role accordingly. [235] This means that lawyer-mediators do not have any explicit or implicit guidance about how to practice ethically.

III. LOOKING AHEAD: TWO MODEST PROPOSALS

The problems of increased juridification and professionalization have turned legal ethics more insular at the exact moment that lawyers' roles have become more expansive. The consequence, of course, is that lawyers are increasingly involved in activities not contemplated by the regulatory apparatuses designed to facilitate ethical practice. But as much as this story is true, it is also suggestive of a broader issue: lawyers and legal ethicists think too narrowly about the sources

229. MODEL RULES R. 1.0.

230. Imre S. Szalai, *The Failure of Legal Ethics to Address the Abuses of Forced Arbitration*, 24 HARV. NEGOT. L. REV. 127, 159 (2018).

231. *See* Joseph Panetta & Ross Kartez, *Five Indicators Mediation Is at a Tipping Point*, N.Y. L.J. (Aug. 7, 2023), https://www.law.com/newyorklawjournal/2023/08/07/five-indicators-mediation-is-at-a-tipping-point/ [https://perma.cc/YAX6-6KKB].

232. Kristen Blankley, *Is a Mediator Like a Bus? How Legal Ethics May Inform the Question of Case Discrimination by Mediators*, 52 GONZAGA L. REV. 327, 351 (2017).

233. *Id*.

234. MODEL RULES R. 2.4.

235. MODEL RULES R. 2.4(b).

of legal-ethical guidance. This Part identifies a broader, more integrated legal ethics that pulls from some of juridification and professionalization's own products (such as substantive statutory law and civil procedure) and briefly suggests interventions. Here, I make two proposals. First, I argue that future legislation can better recognize the phenomenon of juridification by including legal-ethical provisions in substantive law statutes. Second, I argue that the domain of legal ethics should be expanded to include *all* legal rules that plausibly constrain lawyer behavior. The benefits of this are both pedagogical and discursive but also set the stage for legal policy reform wherein state bar authorities are empowered to impose discipline for legal-ethical violations beyond those contemplated by the *Model Rules*.

A. EXPANDING LEGAL ETHICS' LEGISLATIVE AND REGULATORY FOOTPRINT

Future legislation can better recognize the phenomenon of juridification by including legal-ethical provisions in substantive law statutes. As new laws are enacted, juridification's subprocess of legal expansion shows that lawyers become more vitally important in interpreting the law. To the extent that new laws also create new causes of action, new issues fall within lawyers' remit. Also, as discussed in Part II, new legislation and regulation create dynamic compliance pressure, wherein individuals and groups that are governed by the law will need to seek out *ex ante* legal advice to minimize their risk. This is especially true if new laws and regulations are complex.

As a practical matter, future legislation should include explicit provisions indicating that to the extent lawyers are helpful to understand or help discharge the objective of the legislation, they should behave ethically as per the legislative guidance. Consider a specific example from U.S. tax law. Though primarily a field of statutes and regulations, there are a handful of highly influential common law doctrines in tax law, one of which is called the economic substance doctrine. With Benjamin Alarie, I previously described the economic substance doctrine as follows:

> The Economic Substance Doctrine stands for the proposition that a transaction that technically complies with the Internal Revenue Code can nevertheless be disregarded if it "do[es] not vary control or change the flow of economic benefits." Put differently, transactions must have some purpose other than merely creating tax savings. Transactions that fail the test will be taxed as if they had not occurred. The IRS will also impose rather onerous penalties of 20% of the disallowed tax benefits, and up to 40% for any underpayment that is a result of inadequate disclosure. These are strict liability penalties and so taxpayers are precluded from asserting reasonable cause or good faith defen[s]es.[236]

236. *See* Alarie & Aidid, *supra* note 66, at 37.

The economic substance doctrine is an anti-abuse doctrine. It does not punish taxpayers for merely engaging in aggressive tax planning, however. Instead, the doctrine enables courts to set aside transactions that have no purpose other than tax avoidance.[237] Are lawyers who structure these transactions and use lawyering to enable this kind of tax avoidance behaving ethically? The answer is not clear. Though it is clear that lawyers who abet these tax avoidance transactions are frustrating the purpose of the doctrine and legislation, whether this is ethical lawyering is a distinct question. A Model Rule in this context would not be particularly helpful because, as discussed in the previous sections, distinctly legal-ethical rules operate at a level of generality that make them (1) difficult to enforce, (2) not well-suited for highly contextual legal-ethical problems, and (3) vulnerable to a certain kind of evasive, technocratic analysis that discourages meaningful ethical deliberation. In fact, the *Model Rules* already feature prohibitions against abetting illegal activity.[238] But tax avoidance falls somewhere in the murky middle; it is not quite tax evasion, which is clearly criminal, nor is it tax minimization because lawyers are not merely exploiting their legal entitlements. Instead, it is what Zoe Prebble and John Prebble describe as "[c]ontriving transactions and structures that reduce tax in ways that are contrary to the policy or spirit of the legislation."[239] Tax avoidance thus operates in a liminal space that is unique to the tax law. Any legal-ethical rule seeking to discourage lawyers from designing these sorts of abusive transactions must be developed with the tax law in mind, then.

Tax legislation can also clarify the legal-ethical duties of lawyers working on tax matters. Currently, there is little consensus on whether lawyers have a "duty to the revenue system."[240] As Heather Field explains, there is tax commentary that takes the view that lawyers are obliged to "protect the revenue."[241] Linda Galler elaborates: "Under this view, lawyers advising clients in tax matters must balance the immediate demands of their clients against the public's interest in a sound tax system which operates in accord with policy judgments reached through a democratic process."[242] Others have taken a decidedly different view than the perspectives that Field and Galler summarize (though do not necessarily hold). Camilla Watson argued that tax lawyers are no different than other

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237. *See generally* William Joel Kolarik II & Steven Nicholas John Wlodychak, *The Economic Substance Doctrine in Federal and State Taxation*, 67 THE TAX LAW. 715; David A. Weisbach, *An Economic Analysis of Anti-Tax-Avoidance Doctrines*, 4 AM. L. & ECON. REV. 88.

238. Model Rule 8.4 makes it professional misconduct to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." MODEL RULES R. 8.4.

239. Zoe Prebble & John Prebble, *The Morality of Tax Avoidance*, 43 CREIGHTON L. REV. 693, 696 (2010).

240. *See* Heather Field, *Fostering Ethical Professional Identity in Tax: Using the Traditional Tax Classroom*, 8 COLUM. J. TAX L. 215, 247 (2017).

241. *Id.*

242. Linda Galler, *The Tax Lawyer's Duty to the System*, 16 VA. TAX REV. 681, 693 (1997) (reviewing BERNARD WOLFMAN, JAMES P. HOLDEN & DEBORAH H. SCHENK, ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE (1995)).

individuals subject to tax law and therefore take on no additional obligations.[243] Lawyers might be bound by their own professional duties and by their desire not to commit a crime, but otherwise, there is "no separate duty owed either to the tax system or to society."[244] However, future revisions of the Internal Revenue Code can simply announce whether such a duty exists.

Legislators wishing to enact new tax laws may quite understandably balk at the idea of announcing ethical rules for tax lawyers. After all, conventional wisdom holds that tax law is about collecting, distributing, and tabulating taxable income. But this conservative position underestimates the centrality of lawyers to ordinary tax administration; that is, it underestimates the extent to which the tax system already depends on lawyers for these collection, distribution, and tabulation efforts. In self-reported tax systems like the United States, taxation depends on information provided by the taxpayer. In a juridified world of complex tax law, some proportion of taxpayers is seeking *ex ante* legal advice for compliance or tax minimization purposes. The result is that lawyers effectively mediate the information exchange between the Internal Revenue Service and a growing share of the taxpaying public. If legislators can impose duties on and make demands of taxpayers, and likewise impose duties on and make demands of tax administrators, it stands to reason that they can make demands of lawyers as one of the tax system's vital conduits. The broader argument is that legislators should take into account the extent to which the objectives of their laws depend on lawyers for execution, enforcement, or interpretation. Recognizing this means taking responsibility for its functioning according to meaningful professional standards. Tax is but one example; legislators should consider announcing legal ethics rules in other lawyer-dominated substantive law areas like immigration.

B. EXPANDING LEGAL ETHICS' DISCURSIVE SPHERE

Expanding legal ethics' regulatory and legislative footprint by articulating ethics rules *ex ante* as part of substantive legislation is one step toward giving lawyers meaningful guidelines about how to ethically discharge their ever-growing duties. As necessary, however, is a reconsideration of the various sources of legal ethics guidance. Currently, the field of legal ethics is narrowly understood as consisting of ethics rules of state bar regulators and, in some instances, common law doctrines invoked in malpractice suits.[245] In even more specialized cases, such as the "ineffective assistance of counsel" doctrine available to criminal defendants, lawyers can be found to have violated a client's constitutional rights.[246] Aside

243. *See* Camilla E. Watson, *Tax Lawyers, Ethical Obligations, and the Duty to the System*, 47 KAN. L. REV. 847, 851 (1999).

244. *Id.* at 871.

245. *See* Louis Parley, *A Brief History of Legal Ethics*, 33 FAM. L. Q. 637, 637–38 (1999).

246. *See* U.S. CONST. amend. VI (establishing that in criminal prosecutions an individual is entitled to "assistance of counsel for his defense"); Jeffrey Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 434 (1996).

from these, however, few can identify other sources of legal ethics rules. In reality, there are sources of legal ethical guidance peppered throughout the legal system, yet these sources are often improperly conceived of as procedural rules or extracontractual duties.

In their work on family law, Kerry Rittich and Janet Halley recognized that the black-letter rules and institutions of family law (*e.g.*, marriage and parenthood) were "artificially segregated" from other legal concepts that were nevertheless constitutive of the field, including rules that had important distributive implications (*e.g.*, tax and immigration law).[247] Accordingly, they design a conceptual terminology for organizing the field that at once recognizes: (i) the relationship between the different sources of law, (ii) how they independently and dependently constitute the field, and also (iii) how their conceptual and doctrinal distinctions demand focused scholarly attention.[248] The terminology has broad applicability; though designed with family law at the fore, it is a useful lens for any body of law that has the same foreground-background dynamics.[249]

Consider the Rittich-Halley framework in the context of legal ethics. Figure 2 below is a non-exhaustive summary of the basic classifications:

Type	Legal Content
Legal Ethics I	*e.g.*, Primary statements of legal ethics rules
Legal Ethics II	*e.g.*, Civil and Criminal Procedure; rules of evidence, substantive law statutes
Legal Ethics III	*e.g.*, Contracts, insurance, doctrinal bulwarks such as good faith
Legal Ethics IV	*e.g.*, Professional norms, social commitments

FIGURE 2

First, the obvious: the initial category of Legal Ethics I is comprised of the primary sources of lawyer regulation, including the rules of professional responsibility, the scant case law expounding these rules, and the regulations governing the institutions of licensure. These, which tend to include specific statements of law about what lawyers can and cannot do, have attracted virtually all the scholarly attention. These are the rules that have been most substantially affected by the twin forces of juridification and professionalization: the rules articulate only minimum standards of conduct, albeit formally, and thus have less reach than responsive legal ethics ought to in a world where law and lawyers suffuse social life and institutions. For the purposes of this Article, this category consists primarily of the *Model Rules* and its state progenies but may also consist of the *Model Code of Judicial Conduct* and *the Code of Conduct for United States Judges*.

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247. Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMPAR. L. 754, 761 (2010).

248. *Id.*

249. *Id.*

Legal Ethics II represents the procedural rules that operate on lawyers. The case for expanding the domain of legal ethics to include civil and criminal procedure is two-fold. First, as we discussed in the previous section, lawyers have a strong incentive to comply with procedural rules incident to litigation because the threat of sanctions is immediate and may risk their ability to vindicate their client's interests. A second reason is because, flatly, these rules *do* articulate a vision for what constitutes ethical lawyering. A civil procedure rule against filing frivolous lawsuits signals that lawyers ought to relate to courts as serious forums for substantive dispute resolution. The civil procedure rule against stonewalling opposing counsel's discovery indicates that lawyers ought to be collaborative and conciliatory when it comes to information exchange, and even articulates how adversarial relationships and partisanship ought to be tempered in certain federal litigation procedures.[250] Even where this kind of meaning cannot be gleaned from the civil procedure rules, the fact that there is overlapping subject matter with the *Model Rules* should encourage scholars to take them seriously as legal-ethical guidance.

Legal Ethics III is somewhat amorphous at first glance. It includes the web of obligations conferred upon lawyers by contracts (explicit) and what I term background duties (implicit), such as the ambient duty of good faith. Within the contract category exists multiple sources of law to bind lawyers and provides highly specific ethical guidance. The canonical example is the engagement letter, whereby a lawyer's role is proscribed in a duly executed agreement with a client. In the larger web of contracts, there are agreements to provide professional liability insurance, more commonly known as malpractice insurance. These insurance policies will sometimes include exclusions that undermine the policy's applicability in cases where lawyers engage in deliberate wrongdoing,[251] creating perhaps the only direct financial incentive constraining lawyer behavior. These contracts all operate against a background presumption of good faith; that is, lawyers are not consciously working to frustrate the agreements and will generally discharge their duties as contracted. Perhaps future empirical research—*e.g.*, qualitative survey data—can explore whether the contracts and duties that comprise Legal Ethics III have more powerful binding than the more direct professional responsibility regimes.

A final category, here called Legal Ethics IV, covers professional norms and identity constraints. These are loosely enforced but can be central to lawyer behavior, particularly in circumstances where lawyers are institutionally obliged

250. *See* FED. R. CIV. P. 37, advisory committee's note to 1980 amendment ("Rule 37 authorizes the court to direct that parties or attorneys who fail to participate in good faith in the discovery process pay the expenses, including attorney's fees, incurred by other parties as a result of that failure").

251. *See, e.g.*, Ill. State Bar Ass'n Mutual Ins. Co. v. Leighton Legal Grp., 103 N.E.3d 1087, 1090 (Ill. App. Ct. 2018) ("We conclude that the insured's conduct, as alleged in the underlying complaint, is excluded from coverage.").

to collaborate (*e.g.*, in firms or in government). Like Rittich and Halley's Family Law 3 and 4, this category is "theoretically limitless."[252]

CONCLUSION

The purpose of this Article is to describe one of the major shortcomings of legal ethics—its failure to account for the forces of juridification. Juridification consists of three separate subprocesses—legal expansion, judicialization, and proceduralization—each bound together by their shared consequence of making lawyers substantially more important in modern society. Rather than recognize this and adapt, legal ethics regimes appear content with governing an ever-thinning slice of the professional pie, mainly that which exists in the context of the traditional lawyer-client and lawyer-tribunal relationship. The result is that the high-stakes matters that lawyers are involved in—everything from plea bargaining to policymaking to administrative decision-making—are not reached, so to speak, by the ethical rules.

The solution might be a wholesale rethinking of the "law of lawyering," but this Article took a more modest approach and suggested at least two interim interventions. The first is to include legal-ethical provisions in subsequent laws. If emergent legislation increasingly depends on lawyers to discharge and enforce, then lawmakers should consider the possibility of abuses by lawyers and anticipate these abuses directly in the content of the legislation. Also, lawmakers should consider the possibility that lawyers have special knowledge, privilege, and status that enables them to play a larger ethical purpose. This means articulating a vision of what ethical lawyering means. There is precedent for this. As discussed above, Sarbanes-Oxley mandated that in-house lawyers report material abuses.[253] Future legislation that equally depends on lawyers—consider tax, immigration, criminal, and family law, for instance—should be similarly prescriptive. A second proposal is more discursive and asks lawyers and legal scholars alike to think of legal ethics as drawing from more diverse sources than what we currently consider to be the "law of lawyering." The Rittich-Halley framework borrowed from family law is a meaningful step in that direction.

252. Halley & Rittich, *supra* note 247, at 763.

253. Press Release, Securities and Exchange Committee, SEC Adopts Attorney Conduct Rule Under Sarbanes-Oxley Act (Jan. 23, 2003) (explaining how Section 307 of the Sarbanes-Oxley Act will "require an attorney to report evidence of a material violation, determined according to an objective standard, 'up-the-ladder' within the issuer to the chief legal counsel or the chief executive officer of the company or the equivalent.").