Legal Complicity in an Age of Resurgent Authoritarianism

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ABSTRACT

Faith in end of history narratives emergent at the end of the twentieth century carried powerful ethical implications for engagement with authoritarian regimes. The most widespread of these narratives was modernization theory: the idea that economic development would invariably lead to political democratization or liberalization. Asserting this relationship offered up the alluring possibility that engagement with authoritarian regimes posed no ethical qualms of complicity and only helped hurry such regimes towards their inexorable demise. For lawyers from liberal nations, this possibility was especially seductive exactly because they often assert their professions' special links to promoting liberal political values through a consonant logic of amoral professionalism. Therefore, legal representation within and for authoritarian legal regimes was absolved by virtue of the transformative future modernization theory promised. No quick adoption of this stance was more evident than the post-1978 engagement of American lawyers with the Chinese Communist Party.

Today, end of history narratives have succumbed to not only resilient authoritarian regimes but also a global resurgence in authoritarian ideologies in liberal regimes. Many authoritarian regimes have proven capable of sustained economic development, even economic liberalization, while keeping democratic institutions from forming or flourishing. This development thus demands a renewed examination of the ethics of legal engagement with authoritarian regimes, especially as they have become deeply integrated into the world economy. The American legal profession's modern engagement with China is an acute case of this renewed problematic, but only one example of a shared conundrum among liberal legal professions worldwide.

Recursively, the challenges of authoritarian engagement are illustrative for growing discontent concerning the fundamental empirical predicates of the amoral civic virtues promised by liberal legal professions. Rising authoritarian ideologies

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worldwide blur the line between foreign and domestic authoritarianism, as well as foreign and domestic legal practice. Thus, the fall of modernization theory exposes common issues regarding liberal legal professions' regulatory autonomy—amid growing doubts over their systemic independence from market forces and service to democratic values.

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This belief promotes peace of mind. You do not have to face those troubling questions: What is the public interest? How far should I push the client's interests? How vigorously should I press public interest advice? Is my professional life helping or hurting the world? How much risk of not making partner am I willing to take? The moral life, nowadays, is likely to lead away from an untroubled conscience—virtue is its own punishment.

- John Leubsdorf[1]

The world as we know it. . .is falling apart under the weight of its contradictions.

- Arif Dirlik[2]

INTRODUCTION

The end of the twentieth century was suffused with ideas that the tides of history had turned towards an inexorably brighter future for political liberalism. A wide array of social and technological trends were cited as motor forces behind various "end of history" narratives producing a world where global economic integration, political liberalization, and general social progress were all on a steady ascent. Such optimism was perhaps no more eagerly expressed in the collection of thinkers and theories, broadly termed "modernization theory," which held out that economic development, even simply aggregate economic growth, planted the irresistible seeds of political liberalization. Thus, while many countries had yet to succumb to the waves of democratization which had washed over the twentieth-century world, this resistance was cast as both transitory and hastened along by their near universal embrace of economic globalization. Promoting economic growth could therefore be turned into an all-encompassing rationale for international engagement and inaugurated an era where public and private links between nations set aside the binary divisions of the Cold War. Such logic also side-stepped the concerns of those potentially troubled by the ethical implications of engaging with illiberal regimes, even for the most avowedly profit-seeking endeavors.

A clear and accelerating adjunct to modernization theory were articulations which emphasized the "rule of law" as one of the underlying causal mechanisms linking economic and political development. Often with quite wide definitional latitude, the rule of law was seen as capable of both facilitating economic growth and creating the institutional pre-conditions for political liberalism. As such, this vision contemplated liberal lawyers as another vector of modernization, while also generating a corollary logic of ethical absolution for lawyers operating in regimes that facially rejected their values.

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1. Robert Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 64 n.228 (1988).
2. ARIF DIRLIK, COMPLICITIES: THE PRC IN GLOBAL CAPITALISM 1 (2017).

This logic was resonant with lawyers' foundational architectural role in economic globalization and leadership in many international institutions and was often used to further transform liberal lawyers' engagement with authoritarian regimes from one of potential complicity into a moral good.

These ideas were intimately intertwined with the growing global power of the United States in the post-World War II era and their popularity intensified after the fall of the Soviet Union in 1989, bringing with it a particularly strong international economic and symbolic boost to American lawyers. Lawyers in the United States not only held a comparatively dominant position in the corridors of American power, but they had also historically cultivated their image as powerful stimulating agents of capitalism and democracy. Rearticulated through the language of modernization theory, this vision was quickly extrapoloated to international society.

As a result, American lawyers were often portrayed — at home and abroad — as promoting social development even when working to advance the interests of international actors or authoritarian regimes who both rejected liberalism and had long been stark critics of American law. With little intraprofessional debate or public deliberation in the United States, modernization theory provided lawyers with a near unlimited global geography of ethical absolution wherever they sought to practice and for whomever they sought to represent.

This new ethics of engagement posited by modernization theory was so evocative because it resonated with the preexisting ethical logics of legal professionalism. American lawyers had inherited a strong self-regulatory autonomy from the common law tradition which was defended on the grounds that their profession embraced public virtues insulated from the market logics that dominated other economic actors. These particular public virtues had long been argued not to emerge from a direct promotion of public goods, but instead from lawyers inserting professional values into their private relationships with their clients and by sustaining the larger legal system's integrity as a check on state power. Whatever the aims, objectives, or values of their clients, such were deemed orthogonal to the ethical dimensions of a lawyer's practice and rendered moot potential claims of complicity.

Cast as a bulwark against both the state and the market, lawyers' foundational ethical imperative was thus solely to represent their clients' legal self-interest without regard to their individual character or social effect—classically captured by Oliver Wendell Holmes as the "bad man" serving the larger social good.[3] Drawing on this particular historical imagery, American lawyers argued that their ability to carry out this dual public/private service required regulatory autonomy from the state and justified their monopoly control over access to the profession.[4]

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3. "The philosophical magic that turns an unethical behaviour into a morally acceptable one." César Arjona, *The Usage of What Country: A Critical Analysis of Legal Ethics in Transnational Legal Practice*, 32 CAN. J.L. & JURIS. 259, 260 (2019).

4. Sung Hui Kim, *Lawyer Exceptionalism in the Gatekeeping Wars*, 63 SMU L. REV. 73 (2010).

Broad confidence in this client-centered ethical structure has always been subject to critique domestically and internationally.[5] Inside and outside the United States, scholars have subjected the self-presentation and stylized histories of legal professions to sustained analysis regarding their economic and democratic contributions.[6] It is also important to note that many within the profession have long questioned a purely client-centered ethical frame. Challenges, popularly and within the profession, to this model have thus been cyclical throughout American history. Still, even amid larger historical crises of faith concerning their social contributions, American lawyers have been able to avoid the imposition of any proactive social duties beyond those defined by the client relationship—and more successfully so than near any other modern legal profession today.

Especially as American lawyers had long promoted their foreign influence as further validation of their liberal bonafides at home, extending and integrating this form of civic amoralism with the ethical implications of modernization theory worked seamlessly. Authoritarian regimes and their international interlocutors became just another set of clients whose individual characters were immaterial to their vigorous representation, and whatever larger qualms existed about the social impact of such representation were assuaged by modernization theory's promise of an inevitably more liberal future. It was this mutual resonance that allowed a near-reflexive late twentieth century avoidance of the historical controversies concerning the ethics of legal representation in unjust regimes which have troubled the conscience of lawyers wary of their potential complicity in legitimating these systems—for example, in relation to apartheid South Africa.

A high-profile example of this resonance was the rush of American legal engagement with China after 1978. After the 1949 victory of the Chinese Communist Party (CCP), China became a pariah of the American-led international legal order. Moreover, the CCP legal system was held out by liberal commentators as a quintessential exemplar of the rejection of the "rule of law" under Cold War rubrics. But the progressive reintegration of China into the global economic order after the CCP's 1978 reforms swiftly transformed legal engagement from a source of potential complicity to a motor force of China's political liberalization. In turn, the translation of the purely client-centered ethical framework of American lawyers to this authoritarian context helped not only facilitate the systemic integration of the American and Chinese economies, but also presented a fresh foreign context where American lawyers could demonstrate the social virtues that continued to justify their professional self-regulation at home. Even when the CCP would openly brandish its illiberal commitments, the engagement

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5. RICHARD ABEL & PHILIP LEWIS EDS., LAWYERS IN SOCIETY Vol. I-III (1988).

6. *See, e.g.*, Hilary Sommerlad & Ole Hammerslev, *Lawyers in a New Geopolitical Conjuncture: Continuity and Change, in* LAWYERS IN 21ST-CENTURY SOCIETIES VOLUME 1: NATIONAL REPORTS (Richard Abel, et al. eds, 2022).

of the American legal profession on purely private, commercial terms would for decades only continue to intensify.

Yet, the conjunction of historical events which led to such avowed faith in modernization theory has now collapsed, and in quite rapid fashion. The modern resilience of authoritarian regimes has been matched by growing illiberalism throughout the democratic world—the United States often emblematically so. A common diagnosis of this "end of 'end of history'" is that arguments about the mutualistic relationship between law, markets, and democracy had been built on highly over-confident grounds—especially as to the relationship between aggregate economic growth and democratic vitality. Moreover, China's continued, if not hardening, embrace of authoritarianism after decades of unparalleled economic growth has been amplified by the implications of Russian military aggression—a sharp reminder of the once brash pronouncements of modernization theory's implications after the fall of the Soviet Union.

Ultimately, the consonance of modernization theory and a solely client-centric legal ethics was premised on empirical predicates regarding the nature of legal practice in liberal nations. One can argue for a professional ethics that is client-centered if one presumes that surrounding legal institutions are procedurally just and that these legal institutions operate within a substantively just society. By contrast, traditional arguments regarding lawyering in unjust contexts had to explicitly justify themselves in predictive empirical terms when these assumptions were not present. Modernization theory bypassed this traditional dilemma in its entirety by advancing the possibility of lawyering in an unjust context without need for such contextual and self-critical reflection—via its promise of a more just future whose arrival would be only hastened by the operation of the legal architecture of economic globalization. The recent loss of confidence in modernization theory's empirical promise thus raises difficult questions as the volume and intensity of legal engagement with authoritarian regimes is central to the international economic order and thoroughly normalized in the institutional development of many law firms and in the career trajectories of generations of lawyers.

While many actively reject amoralism in their work, today lawyers cannot avoid the growing empirical evidence that they neither operate in a just world, nor that current legal and economic institutions are teleologically propelling any nation towards a more just future. What this likely means in the short-term is that most lawyers—American or otherwise—will have to navigate the ethics of international legal practice without the comfort of past confidences about the social impact of their work. It certainly means that engaging with authoritarian actors must be considered more along the lines of those who have traditionally grappled with the limited and difficult spaces for ethical lawyering in unjust societies—perhaps even more intesenively so as domestic and foreign practices are today so intermingled.

It is not coincidental that in the United States, and the near entirety of the common law world, faith in the social contribution of lawyers through their praxis of civic amoralism has also come under intensifying domestic criticism in recent decades. A whole range of commentators have deployed old and novel arguments asserting the misleading and damaging myopia of a solely client-centered professional ethics. New empirical studies increasingly place pressure on historical narratives and professional self-idealizations which argue that lawyers are more than simply servants of the market.

Critical to this shift has been greater acknowledgment that the ideal of a lawyer sitting between a criminally accused citizen and an all-powerful state is now ever-further from reality in many areas of law. By contrast, much modern legal practice is concerned with facilitating the aims of objectives of clients over time—vis-à-vis not just other individuals but the state itself, and now even other states. Few powerful private actors are noe exogenous to the laws that regulate them and they employ lawyers to facilitate shaping the production and enforcement of the law itself well beyond any courtroom.

However murky these developments have made the line between the legal and the moral for individual lawyers, this far more complex understanding of how modern lawyers operate brings into serious question both their insulation from market logics and their fidelity to democracy. This shift reframes concern with complicity away from retrospectively defending a client's particular criminal behavior to proactively shaping the entire legal world according to their objectives. Moreover, this genre of modern legal practice is coupled with the near universal provision of legal services through markets operating in the context of stark economic equality. As a result, lawyers face a high burden to demonstrate that they, as a class, are not systemic reproducers of extant social inequalities.

Ekow Yankah has powerfully articulated this as a fear of "legal hypocrisy" wherein professional discourses are used to disguise the dominant use of law as tool of the powerful. Here is where the blurred lines between international and domestic practice becomes most interlinked. For under modern conditions of economic globalization, "clients" can be authoritarian social entities—not unpopular or disenfranchised people—operating transnationally while wielding resources beyond that of entire nation states. Thus, legal hypocrisy becomes not just a geopolitical concern, but also raises further questions about the basic empirical grounds of professional autonomy.

In our globally integrated world today, lawyers may be no worse than many other social actors who have complex relationships to authoritarianism and inequality. Many individual lawyers pursue their conscience instead of market incentives, often at incredible cost. Yet so do many other citizens, even commercial actors. Comparability, however, is not the proper threshold for granting the special regulatory benefit of professional autonomy in a democratic society. For if markets are not inherently in service to democracy, and lawyers are predominately in service to markets, then the dominant practice of lawyers cannot be

reflexively assumed to be prodemocratic in any setting. Denying this tension only further invites accusations of Yankah's legal hypocrisy.

Whatever the solution will be, it cannot place the entire edifice of ethical reflection on the individual practitioner. While lawyers should not bury their heads in the proverbial sand in regard to their own moral agency, they are caught up in structural realities that resist easy answers as to what actually constitutes complicity in a world where authoritarian impulses and actors are increasingly ubiquitous.[7] Again, while the status of American lawyers highlights this conundrum, and their recent relationship to China is therein illustrative, this is a shared global problem. Many modern legal professions have already lost a great deal of their self-regulatory autonomy, and without a renewed, specifically democratic, vision of professionalism, American lawyers may soon find themselves in similar stead.

The article proceeds in four parts. Part I outlines the traditional logic of American lawyers' amoral civic virtue which has historically justified their regulatory autonomy, the historical evolution and modern crises in their legal ethics, and parallel developments in other jurisdictions. Part II introduces the traditional discourse on lawyering and complicity in unjust regimes, the resonance of modernization theory with lawyers' amoral civic virtue to sideline this traditional discourse, and the exemplification of this mutuality in the justifications for post-1978 American legal engagement with China. Part III details modernization theory's rapid fall from grace following the demonstrated resilience of modern authoritarian regimes and uses Ekow Yankah's concept of "legal hypocrisy" to explore how the issue of authoritarian engagement exposes the now universal crisis regarding the empirical predicates of lawyers' professional autonomy. The Conclusion contemplates what this crisis in professionalism means for the regulation of American lawyers and the need to articulate a renewed democratic vision of lawyering moving forward.

I. THE (CONTESTED) AMORALITY OF LAWYERS' CIVIC VIRTUE

A. THE SOCIAL BARGAIN AND CONTROVERSIES OF PROFESSIONAL AUTONOMY

One facet of Emile Durkheim's enduring contribution to sociology is his study of modern professions.[8] Durkheim, like many scholars of his generation, was preoccupied with the expansive impacts of industrialization on social organization. In his view, professions were classes that sought to preserve public values in their work insulated from the encroachment and domination of market forces. This insulation generally involved some set of professional norms which were collectively enforced but outside of direct state determination and enforcement.

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7. *See* Eva Pils, *Complicity in Democratic Engagement with Autocratic* Systems, 13 ETHICS & GLOB. POL. 142, 143, 151-55 (2021).

8. *See generally* EMILE DURKHEIM, PROFESSIONAL ETHICS AND CIVIC MORALS (1958).

While often not explicitly invoked, Durkheim captured much of the historical ethos of common law lawyering, which emphasized its formal independence and predilection for facilitating the private ordering of society outside of the state. This independence was justified by the social benefits it produced—benefits that were argued to persist even as the originally English origins of the common law transitioned from a feudal to a liberal democratic context (though then fully concurrent with colonialism). The force of this argument helped lawyers secure significant degrees of professional independence in most common law jurisdictions and, to some degree, among other Western states.[9]

Prior to the twentieth century, a core aspect of this independence was control over admittance to the profession through a system of apprenticeship without formal educational requirements. After 1776, the United States continued to embrace much of its common law inheritance from England, and its legal practice was regulated largely through this more decentralized private system. A great deal has been written about the particular role lawyers took on in colonial and post-Revolutionary American society,[10] and the many nineteenth-century conflicts over how to regulate lawyers—still largely a province of the individual states—evolved into intense battles over formal educational requirements. However, polarizing as this process was, the profession as a whole defended its autonomy to make its own determinations. Following Durkheim's basic outline, the shared presumption was still that lawyers' independence allowed them to inject liberal ideals and a special fidelity to the law into their practice without coercion by the state and without being beholden to raw commercialism. Robert Gordon's seminal article *The Independence of Lawyers* broadly splits these virtues into the mutually reinforcing ideals of "the ideal of liberal advocacy" and "the ideal of law as a public profession."[11]

Even amid wide-ranging domestic and international turmoil over the course of the twentieth century, American lawyers successfully gained and retained more self-regulatory autonomy regarding admission and discipline than any other modern legal profession. Inherent in this success was a more defining assertion that the American profession's values included a specific relationship to democracy. As Paul Carrington, long-time defender of professional autonomy, argued: American lawyers were "stewards of democracy."[12]

These arguments were popularly grounded in a particular social imagination full of now classic tropes. Historical anecdotes drew on the image of the lawyer as committed to the vitality of the legal system even when representing

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9. "These traits grounded lawyers' moral, cultural and intellectual authority, facilitating and legitimising professional closure and lawyers' consequent capacity to extract monopoly rents and enjoy a special, relatively autonomous, status in the institutional environment of the modern Western state." Sommerlad & Hammerslev, *supra* note 6, at 1; *see also* BRYANT GARTH & YVES DEZALAY, LAW AS REPRODUCTION AND REVOLUTION (2022).

10. *See* Nick Robinson, *The Decline of the Lawyer-Politician*, 65 BUFF. L. REV. 65 (2017).

11. Gordon, *supra* note 1, at 10.

12. PAUL D. CARRINGTON, STEWARDS OF DEMOCRACY: LAW AS A PUBLIC PROFESSION (1999).

disadvantaged criminal clients either unpopular with the state or society, and sometimes both. The most enduring episode of this American imaginary was John Adams' Revolutionary-era representation of British soldiers who had been accused of murdering American citizens.[13] Adams' actions are thus cited as evidence that without professional independence, legal representation would be subject to the vagaries of government intervention and lawyers' personal livelihoods ever threatened by popular sanction.

This view of lawyers' autonomy as flowing from a demonstrated social bargain was rarely questioned within the profession. It was easily paired with a reinforcing premise that lawyers' civic virtue was generated by this indirect logic linking private self-interest and public contribution. Leaders of bar associations, local and national, would take on the recurrent mantle of defending the continued vitality of this bargain—often lamenting the under-appreciation of lawyers' less overt social contributions.[14] As a result, American lawyers' professional ethical imperative remained to zealously serve the private interests of their clients shielded by strong confidentiality norms, control over admission to legal practice, and self-enforcement of lawyer discipline.

Symbolically, this ethos was often reduced to the image of the Oliver Wendell Holmes' "bad man" who works the law as an amoral technician with no guiding star beyond his client's objectives.[15] This bad man is not an immoral man exactly because this practice is the best way to structure legal representation under a procedurally just adversarial system. Any imposed duty to consider other values—even a lawyer's own personal morality—in an attempt to directly produce public goods would actually undermine the legal system.

Of course, this model has always come under recurrent external scrutiny. Many, classically so Thorsten Veblen, took issue with the self-regulatory power of the profession which at the turn of the twentieth century coincided with rising barriers to practice amid a shift towards urbanized, corporate practice.[16] Critics like Veblen countered that lawyers used their self-regulatory powers to rationalize cartel-like behavior and in practice subordinated themselves to clients' interests without any discernible socially salutary effect.

Yet, while such critiques were part of lively public debates throughout American history, they were politically, if not academically, subdued by the mid-twentieth century as American lawyers did more than simply defend the

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13. Even revisionist accounts of this incident emphasize Adams' self-conscious view that his defense would shore up a broader commitment to legality after the Revolution. Farah Peterson, *Black Lives Matter and the Boston Massacre*, AM. SCHOLAR (Dec. 3, 2018) https://theamericanscholar.org/black-lives-and-the-boston-massacre/ [https://perma.cc/7W95-XTWW].

14. *See* David F. Maxwell, *The President's Annual Address: The Public View of the Profession*, 43 ABA ANN. REP. at 785 (1957).

15. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

16. Richard Wasserstrom, *Lawyers as Professionals*, 5 HUM. RTS. 1 (1975).

Holmesian vision as necessary for a just legal system.[17] Powerfully energized by the civil rights movement at home[18] and their growing role as combatants in the Cold War imagery of the post-World War II global legal order, American lawyers were able to convince large swaths of the American public that their legal practice possessed a specific admixture of public and private virtue that stimulated both American capitalism and democracy.[19]

The specific theorization and study of American legal ethics as an academic subject, however, is a much younger field than one might presume.[20] Historically, ethics was not a subject in standard legal curriculums, as the bargain of professional autonomy was taken as both sacrosanct and self-evident. It was not until the Watergate scandal of the 1970s that legal ethics became a core part of American legal education in response to this acute moment of public outcry.[21] In tandem, historians during this era began to deconstruct some of the shared mythology of the profession. Notably, Jerold Auerbach's 1976 *Unequal Justice* eviscerated the aristocratic view of the early twentieth-century American bar and made clear its discriminatory motivations for rejecting apprenticeship.[22]

It was only this relatively recent era of public discontent that led the profession to promulgate formal statements of professional values among bar associations[23] or debate the need for more concrete social commitments.[24] This increasing formal attention to legal ethics did not lead to any structural changes in the profession, and most often devolved into debates over re-issuing new codes of ethics to be enforced by the profession on itself. Concern with legal ethics would be reignited by new crises, and most consistently tied to countering public criticism that modern lawyers were largely in service of powerful corporations.[25]

The terms of academic debate over legal ethics grew into a quite durable stalemate in the post-Watergate era. Charles Fried's articulation of the lawyer as "friend" became one of the most enduring re-articulations of Holmes's client-

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17. Roscoe Pound, *What Is a Profession? The Rise of the Legal Profession in Antiquity*, 19 NOTRE DAME L. REV. 203 (1944).

18. David Wilkins, *Identities and Roles*, 57 MD. L. REV. 1502 (1998); Kenneth Mack, *Law and Mass Politics in the Making of the Civil Rights Lawyer*, 93 J. AM. HIST. 37 (2006).

19. Michael Ariens, *The Agony of Modern Legal Ethics*, 5 ST. MARY'S J. LEGAL MAL. & ETHICS 134, 134 (2015) ("When the ABA adopted its Code of Professional Responsibility at its annual meeting in August 1969, the American legal profession was a publicly respected and economically vibrant body."); *see also* ROBERT MACCRATE, ET AL., PRESERVING THE CORE VALUES OF THE AMERICAN LEGAL PROFESSION (2000).

20. David Luban & W. Bradley Wendel, *Philosophical Legal Ethics*, 30 GEO. J. LEGAL ETHICS 337 (2017).

21. Laurel Terry, *The Impact of Global Developments on U.S. Legal Ethics During the Past Thirty Years*, 30 GEO. J. LEGAL ETHICS 365, 367 (2017). This established an ongoing pattern of increasing formal pedagogical requirements in response to concerns about lawyer ethics, including a standardized ethics test, the MPRE, with state-specific thresholds that are ratcheted up whenever a crisis with sufficient momentum spills over into public debate.

22. *See* JEROLD AUERBACH, UNEQUAL JUSTICE 3-13 (1976).

23. Benjamin Barton, *The ABA, the Rules, and Professionalism*. 83 N.C. L. REV. 411 (2015).

24. Michael Ariens, *The Rise and Fall of Social Trustee Professionalism*, 2016 J. PROF. LAW. 49 (2016).

25. Thomas Morgan, *Calling Law a "Profession" Only Confuses Thinking about the Challenges Lawyers Face*, 9 U. ST. THOMAS L.J. 542, 545-46 (2011).

centric conception of lawyering.[26] In contrast, William Simon and David Luban have long representatively argued for a more contextual approach to lawyering whereby lawyers' general moral commitments should directly impact their work. Many proponents of this view were buoyed and shaped by the Warren Court-era of public interest lawyering that saw litigation as a powerful tool for liberal social change.

These divergent views often replicated larger issues in political philosophy in which individual legal ethics became a largely derivative domain.[27] Mediating between these generally opposed views of legal ethics grew increasingly difficult, especially as shared notions of the public good have broken down within the profession.[28]

Today, the terrain of American legal ethics continues this largely internal dyadic structure, with more recent generations emphasizing either better reconciling professional values with lawyer behavior[29] or alternative jurisprudential justifications for professional autonomy that centers fidelity to independent legal values.[30] Yet again, competing claims have been made in response that even a publicly minded fidelity to only the law itself is inherently authoritarian in nature.[31]

This stalemate is also replayed in contemplated intraprofessional reforms. The fact that much concern with American legal ethics centers on the ABA's Model Rules of Professional Conduct has been the subject of direct criticism as such debates never cross the line into directly infusing lawyers with any overt social responsibility[32] or promoting greater government funding of legal aid.[33] Most illustratively, Paul Tremblay recently argued that under certain conditions, the ABA Model Rules do not proscribe a lawyer from assisting a client's unlawful

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26. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1065-1067 (1976).

27. W. Bradley Wendel, *Pluralism, Polarization, and the Common Good: The Possibility of Modus Vivendi Legal Ethics*, 131 YALE L.J. F. 89, 92 (2021) ("The debate in legal ethics between those who emphasize fidelity to positive law and scholars who emphasize the common good or the public interest is isomorphic to the long-running opposition in political philosophy between liberalism and alternatives such as communitarianism, republicanism, and deliberative democracy.").

28. *See* W. Bradley Wendel, *The Rule of Law and Legal-Process Reasons in Attorney Advising*, 99 B.U. L. REV. 107 (2019); Michael McGinniss, *Expressing Conscience with Candor, Saint Thomas More And First Freedoms in the Legal Profession*, 42 HARV. J. L. & PUB. POL'Y 173 (2019).

29. *See* Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN L. REV. 589 (1985).

30. *See* Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 493 (2011); *see also* W. Bradley Wendel, LAWYERS AND FIDELITY TO LAW (2012) (introducing a more Habermassian view of lawyering as a form of faithful reasoning that is needed for social ordering); DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE (2008).

31. Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND L.J. 379. 381-95 (1991); David Dyzenhaus, *Why Positivism is Authoritarian*, 37 AM. J. JURIS 82, 85-86 (1992).

32. Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 720 (1981) ("But neither are any profession's own encyclicals likely to incorporate public policies that might significantly compromise members' status, monopoly, working relationships, or autonomy.").

33. *See* Ariens, *supra* note 19, at 156-57.

conduct if it is not criminal or fraudulent.[34] In turn, some lawyers have openly defended facilitating their client's "disruptive" law-breaking as itself in line with professional values.[35]

The strength of this professional rhetoric has often misled some outside observers to misapprehend the actual institutional arrangements of American lawyering. The American Bar Association, for example, is not directly involved in any form of lawyer discipline nor mandates pro bono work for its members—less than fifteen percent of American lawyers are actual members. The fragmenting impact of American federalism on the state-specific regulation of lawyer discipline and admission is one common surprise for foreign lawyers, and few foreign observers are directly exposed to the fact that state judiciaries are the dominant apex regulators for a wide range of lawyering issues.[36] Yet, this institutional arrangement means that most formal changes in lawyer regulation must currently happen at the state level—often far removed from general academic debate.

Concurrent with this regulatory inertia, the reality of lawyers' indirect social contribution has been most consistently challenged in the modern era by empirical scholarship pointing to the economic subordination of lawyers by powerful clients/capital.[37] Richard Abel is the pioneering modern critic in this vein, developing Margali Larson's "market control" theory whereby professional norms, ala Veblen, serve cartel-like insider interests.[38] Others have empirically tested any number of claims about how the self-regulatory power of lawyers is used,[39] including the new scholarship seeking to develop better psychologically informed models of lawyering.[40]

The same clash of professional ideal and empirical reality plays out when it comes to the behavior of bar associations as the most prominent defenders of these ideals and the self-regulatory logics they enshrine.[41] The continual revising

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34. *See generally* Paul R. Tremblay, *At Your Service: Lawyer Discretion to Assist Clients in Unlawful Conduct*, 70 FLA. L. REV. 251 (2018) (discussing whether the ABA Model Rules allow lawyers to assist in a client's unlawful, but not criminal or fraudulent conduct); *see also* Samuel J. Levine, *Another Look at Lawyer Discretion to Assist Clients in Unlawful Conduct: A Response to Professor Tremblay*, 70 FLA. LAW REV. FORUM 13 (2018); Bruce A. Green, *May Lawyers Assist Clients in Some Unlawful Conduct?: A Response to Paul Tremblay*, 70 FLA. L. REV. FORUM 1 (2018).

35. Charles M. Yablon, *The Lawyer as Accomplice: Cannabis, Uber, Airbnb, and the Ethics of Advising "Disruptive" Businesses*, 104 MINN. L. REV. 309, 378-84 (2019).

36. *See* Benjamin Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1184, 1213-15 (2003).

37. Robert Gordon notes the centrality of Louis Brandeis as a symbol of the publicly interested private lawyer, and Brandeis's early twentieth-century critique that lawyers had already lost their way by abetting capital at the expense of the public. Gordon, *supra* note 1, at 2-3, 14.

38. *See* Richard Abel, *Toward a Political Economy of Lawyers*, 1981 WIS. L. REV. 1117 (1981).

39. Benjamin Hoorn Barton, *Why Do We Regulate Lawyers? An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L. J. 429, 432-33 (2001).

40. Donald C. Langevoort, *Ego, Human Behavior, and Law*, 81 VA. L. REV. 853, 860, 863-64 (1995); Andrew Perlman, *A Behavioral Theory of Legal Ethics*, 90 IND. L. J. 1639, 1663 (2015).

41. Elizabeth Chambliss & Bruce A. Green, *Some Realism about Bar Associations*, 57 DEPAUL L. REV. 425, 428 (2008) ("The empirical literature on bar associations likewise invites a certain amount of cynicism—

of codes of professional conduct, either by the ABA or state or local bar associations, has increasingly led to incredulity about their sincerity,[42] especially when tested against meaningful evidence of their real-world impact on lawyer behavior.[43] It is fair to say that most empirically oriented scholars, qualitative and quantitative, recurrently conclude that few of the asserted grounds of lawyers' regulatory autonomy survive their scrutiny.[44]

More systemically, interdisciplinary work studying lawyers largely reveals a world of practice quite removed from the imagery of John Adams' Revolutionary era criminal defense. Today, defending unpopular criminal clients with no other resort against the state is quite often the sole purview of public defenders who too often are the least resourced class of practicing lawyers. Instead of defiantly appearing ex-post to represent a minoritized client, many lawyers' practices involve ongoing representation which organizes and facilitates clients' long-term commercial or financial interests. This planning function reflects much of the complexity of modern economic life whereby private legal practice is largely civil, not criminal, in nature—and may never directly involve courtroom litigation. While legal practice remains diverse, the vast predominance of legal wealth and status today is concentrated in urban, corporate practice serving the most powerful social institutions in American life.[45] The traditional image of the profession is thus out of step with how legal practice systemically impacts modern American economic and political life.[46]

Yet, many still repeat the same historical tropes that solely emphasize insulation from the state—even those serving the most powerful private agents on the planet whose resources regularly outstrip those of nation states.[47] Moreover, as with any socialized professional group, the more elite lawyers become in their careers, the less comfortable they become in calling out their peers on these grounds,[48] even when engaged in high profile political scandals.[49]

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or at least pessimism—about the possibility of public-interested law reform."); W. Bradley Wendel, *Foreword: The Profession's Monopoly and Its Core Values*, 82 FORDHAM L. REV. 2563, 2572 (2014). ("More to the point, the bar's most vigorous defense of its independence generally occurs in cases where other institutions seek to hold lawyers responsible for promoting injustice.").

42. *See* Thomas L. Shaffer, *American Legal Ethics*, 59 THEOLOGY TODAY 369, 369-70 (2022).

43. *See* Peter A. Joy, *Ethical Duty to Investigate Your Client?*, 11 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 414, 414 (2021).

44. *See* Leslie Levin, *The Monopoly Myth and Other Tales about the Superiority of Lawyers*, 82 FORDHAM L. REV. 2611, 2629-30 (2014).

45. *See* David Barnhizer, *Princes of Darkness and Angels of Light*, 14 NOTRE DAME J. L. ETHICS & PUB. POL'Y 371, 413 (2000) ("[T]he entire foundation on which the organized bar rests the edifice of entitlement to self-regulation and special rules [has] little to do with the reality of private law practice.").

46. Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L. J. 101, 102 (2004).

47. Barnhizer, *supra* note 45, at 376. ("Lawyers representing tobacco companies, murderers and polluters are consequently serving the interests of society and working for a form of the good, just as much as are those we commonly think of as public interest lawyers.").

48. Leah Litman, *Lawyers' Democratic Dysfunction*, 68 DRAKE L. REV. 303, 305-07 (2020).

49. Cynthia Godsoe, Abbe Smith & Ellen Yaroshefsky, *Can You Be a Legal Ethics Scholar and Have Guts?*, 35 GEO. J. LEGAL ETHICS 429, 429-33 (2022).

A consistent professional and academic retort to outside critiques has been that even if modern practice is compromised then this is something new, and that it can be rectified with an internally-driven professional revival.[50] Anthony Kronman notably advanced this type of "golden age" reasoning in *The Lost Lawyer*,[51] which joined a recurrent chorus lamenting the pernicious commercialization of American legal practice.[52] Yet, historians such as Laura Kalman have undermined such professional nostalgia by showing that complaints about the commercialization of American legal practice have a long pedigree and go even further back in time if you include the anti-aristocratic arguments of the mid-nineteenth century.[53]

As such, empirical and historical study has made it increasingly difficult to see how legal practice is systematically insulated from market forces[54] when "elite" lawyering means shaping the production and (non)enforcement of the law to match powerful clients' interests.[55] New studies repeatedly detail the market-pressures on modern legal practice,[56] including the institutional structure of law firms,[57] entry-level hiring,[58] and in-house counsel. Instead of exhibiting true independence from clients or the market, such studies highlight how lawyers' professional practice converges with the morality of their clients.[59]

Perhaps no area of law better represents this modern reality than modern tax practice. Tax practice is largely proactive in nature. Practitioners plan ahead for the purpose of maximizing clients' future legal entitlements.[60] Furthermore, the scope of this "planning" has been shown to include extralegally generating new entitlements for clients and influencing the terms of public regulation.[61] Similarly,

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50. Ariens, *supra* note 19, at 58.

51. *See* ANTHONY T. KRONMAN, THE LOST LAWYER (1993).

52. *See, e.g.*, Jeffrey W. Stempel, *Embracing Descent: The Bankruptcy of a Business Paradigm for Conceptualizing and Regulating the Legal Profession*, 27 FLA. ST. UNIV. L. REV. 25, 29-34 (1999).

53. *See* Laura Kalman, *Professing Law: Elite Law School Professors in the Twentieth Century*, *in* LOOKING BACK AT LAW'S CENTURY 337-339 (Austin Sarat, et al. eds., 2002).

54. "Lawyers are now viewed as simply one of many different kinds of 'service providers.'" Laurel S. Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as Service Providers*, 2008 J. PROF. LAW. SYMP. 189, 211 (2008).

55. "[We] know that lawyers will fight to preserve a world in which their legal duties rarely, if ever, require them to take an ethical stand against errant managers . . . never [having] to resign and can continue to do what they've always done: give advice, get paid, and watch." Kim, *supra* note 4, at 136.

56. See David Barnhizer, *Abandoning an 'Unethical' System of Legal Ethics*, 2021 MICH. ST. L. REV. 347, 382-388 (2021).

57. *See* Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1867-73 (2008).

58. *See* John Bliss, *From Idealists to Hired Guns?: An Empirical Analysis of "Public Interest Drift" in Law School*, 51 U.C. DAVIS L. REV. 1973, 2003-06 (2018).

59. *See* Riaz Tejani, *Moral Convergence: The Rules of Professional Responsibility Should Apply to Lawyers in Business Ethics*, 35 GEO. J. LEGAL ETHICS 33, 62-66 (2022); *see also* Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORDHAM L. REV. 2081, 2083 (2005).

60. *See* Heather M. Field, *Aggressive Tax Planning and the Ethical Tax Lawyer*, 36 VA. TAX REV. 261, 263 (2017).

61. *See* Zoe Prebble & John Prebble, *The Morality of Tax Avoidance*, 43 CREIGHTON L. REV. 693, 695-96 (2010).

some assert that corporate law practice can serve a public calling exactly because it places lawyers at the heart of private power,[62] even when lawyers are direct employees of corporations.[63] Again, the empirical reality of such claims has been tested to reveal that the anecdotal does not rise to the level of systematic reality.[64]

When the lines between lawyer behavior and client interest are so blurred, the charge of being complicit with the anti-social aims of powerful clients, regardless of their general unpopularity, becomes harder to deflect. Even basic fidelity to law is an empirically murky subject when the law itself is far from a fixed or determinate entity in the world of advanced legal engineering.[65] At a minimum, such modern realities present a morally and empirically suspect ground for lawyer self-regulation.[66]

As much debate as these claims have produced, even those who see the profession as in crisis still shy away from calls for state intervention and instead opt for collective self-correction[67] or individual moral realignment to address systemic ills.[68] More radical prescriptions are advanced,[69] but even quite critical diagnoses still hesitate to question professional independence.[70] Moreover, such studies have still been met by near absolute resistance by bar associations in acknowledging their findings[71]

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62. *See* Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255 (1990).

63. Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869 (1990).

64. Lyman P.Q. Johnson, *Counter-Narratives in Corporate Law: Saints and Sinners, Apostles and Epistles,* 2009 MICH. ST. L. REV. 847, 865 (2009).

65. Tanina Rostain, *Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry*, 23 YALE J. REGUL. 77 (2006); *see also* Christine E. Parker, Robert E. Rosen & Vibeke L. Nielson, *The Two Faces of Lawyers: Professional Ethics and Business Compliance with Regulation*, 22 GEO. J. LEGAL ETHICS 201, 239 (2009).

66. *See* ROBERT L. NELSON ET AL., THE MAKING OF LAWYERS' CAREERS: INEQUALITY AND OPPORTUNITY IN THE AMERICAN LEGAL PROFESSION 351-352 (John M. Conley et al. eds., 2023). Systematic empirical surveys of American legal practice are still relatively rare, but this book provides the results of a multi-year project centered at the American Bar Foundation. While its primary thrust is to deconstruct legal practice as a terrain of meritocracy, the book presents many related insights on the subordination of lawyers to powerful clients and its long-term effects on their political dispositions.

67. *See* Elizabeth Chambliss, *Marketing Legal Assistance*, 148 DAEDALUS 98, 103 (2019).

68. "This is not to suggest that attorneys should be required to introduce moral considerations into their work; imposing moral engagement under threat of discipline eviscerates the power of the endeavor by making it an externally oriented task to be completed, rather than an internally directed, ongoing exploration." Robert Vischer, Tortured Ethics: Abu Ghraib and the Moral Lawyer 47 (Oct. 5, 2004) (unpublished manuscript) (emphasis omitted), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=601203 [https://perma.cc/28DM-CFDL].

69. *See, e.g.*, Russell Pearce, *The Professionalism Paradigm Shift*, 70 N.Y.U. L. REV. 1229 (1995); Dana Remus, *Reconstructing Professionalism*, 51 GA. L. REV. 807 (2017); *see also* Dru Stevenson, *Against Confidentiality*, 48 U.C. DAVIS L. REV. 337 (2014).

70. *See* Alexander Guerre, *Lawyers, Context and Legitimacy: A New Theory of Legal Ethics*, 25 GEO. J. LEGAL ETHICS 107 (2012); Susan Carle, *Power as a Factor in Lawyer's Ethical Deliberation*, 35 HOFSTRA L. REV. 115, 116-20 (2006); JOHN COFFEE, GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 194-98 (2006).

71. *See* Samuel Levine, *Faith in Legal Professionalism*, 61 MD. L. REV. 217, 241 (2002) ("Rather than offering a response to Pearce's empirical evidence, such reliance on the hegemony of the believers in the professionalism model appears to deny-or at least ignore-reality in favor of perpetuating the faith of those in power."); *see also* Elizabeth Chambliss, *Evidence-Based Lawyer Regulation*, 97 WASH. U. L. REV. 297, 303-04

or even contemplating disaggregating discussions of lawyering into different practices[72]—which might open a broader public inspection.[73]

Concern with lawyers as exclusively private facilitators rather than public fiduciaries has grown more acute as the general issue of economic inequality grips public consciousness.[74] Even ethicists who hold to a less morally ambitious view of lawyering acknowledge that recent developments strain models predicated on a foundational fidelity to the law as currently practiced in the United States.[75] Others say this simply is not enough—anything but a clear-eyed empirical view of legal practice is an inapt ground for moving the debate forward.[76]

Understandably, sympathy for professional independence still resonates when it comes to practices like indigent defense that map onto the courtroom ideal of a zealous advocate defending the powerless against the state. And these structural realities do not prevent individual lawyers from reflecting seriously on their social impact or making enormous sacrifices to pursue alternative values in their work.[77] Nor do they preclude the possibility that many clients, even corporations, are themselves not purely profit seeking on their own.[78] The problem is whether there is any systemic difference between this general social heterogeneity in values and those of lawyers as a class, or whether such lines are any different between lawyers and other social actors who are not granted regulatory independence.

For lawyers committed to a more proactively social meaning to their work, arguments about the profession's social contributions and internal norms often present a double-edged sword. If more systemic reform is perceived as unrealistic, then emphasizing professional norms can be a second-best alternative to inducing selfless behavior. Adherence to historical narratives that valorize lawyers can also

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(2019). For examination of how this resistance leads to problematic extrapolations abroad, *see* Samuel L. Levine & Russell G. Pearce, *Rethinking the Legal Reform Agenda: Will Raising the Standards for Bar Admission Promote or Undermine Democracy, Human Rights, and the Rule of Law?*, 77 FORDHAM L. REV. 1635 (2009).

72. *See* Perlman, *supra* note 40, at 1663.

73. *See* Robert Eli Rosen, *Rejecting the Culture of Independence: Corporate Lawyers as Committed to their Clients*, 52 STUD. L. POL. & SOC'Y 33, 33-34 (2010).

74. *See* Sung Hui Kim, *Economic Inequality, Access to Law, and Mandatory Arbitration Agreements: A Comment on the Standard Conception of the Lawyer's Role*, 88 FORDHAM L. REV. 1665, 1665-1667 (2020).

75. W. Bradley Wendel, *The Rule of Law and Legal-Process Reasons in Attorney Advising*, 99 B.U. L. REV. 107, 164 (2019) ("At some point, however, the structure of secret accounts, artificial entities, and not-so-independent directors ceases to make sense as a rational response to a social problem, or even a nested set of problems, regarding the right of privacy and its limits, intra-family wealth transfer, and the like.").

76. Wald and Pearce have made this claim against Wendel, arguing essentially that "the incentives, values and thinking of ordinary lawyers' render [his theories] meaningless." Eli Wald & Russell Pearce, *Beyond Cardboard Lawyers in Legal Ethics*, 15 LEGAL ETHICS 147, 148 (2012); *see also* Eli Wald, *Getting In and Out of the House: The Worlds of In-House Counsel, Big Law, and Emerging Career Trajectories of In-House Lawyers*, 88 FORDHAM L. REV. 1765, 1766 (2020).

77. *See* John Bliss, *Divided Selves: Professional Role Distancing Among Law Students and New Lawyers in a Period of Market Crisis*, 42 LAW & SOC. INQUIRY 855, 890-93 (2017).

78. Parker et al., *supra* note 65, at 240.

be a reservoir of personal resilience for altruistic actors.[79] Again, many lawyers committed to positive social change have grappled with these tensions[80] and how to constructively engage with non-lawyers to promote shared visions of social justice.[81] And there are complete traditions of lawyering built upon rejecting current norms of professionalism, often attached to more radical critiques of American society.[82]

Still, what seems unavoidable today is that debates about legal ethics have foundational empirical predicates which predetermine much of their content. W. Bradley Wendel clearly describes the predominant position in most liberal legal communities: "In the vast majority of cases in a basically just society, however, a lawyer can assume that she is not committing a moral wrong by helping clients order their affairs with respect to their legal entitlements."[83] This term, "a basically just society," is an unavoidably empirical judgment that, in turn, becomes a more central issue than any ideal conceptualization of a system of legal ethics itself.

Herein, it becomes clear that that constructive criticism of modern lawyering should be less concerned with heaping opprobrium on individual lawyers' moral failures than with the institutional choices which shape the function of lawyers within a highly unequal society. As such, the future of debates over legal ethics will be less directly derivative of political philosophy than of empirical political economy. And for non-lawyers concerned with legal ethics, professionalism and the internal mechanics of legal practice will always be downstream from perceptions of their practical effects on democracy and inequality.[84]

B. THE GLOBAL CRISIS IN LAWYERS' CIVIC VIRTUES

As comparative study recurrently reveals, the social role and function of lawyers still varies significantly even among countries with relatively close legal heritages. However, the pressures and logistical demands of economic globalization have generated analogous conundrums across the world, especially as powerful economic actors move in and out of national boundaries with regularity.[85]

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79. Terence Halliday, *Politics and Civic Professionalism: Legal Elites and Cause Lawyers*, 24 LAW & SOC. INQUIRY 1013, 1019-20, 1051-52 (1999).

80. *See, e.g.*, Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

81. *See generally* SCOTT CUMMINGS, AN EQUAL PLACE: LAWYERS IN THE STRUGGLE FOR LOS ANGELES (2021).

82. *See, e.g.*, William E. Forbath, *Class Struggle, Group Rights and Socialist Pluralism on the Lower East Side—Radical Lawyering and Constitutional Imagination in the Early Twentieth Century* 18 (Pub. L. & Legal Theory Rsch. Paper Series, No. 712, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3485241 [https://perma.cc/49L4-JQNU].

83. W. Bradley Wendel, *Legal Ethics Is About the Law, Not Morality or Justice: A Reply to Critics*, 90 TEX. L. REV. 727, 733 (2012). Wendel makes his empirical predicate clear at this point: "around those extreme cases, however, I wrote this book to account for the nature of the good that lawyers do—most of the time." *Id.* at 733-734.

84. Aziz Rana, *Statesman or Scribe? Legal Independence and the Problem of Democratic Citizenship*, 77 FORDHAM L. REV. 1665, 1665-68 (2009).

85. *See* Glenn Morgan & Sigrid Quack, *Institutional Legacies and Firm Dynamics: The Growth and*

While American lawyers stand out in the degree to which they came to dominate their domestic and international institutions, the tension between their self-regulatory powers and their asserted civic virtues has been replicated widely. What seems evident is not that other countries have not faced these tensions, but that they have almost universally moved to limit lawyer independence in response.[86]

A more global view of legal ethics thus reveals rising public rejection of the social bargain of legal professionalism which originally was promoted by all common law professions. In the main, most professions have been unable to resist at least some significant decline in their regulatory autonomy. This relative decline has not led to a complete collapse in lawyer self-regulation, or an abandonment of professionalism, but a common spectrum of weakening.

Take, for example, Canada's common law legal profession. While now subject to more direct legislative supervision than their American peers, Canadian lawyers still retain a relatively high level of self-regulatory autonomy compared to many other national professions.[87] Several precedents have constitutionalized lawyer independence, though also formally establishing a wide-range of justifications for state encroachment.[88] And, while perhaps less grandly mythologized than the American historical image, generally analogous rationales for lawyer independence undergird Canadian justifications for lawyer independence.

In recent decades, however, the empirical turn in Canadian legal ethics has been impacted by new studies which attempt to disaggregate areas of practice[89] and explore the shifting realities of Canadian legal practice.[90] As a result, Canadian legal ethics discourse has been afflicted by a similar general unease with the insufficiency of a solely client-based ethical framework.

Following the general American pattern, a new generation of Canadian legal ethicists have fully rejected the presumption of amoral civic virtue as detached from reality[91] and now call for more robust social duties to be imposed on

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Internationalization of British and German Law Firms, 26 ORG. STUD. 1765, 1765-66 (2005).

86. *See generally* LAURA SYNDER, MODERNIZING LEGAL SERVICES IN COMMON LAW COUNTRIES: WILL THE US BE LEFT BEHIND (2017).

87. *See* Paul Paton, *Between a Rock and a Hard Place: The Future of Self-Regulation -Canada between the United States and the English/Australian Experience*, 2008 PROF. LAW. 87 (2008); Alice Woolley, *Lawyers and the Rule of Law: Independence of the Bar, the Canadian Constitution and the Law Governing Lawyers*, 24 NAT'L J. CONST. L. (forthcoming 2015).

88. Woolley, *supra* note 87, at 3 ("[S]uggesting that state interference with the lawyer-client relationship is warranted where that interference ensures that lawyer advocacy or advice respects legal boundaries, where it furthers other rule of law values or, in exceptional cases, to protect other overriding moral or substantive legal norms.").

89. *See, e.g.*, Adam Dodek, *Lawyering at the Intersection of Public Law and Legal Ethics*, 33 DALHOUSIE L. J. 1 (2010).

90. *See* BARRY CAHILL, PROFESSIONAL AUTONOMY AND THE PUBLIC INTEREST: THE BARRISTERS' SOCIETY AND NOVA SCOTIA'S LAWYERS, 1825-2005 (2019).

91. Arjona, *supra* note 3, at 265 ("For a theory that is based on institutional reasoning, it is surprising how little attention amorality pays to the real empirical context of lawyers daily practice.").

Canadian lawyers.[92] Just as American critics have reviewed the practical disconnect between revisions of professional codes and the realities of legal practice,[93] some Canadian legal ethicists now argue that an entirely new paradigm is required to systemically promote genuine public contribution through legal practice.[94]

Reaction to this new position has been met with controversy, as attempts to impose social obligations on Canadian lawyers have led to recurrent controversy. The dominant professional response has also been that whatever its issues, the profession has only recently gone astray and that this can be remedied by self-exhortation to return to more public-minded values[95] or adherence to voluntary to new ethical codes.[96] For these defenders, an undergirding faith remains that Canadian society is sufficiently just to satisfy the conditions for lawyers' role morality and the their indirect production of social virtues.

Other common law jurisdictions have now repeated parallel patterns of critique and resistance. We can see analagous polarization over social regulation of lawyers in Australia,[97] New Zealand,[98] and the United Kingdom.[99] While each case has its own particularities, each has also had led to greater public intervention in lawyer regulation. Moreover, each case makes clear that much of what is considered to ail lawyers is driven by larger structural social issues.[100] And such structural issues are predominately ones of economic design in which the market for legal services then operates.[101]

Even though it has always been a comparative truism that common law and civil law lawyering draw on different views of their relationship to the state,[102] it

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92. *See* Adam Dodek, *Canadian Legal Ethics: Ready for the Twenty-First Century at Last*, 46 OSGOODE HALL L.J. 1, 7-8 (2008).

93. Trevor Farrow, *Sustainable Professionalism*, 46 OSGOODE HALL L.J. 51, 53 (2008).

94. Daniel Del Gobbo, *Legal Ethics and the Promotion of Substantive Equality* 100:3 CAN. BAR REV. 439, 454 (2022).

95. *See* Paton, *supra* note 87, at 89-90.

96. *See* Amy Salyzyn & Penelope Simons, *Professional Responsibility and the Defence of Extractive Corporations in Transnational Human Rights and Environmental Litigation in Canadian Courts*, 24 LEGAL ETHICS 24, 24 (2021).

97. *See* Vivien Holmes & Simon Rice, *Our Common Future: The Imperative For Contextual Ethics In A Connected World*, *in* ALTERNATIVE PERSPECTIVES ON LAWYERS AND LEGAL ETHICS 56 (Francesca Bartlett, et al. eds, 2011); *cf.* Dimity Kingsford Smith, Thomas Clarke & Justine Rogers, *Banking and the Limits of Professionalism*, 40 U.N.S.W. L.J. 411, 452 (2017).

98. *See generally* Tim Dare, THE COUNSEL OF ROGUES? A DEFENSE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE (2009).

99. *See generally* Andrew Boon, *Professionalism Under the Legal Services Act 2007*, 17 INT'L J. LEGAL PROF. 195 (2010).

100. Smith et al., *supra* note 97, at 452 ("It is, however, reasonable to be skeptical about how much responsibility can be placed on individuals to act ethically when professionalism is undeveloped and when entity structure and incentivized high remuneration remain inimical, executive authority is not professionalized, and professional peer support is scarce.").

101. *See* Maeve Hosier, *The Legal Profession in Troikaland: Before and After the Irish Bailout*, 22 INT'L J. LEGAL PROF. 193, 194 (2015).

102. Catherine A. Rogers, *Between Cultural Boundaries and Legal Traditions: Ethics in International Commercial Arbitration* 3 (Bocconi Legal Studies Research Paper No 06-01, 2001), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=280850 [https://perma.cc/KT3J-KNUH]

is similarly true that European lawyers have had long-standing discourses on professionalism beyond direct state service.[103] At the level of actual lawyer discipline, common ground exists in how civil law professional associations seek to manage concerns with lawyer behavior through ethical voluntarism.[104] In lockstep, new studies lament the lack of empiricism grounding European discourses on legal ethics and their elision of concerns with social power in favor of more platitudinal assertions about the function of national professions in modern contexts.[105]

What these comparative parallels all point to is that in almost every national setting there has been a secular decline in lawyer independence—if still far from the world imagined by more radical modern legal ethicists. Most troubling, the public cynicism motivating deregulatory reforms has largely intensified lawyers' subordination to market discipline rather than reflecting some broader concern with their public function in a given legal system.[106] This genre of deregulatory response belies any clear idea of how to reconfigure legal practice beyond professionalism with non-market values in mind.

This global crisis in legal ethics evidences much of the now endemic discomfort felt by many nations as to the "basic justness" of their societies, even if concrete ideas about how to redemocratize lawyering remain elusive.

II. MODERNIZATION THEORY AS PROFESSIONAL ABSOLUTION

A. THE ETHICS OF LAWYERING IN UNJUST SOCIETIES

The historical participation of lawyers in legal regimes which were, or now are, considered to be unjust has long served as an empirical counterpoint for debates regarding legal ethics. Here, the notion of complicity has always remained center stage; either because the larger legal system of a nation is unjust or because the objectives of powerful clients are seen as crossing a normative threshold where a purely client-centered model appears irresistibly repugnant.

Perhaps most classically, debates over the role of law and legality in Nazi Germany start with the presumption that by no modern standard could the Nazi legal system be considered a part of a just society.[107] Moreover, the Nazi state and many allied actors had objectives that would directly or indirectly promote

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103. Maya Bolocan, *Professional Legal Ethics: A Comparative Perspective* 101 (ABA CEELI Concept Paper, 2002), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=321700 [https://perma.cc/3R7T-XDLG] ("Despite the many differences, the core values of the legal profession in the United States and European countries stem from the same roots and are based on similar central principles[.]").

104. *See id.*

105. *See* Iris van Domselaar & Ruth de Bock, *The Case of David vs. Goliath. On Legal Ethics and Corporate Lawyering in Large-Scale Liability Cases*, 26 LEGAL ETHICS 74, 77 (2023).

106. 6. *See generally* Nuno Garoupa, *Globalization & Deregulation of Legal Services*, 38 INT'L REV. L. & ECON. 77, 77 (2013).

107. *See* DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR 5 (1999).

genocide. Thus, acting as a lawyer within this system, or for particular clients within it, has been argued to be paradigmatically unjust and unethical.

The Nazi example invites broader debate about law beyond legal ethics in part because the German legal profession had enjoyed a long period of global prominence for its professionalism in the era leading up to the Nazi rise. Many have thus considered what role lawyers played in either facilitating or resisting Nazification and how this example can probe basic questions about legality itself.[108] Conclusions about lawyering within the Nazi regime often now revolve not around professionalism *per se* but competing accounts of harm reduction[109] weighed against complicity with the legitimation of immoral legal institutions and intentions.[110]

This tension between harm reduction and complicity drives many parallel debates regarding legal practice under other unjust regimes. Few regimes carry the same universal condemnation as that of the Nazis, and so analogous debates generally only occur in more retrospective considerations of past practices, or by isolating distinguishable anomalies within present systems. Many have attempted to argue that individual institutions can be positive morally even if they exist in a largely unjust context, thereby justifying norms of legal professionalism.[111] In parallel, particular legal proceedings, or patterns of legal persecution, can be ethically isolated within otherwise just legal systems.[112]

Representatively, debates in the United States regarding the role of lawyers in pre-Civil War slavery-related practices are marked by paralle dynamics.[113] Recently, this type of particularized complicity has been raised regarding lawyers working under the Japanese internment regime.[114] In most recent memory, the treatment of detainees at Guantanamo Bay raised similar issues—leading to splits among otherwise normatively consonant lawyers over representing clients under such conditions.[115] But, for the most part, such debates are popularly premised on some notion that these are anomalies within an otherwise just system—and thus do not force reconsidering legal ethics for the profession as a whole.

Perhaps the most studied modern example that did reach almost universal designation as systemically unjust was the case of apartheid South Africa.[116]

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108. *See* Leora Bilsky & Natalie Davidson, *Response: Legal Ethics in Authoritarian Legality*, 34 GEO. J. LEGAL ETHICS 655, 666-67 (2021).

109. *See* David Luban, *Complicity and Lesser Evils: A Tale of Two Lawyers*, 34 GEO. J. LEGAL ETHICS 613 (2021).

110. *See* Bilsky & Davidson, *supra* note 108, at 678.

111. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 113 (1988).

112. *See* Alexandra D. Lahav, *Portraits of Resistance: Lawyer Responses to Unjust Proceedings*, 57 UCLA L. REV. 725, 728 (2010).

113. *See* Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 CARDOZO L. REV. 1793, 1793 (1996); *see also* Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1897-99 (2019).

114. *See* ERIC L. MULLER, LAWYER, JAILER, ALLY, FOE 7 (2023).

115. *See* Mary Cheh, *Should Lawyers Participate in Rigged Systems? The Case of the Military Commissions*, 1 J. NAT'L SEC. L. & POL'Y 375, 375 (2005).

116. *See* RICHARD ABEL, POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980-1994 (1995); *contra* MICHAEL LOBBAN, WHITE MAN'S JUSTICE: SOUTH AFRICAN POLITICAL TRAILS IN THE BLACK CONSCIOUSNESS ERA (1996).

Straddling domestic and international issues of complicity and resistance, explorations of this example similarly generate difficult questions about the inter-relationship of legality, liberalism, and democracy.[117] One key distinguishing feature of the South African example is that it occurred during a time when many American and other foreign lawyers had active practices that operated either within the South Africa system or facilitated aspects of the South African government's engagement with the international economic order.

Contrary to instinctive modern condemnations, many lawyers in the United States who were critical of the regime still hesitated to translate this moral judgment into any support for formal restrictions on lawyers working with or for South African clients as part of the larger boycott movement.[118] Law students protested law firms representing South African clients, and many American law firms and partnerships evidenced sharp internal disagreement on leaving South African clients.[119] Any popular stigma had to be weighed against lucrative practices that included acting as direct stateside lobbyists for the South African government.[120]

While by 1985 the American Bar Association had openly condemned apartheid,[121] the fact that it has no actual disciplinary power meant any real-world decisions still fell to individual lawyers and their firms. Within this discourse, resort to the American professional image was common for justifying representing "unpopular clients" or claims regarding the prosocial impact that American lawyers could have in this context.

Most contemporary examples similarly blend some element of these claims of anomaly and the complications of internationalized legal practice. Contemporary engagement with the Israeli legal system produces perhaps the most polarized international and internal conclusions regarding the treatment of Palestinians.[122] Even lawyers deeply critical of the Israeli system, and who have devoted their lives to Palestinian clients, feel prompted to critically reflect on their potential complicity with a system they deem as unjust.[123]

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117. David Dyzenhaus, *Democracy, Rights, and the Law*, 7 S. AFR. J. HUM. RTS. 25 (1991); DAVID DYZENHAUS, JUDGING THE JUDGES, JUDGING OURSELVES TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER, at ix (1998) (discussing the judiciary's role in the apartheid legal order, its response to the investigation, and how it affects a judiciary's responsibility in a democracy).

118. David Weissbrodt & Georgina Mahoney, *International Legal Action against Apartheid*, 4 L. & INEQ. 485, 506-08 (1986).

119. David Sanger, *Law Firm Drops South Africa Client*, N.Y. TIMES, Oct. 4, 1955, at D1.

120. Rick Atkinson, *Law Firm's Split Airs Lobbying by South Africa*, WASH. POST (Mar. 12, 1984), https://www.washingtonpost.com/archive/politics/1984/03/12/law-firms-split-airs-lobbying-by-south-africa/aad02e87-9af8-4fec-ac16-e87c83789673/ [https://perma.cc/U4T6-K43Y].

121. Goler Butcher, *The Resolution of the American Bar Association against Apartheid*, 28 HOWARD L.J. 649 (1985).

122. *Compare* Itay Ravid, Sleeping *with the* Enemy? On Government Lawyers and Their Role in Promoting Social Change: The Israeli Example, 50 STAN. J. INT'L L. 185, 187 (2014), *with* Maayan Geva, *Military Lawyers Making Law: Israel's Governance of the West Bank and Gaza*, 44 LAW & SOC. INQUIRY 704, 705 (2019).

123. *See generally* MICHAEL SFARD, THE WALL AND THE STATE (2018).

All these examples reflect the historical contingency in what is considered a fundamentally unjust regime.[124] While most lawyers in modern democracies still consider their work as insulated from association with such concerns,[125] the ultimate driving force behind divergent conclusions is varying empirical presumptions about the social impact of lawyering itself.

Consider the serious introspection of human rights lawyers defending marginalized or oppressed peoples in an unjust system as a baseline. Here the commonly contemplated balance is between the harm reduction of defending particular clients and the larger harm of legitimating the unjust system in which they are defended. However, if this same calculus is applied to most any other more mundane representation under that same unjust system, then the strong implication has to be that such representation is complicit with the system's larger injustice. Any retort would have to provide some other type of positive social impact of such lawyering to balance the scales. Few studies of lawyering in unjust regimes contemplate this larger logical implication of their study of human rights lawyering, reflecting the dominant mode of still broaching normative questions about lawyering from non-structural but normatively evocative points of exception.

Here we can see that contemporary domestic controversies over legal ethics today are not so far removed from debates regarding lawyering in unjust regimes exactly because today's faith in the social bargain of professionalism has been weakened and larger judgments about systemic injustice have become less confined to only anomalous zones within otherwise just societies. The terms of these controversies are thus a combination of disagreement about both their empirical predicates—the systemic justness of a legal system—and empirical predictions—the systemic agency of legal practice itself.

B. THE LEGAL DYNAMICS OF COLD WAR GLOBALIZATION

As the South African example so aptly demonstrates, debates about legal ethics have become transnationalized following nearly a century of global economic integration in the post-World War II era. Much has been written about the rise of international legal institutions facilitating this change, particularly the role of American lawyers in this architecture.

For American lawyers, a central role in national foreign policy was evident from the earliest aspects of America's turn of the twentieth century rise as a

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124. "One has to wonder in what injustice we today may, in a century or two, be viewed as complicit?" M. Kelly Tillery, *Complicity*, HARV. L. REC. (November 25, 2019) https://hlrecord.org/complicity/ [https://perma.cc/Q9CR-MYU1].

125. Kiernan McEvoy & Anna Bryson, *Boycott, Resistance and the Law: Cause Lawyering in Conflict and Authoritarianism*, 85 MOD. L. REV. 69, 69-70 (2022). ("While lawyers are often critical of the structural failings of the legal edifice–arguing that particular laws, judges, political or policy initiatives, types of legal proceedings, and indeed core elements of a given legal culture are fundamentally unfair or unjust–this rarely leads them to conclude that they should refuse to engage.").

global power.[126] As noted earlier, the modern legal portrait of American lawyers portrayed themselves as international vanguards of American values. With the onset of the Cold War, this notion took on a whole new intensity as legality itself became a pivotal site of mutual distinction between the United States and the Soviet Union. This era of internationalization thus coincided with renewed assertions regarding the dual public and private virtues of American lawyers as champions and agents of democracy and capitalism.[127]

The generational impact of the Cold War on the American legal profession worked in two ways to reinforce traditional norms of professionalism among even those most critical of American society. First, the legal prosecution of suspected and avowed communists within the United States prompted distrust of state power among those with strong liberal values[128] and resonated with the symbol of unpopular clients in need of lawyers more committed to the law than to general social opprobrium.[129] Second, lawyers who worked with and for social movements calling for radical economic and racial justice were targeted by federal, state, and local law enforcement.[130] By contrast, the institutions of American lawyering, most decisively bar associations, were sites of conflict over how to reconcile professional norms with their larger desire to trumpet the idea that American lawyers were agents of anti-communism.[131]

What was perhaps more novel about these Cold War debates was that defenses of professional independence had to cross over from the representation of individual communists to the actual representation of communist regimes who still had economic interests within the United States. Perhaps the most notable case was that of Victor Rabinowitz, who represented many social dissidents but also the Cuban government in many of its American affairs.[132]

Yet, the geopolitical intensity of the Cold War initially kept most issues of complicity to the margins of international practice, largely because Soviet allied countries, in general, rejected integration into the U.S.-led international order up through 1989. Again, most liberal legal professions went through similar issues

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126. *See* Robert Gordon, *The Ideal and the Actual in the Law*, *in* THE NEW HIGH PRIESTS 14, 52-53 (Gerald Gawalt ed., 1984).

127. Up until the end of the Cold War this contribution was also openly tied to Christianity by leaders of the profession. *See* Robert Storey, *Under God and the Law*, 78 ANN. REP. ABA 322, 325-26 (1953); Sheldon Elliott, *'Lawyers' Duty to the Creator*, 7 J. LEGAL EDUC. 275 (1947).

128. *See generally* STANLEY KUTLER, THE AMERICAN INQUISITION: JUSTICE AND INJUSTICE IN THE COLD WAR (1982).

129. *See* Jose Anderson, *Freedom of Association, the Communist Party, and the Hollywood Ten*, 40 MCGEORGE L. REV. 25, 51-52 (2019); Norman Silber, *Monroe Freedman and the Morality of Dishonesty*, 44 HOFSTRA L. REV. 1127, 1128-29 (2016).

130. *See* Gerald Horne, *Civil Rights/Cold War*, 48 GUILD PRAC. 109, 111-12 (1991); Gregory Briker & Justin Driver, *Brown and Red*, 74 STAN. L. REV. 447, 488 (2022).

131. *See* Tom Killefer, *Free Lawyers and Cold War*, 41 ABA J. 417, 420 (1955).

132. Michael Krinsky, *Victor Rabinowitz*, 69 NAT'L L. GUILD REV. 129, 133 (2012); Michael Lockman, *An Ethical Representation of Sovereign Clients in Debt Disputes*, 30 GEO. J. LEGAL ETHICS 73, 95 (2017).

with Cold War-inspired pressures on their legal systems,[133] which were then turned to fortifying anecdotal defenses of their professional autonomy even though they were otherwise systemically status quo actors.[134]

The heat of these debates often elided the transnationalizing forces reshaping lawyering and which Cold War economic globalization had induced with American lawyers in a leading position. While international institutions proliferated and global supply chains penetrated nearly every global economy, no concomitant international system of legal discipline developed, or stated more precisely, no practical differentiation was made in domestic systems between representing domestic and foreign clients without legislative intervention. As American lawyers and the interests they represented found themselves spread to every corner of the globe, they simply extrapolated their domestic mode of ethical self-representation abroad—as well as when they represented any global interest within the American legal system.

As such, the same moral agnosticism came to be seen as applying to clients regardless of their origin but also, most consequentially, what legal system they are represented in. Here we see the root of the controversies over servicing South African entities during apartheid. For decades, lawyers had been working for South African clients at home but also in South Africa. It was only after rising public awareness of the evils of apartheid that the profession was forced to systemically confront these ethical issues of complicity.

What debate did occur regarding "international" legal ethics rarely touched on the contested normative grounds of domestic lawyering and instead focused on technical compliance and other issues of regulatory mismatch. Over the last four decades, a distinct subset of legal ethicists did directly engage with the growing implications of American lawyering occurring beyond national bounds. Mary Daly and Roger Goebel were early movers who attempted to map out the regulatory challenges of, and potential solutions for, the globalization of legal practice.[135] Other attempts have been made to form a coherent field of what could be called "international legal ethics"[136] for both domestic lawyers working abroad

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133. *See, e.g.*, KEITH EWING ET AL., MI5, THE COLD WAR, AND THE RULE OF LAW (2020).

134. W. WESLEY PUE, LAWYERS' EMPIRE: LEGAL PROFESSIONS AND CULTURAL AUTHORITY, 1780-1950 366 (2016) ("A bolder assertion of discretionary power and a narrower scope for external constraint can hardly be imagined: they believed themselves to be fully empowered as gatekeepers to the profession.").

135. *See generally* Mary Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization*, 46 EMORY L.J. 1057 (1997) [hereinafter Daly, *Lawyering for a Global Organization*]; Mary Daly, *The Ethical Implications of the Globalization of the Legal Profession*, 21 FORDHAM INT'L L.J. 1240 (1998) [hereinafter Daly, *Globalization of the Legal Profession*]; *see also* Roger Goebel, *Professional Responsibility Issues in International Law Practice*, 29 AM. J. COMP. L. 1 (1981). Many during the 1990s were optimistic about harmonization projects and some even argued that the Council of Bars and Law Societies of Europe Code enacted in 1999 might come to act as an umbrella regulation for lawyers globally.

136. *See* Deborah L. Rhode, *International Legal Ethics: The Evolution of a Field*, 42 FORDHAM INT'L L.J. 219 (2018).

and those devoted to more forthrightly transnational forms of practice such as international arbitration.[137]

Reticence to fully link extant domestic critiques of professionalism to international practice reflects how many of these writers were strongly committed to the ideals of professionalism. Their gravest concern was that unmooring lawyers from their domestic context would lead to an abandonment of ethical duties, especially for in-house counsel employed by multinational corporations.[138] Posing this dilemma, however, required a pre-existing empirical belief that lawyers serving powerful international clients wanted to act as agents of moral persuasion, and already did so domestically.[139] Again, empirical study has subsequently cast doubt on this faith matching actual legal practice.[140]

This genre of international work has been influential in various forums, such as the International Bar Association or the United Nations Basic Principles on the Role of Lawyers, as well as in a range of other international and supranational contexts.[141] Concretely, these forums maximally seek the production of voluntary model codes. As a result, just as there are no special domestic regimes for regulating international practice, there remains no substantial international regime for regulating lawyer behavior.[142]

The long-term impact of Cold War globalization among most liberal legal professionals was a hardening of the belief in the need for insulation from state power alongside an almost seamless extrapolation of the norms of a client-centric legal professionalism across the wide-ranging frontiers of economic globalization. As legal ethicist Catherine Rogers describes, for the representatively rapid

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137. *See* Catherine Rogers, *Fit and Function in Legal Ethics*, 23 MICH. J. INT'L L. 341, 350 (2002).

138. This article "expresses the concern that the changes may contribute to the emergence of a new cadre of elite in-house lawyers who represent exceedingly powerful multinational business entities but lack professional identities associated with the rule of law." Daly, *Lawyering for a Global Organization*, *supra* note 135, at 1058-59. Notably, in-house counsel in civil law countries have few professional protections, including a lack of presumed confidentiality. *See id.* at 1103-04.

139. This dynamic clearly connects to the work of David Wilkins on domestic and international lawyering. Wilkins has long promoted the socially responsible vision of corporate lawyering, rooted in his admiration for the accomplishments of pioneering Black lawyers. David B. Wilkins, *Doing Well by Doing Good? The Role of Public Service in the Careers of Black Corporate Lawyers*, 41 HOUS. L. REV. 1 (2004); Ben W. Heineman, Jr. et al., *Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century*, HARV. L. SCH. CENTER ON THE LEGAL PRO. (Nov. 20, 2014), https://clp.law.harvard.edu/wp-content/uploads/2022/10/Professionalism-Project-Essay_11.20.14.pdf [https://perma.cc/G72A-85JM]. Thus, when studying in-house counsel abroad, Wilkins asks whether they will act as agents of resistance to neoliberalism. David Wilkins & Mihaela Papa, *The Rise of the Corporate Elite in the BRICS*, 54 B.C. L. REV. 1149 (2013). Again, this is a question premised on the assumption that as a class in-house counsel are doing so domestically.

140. *See* Christopher Whelan, *Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?*, 34 VAND. J. TRANSNAT'L L. 931, 948 (2001).

141. *See generally* ARMAN SARVARIAN, PROFESSIONAL ETHICS AT THE INTERNATIONAL BAR (2013).

142. Martin S. Flaherty, *Facing the Unravelling of Reform: Domestic and International Perspectives on the Changing Role of China's Rights Lawyers*, 41 FORDHAM INT'L L.J. 1091, 1101 (2018) ("First, international law addressing the role of lawyers remains inadequate. Either it is binding and too general. Or it is detailed and merely hortatory.").

expansion of international commercial arbitration, transnational legal practice came to exist "in an ethical no-man's land."[143]

C. MODERNIZATION THEORY'S PROMISE OF ALL GOOD THINGS TOGETHER

From the outset of their national history,[144] American lawyers were at the vanguard of American global economic empire, continuing through the twentieth-century.[145] Prior to the profession's massive expansion after World War II, many American lawyers were already all too comfortable explaining their overseas engagements using the racialized and nationalist tropes intertwined with the increasingly popular notion that they carried forth the civilizing ethos which had long-marked international law.[146] Yet, the spread of modern economic globalization took on an increasingly rationalized and putatively scientific aesthetic that sought more apparently neutral and universal rationales for development.

While never subduing racialized understandings of the international legal order, social theoretical frames for understanding American engagement with the development of foreign nations became ever more popular. The most dominant of these modern frames is what can loosely be called "modernization theory." Pioneered by scholars from a range of fields, modernization theory became commonly identified with seminal contributions by Walt Rostow, Seymour Lipset, and Samuel Huntington.[147] Achieving something akin to the "common sense" of American international engagement, a core premise of modernization was that social development followed a teleological pattern of progression in which economic growth laid the groundwork for political democratization. The causal levers of this development were varied, but all grounded in stylized versions of Euro-American history which refashioned foreign engagement as a potential form of applied social engineering.[148]

While its proponents, critics, and practitioners engaged in any number of disagreements and refinements, modernization theory bled into the discourse on American lawyering abroad because it was concerned with explaining the two things that American lawyers often took credit for vitalizing—economic growth and political democratization. The particular prevalence of lawyers in the American

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143. *See* Rogers, *supra* note 102, at 1.

144. *See generally* JAMES C. FOSTER, THE IDEOLOGY OF APOLITICAL POLITICS 13, 37-43 (1986); Justin Simard, *The Birth of a Legal Economy: Lawyers and the Development of American Commerce*, 64 BUFF. L. REV. 1059 (2016).

145. *See* BENJAMIN COATES, LEGALIST EMPIRE 98 (2016).

146. *Compare* MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS 482-87 (2001), *with* Harold Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

147. *See* WALT ROSTOW, THE STAGES OF ECONOMIC GROWTH (1960); Seymour Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 AM. POL. SCI. REV. 69 (1959); SAMUEL HUNTINGTON, THE THIRD WAVE (1991).

148. For a general critique of these stylized histories, see HA-JOON CHANG, KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE (2002).

foreign policy establishment led to growing faith that legal reform was one of the causal levers that could be applied abroad to achieve developmental goals—and by administrations across the American political spectrum. The private and public virtues of American lawyers abroad thus could, in multiple roles, be as uniquely impactful abroad as they had claimed to have been at home.[149]

One particularly striking example of this synergy was the, perhaps once counterintuitive, position that democratization could be facilitated by direct support for and engagement with authoritarian regimes. The progressive, teleological character of modernization theory made such claims especially useful for alliance with authoritarian regimes which had promised to act as bulwarks against communism. Such bulwarks were justified, at least publicly, not as a matter of opportunistic alliance but because such authoritarians were committed to the genre of economic and legal reforms that modernization theory posited would later lead to their democratization. While the use of such rationales for engagement with authoritarians such as Chile's Augusto Pinochet has traditionally been held out as an early example of this dynamic, Republican-era Chinese authoritarian Chiang Kai-shek was likely the first for which American allegiance was granted based on this logic of eventual transition.[150]

Over time, this prediction of democratic spillover would come to apply to even non-aligned authoritarians who pursued "orthodox" economic and legal development. As a result, arguments that private American engagement, in particular that of American lawyers, was somehow complicit in facilitating the authoritarian aims of such regimes shrank to apply only to the smallest number of actively avowed enemies.[151] And while individual lawyers or law firms may have been singled out episodically for public chastisement in some quarters, the role of lawyers in American economic internationalization became strongly cloaked in the ethical absolution that modernization theory provided.

Here, the lynchpin consonance emerges—modernization theory's reconciliation of economic and democratic values resonates with the traditional indirect logic underlying American lawyers' professional amoralism. Both achieve their ultimate positive social contribution through a fierce defense of private self-interest and instinctive aversion to any criticism of serving socially unpopular, if massively powerful, agents.

It was no coincidence that those American lawyers at the vanguard of economic globalization were largely drawn from the most elite sectors of the urban bar and the most proactive in promoting the virtues of the profession while

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149. See JEDIDIAH KRONCKE, THE FUTILITY OF LAW AND DEVELOPMENT (2016) for a history of these developments.

150. *Id.* at 167.

151. Perhaps the most enduring example is North Korea. *See* Shim Kyu-Seok, *Practicing Law in Pyongyang - and Adoring It,* KOREA JOONGANG DAILY (Jan. 22, 2019), https://koreajoongangdaily.joins.com/2019/01/22/people/Practicing-law-in-Pyongyang-and-adoring-it/3058497.html [https://perma.cc/V9MU-RA4D].

representing powerful social interests.[152] Bryant Garth and Yves Dezalay have repeatedly detailed how the public/private bargain of American lawyers is often invoked to predict the impact of international lawyering in various countries[153] and has facilitated a great deal of the open integration between the logics of modernization theory and American lawyers' civic virtue.[154]

Debates about the impact of American lawyers in foreign contexts, both public and private, has produced voluminous literatures which, at least in this respect, emphasize that they did pursue the interests of their clients rather than directly challenge social injustice.[155] Thus, modernization theory helped provide a powerful bridge between the domestic and international in a manner that neatly fit the Cold War's geopolitics of ideological allegiance over actual democratic commitments. The bridge was then progressively extended wherever economic globalization penetrated. Furthermore, the complexities of modern financial capitalism meant that for more and more lawyers their practices tied them to long-term relationships planning their globalized clients' long-term objectives—including shaping American law itself if necessary.

Such developments provided an entirely new global geography for American lawyers' democratizing agency free from concerns with authoritarian complicity, even in contexts which had traditionally been considered the province of the soul-searching debates over lawyering in unjust regimes. Ultimately, any attendant empirical debate over whether a society was "basically just" was obviated by a future promise of the coming transformations of the "end of history."

D. CHINA FROM LEGAL PARIAH TO MODERNIZATION'S CONVERT

In the final decades of the twentieth century, faith in modernization theory became subject to growing academic criticism, but only growing professional approval. Nowhere was this faith on better display than in American lawyers' reengagement with China after 1978.

Prior to 1978, the CCP had for three decades largely sealed its economy off from the patterns of modern economic globalization. Its rise to power in 1949 was accompanied by an open rejection of the international legal order and robust

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152. *See* Ronit Dinovitzer & Bryant Garth, *Pro Bono as an Elite Strategy in Early Lawyer Careers*, *in* PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 115, 131 (Robert Granfield & Lynn Mather eds., 2009) ("Elites [are] more likely than the rank and file of the profession to both promote the ideals of the profession and to reap the profits that come from those ideals[.]"); Bryant Garth, *Noblesse Oblige as an Alternative Career Strategy*, 41 HOUS. L. REV. 93, 106-07 (2003).

153. *See* Bryant Garth, *Corporate Lawyers in Emerging Markets*, 12 ANN. REV. L. & SOC. SCI. 441, 445-47 (2016).

154. *Compare* Yves Dezalay & Bryant Garth, *Corporate Law Firms, NGOs, and Issues of Legitimacy for a Global Legal Order*, 80 FORDHAM L. REV. 2309, 2310-13 (2012), *with* Christine Parker & Tanina Rostain, *Law Firms, Global Capital, and the Sociological Imagination*, 80 FORDHAM L. REV. 2347, 2355-57, 2366 (2012).

155. *See, e.g.*, Jayanth Krishnan et al., *Legal Elites and the Shaping of Corporate Law Practice in Brazil*, 41 LAW & SOC. INQUIRY 346 (2016).

criticism of what it saw as rationalizations of capitalist injustice.[156] Chinese law, in turn, was recurrently cast as an antipode to Western law—magnified by the collapse of pre-1949 presumptions that Chiang Kai-shek would be an early demonstration of American-inspired modernization theory in action. Yet, when CCP leader Deng Xiaoping announced a new era of wide-ranging reforms and re-engagement with the global economic system in the late 1970s,[157] a great enthusiastic rush of American trade and investment with China arose.[158] This rush included many of those same lawyers who had grown quite adroit duroing the previous three decades labeling Chinese law as the antithesis of American legal values.

The rapid ebullience of this re-engagement with a recent strategic enemy was predicated on the now well-integrated tenets of modernization theory and the resonant professional self-image of American lawyers as vectors of economic and democratic dynamism. A great deal of focus was put on various legal exchanges at the private and public level—though some critical academic debate did immediately ensue about China's prospects for liberalization and American lawyers' role therein.[159] Nonetheless, the overwhelming sentiment was one that provided private American lawyers little hesitation in acting on behalf of clients who sought competitive advantage from Chinese labor or imagined future access to China's domestic markets, and such absolution extended to represening the CCP itself internationally and at home. In 1980, China was granted "Most Favored Nation" (MFN) trading status as one tangible effect of a chorus of voices predicting that this would help lay the groundwork for political liberalization.

In turn, the CCP granted American lawyers and other foreign elites spaces in which to maneuver as it redeveloped its own legal infrastructure.[160] The "rule of law" as a causal level of development had by this time developed into its own sometimes independent vein of modernization theory, often claiming aspects of American law and legal institutions as having their own independent liberalizing effects.[161] This was also an era when the CCP practiced a form of managed experimentalism that even included philanthropically-conceived legal projects, such as law school clinics or judicial training programs, which were open as to their

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156. *See* JEDIDIAH KRONCKE, THE FUTILITY OF LAW AND DEVELOPMENT: CHINA AND THE DANGERS OF EXPORTING AMERICAN LAW 192-193 (2016).

157. RANDAL PEERENBOOM, CHINA'S LONG MARCH: TOWARD RULE OF LAW 1, 55, 58 (2002).

158. SUSAN L. SHIRK, HOW CHINA OPENED ITS DOOR: THE POLITICAL SUCCESS OF THE PRC'S FOREIGN TRADE AND INVESTMENT REFORMS 1 (1994).

159. *See, e.g.*, Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT'L ECON. L. 179, 213-14 (1999); *see also* William P. Alford, *Exporting "The Pursuit of Happiness,"* 113 HARV. L. REV. 1677, 1699-1700 (2000).

160. The domestic developments related to Chinese lawyers during this period are especially complex. For a broad contextualization, see generally John Ohnesorge, *Regulation of the Legal Profession in China*, 8 CHINA L. & SOC'Y REV. (forthcoming, 2023).

161. *See* Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 CORNELL L.J. 209, 214-15 (2011).

liberalizing motivations. Claims of American lawyers' impact on Chinese development were not only reserved for such overtly altruistic engagements, but they were also often attributed to even the most unabashedly profit-driven engagement by private American lawyers.[162]

The first stress test of this set of modernizing presumptions came only eleven years later during the Tiananmen Massacre of 1989. This violent crackdown on pro-democracy protesters, centered in Beijing but spread throughout China, made clear that the CCP had little interest in political democratization and was all too wary of the mechanisms of ongoing Soviet destabilization. Yet, while some American academic and non-profit actors were turned away from legal engagement after Tiananmen, whatever pause the aftermath induced was but a blip in increasing international economic integration and the persistent faith in the eventual liberalizing force of American lawyers' engagement with China.[163] U.S. commercial and legal engagement with China again only deepened, and the 1990 round of debate over China's MFN status led once again to its renewal.

While many dissents were voiced, the unipolar moment of the 1990s spurred ever growing confidence that the "end of history" had been reached with the defeat of the Soviet Union. Presumed to be far less formidable than the U.S.S.R., any other incidence of authoritarians integrating into the global economic order was judged to be inherently transitory. Even more aggressively, it became commonplace to claim that an emphasis on human rights issues in foreign relations was naïve and would impede long-term social development by unduly complicating trade relations.

The strength of this conviction became clear when President Bill Clinton, who had campaigned on a pledge to make human rights a cornerstone of U.S.-China diplomacy, took only a year after his 1993 election to backtrack from this commitment and publicly cite the tenets of modernization theory as he promoted permanent normal trade relations with China.[164] This logic was again on confident display during the process of China's ascension to the World Trade Organization in 2001.[165]

Ongoing debates within the American legal academy and related philanthropic actors did push greater nuance and reflection on these issues.[166] This kind of

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162. *See* Jamie P. Horsley, *Doing Business with the People's Republic of China: The Role of Foreign Lawyers*, 7 MICH. Y.B. INT'L LEGAL STUD. 63, 78 (1985).

163. *See* Anthony Dicks, *The Chinese Legal System: Reforms in the Balance*, 119 CHINA Q. 540, 575-76 (1989).

164. Ann Devroy, *Clinton Reverses Course on China*, WASH. POST, May 27, 1994, at A1. ("This decision offers us the best opportunity to lay the basis for long-term sustainable progress on human rights and for the advancement of our other interests with China.").

165. There were and are many different perspectives on the relationship between human rights and modern economic globalization. *See, e.g.*, Susan Koshy, *From Cold War to Trade War*, 58 SOC. TEXT 1, 21 (1999).

166. *See, e.g.*, Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored 'Rule of Law' Reform Projects in the People's Republic of China*, 18 UCLA PAC. BASIN L.J. 64, 66 (2000); Sophia Woodman, *Bilateral Aid to Improve Human Rights*, 51 CHINA PERSP. 28, 30 (2004).

debate drew attention because such engagements, often falling under the rubrics of "law and development" or "rule of law promotion," were central to the new constellation of practices which continued to link the virtues of the American legal profession to its presence in international affairs.[167]

Yet, these debates involved only a tiny sliver of the volume of actual Sino-American legal exchange. The number of private lawyers managing American commercial activity in China dwarfed those committed to overtly public interest projects, even as private lawyers often publicly linked their enterprises together. Overt reference to legal ethics or concerns with complicity were rare as the same near-commonsensical extrapolation of domestic norms to international practice had taken hold. However unjust one could judge the CCP, or any actor aligned with its objectives, representation in any forum or other engagement with American lawyers was laying the foundation for a more liberal China with every billable hour.

By the 1980s, even the most brutal authoritarian regimes had made use of the services of international law firms, American and otherwise. While rarely cast as such, the South Africa example had already been predated by an international expansion of American legal practice into many unjust regimes. In turn, a similar rush to re-engage with Russia and the former Soviet Republics was carried forth with the same enthusiasm.[168]

The onset of the twenty first century witnessed direct representation of and operation within authoritarian regimes as a normalized aspect of elite international legal practice.[169] The clarion resonance of modernization theory and the logic of a socially virtuous amoral legal ethics led to open calls that lawyers "may represent any type of regime while simultaneously serving goals of transnational justice."[170]

III. LEGAL HYPOCRISY IN AN AGE OF RESURGENT AUTHORITARIANISM

A. CHINA AND THE QUICK DEATH OF MODERNIZATION THEORY

Modernization theory's end of history faith in inexorable liberalism predicted a globe converging towards a basically just world. It requires little exaggeration to say that this teleological faith has been recently shattered in just a few short years. The resilience of authoritarian regimes, often after long periods of economic growth, has defied modernization theory's predictions. In concert, the rise of illiberal populist movements and leaders across the globe has unsettled most liberal democratic nations. How to prevent what has been called "democratic

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167. *See* Bryant Garth, *Building Strong and Independent Judiciaries through the New Law and Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results*, 52 DEPAUL L. REV. 383, 388 (2002).

168. *See* Robert Rosenblatt, *U.S. Lawyers Teach Soviets How to Be Capitalists*, L.A. TIMES (Oct. 31, 1990, 12:00 AM), https://www.latimes.com/archives/la-xpm-1990-10-31-fi-3277-story.html [https://perma.cc/2Y5A-RHPC]; Deborah Stead, *American Lawyers in the Soviet Thicket*, N.Y. TIMES, Nov. 5, 1990, at D1.

169. Jones Day has perhaps the most extensive practice of authoritarian representation. *See generally* DAVID ENRICH, SERVANTS OF THE DAMNED (2022).

170. Lockman, *supra* note 132, at 76.

backsliding" has replaced regime democratization as the pressing frame of contemporary conversations.[171] At the core of these developments is a serious questioning of the purported uncomplicated relationship between markets and democracy. This questioning must then implicate any ethical frameworks which were dependent on this presumption, such as any professional discourse which claimed to serve markets and democracy without complication—that of American lawyers again emblematically so.[172]

From the outset of modernization theory's emergence as the "common sense" of development, an equally robust literature on democratization cast severe doubts on an easy relationship between economic development and political regime change.[173] Many scholars questioned whether any particular vector of democratization had been consistent enough to serve as the type of actionable causal level proposed by modernization theorists. While too robust a literature to survey here even in brief, the clear takeaway from this critical work is that not "all good things go together" when it comes to development in any country.[174]

In fact, while engagement with China was publicly framed through modernization theory's lens, it also became a common example of its limitations.[175] For the specific hope that the "rule of law" would operate as one of modernization theory's levers, such expectations, especially American related aspirations, have been met by far more complex on-the-ground realities.[176] Chinese lawyers, as a class, are understandably more wedded to the market realities that the CCP shapes for them than in acting as a democratic vanguard.[177] In turn, a whole host of conceptual frames have proliferated to describe the CCP regime as different shades of "resilient authoritarianism" defying consistent predictions of its imminent collapse.[178]

Even so, the striking repressive turn that the CCP has pursued under Xi Jinping since 2013 took many long-time observers by surprise. For all the technical elements scholars have explored as contributing to the CCP's management of

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171. *See* Fabio Wolkenstein, *What is Democratic Backsliding*, 30 CONSTELLATIONS 1, 268-69 (2022).

172. *See* Bryant G. Garth, *Independent Professional Power and the Search for a Legal Ideology with a Progressive Bite*, 62 IND. L.J. 183, 183-86, 214 (1987).

173. *See* Adam Przeworski & Fernando Limongi, *Modernization: Theories and Fact*, 49 WORLD POL. 155, 156 (1997).

174. Sonia Grimm & Julia Lenninger, *Not All Good Things Go Together: Conflicting Objectives in Democracy Promotion*, 19 DEMOCRATIZATION 391, 392 (2012).

175. *See* JIE CHEN, A MIDDLE CLASS WITHOUT DEMOCRACY: ECONOMIC GROWTH AND THE PROSPECTS FOR DEMOCRATIZATION IN CHINA 150-54 (2013).

176. *See generally* Sida Liu, *Globalization as Boundary-Blurring: International and Local Firms in China's Corporate Law Market*, 41 LAW & SOC'Y REV. 771 (2008) (showing how Chinese lawyers learned to perform the social rituals and display the public symbols of American lawyering while often working to hide local realities or normative divergences).

177. *See* Ching-fang Hsu, Ideological Freelancers: The Politics of Legal Profession on Defense of and Offense against Authoritarianism 111 (2020) (Ph.D. dissertation, University of Toronto) (on file with University of Toronto).

178. *See* Andrew J. Nathan, *China's Changing of the Guard: Authoritarian Resilience*, 14 J. DEMOCRACY 6, 16 (2003).

concurrent economic development and political centralization, what seems clear during this recent turn is that whatever experimentalism the CCP had allowed that held out any hint or promise of political liberalization has been excised.

In particular, the Xi administration has amplified its concerted persecution of the many Chinese citizens who had hoped and fought for a more liberal future.[179] More perversely, this drive was facilitated by the CCP's assumption that no systemic material backlash from this crackdown would come from foreign legal professions, much less American lawyers.[180] Long-time supporters of human rights brought to the international community great detail about their suppression in China.[181] These same voices have grown increasingly incensed that international law firms have been absolutely silent during these developments,[182] even as the professional associations they claim membership in perform public rituals of support.[183] Such anger leads to the reflexive response by some to call the legal profession to task. But this has become yet another example of expecting abroad something that is highly contingent domestically.[184]

The nature of this contradiction was again been on display in the post-2019 developments in Hong Kong. Hong Kong had been seen as a liberal holdout within China even after its 1997 handover from the United Kingdom—sometimes cast as harbinger of China's own larger democratization.[185] At the same time, its putative economic liberalization had often made it a favored locale in the feverdreams of modernization theory's proponents.[186] As such, Hong Kong has long

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179. *See generally* EVA PILS, CHINA'S HUMAN RIGHTS LAWYERS: ADVOCACY AND RESISTANCE (2014).

180. *See* James Hefferman, *An American in Beijing: An Attorney's Ethical Considerations Abroad with a Client Doing Business with a Repressive Government*, 19 GEO. J. LEGAL ETHICS 721, 721-22 (2006); *see also* Lucy Hornby, *China Lawyer Travails Split American Bar Association*, FIN. TIMES (Aug. 5, 2016), https://www.ft.com/content/fd221ebc-5ac2-11e6-8d05-4eaa66292c32 [https://perma.cc/9M8S-5JNN].

181. Eva Pils, *In Whose Service?: The Transnational Legal Profession's Interaction with China and the Threat to Lawyers' Autonomy and Professional Integrity*, 41 FORDHAM INT'L L.J. 1263, 1265 (2018); Fu Hualing, *The July 9th (709) Crackdown on Human Rights Lawyers: Legal Advocacy in an Authoritarian State*, 27 J. CONTEMP. CHINA 554 (2018).

182. Flaherty, *supra* note 142, at 1105 ("No foreign law firm doing business in China has issued any public statement, nor apparently has made any private representation, condemning the ongoing crackdown on rights and other lawyers. The same apparently goes for any practicing attorney, prominent or otherwise.").

183. Pils, *supra* note 181, at 1265-66 ("Against the wider background of collaboration and exchange, foreign governments, legal professional bodies, and entities working with them have also not shied away from criticizing the Chinese government . . . but to be effective, commitment to the excellent standards invoked here should be demonstrated throughout the legal profession's engagement with colleagues in authoritarian systems.").

184. *See* Flaherty, *supra* note 142, at 1107 (considering the following statement, which is posed as out of step with the general practice of American lawyers: "[a]n even greater challenge issues externally. It is, in a word, money. The profits derived from doing business in what will soon be the world's largest economy come with their own perceived shackles. Foreign attorneys and firms in China can be all but petrified that any advocacy on behalf of embattled Chinese counterparts can lead to loss of clients, connections, and outright banishment.").

185. *See* Robert Berring, *Farewell to All That*, 19 LOY. L.A. INT'L L.J. 431.

186. *See* James Peck, *Milton's Paradise: Situating Hong Kong in Neoliberal Lore*, 1 J.L. & POL. ECON. 189, 200 (2021).

been the major regional legal hub for many international legal professions and the site of a variety of confident mergers between foreign and Chinese law firms. Yet, following the 2019 pro-democratic protests and resulting riots, a wholesale reorganization of Hong Kong's political institutions coincided with a systemic repression of pro-democracy advocates, many of whom were local lawyers.[187] The reaction by the private foreign legal community was complete silence, with American law firms again no different. What changes in the local market have occured have been the result of national political action, not any self-imposed restrictions by law firms based on non-market professional values. In fact, while the American Bar Association has issued any number of new condemnations, the actual subsequent controversies in Hong Kong have been the degree to which American firms have, in fact, been complicit in these changes.[188]

The sum force of these developments is a new era where the past framing of engagement with China through modernization theory's lens has been roundly called a mistake.[189] This change has, unfortunately, prompted little genuine self-reflection about what this means for domestic understandings regarding the relationship between lawyers, markets, and democracy in the United States and elsewhere.[190] Instead, the entire Sino-American relationship has been embedding in a self-reinforcing national security discourse which has reframed the relationship in an anything-but-self-critical discourse of geopolitical competition.[191] Those once hopeful for China's liberalization have now turned to developing strategies for minimizing what many perceive as the damaging effects of this broad geopolitical shift.[192]

However, while the relationship of China and American lawyers is illustrative of modernization theory's once-hegemonic status and rapid fall from grace, some do credit China's presence on the international stage as supportive in technical and geopolitical terms of this global rise.[193] Yet, it is but one example of this fall-out from a secular global rise in authoritarianism. What is more evident is that

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187. *See* Albert Y. H. Cheung, *Unpalatable Realities, No Choices*, 19 INT'L J. CONST. L. 1154, 1164 (2021).

188. *See* Vivia Chen, *Davis Polk Talks Out of Both Sides of Its Mouth on Human Rights*, BLOOMBERG L. (May 27, 2022), https://news.bloomberglaw.com/us-law-week/davis-polk-talks-out-of-both-sides-of-its-mouth-on-human-rights [https://perma.cc/SU6F-LYP8]; Chris Opfer, *Mayer Brown Faces Boycott Call After Dropping Hong Kong Client*, BLOOMBERG L. (Oct. 18, 2021), https://news.bloomberglaw.com/business-and-practice/mayer-brown-faces-boycot-call-after-dropping-hong-kong-client [https://perma.cc/9LPR-KECC].

189. *See* Reihan Salam, *Normalizing Trade Relations with China Was a Mistake*, THE ATLANTIC (June 8, 2018), https://www.theatlantic.com/ideas/archive/2018/06/normalizing-trade-relations-with-china-was-a-mistake/562403/ [https://perma.cc/HYZ2-3Q4A].

190. In his final publication, Arif Dirlik reflected on how reactions to Chinese authoritarianism most crucially omit the consonant authoritarian nature of global capitalism. DIRLIK, *supra* note 2, at 34-35.

191. *See* ANTHEA ROBERTS & NICOLAS LAMP, SIX FACES OF GLOBALIZATION 122 (2021).

192. *See* Gregory Shaffer, *Governing the Interface of U.S.-China Trade Relations*, 114 AM. SOC'Y INT'L L. 622, 639–40 (2021).

193. *See* Jessica Chen Weiss, *A World Safe for Autocracy? China's Rise and the Future of Global Politics*, 98 FOREIGN AFF. 92, 92–94 (2019).

something akin to a process of authoritarian learning has developed in recent decades that is no longer bilateral and regime-specific but global.[194] As a result, only the weakest or most marginalized regimes now perceive any genuine sanction for violating human rights norms, especially given where their allegiances fall in the new geopolitics of national security competition.

More broadly, an entire literature has developed on 'authoritarianism and law' that subverts many of the long asserted truisms about law and political development in which modernization theory partook.[195] Herein, authoritarian regimes have been shown quite increasingly capable of managing foreign actors within their own legal systems[196] while they also invest in international "legal hubs" in attempt to detach domestic and international legal practices.[197] Their ability to influence international legal institutions has also reversed previous assumptions about the liberalizing effects of such engagement,[198] especially those that structure the multi-lateral trading system.[199]

If the resilience and legal adaptability of authoritarian regimes had not been enough to derail modernization theory's confidence, perhaps the most startling development in recent years has been the Russian invasion of Ukraine.[200] The invasion has placed greater scrutiny on the fact that international law firms have long served the Russian state and its most corrupt citizens, including facilitating sanction-avoidance and shielding overseas mercenary operations.[201] Here, U.K. law firms were perhaps the most active in their representation of Russian oligarchs and in assisting their integration into international financial hubs like London[202]—all while exhibiting the same consequent apathy of an amoral, role-based legal ethics.[203]

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194. *See* ROSALIND DIXON & DAVID LANDAU, ABUSIVE CONSTITUTIONAL BORROWING: LEGAL GLOBALIZATION AND THE SUBVERSION OF LIBERAL DEMOCRACY 3 (2021).

195. *See generally* TOM GINSBURG & TAMIR MOUSTAFA, RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (2012); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018).

196. *See* Frederick R. Chen & Jian Xu, *Partners with Benefits: When Multinational Corporations Succeed in Authoritarian Courts*, 77 INT'L ORG. 144, 145–46, 172 (2023).

197. Matthew S. Erie, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 60 VA. J. INT'L L. 225, 227–30 (2020).

198. *See* Thomas Ginsburg, *How Authoritarians Use International Law*, 31 J. DEMOCRACY 44, 44–47 (2020).

199. *See* Greg Shaffer & Henry Gao, *China's Rise: How it Took on the U.S. at the WTO*, 2018 U. ILL. L. REV. 115, 116–20 (2018).

200. Global peace through economic integration is a distinct but complementary claim to modernization theory's promises. *See* Patrick J. McDonald, *Peace Through Trade or Free Trade?*, 48 J. CONFLICT RESOL. 547, 547–49 (2004).

201. *See* Alice Speri, *Mercenary Lawyers: Inside the Aggressive Legal War to Shield the Founder of Russia's Wagner Group*, THE INTERCEPT (Oct.19, 2022), https://theintercept.com/2022/10/19/russia-hack-wagner-group-yevgeny-prigozhin/ [https://perma.cc/4LP2-Z624].

202. *See* Nick Cohen, *The Unsavoury alliance between oligarchs and London's top lawyers*, THE GUARDIAN (May 26, 2018), https://www.theguardian.com/commentisfree/2018/may/26/unsavoury-alliance-between-oligarchs-and-london-top-lawyers [https://perma.cc/7YRY-JRV5].

203. *See id.*

The difference in reactions to the Russian invasion from the Chinese domestic repressive turn has been noticeable. In some liberal states, the Russian invasion has motivated calls for full legal disengagement from Russia—highlighted by recent Harvard Law graduate Ryan Donahue's public refusal to work for a firm that maintained Russian operations. Concerened legal academics have constructed a database to track the actual material progress of this disengagement, unsubtly titled "Law Firms and Russian Profits."[204] Yet, among other industries, what is most noticeable is the general lack of law firm disengagement, though the Russian invasion shows no sign of abatement.[205] Even here, the imagery and mandates of a client-centric professionalism are continually invoked to resist any potential state regulation of the free access of Russian state interests to international legal services.[206]

Modernization theory seems to be quickly fading into the past, but the transnationalized world of legal engagement it gave easy absolution to remains much harder to unwind even under the most egregious of contexts.

B. THE UNAVOIDABILITY OF LEGAL ETHICS' EMPIRICAL PREDICATES

Ekow Yankah argues that the concept of 'legal hypocrisy' is central to the dilemmas of modern liberal regimes. For Yankah, a legal system is hypocritical if it "becomes a barely disguised tool for power."[207] Yankah's formulation is useful for understanding resurgent authoritarianism, as it is exactly this hypocrisy that undermines the rule of law in ways that coincide with growing doubts regarding the fidelity of modern lawyers to anything except market dictates.

Under Yankah's analysis, much of what is characterized as authoritarian law is hypocritical—only tempered by authoritarians' practical concerns with exercising power effectively and maintaining their political authority. For lawyers working under authoritarian regimes, this practical restraint can provide some limited room to maneuver and remains perhaps the most sympathetic context for a defense of professional independence.[208]

But for those lawyers working with and in authoritarian regimes from the outside, they now do so in a post-modernization theory world where faith in the future is far from given. There is no collective understanding that we are heading

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204. *See* Robert M. Daines, *Law Firms and Russian Profits*, STAN. L. SCH. (Mar. 16, 2022), https://law.stanford.edu/law-firms-and-russian-profits/ [https://perma.cc/39TZ-L5C3].

205. *See* Simon J. Evenett & Niccolo Pisani, Less Than Nine Percent of Western Firms Have Divested From Russia 8 (Dec. 20, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4322502#:~:text=At%20the%20end%20of%20November,notable%20variation%20in%20divestment%20rates. [https://perma.cc/7M7H-C35U].

206. *See* Press Release, Foreign, Commonwealth & Development Office, Sanctions in Response to Putin's Illegal Annexation of Ukrainian Regions (Sept. 30, 2022), https://www.gov.uk/government/news/sanctions-in-response-to-putins-illegal-annexation-of-ukrainian-regions [https://perma.cc/R63D-B5XL].

207. Ekow Yankah, *Legal Hypocrisy*, 32 RATIO JURIS 1, 4 (2019).

208. *See* Yulia Khalikova & Anton Kazun, *Should I Stay, or Should I Go? Self-Legitimacy of Attorneys in an Authoritarian State*, 75 CRIME, L. & SOC. CHANGE 373, 390–91 (2021).

towards a more just world, and no nation can reflexively claim that its status as 'basically just' is broadly shared without controversy.

This means that discussions of lawyers' constitutive role in modern economic globalization have implications for evaluating the empirical predicates of their professional ethics at home. This problem is not novel and has been part of a longer, critical, but ever-marginalized tradition on international lawyering, just as modernization theory has always had its detractors.

Over twenty-five years ago, Philip Alston inaugurated a firestorm of criticism when he argued that international lawyers served as the myopic "handmaidens" of global capitalism.[209] In parallel, John Flood referred to elite international lawyers as self-promoting "sanctifiers" of economic globalization.[210] Both were attacked for ignoring the virtues of modernization theory and for centering moral judgments of the clients international lawyers represented.

Such critiques only intensified following deeper global economic integration and now implicate lawyers from most every developed nation involved in facilitating various extractive multi-national projects.[211] With more direct aim at American lawyers, Samuel Moyn recently ignited a similar backlash by criticizing the relationship between human rights lawyering and neoliberalism, as well as the corrosive relationship between American law schools and democracy.[212] All of which again is consonant with the broad sociological point long advanced by Dezalay and Garth regarding the overlapping world of public interest and private law which continue to resist regulatory differentiation as distinct forms of lawyering.[213]

This broadly critical tradition highlights the fundamental reality that every international and transnational ethical challenge recapitulates domestic challenges. Modernization theory held out the alluring idea that legal practice in even the most repressive contexts was not just different, but was, in fact, freer from the concerns of domestic practice because it hyper-charged the presumed empirical

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209. Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 3 EUR. J. INT'L L. 435, 435 (1997).

210. *See* John Flood, *Lawyers as Sanctifiers: The Role of Elite Law Firms in International Business Transactions*, 14 IND. J. GLOB. LEGAL STUD. 35, 38 (2007).

211. *See generally* Arjona, *supra* note 3.

212. *See* Samuel Moyn, *Law Schools are Bad for Democracy*, CHRON. HIGHER EDUC. (Dec. 16, 2018), https://www.chronicle.com/article/law-schools-are-bad-for-democracy/ [https://perma.cc/T7LW-DUZH].

213. 213. *See* Andrew Fagan, *The Gentrification of Human Rights*, 41 HUM. RTS. Q. 283, 305–06 (2019); Tom B. Ginsburg, *Law and the Liberal Transformation of the Northeast Asian Legal Complex in Korea and Taiwan*, in FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM 43, 61 (Terrance Halliday, et al. eds., 2007). Many American lawyers who committed themselves to humanitarian-conceived projects of legal exchange and reform in China have felt compelled to openly defend themselves from criticism that their work helped scaffold the construction of China's resilient legal authoritarianism. This occurs alongside the same deafening silence of their private legal peers when commercial activity has always been the focus of American lawyers in China and their material epicenter of their collective impact.

predicates of professional autonomy to set aside any concerns with contemporary injustices.

Thus, if we return to the question of empirical predicates at the heart of Wendel's deceptively simple "basically just society," we can see that it implicates far more than the content of legal ethics.[214] One cannot easily unsettle one facet of a now mutually constitutive system of foreign and domestic legal practice whose empirical predicates were taken as mutually reinforcing for over half a century.[215]

IV. CONCLUSION

Eight years ago, leading scholar of legal globalization Laurel Terry observed that for lawyers "global dialogue, global collaboration, and formal and informal global networks seem to be here to stay."[216] As a descriptive statement this may still be true, but the content of these conversations has shifted dramatically from what Terry might have then predicted. The hopeful aspiration that lawyers as a global profession would serve as a vanguard of progressive liberalization already required the strongest of interpretive bents on American and other legal histories.[217] The ultimate answer Robert Gordon could provide as to whether American lawyers historically promoted the rule of law at home—as he pondered their promotion of it overseas—was a cautious "sometimes."[218]

What seems clear is that understanding the role of lawyers in any international context requires both a critical perspective on their domestic reality and a clear-eyed view of the social dynamics of globalization. While modernization theory once proved incredibly resistant to critique among the professional elites to whom it granted great agency,[219] its fall cannot lead to a world with no theory at

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214. Wendel, *supra* note 83, at 733. Wendel's recent work is marked by a growing sense of unease regarding the realities of legal practice—even expressing concern that something akin to Yankah's worry has indeed coming to root in the American system: "[J]ust repeating these arguments as mantras, while failing to appreciate the moral costs of representing some clients, risks mystification, cynicism, alienation, and amoralism." W. Bradley Wendel, *Lawyering Shaming*, 2022 U. ILL. L. REV. 175, 227 (2022).

215. A separate question would be whether economic development is, in fact, a good, in and of itself, without democratic contribution. Such discussion is valid once the groups involved drop other justificatory democratic claims as the primary basis of legitimation. *See, e.g.*, Jerry A. Cohen, Essay, *Was Helping China Build Its Post-1978 Legal System A Mistake?*, 61 VA. J. INT'L L. ONLINE 1, 1 (2020).

216. Laurel Terry, *The Impact of Global Developments on U.S. Legal Ethics During the Past Thirty Years*, 30 GEO. J. LEGAL ETHICS 365, 387 (2017).

217. Emblematic are discussions of the "legal complex" of lawyering as inherently pro-liberalizing. *See* Terence C. Halliday et al., *The Legal Complex in Struggles for Political Liberalism*, *in* FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM 1, 8 (2007). Yet, even in this now well-known collection the editors state that: "[c]uriously, in no case was each segment of the legal complex internally unified in its fight for basic legal freedoms." A deeper consideration of what the statistical majority of lawyers were doing in each of these case studies reveals that in reality "pro-liberal" aspects of the complex are, by far, the statistical minority. *Id.* at 17.

218. Robert W. Gordon, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, 11 THEORETICAL INQ. L. 441, 468 (2010).

219. *See* Nils Gilman, *Modernization Theory Never Dies*, 50 HIST. POL. ECON. 133, 149 (2018).

all. Many critical views of globalization have been proffered before,[220] but the great uncertainty gripping the modern world has seen resort to uglier forms of ethnic and political nationalism to fill modernization theory's space as an all-too-ready and dismal alternative.

This systemic malaise also means that the unavoidably negative light which has been cast on the American and other liberal legal professions should not be taken as an exceptional indictment. While lawyers have been the builders of much of the post-World War II international order, they have hardly acted alone. Kimberley Kay Hoang has described the modern global economic order as enmeshed in "spiderweb capitalism" whose sinews have been spun and maintained by a wide range of professions and actors from across the world.[221] The line between lawyers and other professions has become ever harder to draw as their coordination crisscross modern economies.[222] As such, the orchestration of authoritarian regimes' integration into global society goes well beyond lawyers, American or otherwise.

Consider the recent public scrutiny given to the consulting firm McKinsey's work with multiple authoritarian regimes and the visceral reaction prompted by lavish corporate celebrations within visual distance of detention camps.[223] Political scientist Calvert Jones has produced a range of scholarship detailing how powerful outside experts from any number of liberal nations become subordinated to authoritarian priorities.[224] Perhaps most notorious is the case of former Blackwater CEO Erik Prince's Frontier Services Group which supplied logistical support for Xinjiang detention camps,[225] in defense of which Prince fell back on the claim that such services were not political.[226]

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220. *See* IMMANUEL WALLERSTEIN, WORLD-SYSTEMS ANALYSIS (2004); ANDRE G. FRANK, REORIENT: GLOBAL ECONOMY IN THE ASIAN AGE 7 (1998).

221. *See* KIMBERLY KAY HOANG, SPIDERWEB CAPITALISM: HOW GLOBAL ELITES EXPLOIT FRONTIER MARKETS 5–6 (2022).

222. *See* Tanina Rostain, *The Emergence of "Law Consultants,"* 75 FORDHAM L. REV. 1397, 1397–99 (2006).

223. *See* Michael Posner, *How McKinsey and Co. Fails as a Global Leader*, FORBES (Dec. 18, 2018), https://www.forbes.com/sites/michaelposner/2018/12/18/how-mckinsey-co-fails-as-a-global-leader/ [https://perma.cc/HT4S-AUHD]; WALT BOGDANICH & MICHAEL FORTSYHTE, WHEN MCKINSEY COMES TO TOWN 33–34 (2022).

224. Calvert W. Jones, *Seeing Like an Autocrat: Liberal Social Engineering in an Illiberal State*, 13 PERSPS. ON POL. 24, 34 (2015); Calvert Jones, *What Happens When Consultants Work for Authoritarian Regimes*, HARV. BUS. REV. (Apr. 8, 2019), https://hbr.org/2019/04/what-happens-when-consultants-work-for-authoritarian-regimes [https://perma.cc/85UH-47FX]. Jones's field work in the United Arab Emirates gives further insight into the processes of socialization that interconnect elites from authoritarian regimes with their global peers.

225. *See* Marc Fisher, Ian Shapira & Emily Rauhala, *A Warrior Goes to China: Behind Erik Prince's China Venture*, WASH. POST (May 4, 2018), https://www.washingtonpost.com/new/world/wp/2018/05/04/feature/a-warrior-goes-to-china-did-erik-prince-cross-a-line/ [https://archive.ph/zitTX].

226. *See id.* Whether from principle or fear of implication given the heightening national security framing of Sino-American relations, Prince was reported to the Department of Justice by one of the law firms he had retained to explore the legality of these services. Jeremy Scahill & Matthew Cole, *Before He Was FBI Director, Chris Wray Supervised an Investigation That Found Erik Prince Likely Broke U.S. Law*, THE

The legacy of wide-ranging economic globalization also means that conceptualizing engagement with authoritarian regimes as something that happens in some foreign or extraterritorial space is an anachronism. Increasingly, authoritarian regimes are active participants within liberal societies as much as they are within international institutions.[227] Universities are increasingly caught up in reconciling their expansive engagement with authoritarian regimes, even verging on financial dependence.[228] There is now a growing literature on the impact of authoritarian regimes on liberal legal systems themselves.[229] None of which is easily separable from the home grown authoritarianism taking root in many formally democratic regimes.[230]

Individual voluntarism and self-regulation will never be able to meet such challenges.[231] Some have offered more tailored solutions to issues of complicity in international corporate malfeasance,[232] or developed creative legal arguments to hold legal advisers responsible for complicity with more overt acts of authoritarian violence.[233] Recognizing the complications of individual determinations, Diego Zambrano has more surgically proposed a system of executive or legislative determination that would guide judges in managing the impact of authoritarians in liberal court systems.[234]

Still, the global contours of the problem present the possibility that there is little that can be done through the traditional means of lawyer regulation. Tinkering with ethical codes or law school pedagogy will achieve little if the political economy in which private lawyering is embedded still presumes that social goods will be delivered through a blind advancement of private interests. Shai Agmon has recently provided the clearest articulation of how legal services' provision as a

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Intercept (MAR. 19, 2018), https://theintercept.com/2018/03/19/erik-prince-frontier-services-group-chris-wray-fbi/ [https://perma.cc/DK5S-RT3X].

227. "Authoritarian influence peddling" abetted by "western enablers who currently have little to fear from the court of public opinion." Thorsten Benner & Ricardo Soares de Oliveira, *Facing Up to Authoritarian Influence-Peddling*, FIN. TIMES (Nov. 15, 2016), https://www.ft.com/content/cb0d0469-147f-3d6e-b13a-cc810fc03125 [https://perma.cc/8ENH-4TXY].

228. Yvonne Chiu, *Don't Aid and Abet China's Surveillance State*, L. & LIBERTY (June 12, 2019), https://lawliberty.org/forum/dont-aid-and-abet-chinas-surveillance-state/ [https://perma.cc/BDS9-9MZH].

229. *See, e.g.*, Mark Jia, *Illiberal Law in American Courts*, 168 U. PA. L. REV. 1685, 1687–88 (2020); Diego Zambrano, *Foreign Dictators in U.S. Courts*, 89 U. CHI. L. REV. 157, 157 (2022).

230. *See* Scott L. Cummings, *Lawyers in Backsliding Democracy*, 112 CALIF. L. REV. 513, 518–20 (2023).

231. *See, e.g.*, Robert C. Bird, Daniel R. Cahoy & Lucien J. Dhooge, *Corporate Voluntarism and Liability for Human Rights in a Post-Kiobel World*, 102 KY. L.J. 255 (2014); Virginia H. Ho, *Of Enterprise Principles & Corporate Groups: Does Corporate Law Reach Human Rights?*, 52 COLUM. J. TRANSNAT'L L. 113, 138 (2013).

232. Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon, An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 95 (2002).

233. Caspar Plomp, *Aiding and Abetting: The Responsibility of Business Leaders Under the Rome Statute of the International Criminal Court*, 79 UTRECHT J. INT'L & EUR. L. 4, 6 (2014); Milan Markovic, *Can Lawyers Be War Criminals*, 20 GEO. J. LEGAL ETHICS 347, 349 (2007).

234. Zambrano, *supra* note 229, at 165.

market commodity—inevitably distributed along lines of economic inequality—means that lawyers cannot help but systemically reproduce this same inequality if their work is solely market driven.[235] Essentially, and at whatever historical starting point one may choose, Durkheim's notion of professionalism has become an empirical nonstarter.

The most realistic perspective available is the one still anathema to most lawyers: that they face the same moral quandaries as all other social actors without any ontologically special reservoir of either resistance or perspicacity. It is exactly acknowledging this lack of specialness which troubles so many legal ethicists. Monroe Freedman, long a nuanced defender of lawyer autonomy, stated without hesitation that the discretion to choose one's client came with moral culpability that a lawyer should not avoid through recourse to professional truisms.[236] It is perhaps all too obvious that any lawyer freed from the demands of material necessity has almost innumerable options to exercise this discretion in a principled fashion.[237] Yet, a vice-like attachment to formalistic notions of private freedom still result in confidently inapt analogies between serving the most powerful and serving the most powerless.[238] For the American legal profession, a comprehensive self-assessment would require not just a loss of their special status at home, but also a loss of the special status they have enjoyed in the international world for most of modern history.[239]

Exceptional lawyers have and do exist in professions across the world.[240] Socially motivated lawyers make significant sacrifices to work for causes in which the moral and empirical complexity of modern society demands constant innovation and enduring optimism.[241] But the same is true for many non-lawyers.

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235. "[L]egal representation is allocated as a commodity where it is bought and sold in the market: the more one pays, the better legal representation one gets. . .the integration of a market in legal representation with the adversarial system undercuts the very normative justifications on which the system is based." Shai Agmon, *Undercutting Justice: Why Legal Representation Should Not Be Allocated by the Market*, 20 POL. PHIL. & ECON. 99, 99 (2021).

236. Monroe Freedman, *The Lawyer's Moral Obligation of Justification*, 74 TEX. L. REV. 111, 113 (1995).

237. *See* Isaac Chotiner, *A Harvard Law School Professor Defends His Decision to Represent Harvey Weinstein*, NEW YORKER (Mar. 7, 2019), https://www.newyorker.com/news/q-and-a/a-harvard-law-school-professor-defends-his-decision-to-represent-harvey-weinstein?_sp=5141a90d-af12-4b39-b44c-491d9d92d361.1727255094282 [https://archive.ph/57nvM].

238. *See* Wendy Brown, *Neoliberalism's Frankenstein: Authoritarian Freedom in Twenty-First Century "Democracies,"* 1 CRITICAL TIMES 60, 65 (2017). David Dyzenhaus has long argued that the prioriziation of formal legality inherent in some forms of legal ethics risks undermining substantive democracy. He terms this "the hegemony of the negative liberty strand within public life." David Dyzenhaus, *Rand's Legal Republicanism*, 55 MCGILL L.J. 491, 509 (2010).

239. *See* Anthony E. Davis, *Regulation of the Legal Profession in the United States and the Future of Global Law Practice*, 19 PROF. LAW. 1 (2008) (noting the complex relationship between American firms and international regulators); *see also* Christopher Whelan, *The Paradox of Professionalism: Global Law Practice Means Business*, 27 PENN ST. INT'L L. REV. 465, 482–83 (2018) (describing the tension between the public interest dimension and the privatized commercial aspect of practicing law).

240. *See, e.g.*, Paula A. Franzese, Eugene D. Mazo & Lawrence Spinelli, *The Lawyer Hero: Lessons in Leadership for Lawyers From Watergate to the Present Day*, 54 U. TOL. L. REV. 359, 362 (2023).

241. *See* McEvoy & Bryson, *supra* note 125, at 103.

The fact that moral choices are possible, and self-sacrifice available, does mean that anyone with technical expertise should automatically be treated with a deference unavailable to others—the presumption could just as easily be the opposite. In the end, any society may judge authoritarian engagement in any number of ways, and lawyers' role therein, but the question in a democratic society is who makes those decisions.

Many may welcome something like the full public regulation of lawyers in the United States and elsewhere, but for those who do not, denialism will no longer suffice. Recourse to what Sharon Dolovich criticized as the tired tropes of "exhortation or civility codes or calls for moral renewal" will only stir increasing outside incredulity.[242] The distance between the high self-referential discourse of bar associations and the empirical realities of their members' practices will fuel ever greater public sympathy for Yankah's charge of legal hypocrisy.[243] As with so much of modern life, hypocrisy travels at the literal speed of light, and its every instance is eternally preserved for instant cross-reference—clearly authoritarian regimes have drawn their own conclusions about the democratic nature of modern American legal practice.

Promoting an explicitly pro-democratic vision of lawyering would likely require completely deconstructing the current mode of lawyer self-regulation. Until then, legal representation will likely almost always be seen as replicating the same broader issues which complicate declaring one within a "basically just" society. It is clear that legal ethics cannot ignore global and comparative developments or presume the model-like functionality of any existing system of lawyer regulation.[244] But even if deciding what is "democratic" in the current context is far from uncontroversial, many of those laboring for truly marginalized clients have advanced possibilities.[245] What none of them embrace is an amoralism which demands nothing in return but defensive self-congratulation.

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242. "[E]ven the commitment of individual lawyers to ethical lawyering does not get us all the way there, for as we have seen, the cultivation of integrity also requires institutional support." Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 FORDHAM L. REV. 1629, 1687 (2002).

243. *See* William T. Allen, *Corporate Governance and a Business Lawyer's Duty of Independence*, 38 SUFFOLK U. L. REV. 1, 5–6 (2004).

244. *See* Judith A. MacMorrow, Sida Liu & Benjamin Van Rooij, *Lawyer Discipline in an Authoritarian Regime: Empirical Insights from Zhejiang Province, China* 30 GEO. J. LEGAL ETHICS 267 (2017). This interpretation of an empirical study of Chinese lawyer discipline in Zhejiang seeks to show how the system only furthers regime interests and not legal professionalism. The authors' disappointment presumes that the system of lawyer discipline in the U.S. effectively serves pro-social values.

245. *See* Sameer Ashar, *Deep Critique and Democratic Lawyering in Clinical Practice,* 104 CALIF. L. REV. 201, 219–224 (2016); *see generally* SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION (2016).