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TABOR LECTURE

THE (OVER)USE OF AGE AND CUSTOM IN LEGAL ETHICS

Keith Swisher*

The influence of old and customary ways on legal ethics is ubiquitous. Like other humans, the members and regulators of the profession suffer from heuristics and biases – including the status quo bias. Unsurprisingly, those who resist a particular ethical application or ethical improvement in legal or judicial ethics often invoke tradition and preexisting practice as reasons against change; the ABA, courts, scholars, and lawyers have all done so in recent memory (several examples of which are discussed in this Essay). This older-is-better approach raises concerns because it can ignore or hamper the pursuit of excellence characteristic of professions. In addition to becoming and remaining competent in practice, lawyers and judges are supposed to seek the improvement of the law and the delivery of legal services. Moreover, although ethics of course incorporates and protects certain enduring principles (including deontological concepts), legal and judicial ethics as written or applied are subject to revision to correct previous errors or omissions and to account for the changed context, including new members and new types of practice. On the twentieth anniversary of the Tabor Lecture in Legal Ethics, this Essay explores whether and to what extent a preoccupation with old and customary practices risks stunting and stagnating our ethical professional development.

I. INTRODUCTION

As Holmes famously grumbled, “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”¹ And so it is true with legal and judicial ethics, or so this Essay argues.

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¹ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). To assure the reader at the outset, this Essay does not involve rules as old as Henry IV. My concern with more recent, but still stagnant, ethical rules originated at, I believe, an awards luncheon. There, Professor Steve Gillers (NYU) received the ABA’s highest honor in legal ethics (the Franck Award) and gave an acceptance speech briefly touching on the issue (among many other issues). See Stephen Gillers, *2011 Michael Franck Award Acceptance Speech*, 21 PROF. LAW. 6, 31 (2011). By way of example, Professor Gillers remarked:

Simply stated, my thesis is that age² and custom³ do not sufficiently justify the presence or absence of an ethical rule or an ethical application,⁴ although both can play a lesser role as a potentially relevant factor. I go even further in suggesting that practitioners, policy-makers, drafters, and regulators should not necessarily venerate old and customary practices; they should instead subject those practices to heightened scrutiny.

The influence of old and customary ways on legal ethics is ubiquitous. Like other humans, the members and regulators of the profession suffer

We are not today governed by the rules of 1908, 1970, 1983, or even 2002. The world has moved on and so have we. We have changed the rules in response to societal change and we have been able to do so while keeping duty to client paramount. Predictions of dire consequences from these efforts have proved false. Change should not be easy, of course, but neither should we listen to those who foretell, with no empirical support, that the price of change is to threaten what it means to be an American lawyer. To the contrary, the true threat to our professional identity is to ignore the need for change when it confronts us.

Id.

² By age, I generally mean the length of a given practice. See generally BLACK'S LAW DICTIONARY 73 (10th ed. 2014) (providing definitions for "age").

³ By custom, I generally mean a prevalent practice of lawyers or judges. Further distinctions are noted below where applicable. See generally BLACK'S LAW DICTIONARY 468 (10th ed. 2014) (providing definitions for "custom" and "custom and usage").

⁴ The arguments below focus primarily on rules of legal ethics and applications of those rules (although professional liability concepts are intermixed where applicable or analogous). Professionalism principles are thus not the primary focus. There is, however, an important exception. In certain states, Professionalism Creeds or roughly equivalent pronouncements are actually enforced against lawyers through the disciplinary system (and through court sanctions). See, e.g., ARIZ. R. SUP. CT. 31(a)(2)(E), 41(g) (making "repeated or substantial violations" of the Lawyer's Creed of Professionalism grounds for discipline). See also David A. Grenardo, *Making Civility Mandatory: Moving from Aspired to Required*, 11 CARDOZO PUB. L. POL'Y & ETHICS J. 239, 253 (2013) ("Several jurisdictions, such as South Carolina, Florida, Arizona, Michigan, and the Northern District of Texas, took the final step in responding to incivility by making civility mandatory.").

from the bandwagon effect,⁵ anecdotal declinism,⁶ system justification,⁷ and of course the status quo bias.⁸ Unsurprisingly, those who resist a particular ethical application or ethical improvement often invoke tradition and practice; the ABA, courts, scholars, and lawyers have all done so in recent memory.⁹ As a current example, the ABA's Ethics Committee recently proposed a long-overdue (in my opinion) amendment to the ethical rules, which proposed to prohibit harassment

⁵ See Richard Nadeau et al., *New Evidence About the Existence of a Bandwagon Effect in the Opinion Formation Process*, 14 INT'L POL. SCI. REV. 203, 203 (1993) (referring to the effect as "rallying to the majority opinion"). Although ordinarily focused on smaller groups (e.g., corporate boards), not a profession, groupthink studies may also be relevant to the bandwagon problem. See generally Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1238 (2003) (quoting IRVING JANIS, VICTIMS OF GROUPTHINK 78 (1978)) ("Irving Janis, the creator of this theory, described groupthink as 'a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members' striving for unanimity overrides their motivation to realistically appraise alternative courses of actions.'").

⁶ That is, people may tend to see institutions, governments, or societies in a state of decline and thus lean toward the past over the present or future. In addition, we tend to recall our past performances as better (or at least different) than they actually were at the time. See *Declinism*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/definition/declinism> [<https://perma.cc/7ZK4-6G8J>] (stating that declinism is one's belief that "a particular country, society, or institution is in a state of significant and possibly irreversible decline").

⁷ That is, we have an inclination to view our current system as fair and preferable. See, e.g., John T. Jost, *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 INT'L SOCIETY OF POL. PSY. 6, 881-82 (2004) (discussing system justification as a theory for maintaining the current order).

⁸ See generally William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 9-10 (1988) (illustrating that we have a tendency to prefer the current state of affairs and to see change as a detriment). The authors note:

Despite a desire to weigh all options evenhandedly, a decision maker in the real world may have a considerable commitment to, or psychological investment in, the status quo option. The individual may retain the status quo out of convenience, habit or inertia, policy (company or government) or custom, because of fear or innate conservatism, or through simple rationalization. His or her past choice may have become known to others and, unlike the subject in a compressed-time laboratory setting, he or she may have lived with the status quo choice for some time. Moreover, many real-world decisions are made by a person acting as part of an organization or group, which may exert additional pressures for status quo choices.

Id.

⁹ See, e.g., Bradley S. Abramson et al., *Joint Comment Regarding Proposed Changes to ABA Model Rule of Professional Conduct 8.4*, AM. BAR ASS'N (2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/joint_comment_52_member_attys_1_19_16.authcheckdam.pdf [<https://perma.cc/HZX8-83VZ>] (providing an example of attorneys opposing changes to Model Rule 8.4, and using age and custom as a reason not to adopt the amendment).

and discrimination in conduct related to the practice of law.¹⁰ Believe it or not, from inception to mid-2016, the ethical rules did not explicitly prohibit a partner from sexually harassing or racially discriminating against an associate in a firm.¹¹ Although the proposed rule received support, it also received fierce criticism, from within and without the ABA. The critics have raised many concerns, but one explicit and implicit

¹⁰ See Standing Comm. on Ethics & Prof'l Responsibility et al., *Report to the House of Delegates* AM. BAR ASS'N (Aug. 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/scepr_report_to_hod_rule_8_4_amendments_05_31_2016_resolution_and_report_posting.authcheckdam.pdf [<https://perma.cc/U73S-F25H>] (showing the ABA Standing Commission on Ethics & Professional Responsibility's report to the House of Delegates on Model Rule 8.4). The proposed rule was repeatedly narrowed in response to objections and eventually adopted. See also MODEL RULES OF PROF'L CONDUCT R. 8.4(g) (2016) (disallowing a lawyer from engaging in discriminatory conduct based on various protected classes); *Point-Counterpoint: A Speech Code for Lawyers?*, 101 JUDICATURE 70, 70-71 (Duke Law Center for Judicial Studies 2017) [hereinafter Swisher v. Volokh Debate] (explaining the history and controversies over the new rule in a written debate between Professor Keith Swisher and UCLA Professor Eugene Volokh).

¹¹ The closest current rule is not actually a rule but a non-binding comment, and in any event, it explicitly limits its application to the representation of a client. See MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (1998), providing that:

A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

Id. See generally MODEL RULES OF PROF'L CONDUCT Scope cmt. 14 (1983) ("[c]omments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.").

recurring concern has been that this new rule is new.¹² In simplistic terms, new is bad, while old must be good.¹³

¹² See Abramson et al., *supra* note 9 (stating that the proposed rule takes “Rule 8.4 in a completely new and different direction because, for the first time, the new Rule would subject attorneys to discipline for engaging in conduct that neither adversely affects the attorney’s fitness to practice law nor seriously interferes with the proper and efficient operation of the judicial system” and lamenting “what this departure from the historic principles of attorney regulation will mean”). The commentators later note that “[s]uch a dramatic departure from the historic regulation of attorney conduct should not be taken lightly. It would represent an entirely new and precedent-setting intrusion on attorneys’ professional autonomy, freedom of speech, and freedom of association.” *Id.* at 6–7. See also Thomas More Society, *Proposed Amendments to Model Rule of Professional Conduct 8.4 and Comments* (Mar. 11, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/thomas_more_society.authcheckdam.pdf [<https://perma.cc/Y79Q-E5PQ>] (adopting the preceding comment in full). To be sure, intrusions on “attorneys’ professional autonomy, freedom of speech, and freedom of association” can certainly be relevant considerations in the ethical analysis, but what relevance, if any, is the “dramatic departure from the historic principles of attorney regulation” and “new and precedent-setting” nature of a proposed rule? *Id.* That is this Essay’s focus.

¹³ In addition to the commentary in the preceding note, see also Keith R. Fisher & Nathan M. Crystal, *ABA Bus. Law Section Ethics Comm.*, AM. BAR ASS’N at 6–7 (March 10, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/aba_business_law_ethics_committee_comments.authcheckdam.pdf [<https://perma.cc/CVL7-T229>] (suggesting a need to preserve the status quo and that those proposing to change from ethical status quo should demonstrate a need or “compelling need”). Cf. Chief Justice Roy S. Moore, *Opposing Proposed Rule 8.4 and Comment 1*, 3 (Mar. 11, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/moore_3_14_16.authcheckdam.pdf [<https://perma.cc/5GNF-JAMW>] (opposing the rule change in part because it represents a liberal “culture shift” and because it might punish attorneys who maintain “old beliefs,” “religious beliefs,” or “traditional beliefs”); Charles C. Stebbins III, *Comment*, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/stebbins_3_12_16.authcheckdam.pdf [<https://perma.cc/M2X6-BX2F>] (arguing that the bar should not be an instrument of popular politics and that if the members of the bar agreed with the new rule there would be no need for it to exist); ABA Standing Comm. on Prof’l Discipline, *Comments on Draft Proposal to Amend Rule 8.4 of the ABA Model Rules of Prof’l Conduct*, AM. BAR ASS’N (Mar. 10, 2016) (acknowledging that “[l]egal research shows that conduct constituting discrimination and harassment by a small number of lawyers has, sadly, long existed (as it also has existed in the general population), but also that such conduct has been the subject of disciplinary action when appropriate” and “[a]s available data shows generally, a very small percentage of the approximately 1.4 million lawyers in this country engage in misconduct necessitating discipline” but ultimately refusing to endorse the proposal or the proposition that an anti-harassment rule should be in the black-letter text of the rules); Andrew F. Halaby, *December 2015 Draft Proposal to Amend ABA Model Rule of Professional Conduct 8.4 and Comment 1*, 3 (Dec. 30, 2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/halaby_12_30_2015.authcheckdam.pdf [<https://perma.cc/3HNW-ENRD>] (objecting to the proposal in part because “I am unaware of any problem with the current, comment-based approach of Model Rule 8.4” and this “absence of any substantial problem requiring a solution itself counsels against change” and

This old-is-good bias raises concerns because it appears to ignore or hamper the pursuit of excellence characteristic of professions (or at a minimum, the pronouncements of professions).¹⁴ In addition to becoming and remaining competent in practice,¹⁵ lawyers and judges are supposed to seek the improvement of the law and the delivery of legal services.¹⁶ Although ethics of course incorporates and protects certain enduring principles (including deontological concepts), legal and judicial ethics as written or applied are subject to revision to account for new or changed context or to correct previous errors or omissions.¹⁷ A preoccupation with the old and customary risks stunting and stagnating our ethical professional development.¹⁸

The predisposition toward the old also can have implications for the constitutionalization of legal ethics.¹⁹ Legal ethics issues occasionally are resolved, at least partially, at the Supreme Court. Underlying ethical regulations can run parallel, or counter, to due process or the First

because “the Proposal, if adopted, will further marginalize the ABA as just another voice in the din of the culture wars, and a shrill voice at that”).

¹⁴ See, e.g., MODEL RULES OF PROF'L CONDUCT Pmbl. (1983) (suggesting that a lawyer should work toward attaining the highest level of skill and improving the legal profession as a whole). Further:

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

Id.

¹⁵ See MODEL RULES OF PROF'L CONDUCT R. 1.1 (1983) (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”). See also *id.* cmt. 8 (“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”). As the drafters astutely noted, competent representation is that which is reasonably *necessary*, not that which is customary among other practitioners. To be sure, custom might provide insights as to what is reasonably necessary in the circumstances, but it should not be the standard to which lawyers hold themselves. See *id.* R. 1.1.

¹⁶ See, e.g., MODEL RULES OF PROF'L CONDUCT Pmbl. (1983) (“As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.”).

¹⁷ See generally Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1249–52 (1991) (discussing the change from the original Canons in the early 20th century to the current Model Rules of Professional Conduct adopted in 1983).

¹⁸ See *infra* Part IV (addressing several significant shortcomings with overreliance on age and custom).

¹⁹ See, e.g., *Carrigan v. Nevada Comm'n on Ethics*, 131 S. Ct. 2343, 2347 (2011) (concluding that a Nevada ethics provision did not violate the First Amendment of the Constitution).

Amendment, for instance.²⁰ Although focusing on old practices (often around the time of the founding or an amendment to the Constitution) is perhaps inescapable at the Supreme Court, the Court has at times placed a premium on outdated practices in determining whether a particular ethical rule or norm should be upheld or rejected.²¹ Because the modern concept and regulation of legal and judicial ethics did not occur until the twentieth century (and well into the twentieth century for certain key aspects), the Supreme Court's reasoning casts doubt on the entire project, at least at constitutional intersections.²²

Finally, the changing nature of both practice and the profession may create a professional responsibility to review and as appropriate revise ethical rules and regulation, or so I argue below.²³ The clients have changed, and the lawyers have changed (somewhat).²⁴ The firm

²⁰ See *id.* (deciding that Nevada's Ethics in Government Law, requiring the plaintiff's recusal from a specific vote for ethical reasons, did not run counter to the First Amendment of the Constitution).

²¹ See, e.g., *Carrigan*, 131 S. Ct. at 2347-49 (2011) (noting the "long-established tradition" of judicial and legislative recusal statutes and therefore rejecting a First Amendment challenge to a legislative recusal statute). See also *id.* at 2355 (Alito, J., concurring) (concluding that legislative voting is indeed expressive conduct, but nevertheless concurring because "recusal rules were not regarded during the founding era as impermissible restrictions on freedom of speech"); *Republican Party of Minn. v. White*, 536 U.S. 765, 785 (2002) (analyzing the relatively narrow "practice of prohibiting speech by judicial candidates on disputed issues" and finding that practice "neither long nor universal"). See also *Williams-Yulee v. Fl. Bar*, 135 S. Ct. 1656, 1674-75 (2015) (containing dueling opinions of Chief Justice Roberts for the majority and Justice Scalia in dissent over the importance of "historical pedigree" and "history and tradition" in analyzing a judicial ethics rule against various First Amendment challenges). On the constitutionalization of legal ethics concepts generally, see Ronald D. Rotunda, *Constitutionalizing Judicial Ethics: Judicial Elections After Republican Party of Minnesota v. White, Caperton, and Citizens United*, 64 ARK. L. REV. 1, 4-5 (2011) (discussing the systemization of legal ethics in constitutional jurisprudence); Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1434 (1999) (exploring the integration of ineffective assistance of counsel in constitutional jurisprudence); Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 57 (1998) (observing the need for constitutional guidance in legal ethics).

²² See generally *Legal Ethics*, DUKE UNIVERSITY SCHOOL OF LAW, <https://law.duke.edu/lib/researchguides/legale/> [<https://perma.cc/M8VR-K5AS>] (outlining briefly the twentieth-century origin of legal ethics in the United States).

²³ See *infra* Parts IV-V (discussing the inherently dated nature of age and custom and a more modern approach to ethics).

²⁴ See, e.g., Deborah L. Rhode, *Foreword: Diversity in the Legal Profession: A Comparative Perspective*, 83 FORDHAM L. REV. 2241, 2242-47 (2015) (comparing diversity in the legal professions in the United States and the United Kingdom); Jason P. Nance & Paul E. Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 CONN. L. REV. 271, 271 (2014) (providing an analysis of diversity in the legal profession in the United States); Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079, 1079 (2011) (discussing diversity and discrimination in the legal profession and who should be responsible for pursuing diversity in the profession).

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structures have changed, and the practice has changed.²⁵ And all of these key ingredients are continuing to change.²⁶ Thus, it is dubious to presume that the ethical rules and professionalism creeds were drafted with similar circumstances in mind and therefore likely continue to apply fairly.²⁷ The ethical rules may well need continual reexamination (a point that the ABA recently acknowledged through the Ethics 20/20 Commission, among other efforts).²⁸

In sum, the scope of the concern is almost breathtakingly widespread.²⁹ We use age and custom, pervasively yet often unthinkingly, in all types of legal (and other) analyses.³⁰ This piece is focused, and therefore hopefully distinctive, on this use in a particular context: whether and to what extent the use of age and custom is appropriate in *legal ethics*. This inquiry includes the comparative question of whether its use is more or less appropriate in this discipline than in other areas of law and practice.³¹ On a starting pole, deferring to age and custom might be particularly inappropriate for legal ethics because (for

²⁵ See, e.g., RICHARD SUSSKIND, *THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES* (2010) (discussing several ways in which traditional associations and practice models have been disrupted); MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1991) (exploring how large law firms changed over time in the United States from inception to the late twentieth century).

²⁶ See generally Robert W. Denney, *Then and Now: How Lawyers' Choices Have Changed*, AM. BAR ASS'N (Nov. 2010), https://www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_articles_v36_is6_pg10.html [<https://perma.cc/3UXE-YF8G>] (discussing how law firms and attorneys have changed since the economic collapse in 2007–2008).

²⁷ See generally Peter Geraghty, *History of U.S. Legal Ethics Standards*, AM. BAR ASS'N (Dec. 2016), <https://www.americanbar.org/publications/youraba/2016/december-2016/a-brief-history-of-the-development-of-legal-ethics-standards-in-html> [<https://perma.cc/G9E3-FEVB>] (providing a brief history of legal ethics development in the United States).

²⁸ Being essentially a contextualist in ethical application, I perhaps should disclose a bias in favor of a rule-making procedure that more often incorporates context (and changed context). See Keith Swisher, *The Moral Judge*, 56 DRAKE L. REV. 637, 661–68 (2008) [hereinafter Swisher, *The Moral Judge*] (explaining the criteria of a moral adjudicator and the importance of morals in judges); Keith Swisher, *Legal Ethics and Campaign Contributions: The Professional Responsibility to Pay for Justice*, 24 GEO. J. LEGAL ETHICS 225, 260–62 (2011) (exploring the legal ethics issues with lawyers providing contributions to judicial campaigns). To be sure, not every changed circumstance will be ethically salient or dispositive, but that is not a determination that can be made unthinkingly or in blind deference to past proclamations or customs.

²⁹ See generally *infra* Parts II–V (highlighting the problems with using age and custom in legal ethics and suggesting a counteractive approach).

³⁰ *But see* People v. Hickman, 268 P. 909, 913 (Cal. 1928) (stating that “any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power . . . must be held to be due process of law”).

³¹ See *infra* Parts II–V (providing the background of age and custom in legal ethics and some issues with using these factors and offering a solution to the problem).

example) legal ethics arguably includes rules and adjudications on right and wrong conduct.³² On the seemingly opposite pole, professional ethics involves and is arguably descriptive of professional practice, and accordingly some have suggested that professional ethics cannot or should not exist outside the custom of the profession (and of course age helps to discern custom).³³ To the extent that is or is mostly the case, age and custom are not just appropriate in legal ethics analyses but necessarily inescapable, yet even under this view questions still remain: how much weight should be given to what the profession does (and for how long it has done so)? Like the proverbial law-and-society scissors,³⁴ the system of ethical regulation affects and effects what the profession does, and the inquiry can therefore be difficult to address in isolation.³⁵

This Essay ultimately suggests that age or custom should not be a reason to avoid ethical introspection or regulatory change.³⁶ Instead, if a practice reeks of age or custom, it is ripe for review; in other words, age and custom should be reasons to scrutinize a practice, not exalt it.³⁷ Part II lists several non-exhaustive instances in which drafters, courts, and commentators have given age and customary practice significant (and as I argue later, excessive) weight. Part III gives credit where credit is due,

³² See generally *infra* Part IV (identifying the risks of using age and custom in legal ethics).

³³ See generally *infra* Part III (noting the argument that custom defines professional ethics).

³⁴ See William N. Eskridge, Jr., *Willard Hurst, Master of the Legal Process*, WIS. L. REV. 1181, 1187 (1997) (explaining how the Law and Society scissors work). Further:

An excerpt in their materials from Lon Fuller epitomized the attitude of Garrison and Hurst as well: . . . We may picture Law and Society as the two blades of a pair of scissors. If we watch only one blade we may conclude that it does all the cutting. Savigny kept his eye on the Society blade and came virtually to deny the existence of the Law blade. With him even the most technical lawyer's law was a kind of glorified folk-way. Austin kept his eye on the Law blade and found little occasion . . . to discuss the mere 'positive morality' which social norms represent We avoid all these difficulties by the simple expedient of recognizing that both blades cut, and that neither can cut without the other. . . .

Id.

³⁵ In those many instances in which a particular practice is left primarily or even exclusively to the profession's discretion, the regulators can be accused of permitting that practice (through inaction or explicit deference in the rules). Thus, silence is arguably not silence but permission or even blessing.

³⁶ See generally Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201, 208 (1931) (noting that "it is impossible to derive the goodness of an act from its frequency or universality").

³⁷ The applicable ethical rule (if any) ultimately might not change after a careful analysis of all ethically relevant factors; it is always possible that the original approach remains more-or-less just, even in a significantly different context. Some also explicitly or implicitly assume that a custom, and especially a time-honored one, makes it more likely that the practice is just. This related assumption is also explored below. See *infra* Part III.

acknowledging that age and custom can offer ethically salient considerations. Part IV, however, discusses several of the traps and misfires attending a focus on, or deference to, age and custom. Part V suggests that age and custom have two primary and defensible places in ethical analysis, namely, as a factor that might, but might not, be material in context and as a signal that review and potentially revision is due (or overdue).

II. EXAMPLES ABOUND OF OLD AND CUSTOMARY APPROACHES

This Part gives several examples of the bench and bar's preoccupation, at least at important times, with old and customary practices. Although these examples are certainly not exhaustive, they hopefully will highlight the problem and its risks to legal and judicial ethics.

In exorbitant citations to Blackstone,³⁸ courts and commentators have declared (and occasionally boasted) that judges previously were not required to recuse themselves in the face of most conflicts of interest, much less appearances of impropriety.³⁹ Thus, as we have been told and retold, judges could (and did) preside over cases involving their lovers, family

³⁸ See, e.g., 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 361 (1768) (“[T]he law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.”). See also *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1917 (2016) (Thomas, J., dissenting) (presenting a recent example of using Blackstone as a sword). Justice Thomas stated:

But mere bias—without any financial stake in a case—was not grounds for disqualification. The biases of judges ‘cannot be challenged,’ according to Blackstone, ‘[f]or the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.’

Id. (quoting in part 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 361 (1768)). See also Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671, 678–79 (2011) (discussing why Blackstone might have taken such a view of disqualification).

³⁹ See, e.g., *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 891 (2009) (Roberts, C.J., dissenting) (quoting John Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609 (1947) (“The common law of disqualification . . . was clear and simple: a judge was disqualified for direct pecuniary interest and for nothing else.”)); John Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 611–12 (1947) (noting similarly that “[i]n short, English common law practice at the time of the establishment of the American court system was simple in the extreme. Judges disqualified for financial interest. No other disqualifications were permitted, and bias, today the most controversial ground for disqualification, was rejected entirely.”). In addition, Frank sensibly observed that “[d]espite Blackstone’s denial that bias could exist as a ground for disqualification a more recent humility has prompted recognition that human judges may deny justice not only for profit or to benefit a kinsman, but for less tangible prejudices for or against a party, a lawyer, or a cause.” *Id.* at 619.

members, and associates.⁴⁰ Judges also could (and occasionally did) serve as both the trial judge and as a member of the appellate panel and as both the prosecutor and (later) the adjudicator. This historical backdrop is often used as a reason to suggest that the modern judge does not or should not have a duty of recusal in a changed context (often involving less egregious circumstances than the permitted conflicts of the past).

Even assuming that Blackstone presented an accurate picture of previous judicial recusal and disqualification rules and norms (or the lack of them),⁴¹ why is this picture relevant to modern ethical analysis? In other words, why do courts and commentators continue to cite aged eras in which ethical and professionalism norms were primitive, ill-defined, and often ill-recorded? Old is not synonymous with good, and as explored below, this holds especially true for ethical analysis. The Blackstonian example is but one of a puzzling attachment to the old in ethics. (As an analogous example, Aristotle—an ancient Greek philosopher who lived from 384 to 322 BC—is still cited copiously and often uncritically in ethics-related and other arguments.) In other words, we continue to consult outdated eras and practices when we attempt to discern the ethical rule or ethical result.

This seemingly sentimental attachment has implications for broader constitutional theory. If one believes that moral decisions necessarily attend constitutional (or other) adjudication, the problems are nearly identical. The believer will have to, or at least should, grapple with the extent to which the age and custom of a practice should be considered.⁴² We need not journey far afield to see the exact intersection with our topic.

⁴⁰ See Frank, *supra* note 39, at 615–16 (noting that common law generally did not bar a judge from presiding over relatives' cases but that statutes and more recent cases generally do require recusal in such circumstances).

⁴¹ Frank's seminal piece, which has served as a window to the past for many courts and scholars, does not actually observe or advocate for the dubious transfer of English common law to American courts. Frank observed, for example, that:

[T]he contemporary disqualification practice of both federal and state courts is broader than that of the common law. Not only has the principle of pecuniary interest been extended to keep pace with changing economic institutions, but relationship between judge and litigant and a variety of other types of judicial bias have been prohibited in modern practice by the common law.

Id. at 612. To be sure, Frank at times seems to place an unjustified premium on tradition. See, e.g., *id.* at 636 (answering a disqualification question solely by reference to the practice and tradition of other judges).

⁴² See, e.g., RONALD DWORKIN, *JUSTICE IN ROBES* (2006) (arguing for, among other things, the inescapability of morality in adjudication). Of course, age and custom might be important factors in other venues and for those who see no moral component in adjudication, but this work's emphases on legal ethics and moral judgment limit that inquiry.

Many professional ethics rules run up against constitutional challenges.⁴³ If one weighs age and custom heavily (as a majority or near-majority of the Supreme Court of the United States has done in recent memory), the resulting constitutional rule will generally displace a more modern ethical rule or practice. The Supreme Court has stated that “a universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional,” and it at times has even labeled such traditions “dispositive.”⁴⁴ Indeed, on the very ethical rule change with which this Essay began, which will protect and vindicate to some degree those who have been harassed and suffered discrimination in law firms and agencies, several scholars, hundreds of practitioners, and most recently the Attorney General of Texas have argued that the new ethical rule must die before the First Amendment (or more particularly, their interpretation of the First Amendment).⁴⁵ To the extent jurists or scholars search for ethical or analogous rules against discrimination and harassment in the eighteenth or nineteenth centuries, they for the most part will return empty-handed. But just because anti-discrimination and harassment rules are not “time-honored” fails to justify their exclusion today.

As another example, when the question of whether to permit non-lawyer ownership of law firms recently returned to the ABA, the ABA preemptively rejected the question citing previous conclusions or “core values.”⁴⁶ That is not to say (at least not here) that the ABA’s rejection was

⁴³ See, e.g., Carrigan v. Nevada Comm’n on Ethics, 131 S. Ct. 2343, 2347–48 (2011) (commenting on the interplay of ethical rules and the First Amendment).

⁴⁴ See *id.* (quoting in part Republican Party of Minn. v. White, 536 U.S. 765, 785 (2002) (internal quotation marks omitted)). See also *supra* note 21, 39–40 (citing additional cases suggesting a similarly deferential view of age and custom).

⁴⁵ See, e.g., Ron Rutunda, *The ABA Overrules the First Amendment: The Legal Trade Association Adopts a Rule to Regulate Lawyers’ Speech*, WALL ST. J. (Aug. 16, 2016), <https://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418> [<https://perma.cc/6KES-XN47>] (commenting, as a law professor, that anti-discrimination measures in Rule 8.4(g) would contravene First Amendment protections). See also *supra* notes 12–13 (noting many and varied objections to the new rule against harassment and discrimination in connection with the practice of law); Swisher v. Volokh Debate, *supra* note 10 (arguing over the free speech challenges, among others). The Attorney General of Texas, who happens to be conservative, believes that the new rule is an unconstitutional infringement on lawyers’ First Amendment rights. Ken Paxton, Attorney General of Texas, Op. No. KP-0123 (Dec. 20, 2016).

⁴⁶ See, e.g., Stephen Gillers, *How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*, 40 PEPP. L. REV. 365, 401 (2013) (recounting the ABA’s preemptive actions and noting that “[i]nvoking the phrase ‘core values’ is not a substitute for reasoned dialogue, although unfortunately it seems at times to serve as one.”). See American Bar Association Center for Professional Responsibility, *Revised Recommendation 10F* (2000), https://www.americanbar.org/content/dam/aba/migrated/family/reports/standards_civility.authcheckdam.pdf [<https://perma.cc/NW6E-H86X>] (providing the list of values for

wrong on the merits, but its reasoning was weak. The legal profession's independence and any good consequences flowing from that independence might justify the ABA's conclusion, but the notion that nonlawyer ownership—even with strict controls—is bad simply because it has previously been banned is a poor justification.

As additional examples (admittedly in the legal malpractice context), when lawyers cause damage to their clients, the aggrieved clients can sue those lawyers for malpractice (professional negligence), among other potential causes. But whether a lawyer fell below the standard of care and therefore breached a duty to the client will, in all likelihood, be measured against other lawyers' customary practices in the state.⁴⁷ Thus, the lawyer's actions ordinarily will not be held to a higher standard or face a national comparison.⁴⁸ Indeed, that the lawyer violated the ethical rules

attorneys). American Bar Association Section of Legal Educ. and Admissions to the Bar, *Legal Education and Professional Development: An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 207 https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report.authcheckdam.pdf (1992) [<https://perma.cc/7BB5-ZUHW>]. The ABA's core values statement of 2000 both arose out of controversy and was itself controversial. See generally Paul D. Paton, *Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America*, 78 *FORDHAM L. REV.* 2193, 2193–94 (2010) (“The Resolution provided a non-exhaustive list of ‘core values’ and urged that each jurisdiction responsible for lawyer regulation implement the ‘principles’ set out in the resolution, all of which would function as a bulwark against encroachment on the traditional law firm model. For all intents and purposes, the [multi-disciplinary practice] debate was dead, buried in ‘core values’ rhetoric. That rhetoric served to preserve a regime for the delivery of legal services, which, while anchored in legitimate concerns about conflicts of interest, independence, and preserving privilege, also functioned to prevent competition and to protect lawyers’ turf.”); Nathan M. Crystal, *Core Values: False and True*, 70 *FORDHAM L. REV.* 747, 748 (2001) (arguing that “[r]eliance on core values of the legal profession in debates about legal ethics has rhetorical appeal but is fundamentally misleading” and “at a deeper level, reliance on the core values of the profession often reflects an anti-market, anticompetitive attitude of the bar that impedes change in rules of professional conduct, including efforts to improve the delivery of legal services to people of moderate means”).

⁴⁷ See, e.g., *Commercial Union Ins. Co. v. Lewis & Roca*, 902 P.2d 1354, 1356 n.2 (Ct. App. 1995) (quoting in part *Black's Law Dictionary* 959 (6th ed. 1990)) (“Legal malpractice is defined as the ‘failure of an attorney to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in performance of tasks which they undertake, and when such failure proximately causes damage it gives rise to an action in tort.’”). Cf. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 52(1) (AM. LAW INST. 2000) (“For purposes of liability . . . a lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances.”).

⁴⁸ Specialists, especially ones who advertise themselves as such, might be held to a higher standard, but this distinction is not currently relevant (and in any event, the higher standard is often the custom of other specialists in the jurisdiction).

will not be dispositive or even presumptively negligent.⁴⁹ Instead, the prevailing practices in the state will generally be the touchstone. But other lawyers in the state might be failing to live up to the values of the profession in terms of (for example) quality legal service or loyally protecting their clients' interests.⁵⁰ In short, these lawyers might be

⁴⁹ Surprisingly, the ethical rules explicitly demote themselves. See American Bar Association Center for Professional Responsibility, *Model Rules of Professional Conduct: Scope*, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html [https://perma.cc/93AL-4SH4] (stating that a “[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation . . . Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.”). Further, the preceding comment is consistent with the majority approach in the states (i.e., that a rule violation may be evidence of a breach without entitling the aggrieved party to any presumption or disposition on this element). See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52(2) (AM. LAW INST. 2000) (“Proof of a violation of a rule or statute regulating the conduct of lawyers: (a) does not give rise to an implied cause of action for professional negligence or breach of fiduciary duty; (b) does not preclude other proof concerning the duty of care in Subsection (1) or the fiduciary duty; and (c) may be considered by a trier of fact as an aid in understanding and applying the standard [care] to the extent that (i) the rule or statute was designed for the protection of persons in the position of the claimant and (ii) proof of the content and construction of such a rule or statute is relevant to the claimant’s claim.”); Note, *The Evidentiary Use of the Ethics Codes in Legal Malpractice: Erasing a Double Standard*, 109 HARV. L. REV. 1102, 1119 (1996) (“By creating the Model Rules of Professional Conduct and the Model Code of Professional Responsibility, the legal profession’s governing bodies have provided comprehensible, accessible, and enforceable rules of conduct for the nation’s exploding population of lawyers. The fact that these rules were designed specifically for application in the disciplinary context does not overcome the logic, feasibility, or functional value of extending their application – at least in part – to the malpractice context.”) (footnote omitted).

⁵⁰ The Restatement adopts this approach without reservations, and it spends time explaining why this already narrow standard is so narrow that lawyers will ordinarily avoid liability. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 cmt. b (AM. LAW INST. 2000). The lawyer’s duty is broadly defined:

As is generally true for professions, the legal duty refers to normal professional practice to define the ordinary standard of care for lawyers, rather than referring to that standard as simply evidence of reasonableness The competence duty, like that for diligence, does not make the lawyer a guarantor of a successful outcome in the representation. It does not expose the lawyer to liability to a client for acting only within the scope of the representation or following the client’s instructions. It does not require a lawyer, in a situation involving the exercise of professional judgment, to employ the same means or select the same options as would other competent lawyers in the many situations in which competent lawyers reasonably exercise professional judgment in different ways. The duty also does not require

engaging in ethically questionable practices. That these practices persist and prevail is more reason, not less, to regulate and otherwise scrutinize the conduct, yet malpractice law typically looks to prevailing practices, regardless of the ethicality of those practices. “Everybody is doing it” is hardly a dispositive, or even invariably persuasive, ethical argument.⁵¹

As in other areas, this approach has spread into constitutional law. For a criminal defendant to show a deprivation of the right to effective assistance of counsel, the defense attorney’s performance must fall below “prevailing professional norms.”⁵² Yet prevailing norms might not be—

“average” performance, which would imply that the less skillful part of the profession would automatically be committing malpractice.

Id. (citations omitted). See RESTATEMENT (SECOND) OF TORTS § 299A cmt. e (AM. LAW INST. 1965) (stating that the standard of care “is not that of the most highly skilled, nor is it that of the average member of the profession or trade, since those who have less than median or average skill may still be competent and qualified”). The Restatement of Torts at least passingly noted the issue. See also RESTATEMENT (SECOND) OF TORTS § 299A cmt. f (AM. LAW INST. 1965) (acknowledging that “[t]here may be, however, minimum requirements of skill applicable to all persons, of whatever school of thought, who engage in any profession or trade.”). But, it then passes the buck to the legislature. *Id.*

⁵¹ See generally Philip G. Peters, Jr., *The Quiet Demise of Deference to Custom: Malpractice Law at the Millennium*, 57 WASH. & LEE L. REV. 163, 163–64 (2000) (“According to conventional wisdom, tort law allows physicians to set their own standard of care. While defendants in ordinary tort actions are expected to exercise reasonable care under the circumstances, physicians traditionally have needed only to conform to the customs of their peers. However, judicial deference to physician customs is eroding.”). It is perhaps for this reason that several state courts have moved away from permitting doctors’ customs to define the standard of care. *Id.* See Charles L. Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281 (1979) (discussing standards as being guided by the rules of professional conduct).

⁵² See generally *Strickland v. Washington*, 466 U.S. 668, 688–89 (1984) (discussing prevailing professional norms). According to the Court:

The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. . . . Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. . . .

Id. Assuming the defendant can overcome this deferential review of the attorney’s performance, the defendant must also show that the attorney’s errors caused prejudice (i.e., a reasonable probability that absent the attorney’s errors, the result would have been different). *Id.* at 693–94.

and in fact often are not—effective.⁵³ As a concluding malpractice-based illustration, a custom also apparently deterred lawyers from suing other lawyers for legal malpractice.⁵⁴ Although that custom has undoubtedly diminished in populous areas, the jury is out on whether it has vanished, particularly in less-populous areas. Still, no ethical rule regulates this practice; indeed, the rules bestow broad discretion to decline clients, even ones in special need. In a related vein, a custom of sorts apparently suggested that lawyers should not report other lawyers' ethical violations; although the ethical rules have since rejected that custom, underreporting still persists.⁵⁵ In sum, when judges or drafters (e.g., ALI) upheld or at least tolerated custom, they blessed practices that are not necessarily good and might be just the opposite.⁵⁶

⁵³ See, e.g., Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 349 (2011) (noting the consequences with Strickland's consideration of practices in a particular locale). These consequences include that:

[P]oor representation might be excused as the local norm. For example, a defendant in Maryland would enjoy better representation than a defendant in Alabama if there were more resources—and thus a higher standard—in Maryland. Even within one state, under this approach someone charged with a crime in a city could be constitutionally entitled to a higher level of representation than someone charged with that same crime in a rural county.

Id.

⁵⁴ See, e.g., ABA Ethics Op. 144 (1935) (acknowledging that laypeople found it difficult to sue lawyers). Opining on public opinion of the feasibility of suing attorneys, the opinion states:

Unfortunately, there appears to be a widespread feeling among laymen that it is difficult, if not impossible, to obtain justice when they have claims against members of the Bar because other lawyers will not accept employment to proceed against them. The honor of the profession, whose members proudly style themselves officers of the court, must surely be sullied if its members bind themselves by custom to refrain from enforcing just claims of laymen against lawyers.

Id.

⁵⁵ See generally Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation*, 12 GEO. J. LEGAL ETHICS 175, 178 (1999) (noting generally a lack of disciplinary enforcement against lawyers who fail to report unethical conduct and the risks and benefits of reporting).

⁵⁶ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52(2) (AM. LAW INST. 2000). As another example of how the ethical rules and malpractice law race to the bottom of custom, the profession indisputably holds high the value of client confidences, yet no ethical rule or standard requires lawyers to inform clients about this duty or any relevant aspects of it (e.g., its exceptions). Thus the potentially ignorant or confused client cannot point a breach of the standard of care or a violation of an ethical rule (except perhaps the general rule addressing communication). *Id.*

As a final, non-exhaustive example, the ethical rules (following the previous Canons) continue to this day to prohibit personal solicitation.⁵⁷ The prohibition originally barred in-person solicitations, but with the advent and proliferation of communicative technology, the prohibition has grown to ban most forms of “real-time” communication, including telephonic and electronic communication (although some regulatory variations of course occur in the states).⁵⁸ If the lawyer is not acting pro bono (which is an exception to the ethical prohibition), should it always be unethical to call, message, or talk in-person with a possible client? That proposition seems highly suspect (as do most categorical rules).⁵⁹ The point here, though, is that the historical adoption and expansion of the rule tell us little, if anything, about the ethical defensibility of the rule.

The following Part explores what age and custom can offer for ethical analysis and then turns to their drawbacks.

⁵⁷ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (AM. BAR ASS'N 1983) (addressing solicitation of clients). The rule states:

A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted: (1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer.

Id. See also ABA CANONS OF PROF'L ETHICS Canon 27 (AM. BAR ASS'N 1908) (“It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations.”). Furthermore:

Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper.

Id.

⁵⁸ See MODEL RULES OF PROF'L CONDUCT R. 7.3 (AM. BAR ASS'N 1983) (regulating telephonic solicitations and other “real time” communications). Coincidentally, while this Essay was in production, the ABA Standing Committee on Ethics and Professional Responsibility released a draft rule amendment, which if adopted would broaden lawyers' ability to solicit clients. ABA Standing Comm. on Ethics and Prof'l Responsibility, Working Draft (Dec. 21, 2017), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/scepr_advertising_rules_draft_12_21_17.authcheckdam.pdf.

⁵⁹ For this reason, the drafters have, over the years, carved out exceptions on their own, and the Supreme Court has essentially forced First Amendment exceptions. See, e.g., *id.*

III. THE VANTAGE OF AGE AND CUSTOM

Age and custom (or the lack of them) can bear significantly on ethical questions.⁶⁰ This Part attempts to flag their insights through key examples, not through an exhaustive categorization.

As one pertinent example, age and custom can impact the advance notice requirement in licensure-revocation proceedings. If the published regulations (e.g., ethical rules) are written at a high level of abstraction, and if other professionals customarily engage in a certain practice (or even if not), the targeted professional might not have received adequate notice that the practice was prohibited.⁶¹ How well, if at all, can the professional know that the practice is ethically dubious if the other members of the profession do it, perhaps even unquestionably? If one holds a strong view of role morality, that knowledge might well be missing under these

⁶⁰ A few preliminary, terminological notes on “custom” might be helpful. In discussing custom (of lawyers and in some instances judges), this Essay does not intend to reference international law or jurisprudence. See generally H.L.A. HART, *THE CONCEPT OF LAW* (1961) (discussing custom and law); Bryan H. Druzin, *Planting Seeds of Order: How the State Can Create, Shape, and Use Customary Law*, 28 *BYU J. PUB. L.* 373, 376 (2014) (examining customary law). A closer topic would be, perhaps surprisingly, the UCC. In the UCC, for example, what this Essay generally refers to as “custom” is “usage of trade,” which is defined adequately (at least for this Essay’s purposes) as “any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question.” U.C.C. § 1-303(c). Also, trade usage is subordinate to the contract terms and the courses of dealing and performance between the parties. *Id.* § 1-303(d). See also generally David E. Pierce, *Defining the Role of Industry Custom and Usage in Oil & Gas Litigation*, 57 *SMU L. REV.* 387, 389-93 (2004) (discussing the relative interchangeability of the terms usage, custom, and practice). Further, the thesis suggests that even when custom is so pervasive that it “justif[ies] an expectation that it will be observed with respect to the transaction in question,” it is still insufficient to dispose of or even predominate the ethical analysis. *Id.* Furthermore, any reliance on “expectations” should of course inquire of the expectation of the client, not just the lawyer, as discussed below. *Id.*

⁶¹ One way that the ethical rules generally avoid what might otherwise cause notice issues is through the declaration that the rules are “rules of reason” and should not invariably be enforced irrespective of the circumstances. See MODEL RULES OF PROF’L CONDUCT cmts. 19 (AM. BAR ASS’N 1983) (“[T]he Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. The Rules presuppose that disciplinary assessment of a lawyer’s conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.”).

conditions.⁶² Apart from the due process concern,⁶³ presumably the lack of notice should impact the analysis at the application stage (but not the rule-making stage, as new rules of course typically apply prospectively, not retroactively).⁶⁴

For the reasons suggested above and related reasons, custom can provide mitigation in certain instances. For example, if the published regulations are fairly clear, but if the other professionals customarily violate a regulation (and thus the regulation is presumably un- or underenforced), the professional may have relied on the actions or words of more experienced or supervisory professionals and engaged in the prohibited practice.⁶⁵ In this scenario, the professional may have operated with a lesser intent (by, for example, assuming that the collective judgment is sound, that the ethical regulations have been subsequently interpreted to permit the practice, or that the regulators ascribe minimal or no harm to the practice).⁶⁶ For these notice and mitigation features, the

⁶² See Thomas M. Jones, *Ethical Decision Making by Individuals in Organizations: An Issue-Contingent Model*, 16 THE ACADEMY OF MANAGEMENT REV. 366, 375 (1991) (“[I]t is difficult to act ethically if a person does not know what good ethics prescribes in a situation; a high degree of social consensus reduces the likelihood that ambiguity will exist.”). One can presumably see, however, the thin account of professional ethics that such views suggest. If professional ethics is solely an account of what the profession’s members do and refrain from doing, the role of morality is exceedingly thin and arguably non-existent. See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 106 (1988) (citing RALPH LINTON, *THE STUDY OF MAN* (1936)) (“Linton was a social anthropologist [studying the social script], concerned to understand societies as he found them; but, we object, it is a drastic mistake to turn the *laissez-faire* concepts of the anthropologist’s enterprise into morality. Ethical theory must not import a bias toward taking all societies as we find them.”). A smaller (but still sizeable) problem is that such accounts often do not contain criteria to discern when members are acting contrary to professional ethics. *Id.* at 105. Although outliers are obviously subject to regulation, what if an appreciable percentage of the profession (or specialty) engage in or refrain from a practice, but the majority of the profession acts in a contrary fashion?

⁶³ As a component of justice, due process should not be dismissed as a doctrinal or even constitutional rule wholly distinctive from the ethical analysis. Cf. Norman W. Spaulding, *Due Process Without Judicial Process? Antiadversarialism in American Legal Culture*, 85 FORDHAM L. REV. 2249, 2273 (2017) (discussing due process without judicial process and the risk to the underlying values).

⁶⁴ See *supra* notes 61–62 and accompanying text (noting that the rules should consider facts and circumstances of each case at the time the conduct in question occurred).

⁶⁵ See *supra* notes 61–62 and accompanying text (explaining how the role of morality in ethics goes beyond what members of the profession do and refrain from doing). Of course, these arguments apply *a fortiori* to the easier case in which a practice has not previously been prohibited by any regulation (whether clear or ambiguous).

⁶⁶ The ABA’s *Standards for Imposing Lawyer Sanctions* might, at first glance, seem relevant to analyzing age and custom in legal ethics. Certain aggravating and mitigating factors (e.g., “substantial experience in the practice of law,” “absence of a prior disciplinary record,” “inexperience in the practice of law”) are indeed related to age and customary indoctrination of the targeted lawyer. See AM. BAR ASS’N, *STANDARDS FOR IMPOSING LAWYER SANCTIONS*

length and pervasiveness of the practice should be analyzed and weighed against the other relevant factors (e.g., harm to the client).⁶⁷ They often will only excuse or mitigate the sanction during the period of deficient notification; once cured (in the form of specific or general deterrence or otherwise), future violations obviously would not result from a notice deficiency. Several state supreme courts have at least implicitly recognized this analysis by refusing to sanction the particular lawyer who engaged in an unethical practice, while putting that lawyer and other lawyers in the state on notice that future instances will result in sanctions.⁶⁸

Age and custom can also be ethically relevant because they might (but of course might not) have become known to clients and parties, and those clients and parties therefore might expect a lawyer or judge to behave according to the custom.⁶⁹ That is not to say that the custom is otherwise

§§ 9.22, 9.32 (1992) [hereinafter IMPOSING LAWYER SANCTIONS]. The Standards, however, take the ethical rules as given. In other words, the Standards make no attempt to assess age and custom in the determination of whether a particular practice should be banned, permitted, or required. In light of their limited purpose, this omission is partially understandable, although considering post hoc whether the particular ethical regulation was more or less justified might result in a more just sanction (or no sanction at all). Cf. Gurney Pearsall, *Revisiting Antigone's Dilemma: Why the Model Rules of Professional Conduct Need to Become Model Presumptions That Can Be Rebutted by Acts of Ethical Discretion* 67 S.C. L. REV. 163, 165 (2015) (arguing that the ethical rules should be viewed as rebuttable presumptions).

⁶⁷ See Pearsall, *supra* note 66, at 180 (suggesting that a lawyer's assessment that she was faced with a choice of evils and chose the lesser evil, which she perceived was in the client's best interest, should be considered in determining mitigation efforts).

⁶⁸ See *In re Evans*, 556 P.2d 792, 797 (Ariz. 1976) (refusing to discipline an attorney for a conflict of interest in suing a former client because neither the court nor the ethics committee had "specifically spoken on this issue"). See also *In re Myrland*, 29 P.2d 483, 484 (Ariz. 1934) (noting in part that the attorney's misconduct mirrored that of other, previously undisciplined attorneys). The court noted that:

such conduct, although reprehensible and contrary to the ethical standards of the profession, has perhaps been practiced with impunity in Arizona by other and older members of the profession in the past We are of the opinion that in view of all these circumstances, a disbarment, or even a suspension of the respondent, would be too severe a penalty for the offense of which he has been guilty, and we confine our action to a statement of our opinion of the character of his conduct, and a formal reprimand of respondent therefor. *We take this occasion, however, to notify the bar at large that a future offense of the same nature on the part of any attorney, after the warning which we now give, will not be treated so lightly.*

Id. (emphasis added).

⁶⁹ There are relatively little empirical data on client and party expectations. But what few data are available suggest caution when presuming to know how lawyers, judges, and clients behave and think. See, e.g., Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 355 (1989) (reporting results of survey, albeit with limited respondents, indicating that the

good, only that the custom might result in an expectation or a reliance interest. That interest could be relevant to whether the lawyer's or judge's conduct involves deception or surprise, for example, which in turn bears on whether the conduct should be condemned, tolerated, or praised.

In addition, to the extent that a practice's age and pervasiveness actually corroborate the rightness of an ethical rule or application, lawyers and regulators can achieve greater efficiency by relying on age and custom. Time and money can be lost from having to consider ethical issues anew, both on a day-to-day decisional level and on a policy or regulatory level. If lawyers cannot rely on customary practices, even "time-honored" ones, they presumably will be slower in completing their work because of the time involved in revisiting the potential ethical issues of the relevant practice.⁷⁰ Although speculative, perhaps the reduced efficiency would result in higher costs and lesser access to justice for clients. Similarly, if the profession or a state must convene and fund a professional rules or regulatory review committee or task force (although such bodies are often comprised of volunteers), that effort presumably distracts the profession or the state from other efforts that might ensure better access to justice or protection of clients, for example.⁷¹

Ignoring custom presents an additional risk to our study of ethical rules and regulation, namely, an anti-empiricism. What lawyers and judges actually do is important for a host of ethical and policy reasons. In one of the most obvious examples, the moral philosopher can be (and sometimes has been) wrong or partially wrong about practice, and this error affects the philosopher's premises and prescriptions.⁷² Furthermore, even when arm-chair guesses are more or less correct, a philosopher, policy-maker, or adjudicator who disregards practice risks becoming dangerously oppressive or at least unrealistic in their prescriptions. For example, several ethical upsides could be obtained by requiring that the

public, and even lawyers, hold unexpected beliefs about confidentiality and the rules governing it).

⁷⁰ Cf. DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 418 (2011) (explaining how organizations that rely on routine are able to improve efficiency). See also *id.* at 246–47 (illustrating how starting from scratch can cost both valuable time and money). In addition to the efficiency consideration, some conflicting evidence indicates that the more time that a person considers an ethical question, the more likely the resulting answer will be a bad one. Thus, these deeply contemplated decisions become breeding grounds for rationalizations. On the other hand, fast or even subconscious thinking often results in bad decisions. See, e.g., *id.*

⁷¹ See Spaulding, *supra* note 63, at 2261 (suggesting that efficiency within the legal system assures justice for its participants).

⁷² Cf. Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1534 (1984) (noting that the role of lawyers is intertwined with the context of legal ethics).

lawyer receive informed consent (perhaps even through a writing signed by the client) before every action on the client's behalf. This requirement would also be extremely impractical (some might even argue impossible), both for the client and the lawyer. It would likely delay, and increase the price of, justice for the client, among other negative consequences.⁷³ At the same time, however, no sound reason appears to exist to bestow age and custom with an ethical presumption: Collective practice has been ethically problematic over a wide array issues (some of which have been discussed in this Essay), and with the exception of simple and often misleading logic, we do not have evidence to suggest that aged and customary practices are more likely to be ethical than newer or less-prevailing practices.

A paradox also seemingly arises in the treatment of custom (or more particularly, from a suggestion to disregard custom completely).⁷⁴ Because the practices of a profession must be considered in professional ethics and regulation for a variety of reasons (a few of which have been mentioned above), they could not be irrelevant as a categorical matter. Although this Essay later argues that custom should not be privileged when setting and applying ethical regulations, the argument that custom is weakly suited for this purpose is based, in part, on changes in custom itself. For example, many ethical rules and professionalism creeds were drafted under the assumption that the representation would involve litigation and only a single lawyer or firm on the client's behalf.⁷⁵ Of course, many matters now (and even then) are transactional or involve multiple lawyers and firms. Today's matters, as another example, often involve fee structures and in-house legal departments that differ markedly from those of the past.⁷⁶ Thus changes in customary practice can call for ethical review and possibly amendment. To be clear, however, if the ethical rules as drafted coincidentally are fair and just as applied to

⁷³ See also *infra* notes 105–106 (raising this example in the discussion of feasibility).

⁷⁴ See Laurel S. Terry, *The Legal World Is Flat: Globalization and Its Effect on Lawyers Practicing in Non-Global Law Firms*, 28 NW. J. INT'L L. & BUS. 527, 545–46, 548 (2008) (commenting on how globalization and associated technologies have changed the practice of law).

⁷⁵ See IMPOSING LAWYER SANCTIONS, *supra* note 66 (suggesting ethical regulations in the context of professional sanctions for lawyers should be based on developed standards of the profession because inappropriate sanctions can undermine the goals of lawyer discipline, fail to adequately deter misconduct and thereby lower public confidence in the profession, and deter lawyers from reporting other lawyers' ethical violations on the view that sanctions are too onerous).

⁷⁶ See Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 677 (discussing how present-day legal transactions often cross state lines and require multiple lawyers' due to complexity).

changed circumstances, the rules should not be amended merely to be trendy or to benefit financially a subgroup of lawyers (e.g., lawyers in large firms).⁷⁷ And likewise, if the ethical rules as drafted are fair and just as applied to the context in which their drafters correctly assumed lawyers or judges would be operating, the rules need not be amended.

Some of these positions can be observed in the ABA's debate on whether to permit screening for lateral hires (even when, e.g., the client's lead lawyer leaves the client mid-litigation and joins the opposing firm).⁷⁸ Proponents of the ABA's amendment routinely argued (among other arguments) that lawyers more frequently change firms today than in the past. That seems true (although neither side pointed to much empirical evidence), but how should this empirical fact impact the ethical analysis? A changed custom, such as this one, does not inherently tilt the ethical analysis in either direction. But it might well be the right occasion to revisit an ethical rule to determine its merit in a changed environment. Of course, the revisited ethical rule might not need to be weakened (as several of the proponents mentioned above had assumed), but the rule might instead need to be strengthened or simply reaffirmed.⁷⁹ Indeed, when a proposal is going to remove a right from clients (as the screening amendment proposed to remove the client's right to consent, or withhold consent, to the lawyers' lateral movement), we presumably all would agree that no presumption to weaken the rule should exist. Arguably, the profession's professed values and *raison d'être* would suggest the opposite: that a presumption against weakening the rule should exist.⁸⁰

⁷⁷ See Louraine Arkfeld, *Amending Rule 8.4 of the Model Rules of Professional Conduct*, AM. BAR ASS'N (2016), https://www.americanbar.org/publications/voice_of_experience/20160/july-2016/amending-rule-8-4-of-the-model-rules-of-professional-conduct.html [<https://perma.cc/PF7W-KCZQ>] (stating that the Model Rules should be amended only when such an adjustment reflects changes in the law and practice of law).

⁷⁸ See, e.g., Keith Swisher, *The Short History of Arizona Legal Ethics*, 45 ARIZ. ST. L.J. 813, 835 (noting the ABA's screening controversy). See also sources cited *infra* notes 89–91 (discussing the ABA's recent rule change, the screening amendment).

⁷⁹ Of course, it might also mean that the ethical rules are ratcheted up too high to the detriment of clients or the unnecessary detriment of lawyers. Cf. Bruce A. Green, *The Lawyer as Lover: Are Courts Romanticizing the Lawyer-Client Relationship?*, 32 TOURO L. REV. 139, 141 (2016) (concluding that "courts should adopt a less idealized rhetoric and express more realistic expectations of the lawyer-client relationship"). It might also mean that drafters or courts have erroneously codified a vision of the lawyer or judge that was never prevalent or commendable. Cf. Bruce A. Green & Rebecca Roiphe, *Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence*, 64 N.Y.U. ANN. SURV. AM. L. 497, 500 (2009) (observing and criticizing that "certain elites within the bar enshrined this . . . view of judges as detached administrators of the law into written standards of courtroom conduct, some of which we refer to as 'courtesy rules'").

⁸⁰ See Gillers, *supra* note 46, at 405–06 (noting that the client's interests should generally control the lawyer-client relationship). Commenting on ethical rule-making, he states:

If the profession can maintain its distinctiveness through a value to protect clients from lawyers' self-interestedness or some other laudable value, then those value-serving practices are praiseworthy and, over time, will become aged and customary.

In sum, we have several reasons to consider age and custom in the setting and application of ethical rules, including notice, intent, context, and the signal for reassessment. These reasons, however, do not appear to be sufficient to avoid ethical review or to allay completely the shortcomings of age and custom, as noted below.

IV. AGE AND CUSTOM AS OUTDATED AND OVERRATED

Although age and custom can be relevant, I identify below at least five reasons to revisit the ethical rules and even professionalism creeds, no matter how time-honored or prevalent they (or the practices they fail to regulate) have become.

First, the profession now operates in an abundance of changed circumstances.⁸¹ These include not just technology and globalization, but also diversity and inclusion in the profession (or at a minimum, the aspiration of increased diversity and inclusion).⁸² Second, and on a somewhat related dimension, binding new members to previously established rules and creeds can be unfair or at least suboptimal. Should not the new members have a voice and perspective on ethical regulation and professionalism pronouncements? Moreover, and central to the value of diversity, their voices and perspectives would contribute meaningfully and beneficially to the rules and regulation.

[a]s between the interests of lawyers and those of clients, when the bar proposes rules governing lawyers, it is client interests that should presumptively control. But it is a presumption only because lawyers do have legitimate interests in their own right, like career development and mobility. Whether and to what extent lawyers must subordinate these interests to those of clients should depend on the strength of the relative interests. The presumption can be rebutted.

Id. Professor Gillers then concluded that "[s]creening is an example of a rule in which the presumption was rebutted." *Id.* The strength of this conclusion is beyond the scope of this article; the point is what, if any, presumption should attach to changed circumstances. *Id.*

⁸¹ See *infra* notes 82, 89, 97 (listing several examples of changed circumstances in the modern practice of law).

⁸² See, e.g., Terry, *supra* note 74, at 545-46, 548 (noting that lawyers have been shaped by technology and that globalization is likely to lead to continued changes within the legal profession). In the sense of (emerging) customary recruitment and admission procedures, this change could itself be considered custom. In other words, customs, new or old, are not invariably bad.

Third, revisiting the rules alleviates the inherent failure of rules.⁸³ At least with our current human limitations, we cannot foresee all future permutations of the circumstances and draft a rule to cover all of those (un- or under- foreseeable) circumstances fairly. Rules will thus fail. Occasions in which the rules are revisited therefore give the profession an opportunity to study previously unforeseen or underappreciated circumstances and to adjust the rules accordingly. Although the profession (primarily through the ABA) has generally been more proactive of late in ethical regulation than certain other professions, these occasions are still necessary for the legal profession. The profession, through its national bar association, promulgated its first nationwide set of ethical rules (the Canons) roughly 100 years ago. That set was notably vague and often unenforced.⁸⁴ The first specific and more regularly enforced ethical code did not actually arrive in most states until the mid-1970s. The standard professionalism creed (which many states have still not adopted) did not arrive until the 1980s and early 1990s.⁸⁵ Thus, the governing documents are not universal in time and place and have not been improved frequently.

Generally speaking, furthermore, the ABA's rules drafters work on committees or commissions comprised of no more than thirty members. Of the one-million-plus lawyers from vastly different backgrounds and in vastly different practices, the ABA drafters hardly comprise a sliver. These august committees are not sufficiently inclusive and representative to avoid unintended errors and blind spots.⁸⁶ To be sure, the ABA to its credit holds numerous hearings and circulates numerous drafts of its

⁸³ See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (stoking the rules-versus-standards debate). See also Swisher, *The Moral Judge*, *supra* note 28, at 661-68 (discussing the failure of rules and the advantage of standards in adjudication).

⁸⁴ See, e.g., Swisher, *supra* note 78, at 817-19 (2013) (noting that the Canons proved somewhat "difficult to implement, vague, and confusing to bar members" (footnote omitted)).

⁸⁵ See, e.g., James E. Moliterno, *Lawyer Creeds and Moral Seismography*, 32 WAKE FOREST L. REV. 781, 782 (1997) (noting at the time that "[p]rofessionalism creeds are sweeping the nation").

⁸⁶ See, e.g., *infra* note 98 (noting a lack of diversity in the drafting committees). Cf. Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 689 (1989) (providing an example of the ABA unintentionally overlooking an essential element of one of its enforcement decisions). See generally *Standing Committee on Ethics and Professional Responsibility*, AM. BAR ASS'N (2017), https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility.html [<https://perma.cc/G6F8-KBP4>] (stating that the Standing Committee on Ethics and Professional Responsibility issues ethics opinions that interpret both the Model Rules of Professional Conduct and the Model Code of Judicial Conduct).

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work product for comment, and since the Canons, the ABA has held four significant rounds of revisions.⁸⁷ Nevertheless, to anticipate and to address fairly every permutation in the practice of law would be herculean—or realistically impossible.⁸⁸

The screening debate once again illustrates the folly of relying on age or custom. If taken at face value, the ABA concluded that changed circumstances partially justified the screening amendment. Yet the ABA had reached the opposite conclusion only eight years earlier.⁸⁹ The changed circumstances over a mere eight years apparently justified overriding custom (albeit coerced custom) in place for several decades.⁹⁰ Thus, no particular weight was given to age or custom.⁹¹ Likewise, of

⁸⁷ See, e.g., Peter Geraghty, *History of U.S. Legal Ethics Standards*, AM. BAR ASS'N (2016), <https://www.americanbar.org/publications/youraba/2016/December-2016/a-brief-history-of-the-development-of-legal-ethics-standards-in-.html> [https://perma.cc/U9A6-QCKT] (discussing how the rules have evolved through revisions). The two major revisions led to the adoption of the Model Code of Professional Responsibility and later the Model Rules of Professional Conduct. *Id.* In addition, the Ethics 2000 Commission and the Ethics 20/20 Commission both produced significant revisions to the Model Rules. *Id.* Code-based judicial ethics have followed a similar lifecycle in this country. The ABA promulgated the first Canons of Judicial Ethics in 1924, which suffered from similar flaws (most often, vague and under-enforced commandments) as the 1908 Canons of (Professional) Ethics for lawyers. The ABA then produced a judicial code in 1972 (the Code of Judicial Conduct), which was revised in 1990 and 2007 (as the Model Code of Judicial Conduct). See *Model Code of Judicial Conduct: Preface*, AM. BAR ASS'N (Oct. 18, 2017), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_preface.html [https://perma.cc/B9X4-DCK7] (affirming that the Code of Judicial Conduct was adopted in 1972). See Brief for Petitioner at 2, *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016) (No. 15–5040), 2015 WL 8300482 (describing the drafting history of the ABA's codes and noting that “every state has adopted ethics codes that are based on or consistent with the ABA's Model Code to govern judicial conduct, to help ensure that all litigants in the justice system are treated fairly and in accordance with due process, and to promote public confidence in the judiciary”), cited in *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1908 (2016). (In the interest of disclosure, the author principally drafted the cited brief on behalf of the ABA.)

⁸⁸ To the drafters' credit, they seemed to concede this fact. See MODEL RULES OF PROF'L CONDUCT Scope (“The Rules do not exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.”).

⁸⁹ See, e.g., Edward A. Adams, *ABA House Oks Lateral Lawyer Ethics Rule Change*, ABA JOURNAL (Feb. 16, 2009), http://www.abajournal.com/news/article/aba_house_oks_lateral_lawyer_ethics_rule_change [https://perma.cc/7G6Q-BWF4] (reporting that the ABA voted to amend Rule 1.10 of the Model Rules of Professional Conduct to allow for screening). See also generally Ted Enarson, *Lateral Screening: Why Your State Should Not Adopt Amended Model Rule of Professional Conduct, 1.10, 37 J. LEGAL PROF. 1, 4–5* (2012) (explaining that before the amendment, twenty-three states allowed full or limited screening).

⁹⁰ As noted above, screening was fully or partially permitted in many states (or in certain federal courts) before the ABA's amendment. In those states, of course, the comment above concerning coercion is inapplicable.

⁹¹ An exception bears noting. Several commentators noted the apparent custom of

course, age and custom was not, or at least should not have been, seen as a negative factor. Lawyers who strive for efficiency or profit over ethics should not be able to jettison or marginalize ethical rules and regulation simply by labeling them “old” or “outdated.”

Fourth, the ethical rules and regulation are designed, in substantial but not exclusive part, to protect clients from predatory or otherwise harmful conduct of lawyers and judges (among others), yet the lawyers and judges are the ones who draft the rules and typically operate the regulatory framework. From this perspective, what the regulated professionals do, and for how long they have done it, is not privileged conduct. Indeed, the conduct could be the very conduct that needs regulation—age or pervasiveness notwithstanding.⁹² Furthermore,

screened lawyers not to breach their screens (in situations or states that permitted the use of screening). The evidence was largely anecdotal and may not rise to the level we can comfortably call custom, but it is at least noteworthy. *But see, e.g., Maritrans GP Inc. v. Pepper, Hamilton & Sheetz*, 602 A.2d 1277, 1281–82 (Pa. 1992) (noting that the law firm apparently breached its screening arrangement). *See also* Susan P. Shapiro, *If It Ain't Broke . . . an Empirical Perspective on Ethics 2000, Screening, and the Conflict-of-Interest Rules*, 2003 U. ILL. L. REV. 1299, 1326 (2003) (attempting to answer this question). Further, this article notes:

Do the screens meet the specifications found in the ethics codes and case law? Not always, especially in the smaller firms. Admonitions simply to ‘stay the hell away’ do not live up to the spirit of the rules. Even walls constructed from more sophisticated blueprints have points of vulnerability, especially with respect to computer networks and firmwide communications. Even more problematic, firms often do not construct screening devices as quickly as necessary because of the lag between the time that the migratory lawyer joins the firm and the time that their tainted baggage is discovered.

Id. Cf. Lee A. Pizzimenti, *Screen Verite: Do Rules About Ethical Screens Reflect the Truth About Real-Life Law Firm Practice?*, 52 U. MIAMI L. REV. 305, 333 (1997) (questioning the future of screens). This article notes:

In summary, I found a large majority of responding firms take conflicts seriously and attempt to resolve them in a measured manner. However, both they and firms with fewer concerns are hampered by flawed conflicts detection, flawed systems for maintaining screens and, to some extent, an adversarial rather than fiduciary analysis of screen issues. This is aggravated by the fact that no firm responding had developed a policy of sanctions regarding breaching screens. Moreover, there are enormous difficulties in proving a screen has been breached.

Id. (footnote omitted).

⁹² The professionals might not be aware that their conduct is ethically problematic. Cognitive biases, for example, might cloud their judgment. *See, e.g., Tigran W. Eldred, The Psychology of Conflicts of Interest in Criminal Cases*, 58 U. KAN. L. REV. 43, 48 (2009) (discussing the psychological research attempting to close the gap on what drives lawyers’ decisions to resolve conflicts). This article notes:

Researchers have uncovered psychological biases that make it extremely difficult for professionals, even those who are acting in good faith and whose only limitation is unconscious, to appreciate the

among the greatest good of the bench and bar in the United States is the ability and arguably responsibility to protect vulnerable parties and groups from the majority or otherwise powerful actors.⁹³ The independence and (quasi-)self-regulation afforded to protect this role should not be abused to disregard or harm the very clients for whom these features were designed.⁹⁴ Indeed, the ABA has acknowledged this

deleterious consequences of conflicts of interest. In other words, . . . psychological research demonstrates that most lawyers—even those who are acting with the best intentions—are unable consciously to identify many conflicts that exist or to appreciate the corrosive effects that such conflicts may have on decision making. Indeed, like all professionals, lawyers systematically understate both the existence of conflicts and their deleterious effects.

Id. (footnotes omitted). See also Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671, 708 (2011), noting that:

Studies reveal that people generally are poor at self-assessment and tend to be overly optimistic judges of their own abilities. Inflated preconceptions of their abilities, in turn, lead subjects to over-estimate their competence in performing specific tasks . . . They tend to exhibit a blind spot to their own biases, take their perception of the world as objective reality, and attribute contradictory perspectives to bias in others, rather than themselves.

Id. (footnotes omitted).

⁹³ See, e.g., THE FEDERALIST NO. 78 (Alexander Hamilton) (noting the need for judicial independence to protect the minority against majority overreaching). See also *Raines v. Byrd*, 521 U.S. 811, 828–29 (1997) (quoting *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring)), noting:

The irreplaceable value of the power articulated by Mr. Chief Justice Marshall [in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803),] lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests.

Id. at 829. See generally MODEL RULES OF PROF'L CONDUCT Pmb1. cmt. 11 (AM. BAR ASS'N 1987). Specifically, the preamble states:

Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

Id. To be sure, this purpose is often linked to protecting minorities from the state, but it seems clear that the good flowing from bench and bar's independence and self-governance should not be abused in favor of the bench and bar.

⁹⁴ See generally MODEL RULES OF PROF'L CONDUCT Pmb1. cmt. 12 (AM. BAR ASS'N 1987). The preamble states:

responsibility not to permit “parochial or self-interested concerns of the bar” to override the public interest.⁹⁵ In short, a pro-lawyer or pro-judge bias has existed in the past, continues to exist, and should be scrutinized.⁹⁶ That it might be efficient or convenient for lawyers or judges to avoid introspection or regulation seems hardly a sufficient justification.

Fifth, and perhaps most alarmingly, an older-is-better bias risks significantly stagnating our ethical development. Although we continue to stumble in certain places, we also continue to improve in our ethical development and in our system of regulation. That is generally (or at least arguably) the case in both American society and in the legal profession.⁹⁷ A fetish for the old is particularly inappropriate for ethics: the values of men from large firms and elite schools in 1908, 1969, and even 1983 (i.e., the rules drafters) “are, at best, under-representative of our pluralist

The legal profession’s relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. *Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.*

Id. (emphasis added).

⁹⁵ The Model Rules acknowledge (albeit in non-binding commentary) that “[t]he profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.” MODEL RULES OF PROF’L CONDUCT Pmb1. cmt. 12 (AM. BAR ASS’N 1987).

⁹⁶ See, e.g., BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM* (2011) (arguing that judges—i.e., former attorneys—systematically favor the legal profession); Dana Ann Remus, *Just Conduct: Regulating Bench-Bar Relationships*, 30 YALE L. & POL’Y REV. 123, 125–27 (2011) (discussing reform of bench-bar relationships).

⁹⁷ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003), stating:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Id. See also *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” (alteration in original) (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958))); Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics-I. Origins*, 8 U. CHI. L. SCH. ROUNDTABLE 469, 471–72, 479–80 (2001) (discussing history of professional regulation).

society.”⁹⁸ In addition, because the profession has historically been under-regulated, and because regulatory capture, blind spots, and under-enforcement still exist, what the profession does should not be sacrosanct.

V. A MODERN APPROACH TO AGE AND CUSTOM

As we move forward in considering and adjusting ethical rules and regulation, the problems above (and below) suggest preliminarily that we should stop to recognize the shortcomings and even dangers of age and custom. Education on bias is not a “panacea,” but it can be enlightening and alleviating.⁹⁹ This is particularly true if the bench and bar individually and collectively implement strategies to “debias” themselves toward age and custom. For example, the inclusion of additional public members (i.e., former, current, and prospective clients), academics from a variety of relevant disciplines, and other professionals in making and implementing ethical rules and regulation will help to counterbalance the unhealthy pull of age and custom in the profession. Relying on the assumption that this more aware and inclusive body will consciously and thoughtfully analyze age and custom, this final Part suggests that age and custom should be used in two primary ways: (A) as a factor, but only a

⁹⁸ Keith Swisher, *Recusal, Government Ethics, and Superannuated Constitutional Theory*, 72 MD. L. REV. 219, 241 (2012) (first quoting Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389, 394–402 (2005) (discussing the values of moral pluralism); then quoting *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (referring to diversity as a compelling interest)). See, e.g., MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 74–75 (1991). The drafters of the 1969 Code included no women and were otherwise narrow in their inclusiveness. *Id.* The Kutak Commission (which drafted the Model Rules) was more diverse, but for example women still constituted only a small minority of the membership. *Id.*

⁹⁹ See, e.g., Andrew M. Perlman, *A Behavioral Theory of Legal Ethics*, 90 IND. L.J. 1639, 1663 (2015) (noting debiasing techniques “are not panaceas”). Further, “[d]ebiasing techniques that reduce cognitive biases and increase the likelihood that lawyers can make more objective and effective decisions. Debiasing strategies could include, for example, seeking second opinions from more objective observers, or explicitly writing out the counterarguments to a position.” *Id.* (footnote omitted). See also *id.* at 1668 (citing Eric Luis Uhlmann & Geoffrey L. Cohen, “I Think It, Therefore It’s True”: *Effects of Self-Perceived Objectivity on Hiring Discrimination*, 104 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 207 (2007)), noting:

A final way to ensure that ethics theories are applied in the manner scholars intend is to educate law students and lawyers about cognitive bias. Although the previously mentioned blind spot bias makes this effort difficult, there are several promising approaches. One social psychologist has found that, by making people more aware of their own lack of objectivity, they can assess new information more accurately.

Id. See also Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1157 (2013) (noting that awareness, self-evaluation, and education can each contribute to the avoidance or mitigation of biases).

factor, that may be relevant to the ethical rule or result; and (B) as an alert to drafters, commentators, and courts that the rule or practice might be ethically questionable and ripe for review.¹⁰⁰

A. *Age and Custom as a Mild Factor in Our Ethical Decision-Making and Regulation*

I have outlined in the previous Part why the age of an ethical rule or custom should not constitute a dispositive or necessarily weighty factor in determining what an ethical rule or practice should be. To see the problem in its clearest revelation, we can look at an ethical rule (or custom) that today is almost universally seen as unethical. In many jurisdictions, the rules used to prohibit lawyers from charging below a schedule of minimum fees. In other words, the lawyer was acting unethically if the lawyer failed to charge the client a high-enough fee; the lawyer could be disciplined for giving the client a break. Although the age of this rule varied across jurisdictions, we can assume for purposes of this illustration that the rule was time-tested. If the rule had been decades-on-decades old, and if practitioners consistently and pervasively followed it¹⁰¹ (and if the pesky Supreme Court had not intervened on an antitrust basis),¹⁰² would its age and pervasiveness have justified its persistence? The easy answer is no, because even if the rule had redeeming qualities, other values clearly outweighed them. The harder and more general inquiry is whether age and custom should even play a role in the analysis. In other words, are they a factor appropriately considered in ethical analysis (and if so, how should they be considered or weighed)? I suggest here that they should be a factor (but only a factor) in the ethical analysis. In light of the nature of ethics and the history of professional regulation, older customs are not sacrosanct, but they are not always worthless.

Old rules or customs have often been wrong, and their persistence may be owing in part to cognitive biases and heuristics.¹⁰³ For example,

¹⁰⁰ See *supra* Part IV (discussing select ways in which age and custom can be harmful in ethical decision-making). I should acknowledge that this Part does not exhaustively list the ways in which age and custom can be useful or harmful. Other ways are noted elsewhere in the Essay, and through my own value judgments or inadvertence, still others might have possibly been missed or under-examined.

¹⁰¹ For this proposition, it does not matter whether the practice was consistent and pervasive because of the ethical rule or because of some other reason.

¹⁰² See *Goldfarb v. Va. ex rel. Va. State Bar*, 421 U.S. 773, 793 (1975) (concluding that some of lawyers' anticompetitive conduct is within the scope of the Sherman Anti-Trust Act); Gillers, *supra* note 46, at 365, 380-82 (discussing minimum fee schedules as an instance in which the bar placed its interests over clients' interests).

¹⁰³ See *supra* notes 5-8 and accompanying text.

we generally avoid admitting our past mistakes.¹⁰⁴ Similarly, we do not want the cognitive dissonance from acknowledging uncertainty about the rightness of our decisions. We therefore interpret information consistently with the previous belief or decision (and ignore or downplay information inconsistent with the decision). These past precedents thus present powerful sources of bias and anchors, which is why I suggest in the next section that we must pause and scrutinize past practices. Furthermore, privileging their age or prevalence would stunt (and arguably has stunted) ethical development. Keeping skeptical of past practices—including a consciousness that they should constitute only a possible factor in the analysis—will likely aid in keeping these detriments in check.

But age and prevalence can offer insights for drafters of ethical rules and adjudicators. The age of a particular rule or practice (but more so just its mere existence) can show that a particular ordering is possible, for example. A similar analysis occurs in torts under the banner of feasibility.¹⁰⁵ To require the impossible, or even that which is extremely

¹⁰⁴ See Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401, 425 (2011) (“[p]sychologists confirm what we all know intuitively: no one enjoys being wrong, even about trivial matters, let alone about consequential decisions that vastly influence other people’s lives”); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1593–94 (2006) (discussing the empirical literature supporting the theory that cognitive bias is a reason people avoid admitting past mistakes). The latter article observes:

Four related but separate aspects of cognitive bias that can contribute to imperfect theory formation and maintenance: confirmation bias, selective information processing, belief perseverance, and the avoidance of cognitive dissonance. Confirmation bias is the tendency to seek to confirm, rather than disconfirm, any hypothesis under study. Selective information processing causes people to overvalue information that is consistent with their preexisting theories and to undervalue information that challenges those theories. Belief perseverance refers to the human tendency to continue to adhere to a theory, even after the evidence underlying the theory is disproved. Finally, the desire to avoid cognitive dissonance can cause people to adjust their beliefs to maintain existing self-perceptions.

Id. (footnotes omitted). See also Keith Swisher, *Prosecutorial Conflicts of Interest in Post-Conviction Practice*, 41 HOFSTRA L. REV. 181, 194 (2012) (noting several examples of prosecutors who refused to change their preexisting views even in the face of solid evidence to the contrary).

¹⁰⁵ See generally David G. Owen, *Design Defects*, 73 MO. L. REV. 291, 324 (2008) (“Without affirmative proof of a feasible design alternative, a plaintiff usually cannot establish that a product’s design is defective. Put otherwise, there typically is nothing wrong with a product that simply possesses inherent dangers that cannot feasibly be designed away.”).

impractical, counts against a proposed ethical rule.¹⁰⁶ That a rule or practice has persisted shows that it is neither impossible nor extremely impractical. Conversely, that a rule or practice has not persisted might indicate (although in and of itself does not prove) that a proposed rule is impossible or extremely impractical.

Additional positive reasons, noted above,¹⁰⁷ exist, including that the age and prevalence of a rule or practice might impact the notice that the professional received (or did not receive). This concern may be suitable or unsuitable depending on the decision-maker and the timing. For example, this concern has no force when promulgating ethical rules, which ordinarily would be prospective, not retroactive, in application. In addition, even when the concern is appropriately considered, the reality is that an unethical practice is an unethical practice. A lack of meaningful notice might serve as a mitigating or temporarily excusing factor but rarely calls into question the rule itself.¹⁰⁸

In closing on this factor-based approach, an example might hopefully be useful. To a certain extent, the rules used to urge lawyers to follow custom,¹⁰⁹ but in one area today, the rules still explicitly rely on custom. In determining a “reasonable” fee, the rules refer to the “fee customarily charged” as a factor bearing on reasonableness.¹¹⁰ This limited approach

¹⁰⁶ Philosophers have long noted and debated this issue. Requiring the impossible helps no one, is counterproductive in terms of moral psychology, and “ought implies can.” See, e.g., John Kekes, *“Ought Implies Can” and Two Kinds of Morality*, 34 PHIL. QUARTERLY 459 (1984). The separate concepts of moral dilemmas and moral failure (i.e., situations in which two ethical requirements necessarily conflict and in which one does not override the other) are irrelevant for present purposes. See also, e.g., LISA TESSMAN, *MORAL FAILURE: ON THE IMPOSSIBLE DEMANDS OF MORALITY* 11–13 (2014) (analyzing the philosophical concepts of moral dilemmas and impossible moral requirements). Impracticality, however, presents a more difficult issue. For legal ethics, the impracticality problem can be illustrated again through the concept of informed consent. Several ethical upsides could be obtained by requiring that the lawyer receive informed consent (perhaps even through a writing signed by the client) before every consequential action on the client’s behalf. This requirement, of course, would be extremely impractical (some might even argue impossible), both for the client and the lawyer. It would likely delay, and increase the price of, justice for the client. *Id.*

¹⁰⁷ See *supra* Part II (providing examples of problems involving legal and judicial ethics).

¹⁰⁸ To be sure, the drafting (but not necessarily the underlying policy or value) might need to be revisited if the deficient notice resulted from vague or sloppy wording.

¹⁰⁹ See MODEL CODE OF PROF’L RESP. EC 7-38 (AM. BAR ASS’N 1987) (“[An attorney] should follow local customs of courtesy or practice, unless he gives timely notice to opposing counsel of his intention not to do so.”). See also ABA CANONS OF PROF’L ETHICS Canon 25 (1908) (“A lawyer should not ignore known customs or practice of the Bar or of a particular Court, even when the law permits, without giving timely notice to the opposing counsel.”).

¹¹⁰ See MODEL RULES OF PROF’L CONDUCT R. 1.5(a)(3) (AM. BAR ASS’N 1987) (“The factors to be considered in determining the reasonableness of a fee include . . . the fee customarily charged in the locality for similar legal services.”); MODEL CODE OF PROF’L RESP. DR 2-106(B)(3) (providing “the fee customarily charged in the locality for similar legal services”

can be highlighted as commendable: custom is not given any particular reverence; it serves merely as one factor among many other relevant factors. Of course, some rules—including ones trying to establish a non-excessive fee within a given market—are more amenable to custom; other rules—such as the prohibition against misappropriating trust account funds—are and should be less reliant on custom. Even with rules more amenable to analysis of customary practices, the connection has a breaking point. To illustrate using the fees example above, if the customary contingency fee for personal injury lawyers in dog-bite cases happened to be eighty or ninety percent, presumably custom would not pass scrutiny under an ethical microscope. In sum, however, age and custom as non-exhaustive factors can assist ethical analysis.

B. Age and Custom as a Warning Sign

The age and custom saturated in our rules and system of regulation, and the age and prevalence of any particular practice, should also provide a signal for review and possibly change, or so I suggest below.

In general, lawyers in America were largely unregulated until the last century and under-regulated until recently (and some would argue still).¹¹¹ Yet, their customs were adopted—sometimes wholesale—into the ethical rules. To be sure, the regulation of lawyers has certainly improved over roughly the last half-century.¹¹² As a prime example, the profession now has a clear(er) set of rules, which are more or less regularly enforced. But those rules originated in significant part from the customs of a largely unregulated profession.¹¹³ In light of the vast incorporation of aged

as a factor in determining the reasonableness of a fee). The rule lists eight factors (and some of the factors have sub-factors).

¹¹¹ See Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 501 (1985) (citing JEROLD S. AUERBACH, *UNEQUAL JUSTICE* 127 (1976)). See also Patrick L. Baude, *An Essay on the Regulation of the Legal Profession and the Future of Lawyers' Characters*, 68 IND. L.J. 647, 648 (1993) ("Powerful historic accounts have argued that the reforms earlier in the century were more effective at elevating the income and status of the profession than at protecting the public.").

¹¹² See, e.g., Swisher, *supra* note 78, at 816 (noting many improvements in Arizona and elsewhere in the regulation of lawyers over the last century); Nancy J. Moore, *Mens Rea Standards in Lawyer Disciplinary Codes*, 23 GEO. J. LEGAL ETHICS 1, 5–6 (2010) (discussing the evolution of the ethical rules and their enforcement). See also Ted Schneyer, *How Things Have Changed: Contrasting the Regulatory Environments of the Canons and the Model Rules*, PROF'L LAW. 161, 176–77 (2008) (noting under-enforcement until the 1970s); Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics – II the Modern Era*, 15 GEO. J. LEGAL ETHICS 205, 206 (2002) (noting early under-enforcement).

¹¹³ Now that the governing ethical rules are in their fifth significant iteration, some of the more ethically questionable customs (e.g., minimum-fee schedules, advertising bans) have largely been jettisoned. Nevertheless, scholars and commentators have noted the significant degree of incorporation of custom into the ethical rules (and professional liability standards).

custom (particularly from what at the time was only a loosely regulated profession) in the Canons (1908) and the Code (1969) – much (but of course not all) of which was carried forward in the Model Rules – the existing ethical rules should not receive deference.

Likewise, customary practices were not necessarily subjected to scrutiny, much less regulated, at least not by a totally objective body. The vast in-semination of custom (although perhaps expected with professional ethics) and the deferential approach to the profession's practices should alert drafters, adjudicators, and commentators that the resulting rules and practices might not have been sufficiently scrutinized in the first place and may well be ethically arbitrary or harmful in parts. Thus, age and custom serve in this capacity as a red or yellow flag, not validation.

Perhaps the retort, or the conscious or subconscious theory, is that because most professionals engage in a practice (or refrain from it), this collective judgment of sorts should be entitled to deference or a presumption of rightness. At the same time, however, other phenomena undercut this theory to some extent. For instance, once a person is submerged in a culture (e.g., a firm or agency or arguably even a profession), that person may be less likely to scrutinize common practices.¹¹⁴ Similarly, observing many others engage in a practice may

See, e.g., Gary A. Munneke & Anthony E. Davis, Esq., *The Standard of Care in Legal Malpractice: Do the Model Rules of Professional Conduct Define It?*, 22 J. LEGAL PROF. 33, 43–44 (1998) (citing in part CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 9.2.4 p. 510 (West 1986)). The article notes:

Finally, the Rules recognize the role of customary usage in setting standards of behavior for lawyers. It was, and is, customary for lawyers to refer cases to other lawyers in return for a share of the ultimate fee in the case even if they handle none of the work. Rule 1.5(e) revised the requirements of the Code with respect to division of fees with other lawyers. It allows lawyers to divide fees without regard to the proportion of work done by each if the lawyers agree in writing to assume full responsibility for the matter. This practice gives an incentive to lawyers who are not competent, or are too busy to undertake a particular case, to associate with another lawyer better positioned to assume the representation. The proportional work/proportional pay provisions of the Code were widely disregarded by practitioners, thereby subjecting them to discipline for acting according to the custom of the profession. The Rules acknowledged the reality of the practice of forwarding fees, and created a standard consistent with that practice.

Id. (footnotes omitted). "Other Model Rules codified customary usage in similar ways," furthermore. *Id.* at 44 n.42 (citing RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 16.3, at 410 (4th ed. 1996)).

¹¹⁴ *See, e.g.,* Catherine Gage O'Grady, *Behavioral Legal Ethics, Decision Making, and the New Attorney's Unique Professional Perspective*, 15 NEV. L.J. 671, 680 (2015) (quoting in part MILTON

explicitly or implicitly suggest to the observer that the practice is permissible or even obligatory.¹¹⁵ Common observation also possibly encourages the availability heuristic (i.e., being overly influenced by readily recallable examples or overestimating their frequency) or cascade (i.e., a “bandwagon or snowballing process”).¹¹⁶ Thus, the collective-

C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* 10 (2004), which states that “[a]ll attorneys are influenced by their work environments and the ‘subtle but powerful forces that shape behavior’ in the law firm.”). See also *id.* at 690 (citing Milton C. Regan, Jr., *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941, 965 (2007) and noting that “[p]rimed by the work environment, the experienced manager is more inclined to make rapid decisions, with little or no moral component, based on learned business schemas and intuition. Less experienced workers, on the other hand, are more likely to see ethical issues in a problem’s definition or framing.”).

¹¹⁵ See O’Grady, *supra* note 114, at 681 (“[a] new attorney will naturally be most inclined to look to the behavior of other attorneys to learn what is expected or appropriate in the work environment. For example, if cheating on small or large ethical decisions is seen as acceptable in the work environment, the new attorney’s individual ethic will be shaped by that culture, and cheating will increase.”).

¹¹⁶ To be sure, this is a somewhat atypical application of the availability heuristic or cascade. It is often studied in relation to newsworthy or current events and identifies a bias toward those events over older or otherwise-less-readily-available information. Thus, this heuristic appears to apply to the discussion of custom in the sense of readily observable and presumably recallable information, and it might suggest a bias against the age criterion (in that newer practices would be more significant than older practices. Granted, these observations might simply support the correct belief that the given practice is, indeed, customary. But the heuristic also might suggest that because attorneys observe other attorneys engaging in the practice, the attorneys are reluctant to criticize it. Cf. Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 685–87 (1999) (discussing the availability heuristic and possible implications when it interacts with social mechanisms). The authors note that:

An availability cascade subsumes two of the special cascades that have recently received considerable attention in the social sciences, though not in law: informational cascades and reputational cascades. An informational cascade occurs when people with incomplete personal information on a particular matter base their own beliefs on the apparent beliefs of others. To be more specific, suppose that the words and deeds of certain individuals give the impression that they accept a particular belief. In response to their communications, other individuals, who lack reliable information, may accept that belief simply by virtue of its acceptance by others. As long as members of the relevant group are heterogeneous along one or more dimensions (e.g., initial personal information, willingness to rely on others for information, timing of social contacts), the transformation of the distribution of beliefs can take the form of a cascade, known also as a bandwagon or snowballing process. . . . In the case of a reputational cascade, individuals do not subject themselves to social influences because others may be more knowledgeable. Rather, the motivation is simply to earn social approval and avoid disapproval. In seeking to achieve their reputational objectives, people take to speaking and acting as if they share, or at least do not reject, what they view as the dominant belief.

judgment theory might actually amount to little more than “monkey see, monkey do.”

Additionally of concern, because our biases cause us to view ourselves as good, fair, and even morally superior, we view our past practices as precedent for, and evidence of, their ethical appropriateness.¹¹⁷ Or so I here suggest, with at least some support in the literature.¹¹⁸ At the same time, owing in part to a practice’s age and custom, moral considerations might have been “faded,” if not eliminated, when the practice is

Everyone has had the experience of modifying public statements or actions in order to win praise or avoid censure. If a particular perception of an event somehow appears to have become the social norm, people seeking to build or protect their reputations will begin endorsing it through their words and deeds, regardless of their actual thoughts. As in the informational case, the outcome may be the cleansing of deviant perceptions, arguments, and actions from public discourse.

Id. (footnotes omitted).

¹¹⁷ See Robbenolt & Sternlight, *supra* note 99, at 1116–17 (discussing circumstances when unethical decisions are most likely made). Commenting on the psychology of lawyers, the authors note that:

[e]ach of us tends to believe that we see the world objectively; to see ourselves as more fair, unbiased, competent, and deserving than average; and to be overconfident about our abilities and prospects. This tendency to view the self in positive terms is heightened when the characteristic at issue is socially desirable—as is the case with ethical behavior. Indeed, attorneys tend to believe that their own ethics and their firm’s ethical standards are more stringent than those of other attorneys and other firms. These views of the self can lead to an ethical blind spot that impedes our ability to perceive and thoughtfully consider the ethical tensions we inevitably face

Id. (footnotes omitted).

¹¹⁸ See Robbenolt & Sternlight, *supra* note 99, at 1119 (citing ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 52 (5th ed. 2009); Blake E. Ashforth & Vikas Anand, *The Normalization of Corruption in Organizations*, 25 *RES. ORGANIZATIONAL BEHAV.* 1, 3 (2003); Linda K. Treviño et al., *Behavioral Ethics in Organizations: A Review*, 32 *J. MGMT.* 951, 970 (2006); HERBERT C. KELMAN & V. LEE HAMILTON, *CRIMES OF OBEDIENCE* 18 (1989)) (“Early decisions may be made in circumstances in which the ethical course of action is not clear. Wanting to believe that the small steps we have already taken have been good ones and preferring to act in ways that are consistent with our previous behavior, we find it difficult to shift course. Eventually, as a practice becomes routine, the points at which deliberation might have occurred disappear, as do the decision’s ethical contours.”). In addition, we generally wish to avoid “loss aversion” by “weigh[ing] potential losses from switching as larger than the potential gains.” William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 *J. RISK & UNCERTAINTY* 7, 35–36 (1988) (“Because of loss aversion, the individual is biased in favor of the status quo.”). See also Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 *SCIENCE* 1124, 1124–25 (discussing various cognitive biases).

considered.¹¹⁹ And a practice might not be considered or reconsidered at all, given the pull of the status quo bias and its raw efficiency.¹²⁰

Finally, custom developed and crystallized in a significantly different professional environment. As noted above,¹²¹ lawyers (and judges) generally no longer look the same, come from the same schools, join and remain in the same firms or associations, use the exact same tools and methods, or serve the same clients. Preexisting customs of an aging bench and bar might be time-tested, but the test (to the extent there actually was any valid test on which we can rely) occurred in a different course. These customs might just as easily lead us astray as they might provide a moral

¹¹⁹ See generally Perlman, *supra* note 99, at 1163–64 (explaining that lawyers sometimes cannot tell when certain situations involve ethical concerns). Further, Perlman provides:

[t]hat lawyers sometimes have difficulty identifying situations that implicate ethical concerns—a problem known as ‘ethical fading.’ This ‘fading’ occurs for a variety of reasons, including groupthink, optimism bias, deference to authority figures, and the gradual nature in which many ethical problems arise. It is also difficult to educate people about cognitive distortions because of ‘blind spot bias,’ a bias about our own resistance to bias.

Id. (footnotes omitted).

¹²⁰ See Samuelson & Zeckhauser, *supra* note 8, at 33–34 (examining three main explanations of the status quo bias). The article states:

Under several interpretations, an affinity for the status quo is perfectly consistent with rational decision making. For instance, consider decision makers who replicate their earlier choice in a second decision. A trivial explanation might be that they make the same decision because they are facing independent and identical decision settings (i.e., their preferences and choice sets are the same, or sufficiently similar, in each). In such a case, rationality *requires* them to make identical choices. A more substantive explanation occurs when the sequential decisions are not independent—that is, the individual’s initial choice affects his or her preferences or choice set in the subsequent decision. Transition costs, for example, may make any switch from the status quo costly in itself. Such transition costs introduce a status quo bias whenever the cost of switching exceeds the efficiency gain associated with a superior alternative.

Id. See also *id.* at 35 (noting that a person can describe a reason for status quo persistence by replacing cost of search with cost of analysis). As to the analytical decision-making:

It has long been recognized that the choice to undertake a decision analysis is itself a decision. If the costs of such an analysis are high, it may well be optimal for individuals to perform an analysis once, at their initial point of decision, and defer to the status quo choice in subsequent decisions, barring significant changes in the relevant circumstances. Even individuals suffering from imperfect memory, who have forgotten the analysis behind their original decision, might rationally presume that the status quo choice was made on rational grounds. Consequently, they retain it, saving the cost of reanalysis.

Id.

¹²¹ See *supra* Part IV.

foundation. Whichever they are (or if more likely, they are somewhere in between), the time has come for a more current assessment. The time has also come to give the new and different members of the bench and bar a voice in ethical rules and regulation – and to respect that voice.

VI. CONCLUSION

At present, age and custom often function as anchors, heuristics, and idleness in ethical analysis. To be sure, age and custom are not irrelevant, but their current treatment does not serve the bench and bar well in its ethical development. The deference to age and custom risks exclusion of valuable inputs, including new members and new practices. We should move instead toward a new approach – giving age and custom their appropriate due as one possible factor in ethical analysis while recognizing that age and custom often signal a need for review and possible revision.

