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A DIFFERENT ALIGNMENT PROBLEM: AI, THE RULE OF LAW, AND OUTDATED LEGAL INSTITUTIONS AND PRACTICES

KEVIN FRAZIER*

ABSTRACT

The Rule of Law is not self-sustaining. Every member of the legal profession is obligated to defend and further it. Yet, as threats to the Rule of Law have grown more complex, the legal profession has instead doubled down on practices and norms that may benefit its bottom-line. Society, though, demands a more interdisciplinary legal system. A first step to redirecting the legal profession toward societally-beneficial ends is to identify and accept a shared definition of the Rule of Law. Thankfully, Cass Sunstein offers a set of seven characteristics that can and should be universally adopted and pursued. Next, the legal system must undergo reform to accept and make use of the regular and substantial inclusion of experts in other disciplines. Realization of this step would empower students, scholars, advocates, and adjudicators to better further the Rule of Law as emerging technologies continue to evolve in a manner contradictory to the equal, predictable, and rational application of the law.

This article recommends two interventions to lower barriers to a more interdisciplinary legal system. First, mandating that all third-year law school students identify a “minor” in another discipline and take several related courses. This update to a wasteful approach to the final year of legal education will seed the profession with a broad set of interdisciplinary lawyers capable of acting as “social architects,” or individuals with the skills and background knowledge necessary to assist in the resolution of pressing societal issues. Second, reforming adjudication of disputes related to emerging technology by requiring judges to consult experts in certain cases or subjecting all decisions related to emerging technology to review by a panel of such experts for an assessment of the decision’s accuracy with respect to scientific and technological issues. Either of these interventions would ensure legal decisions reflect the latest understanding of an emerging technology and, by extension, produce a more reliable and accurate body of law in furtherance of the Rule of Law.

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INTRODUCTION

Few contest the importance of the Rule of Law.¹ Its maintenance, or lack thereof, can substantially affect a democracy. As Asha Rangappa explains, “[i]f you can weaken the Rule of Law, you can weaken democracy.”² Similarly, protection of the Rule of Law can foster economic growth. In recent decades, international development efforts led by the World Bank, for instance, have included investments in the Rule of Law.³ Finally, the Rule of Law can facilitate societal well-being. As pointed out by Cass Sunstein, “[w]hen cases are settled in advance, people are able to plan their affairs and to do so with knowledge of what government may and may not do.”⁴

Safeguarding the Rule of Law, though, is no easy task. The Rule of Law, like a garden inundated with slugs and bugs, requires constant vigilance because of the numerous ways to undermine it. One of the surest ways to chip away at the Rule of Law “is to foment mistrust in the judicial and law enforcement system.”⁵ Consequently, the legal profession has an obligation to proactively search out, and respond to, potential sources of mistrust. Theoretically, this obligation pervades the profession: law schools introduce aspiring lawyers to the Rule of Law;⁶ practitioners select cases and defend clients in alignment with the Rule of Law;⁷ and judges look to the Rule of Law to inform their decisions.⁸ Despite deans, partners, and justices agreeing that lawyers must act as guardians of the

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1. See, e.g., Cass R. Sunstein, *The Rule of Law* 32 (Mar. 30, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4405238 (“An enthusiastic celebration of the rule of law is very much in order.”).

2. Asha Rangappa, *Keynote: The Rule of Law*, 29 CONN. LAW. 12, 14 (2019).

3. *Global Program on Justice and Rule of Law*, WORLD BANK, <https://www.worldbank.org/en/programs/global-program-on-justice-and-rule-of-law> (last visited Dec. 3, 2023).

4. Sunstein, *supra* note 1, at 29.

5. *Id.*

6. John E. Cribbet, *Legal Education and the Rule of Law*, 60 A.B.A. J. 1363, 1364 (1974).

7. See, e.g., John H. Quinn, Jr., *Rule of Law – What is It?*, A.B.A. BUS. L. SECTION: BUS. L. TODAY (Sep. 3, 2021), <https://businesslawtoday.org/2021/09/rule-of-law-what-is-it/>.

8. Sunstein, *supra* note 1, at 28-29.

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Rule of Law,⁹ far fewer have set forth the duties associated with that responsibility.¹⁰ As a result, in practice, the legal profession often fails to proactively identify and respond to threats to the Rule of Law.

One such threat is the development and deployment of emerging technologies. From autonomous vehicles (“AVs”) to geoengineering and, now, artificial intelligence (“AI”), emerging technologies have the potential to improve, as well as impair, the Rule of Law.¹¹ Generative AI tools, for example, can assist pro se litigants with legal research¹²—thereby increasing the ability of the public to fully and forcefully defend themselves in court.¹³ However, those same tools can ease the creation and dissemination of misinformation and disinformation, which causes the public to question whether the law is fairly and accurately established and enforced.¹⁴

The speed and spread of AI mandates an all-hands-on-deck approach to defending the Rule of Law from the effects of this unpredictable and poorly understood technology. The legal system—as currently situated—is not up to this task for two reasons: first, as described above, there is still widespread dissensus as to what constitutes the Rule of Law and what responsibility lawyers have to defend it; and, second, the system discourages the very sort of interdisciplinary thinking that lawyers with a minimal understanding of emerging technologies will need to anticipate and mitigate the threats to the Rule of Law posed by AI and the like.¹⁵

9. See, e.g., Leonard C. Heath Jr., *Lawyer Independence: Atticus Finch, Emerging Technology, and the American Lawyer*, 67 VA. LAW. 26, 28 (2018).

10. The absence of such specification likely falls from the litany of definitions of the Rule of Law and the conception of the Rule of Law as an abstract ideal more so than something that can be intentionally and specifically pursued. See Eric J. Segall, *Justice O'Connor and the Rule of Law*, 17 UNIV. FLA. J. L. & PUB. POL'Y. 107, 109 (2006) (“Many academics have suggested that the rule of law is a general concept not subject to precise definition.”).

11. See Charles M. Mathias, *New Technology, New Law*, 9 COMM'N. & L. 3, 3 (1987) (discussing the need to “impose a rational rule of law” on new technological and legal developments).

12. Brooke K. Brimo, *How Should Legal Ethics Rules Apply When Artificial Intelligence Assists Pro Se Litigants*, 35 GEO. J. L. ETHICS 549, 552-53 (2022).

13. See Sunstein, *supra* note 1, at 4 (listing “hearing rights” as a core principle of the Rule of Law).

14. Tate Ryan-Mosley, *How generative AI is boosting the spread of disinformation and propaganda*, MIT TECH. REV. (Oct. 4, 2023), <https://www.technologyreview.com/2023/10/04/1080801/generative-ai-boosting-disinformation-and-propaganda-freedom-house/>.

15. See Thomas D. Barton, *Re-Designing Law and Lawyering for the Information Age*, 30 NOTRE DAME J. L. ETHICS & PUB. POL'Y 1, 9 (2016) (“[T]he walls also impede the *legal system* itself from integrating its methods with other problem-solving devices: markets, social norms, human emotions, technical fixes, and the architecture of physical environments.”) (emphasis in original).

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Consequently, the legal profession must take responsive action. First, lawyers must reach some sort of consensus around the principles of the Rule of Law. This will ease education of the concept to law students, enable lawyers—as guardians of the Rule of Law—to identify and act on their duties as such, and allow jurists to more consistently and clearly integrate the Rule of Law into their decisions. Each of these developments will have the cumulative effect of increasing public awareness of the Rule of Law and, assuming each member of the legal profession attempts to complete their duties, increasing public trust in legal institutions and actors.

Second, lawyers must realize that defending the Rule of Law in the Age of AI is inherently an interdisciplinary endeavor, and, in doing so, adopt responsive reforms.¹⁶ As conceived by Thomas Barton, “the legal system [has] constructed a strong container for itself, largely detaching from the world.”¹⁷ Barton identifies five barriers to the legal profession incorporating the lessons and insights of other disciplines:

- (1) a “specialized vocabulary” that is “unreadable” for the public and others lacking legal training;
- (2) allocating exclusive authority of legal interpretation to judges who often lack deep understanding of the complex topics involved in litigation, such as emerging technologies;
- (3) procedures that limit consideration of the full scope of relevant information;
- (4) professional norms and rules that reinforce the siloed nature of the legal profession; and
- (5) “[a] detached, self-referencing rationality that measures the validity, success, and justice of legal decisions against the very rules generated from inside the container.”¹⁸

Each of these barriers can and must be lowered for the Rule of Law to withstand an AI assault.

This article calls for the legal profession to embrace interdisciplinary thinking, education, and institutions as the best pathway to defending the Rule of Law against emerging technologies. Part I introduces the

16. Cheyenne DeVon, *On ChatGPT's one-year anniversary, it has more than 1.7 billion users—here's what it may do next*, CNBC (Nov. 30, 2023, 5:03 PM), <https://www.cnbc.com/2023/11/30/chatgpts-one-year-anniversary-how-the-viral-ai-chatbot-has-changed.html> (referring to the Age of AI as the period of time following the introduction of ChatGPT, the first generative AI tool to achieve mass adoption).

17. Barton, *supra* note 15, at 9.

18. *Id.*

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unsettled debate around the proper scope and substance of the Rule of Law, and argues for the adoption of Sunstein’s definition to allow more coordination and action among lawyers tasked with being Guardians of the Rule of Law. Part II reveals the lack of alignment between current approaches to regulating emerging technologies and the Rule of Law. Part III calls on the legal profession to consider changes to law school and adjudication that would render the legal community more interdisciplinary and, thus, better able to impose the Rule of Law on novel and complex issues, such as those stemming from emerging technologies.

Although other scholars have examined whether, and to what extent, technological developments warrant changes within the legal profession,¹⁹ this article fills a gap in that scholarship in two ways. First, it makes a compelling case for reform of the legal profession by clarifying the responsibility of its members to uphold the Rule of Law. Second, by listing several reform proposals, it may foster continued examination into how best to maintain the Rule of Law amid substantial and serial waves of technological development.

I. ADOPTING A SHARED RULE OF LAW FRAMEWORK

The Rule of Law, like “a functioning democracy,” is widely known, desired, and disputed, and, therefore, is wildly difficult to progress. In other words, “universal recognition of the merits of the rule of law has in no way been accompanied by a universally accepted definition of it.”²⁰ For many, the Rule of Law is used as an instrument to achieve their individual conception of a better society. In turn, it is easy to question if reforms presented under the guise of advancing the “Rule of Law” are instead poorly disguised efforts to further ideological ends. The uncertainty surrounding what constitutes the Rule of Law, and the justifiable skepticism as to whether the self-labeled defenders of the Rule of Law are instead merely protecting their own interests, must come to an end.

Unless, and until, that confusion and disagreement is resolved, citation to the Rule of Law may do more harm than good. That is why Paul Burgess contends, “[w]here nobody knows what it really means, even if we all agree it is a good thing, it is difficult to use ‘the Rule of Law’ to win an argument. Accordingly, the relative benefits that come from using ‘the

19. *See generally id.*

20. Jørgen Møller & Svend-Erik Skaaning, *Systematizing Thin and Thick Conceptions of the Rule of Law*, 33 JUST. SYS. J. 136, 136 (2012); *see also* Joel Soon Jian Wei & Chang Wen Yee, *The Rule of Law: A Brief Explanation*, SMU LEXICON (Mar. 21, 2022), https://smulexicon.com/2022/03/21/the-rule-of-law-a-brief-explanation/#_ftnref2 (offering a conception of the Rule of Law from the perspective of the Singapore legal community).

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Rule of Law’ are minimal; ‘the Rule of Law’ becomes devoid of any real meaning.”²¹ After briefly detailing some of the myriad conceptions of the Rule of Law, this Part looks to Sunstein’s recent identification of seven characteristics of the Rule of Law as a “goldilocks” framework that merits widespread adoption as the primary framework for this important concept.

A. Brief Introduction to the Rule of Law

The main line of differentiation with respect to definitions and conceptions of the Rule of Law turns on its relationship to other aspects of liberal political morality. Some scholars, for instance, maintain that the Rule of Law is intertwined with, and non-severable from, democracy and human rights.²² Others, including Sunstein²³ and Joseph Raz,²⁴ frame the Rule of Law as something distinct from related hallmarks of a liberal society. Sunstein, for example, states simply that “[a] nondemocratic government might respect the rule of law.”²⁵ By disentangling the concept, this latter framing allows for a more thoughtful and specific examination of the Rule of Law.

Others have framed this differentiation as “thick” versus “thin” conceptions of the Rule of Law.²⁶ Yet, this fork in the understanding of the Rule of Law contains several sub-branches. According to Robert Stein, “a thin rule of law describes governance in a society in which many of the procedural principles of the rule of law are observed, but not the elements of substantive justice and protection of human rights.”²⁷ Siegfried Wiessner offers a slightly different definition—he explains that subscribers of the “thin” conception see the Rule of Law “as mandating obedience to all commands of the sovereign”²⁸ The two also differ in their

21. Paul Burgess, *Why We Need to Abandon ‘The Rule of Law’*, IACL-IADC BLOG (Sept. 21, 2021) <https://blog-iacl-aide.org/2021-posts/2021/9/21/why-we-need-to-abandon-the-rule-of-law>.

22. Jeremy Waldron, *The Rule of Law*, STAN. ENCYCLOPEDIA OF PHIL. (June 22, 2016), <https://plato.stanford.edu/entries/rule-of-law/>.

23. Sunstein, *supra* note 1, at 32.

24. See generally JOSEPH RAZ, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW 212 (1977).

25. Sunstein, *supra* note 1, at 32.

26. See Möller & Skaaning, *supra* note 20 *passim*; see also John Flood, *The Rule of Law and Legal Education: Do They Still Connect?*, in RESEARCH HANDBOOK ON THE RULE OF LAW 289 *passim* (May et al. eds., 2017).

27. Robert A. Stein, *What Exactly Is the Rule of Law?*, 57 HOUS. L. REV. 185, 196 (2019).

28. Siegfried Wiessner, *The Rule of Law: Prolegomena*, ZEITSCHRIFT FÜR DEUTSCHES UND AMERIKANISCHES RECHT [Z.D.A.R.] 82, 82 (2018) (Ger.).

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analysis of “thick” Rule of Law. According to Stein, “thick,” means “governance under a rule of law that includes all the principles of the rule of law”²⁹ Wiessner’s definition is slightly narrower and more teleological: “A more substantive, or ‘thick,’ concept of the rule of law would aspire to filling the idea of the law with notions of substantive justice.”³⁰ This is far from a complete analysis of the “thin/thick” divide,³¹ which further demonstrates the ongoing and unsettled intellectual battle over the scope of the Rule of Law.

Another source of division arises from the debate over the extent to which the Rule of Law should cover formal, procedural, and substantive elements. One of the most well-known enunciations of the formal aspects of the Rule of Law emerged from Lon Fuller’s “inner morality of law,”³² which listed “generality, publicity, prospectivity, intelligibility, consistency, practicability, stability, and congruence” as principles.³³ These aspects, though, have not been universally accepted. H.L.A. Hart, for one, contested Fuller’s list as legislative drafting guidelines.³⁴

On the procedural aspects of the Rule of Law, Waldron regards them as “equally [as] indispensable to the Rule of Law” as formal aspects because the former “give . . . purchase” to the latter.³⁵ Procedural aspects include safeguards likely well-known by the public and popularly associated with the Rule of Law.³⁶ Sample safeguards include but are not limited to hearings conducted by an impartial judge and pursuant to established procedures, decisions that may be appealed to an impartial tribunal, and litigants having access to counsel and a right to be present at all critical stages of the proceeding.³⁷ According to some scholars, these two aspects make up the entire Rule of Law universe.³⁸

29. Stein, *supra* note 27, at 196.

30. Wiessner, *supra* note 28, at 83.

31. Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 3, 3-5 (2008).

32. LON FULLER, *THE MORALITY OF LAW* (1964).

33. Waldron, *supra* note 22.

34. H.L.A. Hart, *Lon Fuller’s The Morality of Law*, 78 HARV. L. REV. 1281 *passim* (1965) (book review).

35. Waldron, *supra* note 22.

36. *Id.*

37. A. Wallace Tashima, *The War on Terror and the Rule of Law*, 15 ASIAN AM. L.J. 245, 264-65 (2008).

38. Waldron, *supra* note 22.

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Whether the Rule of Law also pertains to substantive aspects has elicited substantial debate.³⁹ This debate arises in part from the difficulty inherent in distinguishing “allegedly substantive requirements of the Rule of Law and specification of the deeper values that underlie and motivate the ideal even in its formal and procedural requirements.”⁴⁰ Put differently, and to borrow from a different discussion in the legal academy, scholars seem torn as to whether inquiries into the Rule of Law “AND” fill-in-the-blank component of good governance should fall under the larger umbrella of the Rule of Law or instead be assessed with respect to the component in question. One exemplary battle in this contest of ideas involves the relationship between property rights and the Rule of Law.⁴¹ Other battles in this domain involve already discussed issues, such as the overlap between the Rule of Law and “conditions of liberty.”⁴²

Those who insist on including substantive provisions related to “universal values” in the Rule of Law are fighting against a steady and quickening current of opposition. As reported by Steven Erlanger, recent research indicates that efforts by the West to enforce certain “universal” values has led to “political resentment, a reassertion of national identity and dignity and a deep backlash against liberal democracy”⁴³ Yet, defenders of substantive provisions argue that a “thin” or formal/procedural conception of the Rule of Law would carry little to no meaning if authoritarian regimes, such as the Third Reich, as well as democratic regimes could theoretically each adhere to the Rule of Law.⁴⁴

Stein, for instance, suggests that the Rule of Law includes a requirement that laws align with the norms and standards of international human rights law.⁴⁵ Given the contested nature of that body of law, this suggestion directly conflicts with Stein’s desire to “more clearly identify the principles of the rule of law.”⁴⁶ It is as if Stein wants to add Canadian bacon and pineapple to a pizza order at the insistence of two people,

39. See Stein, *supra* note 27, at 195 (“One difficulty with incorporating the principle of substantive justice into the concept of the rule of law is identifying what universally constitutes ‘just’ laws.”).

40. Waldon, *supra* note 22.

41. See generally, Ronald Cass, *Property Rights Systems and the Rule of Law*, in THE ELGAR COMPANION TO THE ECONOMICS OF PROPERTY RIGHT, 222-243 (Enrico Colombatto ed., 2004).

42. Waldron, *supra* note 22.

43. Steven Erlanger, *Are Universal Values Really Universal?*, N.Y. TIMES (Sept. 26, 2023), <https://www.nytimes.com/2023/09/26/world/are-universal-values-really-universal.html>.

44. See Stein, *supra* note 27, at 198.

45. *Id.* at 188.

46. *Id.* at 186.

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despite staunch opposition to both toppings by certain members of the dinner party. Sometimes you should just order a cheese pizza and make sure everyone is on board. This latter approach—by prioritizing consensus over one party’s interpretation of what is correct—would better align with Stein’s supposed goal of the Rule of Law “inspir[ing] individual actors and inform[ing] political and social change”⁴⁷

This brief review rushes through intellectual skirmishes that have carried on for centuries.⁴⁸ What is certain is that the Rule of Law defies easy definition. What is likely is that additional time spent attempting to specify the exact bounds of the Rule of Law will do much to resolve those definitional challenges. What follows is that members of the legal community can and should choose to put an end to their slight disagreements, even if only temporarily. Without reaching a shared definition of the Rule of Law, efforts to defend it against the threats posed by emerging technologies may be less effective because of the ongoing uncertainty about what is being defended.⁴⁹ Thankfully, there seems to be some momentum around adopting a more uniform approach to the Rule of Law.

Trends in scholarship suggest increasing consensus around a narrower understanding of the Rule of Law. Writing in 2008, Jeremy Waldron posited that “[i]f you were to ask which current of thought is more influential in legal philosophy, most scholars would say it is the one that is organized around predictability and the determinacy of legal norms”⁵⁰ Still, as made clear by Stein’s 2019 essay, some scholars continue to frame the Rule of Law as a broad and unattainable ideal more so than a set of tenets.⁵¹ Sunstein’s recent identification of seven characteristics of the Rule of Law may end such disagreements. As discussed in more detail below, Sunstein’s specification of seven characteristics of the Rule of Law is ripe for common adoption because it avoids diving into the morasses of the sources of division mentioned above and, of course, his stature in the legal

47. *Id.*

48. See Waldron, *supra* note 22, *passim*; cf. Stein, *supra* note 27, at 187 (noting that despite the Rule of Law being introduced centuries ago, it has not always been frequently nor substantively discussed in U.S. legal settings).

49. See Burgess, *supra* note 21 (“The sheer breadth of things included beneath this umbrella has an unfortunate consequence: it renders any use of ‘the Rule of Law’ confusing to all but those who spend their life researching it.”).

50. Waldron, *supra* note 31, at 9.

51. Stein, *supra* note 27, at 201.

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community may increase the odds of scholars deferring to his understanding.⁵²

B. Sunstein's Interpretation of the Rule of Law

Given the imminent and significant threats that emerging technologies pose to the Rule of Law—discussed in more detail below—there is no time to host a conference, organize a symposium, or conduct an informal election to isolate a definition that at once reflects the unquestioned importance and scope of the Rule of Law while also not becoming so expansive to be rendered meaningless. Thankfully, Sunstein has set forth seven characteristics of the Rule of Law that avoid attaching it to any particular ideology, any other theory, and any specific end.⁵³ Those seven characteristics are:

- (1) *clear, general, publicly accessible rules laid down in advance;*
- (2) *prospectivity rather than retroactivity;*
- (3) *conformity between law on the books and law in the world;*
- (4) *hearing rights;*
- (5) *some degree of separation between (a) law-making and law enforcement and (b) interpretation of law;*
- (6) *no unduly rapid changes in the law; and*
- (7) *no contradictions or palpable inconsistency in the law.*⁵⁴

These seven characteristics reflect formal and procedural conceptions of the Rule of Law more so than substantive ones. Indeed, Sunstein explicitly calls out attempts to tie the Rule of Law to substantive concepts as unnecessary or harmful to defining and protecting the Rule of Law. By way of example, he labels Morton Horowitz's identification of the Rule of Law with free markets as "unwarranted."⁵⁵ Likewise, he does not regard the Rule of Law as exclusive to a specific kind of governance model, such as democracy.⁵⁶ The definitional moat that Sunstein has dug around the Rule of Law is a plus from the standpoint of debating whether his list merits common adoption.

52. See, e.g., Lincoln Caplan, *The Legal Olympian*, HARV. MAG. (2015), <https://www.harvard-magazine.com/2014/12/the-legal-olympian> ("Sunstein . . . has been regarded as one of the country's most influential and adventurous legal scholars for a generation.")

53. Sunstein, *supra* note 1, at 1, 32.

54. *Id.* at 1.

55. *Id.* at 13-14.

56. *Id.* at 32.

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Sunstein has offered the basic “cheese pizza” of Rule of Law frameworks; although some may want other toppings, most, if not all, can agree that the bare essentials are included.⁵⁷ By excluding obviously substantive characteristics such as adherence to international human rights law, Sunstein’s list is more likely to be adopted by members of the legal community around the world. For reasons outlined in more detail below, international acceptance of a shared idea of the Rule of Law is important given that the risks emerging technologies—such as AI—pose to the Rule of Law transcend boundaries and may require coordinated responses from myriad nations.

Sunstein does not profess to have derived these characteristics from the air as a sourdough bread baker does yeast from the San Francisco Bay.⁵⁸ In fact, he acknowledges that the work of others, especially Lon Fuller, Joseph Raz, and John Tasioulas, informed his list of characteristics.⁵⁹ The foundation in existing scholarship bolsters the case for adopting Sunstein’s approach—it shows that his distillation of the key characteristics builds on, rather than replaces, the work of others committed to the concept. With the threats posed by emerging technologies mounting and a mountain of evidence that lawyers cannot agree to the scope and substance of the Rule of Law, now is the time to *choose* to rally behind a specific definition—namely, Sunstein’s definition.

57. An incomplete survey of definitions of the Rule of Law from around the world affirms this prediction. See Makau Mutua, *Africa and the Rule of Law*, INT’L J. HUM. RTS. 159, 160 (2016) (“[S]horn of more modern meanings that impute human rights at its core – the rule of law assured fidelity and certainty to its application.”); Malin Oud, *Rule of Law*, DECODING CHINA, <https://decodingchina.eu/rule-of-law/> (last visited Dec. 5, 2023) (arguing that the Chinese Communist Party’s conception of the Rule of Law differs markedly from that espoused by liberal democratic regimes but still focuses on the law serving as a tool of stability and order); N. Karunakaran & Dr. M. Nirmal Kumar, *A Rule of Law - An Integral Part of Indian Constitution*, 9 INFOKARA RSCH. 32, 32 (2020), <https://tndalu.ac.in/dvv/article/n6.pdf> (“The Rule of Law in India guarantees the primary of law, obedience to the law and judicial independence”); Kathryn Hendley, *Rule of Law, Russian-Style*, 108 CURRENT HIST. 339, 339 (2009) (identifying “the principle that law should apply in equal measure to everyone, irrespective of wealth or political clout,” as the “foundational principle of the rule of law.” This foundational principle—in short, “universalistic law”—has been accepted as a goal of Russian leaders for decades.).

58. Brian Dakss, *Seeking Secret Of S.F. Sourdough*, CBS NEWS: SUNDAY MORNING (Mar. 18, 2005, 9:44 PM), <https://www.cbsnews.com/news/seeking-secret-of-sf-sourdough/>.

59. Sunstein, *supra* note 1, at 1 n.1.

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C. Lawyers as Guardians of the Rule of Law

Perhaps it goes without saying, but lawyers must lead the difficult task of agreeing to a shared Rule of Law definition.⁶⁰ This task arises from lawyers having “a duty and obligation to become concerned with recurring problems within the administration of justice.”⁶¹ For decades, if not longer, lawyers have accepted and acted on this duty. The American Bar Association, for instance, laid out an expansive interpretation of this burden in 1970: “Lawyers, as guardians of the law, play a vital role in the preservation of society.”⁶² This burden also has received international recognition. Lawyers, pursuant to the Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, “shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.”⁶³ The burden has also been accepted by legal education institutions. According to John Cribbet, law school faculty “seek[] to guide the student toward an understanding and respect for the rule of law”⁶⁴

It follows that the legal community ought to develop the capacity, institutions, and means to sustain the Rule of Law through emerging technologies’ relentless assaults on its core characteristics. What this duty entails necessarily depends on the nature of the assaults AVs, geoengineering, and AI levy against the concept—more on that below. This section addresses the wide-ranging actions the legal profession has previously undertaken when its capacity to uphold the Rule of Law waned. A brief review of two prior incidents of the public doubting the competency of the legal profession to uphold the Rule of Law makes clear that the profession can and must respond to those doubts by reorienting the legal profession—a task that requires reforming everything from legal education to the practice of law.

60. Robert Barrington, *Guardians of the Rule of Law or Professional Enablers?*, LAW.COM (Oct. 4, 2021, 10:40 AM), <https://www.law.com/international-edition/2021/10/04/guardians-of-the-rule-of-law-or-professional-enablers/?slreturn=20231105074650> (“Society needs lawyers to be respected as impartial upholders of the rule of law.”).

61. *Continuing Legal Education: Competency and Integrity of the Bar*, 61 *Women L. J.* 125, 128 (1975) (citing Rich Morris) [hereinafter CLE].

62. 1970 ABA Code of Professional Liability via *Continuing Legal Education: Competency and Integrity of the Bar*, 61 *Women L. J.* 125, 125 (1975).

63. The Eighth U.N. Cong. on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Basic Principles on the Role of Lawyers (Sept. 7, 1990), <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-role-lawyers>.

64. Cribbet, *supra* note 6, at 1365-66.

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The first exemplary period of legal reform took off in the wake of Watergate. In response to justifiable and substantial doubts about professional ethics in the legal community in the 1970s, law schools, law firms, and legal institutions all underwent substantial reforms to ensure the public remained confident in the Rule of Law in the U.S. Even before Watergate, “[a] scandalous situation” had developed in the U.S. legal community as a result of inadequate discipline of lawyers who violated professional norms.⁶⁵ The substantial popular outcry that accumulated led to the American Bar Association and state bar associations experimenting with new means of shoring up public trust in lawyers and, by extension, the legal system.⁶⁶ The California State Bar, for instance, considered requiring all practicing attorneys to undergo an evaluation of their understanding of the profession’s ethical responsibilities every five years; the bar also introduced an ethics portion on its bar exam.⁶⁷ While not all post-Watergate proposals were adopted,⁶⁸ precisely followed, nor adhered to for posterity,⁶⁹ it nevertheless reoriented the legal profession and caused lasting changes in both the practice and regulation of the law as well as in policymaking.⁷⁰

The second exemplary period resulted from the pressures placed on legal professionals and institutions by COVID-19. A full analysis of the changes wrought by the pandemic is impossible because those changes are still underway.⁷¹ Yet, an incomplete analysis nevertheless reveals substantial shifts in the practice and application of the law. In particular, court systems quickly adopted major reforms that, prior to the pandemic, may have seemed infeasible. Research by the Pew Charitable Trust confirms the scope and scale of those reforms; they observed that “[d]espite having almost no history of using remote civil court proceedings, beginning in March 2020 every state and D.C. initiated online hearings at

65. See CLE, *supra* note 61, at 127 (quoting the Clark Report).

66. *Id.*; Arnold Rochvarg, *Enron, Watergate and the Regulation of the Legal Profession*, 43 WASHBURN L.J. 61, 67-68 (2003).

67. CLE, *supra* note 61, at 127.

68. Rochvarg, *supra* note 66, at 68-70 (detailing proposals presented to the ABA by the Kutak Commission—some of which did not get adopted).

69. *Id.* at 73 (discussing continued revisions to the ABA Model Rules of Professional Conduct in the decades following the Watergate scandal).

70. *Id.* at 74.

71. See, e.g., Elaine McArdle, *Practice Law in the Wake of a Pandemic*, HARVARD LAW BULLETIN (July 15, 2022), <https://hls.harvard.edu/today/practicing-law-in-the-wake-of-a-pandemic/> (interviewing HLS faculty about the changes they expect in the legal profession in the coming years due to COVID-19 and its lingering effects).

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record rates to resolve many types of cases.”⁷² This embrace of technology trickled down the entire legal system. Law firms, for instance, had to embrace new work-from-home policies.⁷³ More importantly, at least from a Rule of Law perspective, judicial reforms led to increased participation rates by litigants and more efficient dispute resolution.⁷⁴

The effects of Watergate and COVID-19 make clear that the legal profession and legal systems are not immutable. Nevertheless, these two events were not typical affairs—one took down a president; the other locked down the world’s population. In short, these events made the status quo, and even incremental response, untenable with respect to maintaining the Rule of Law. With respect to Watergate, Nixon’s continuation in office would have clashed not only with public perception of his criminality⁷⁵ but also with the overarching principle of the concept: equal application of the law.⁷⁶ Relatedly, had the courts not amended their practices to conform with lock-down mandates during COVID-19, a different characteristic of the Rule of Law—hearing rights—would have been impossible to realize. Next, Part II investigates the pressure placed on the legal profession and the Rule of Law by emerging technologies and argues that, yet again, the status quo is untenable if the Rule of Law is going to persist.

72. Erika Rickard et al., *How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations* at 1, PEW CHARITABLE TRUST (Dec. 2021), <https://www.pewtrusts.org/-/media/assets/2021/12/how-courts-embraced-technology.pdf>.

73. McArdle, *supra* note 71.

74. Rickard et al., *supra* note 72, at 1.

75. Andrew Kohut, *How the Watergate crisis eroded public support for Richard Nixon*, PEW RESEARCH CENTER (updated Sept. 25, 2019), <https://www.pewresearch.org/short-reads/2019/09/25/how-the-watergate-crisis-eroded-public-support-for-richard-nixon/> (“By a margin of 53% to 38%, the public thought that President Ford should not pardon Nixon, if he was found guilty.”).

76. See, e.g., Kevin P. Hancock, *Nixon’s Resignation Anniversary Reminds Us That Presidents Are Not Above the Law*, CAMPAIGN LEGAL CENTER (Aug. 6, 2021), <https://campaignlegal.org/update/nixons-resignation-anniversary-reminds-us-presidents-are-not-above-law> (“Nixon claimed to be above the law. But the Supreme Court—which included three Nixon appointees—unanimously rejected Nixon’s argument.”).

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II. THE THREAT TO THE RULE OF LAW POSED BY EMERGING TECHNOLOGIES

From the perspective of the Rule of Law, November 30, 2022—the release date of ChatGPT 3.5⁷⁷ or “ChatGPT Day”—is akin to August 5, 1974—the publication of the “Smoking Gun” tapes⁷⁸—and March 13, 2020—the date that the President declared a national emergency in response to COVID-19.⁷⁹ The latter two dates (or thereabouts) mark a clear point of departure from the prior legal system. For the reasons set forth below, the latter date—the birth of the Age of AI—should as well. This Part analyzes how efforts to regulate emerging technologies, especially AI, directly clash or, at a minimum, complicate adherence to Sunstein’s seven characteristics.

Using Sunstein’s characteristics, it becomes quite obvious that emerging technologies have the potential to impair the Rule of Law—necessitating substantial and immediate reform of the legal profession and legal system. For the sake of this article, an emerging technology is, per Daniele Roloto and her colleagues:

*a radically novel and relatively fast growing technology characterised by a certain degree of coherence persisting over time and with the potential to exert a considerable impact on the socio-economic domain(s) which is observed in terms of the composition of actors, institutions and patterns of interactions among those, along with the associated knowledge production processes. Its most prominent impact, however, lies in the future and so in the emergence phase is still somewhat uncertain and ambiguous.*⁸⁰

Though this article commonly uses AI as the representative emerging technology with which to show conflicts with the Rule of Law, it is important to point out that the Rule of Law is under threat from the entire class of technologies that share the attributes identified by Roloto. The

77. See, e.g., Kevin Roose, *The Brilliance and Weirdness of ChatGPT*, N.Y. TIMES (Dec. 5, 2022), <https://www.nytimes.com/2022/12/05/technology/chatgpt-ai-twitter.html>.

78. *Watergate timeline: From the crime to the consequences*, ASSOCIATED PRESS (June 17, 2022) <https://apnews.com/article/john-dean-richard-nixon-government-and-politics-crime-c7a7b99cca7c685cfc239f5e08b53378>.

79. *Press Release, Notice on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic*, THE WHITE HOUSE (Feb. 10, 2023), <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/10/notice-on-the-continuation-of-the-national-emergency-concerning-the-coronavirus-disease-2019-covid-19-pandemic-3/>.

80. Daniele Rotolo et al., *What Is an Emerging Technology?*, SCIENCE POLICY RESEARCH UNIT WORKING PAPER SERIES, July 2015, at 4.

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analysis below could likely apply to geoengineering techniques, AVs, 3D printing, and the like.⁸¹ This expansive class of technologies all place pressure on the Rule of Law by virtue of their common features. Moreover, current efforts to regulate these technologies show a lack of alignment with each characteristic of the Rule of Law, as made clear in the remainder of this section. The already large and growing number of technologies exerting pressure on the Rule of Law should be kept in mind while considering whether this moment justifies the sort of overhaul to the legal system that took place following Watergate and in the midst of COVID-19.⁸²

Characteristic #1: Clear, General, Publicly Accessible Rules Laid Down in Advance

The complexity of generative AI tools prevents the development of clear, intelligible, and publicly accessible rules. Lawyers, like the rest of society, were caught by surprise on ChatGPT Day and in the weeks that followed.⁸³ From students to scholars, few to no members of the legal profession had the requisite level of understanding to issue rules confining its use.⁸⁴ Moreover, even if lawyers had such an understanding, the complexity of the technology makes it difficult to issue rules that the public could easily understand.⁸⁵

The proliferation of AI models with different use cases also complicates efforts to issue general rules. Some models, for instance, present minimal risk to individual and societal well-being while also carrying the potential

81. See, e.g., Ryan Hagemann et al., *Soft Law for Hard Problems: The Governance of Emerging Technologies in an Uncertain Future*, 17 COLO. TECH. L.J., 40 (2018) (listing “the Internet of Things, robotics, autonomous systems, artificial intelligence, big data, 3D printing, virtual reality, and the sharing economy” as “[h]ighly disruptive forms of technological change [that] are upending multiple sectors of the modern global economy as well as the laws and regulations that govern them.”).

82. Some scholars, such as Michio Kaku, have already identified quantum computing as an emerging technology that warrants more concern than AI. Eva Rothenberg, *AI fears overblown? Theoretical physicist calls chatbots ‘glorified tape recorders’*, CNN (Aug. 13, 2023), <https://www.cnn.com/2023/08/13/business/ai-quantum-computer-kaku/index.html>.

83. Benjamin Weiser and Nate Schweber, *The ChatGPT Lawyer Explains Himself*, N.Y. TIMES (June 8, 2023), <https://www.nytimes.com/2023/06/08/nyregion/lawyer-chatgpt-sanctions.html>.

84. Ian Bogost, *ChatGPT Is Dumber Than You Think*, THE ATLANTIC (Dec. 7, 2022), Ian Bogost, *ChatGPT Is Dumber Than You Think*, The Atlantic (Dec. 7, 2022), <https://www.theatlantic.com/technology/archive/2022/12/chatgpt-openai-artificial-intelligence-writing-ethics/672386/>.

85. Noam Hassanfeld, *Even the scientists who build AI can’t tell you how it works*, VOX (July 15, 2023), <https://www.vox.com/unexplainable/2023/7/15/23793840/chat-gpt-ai-science-mystery-unexplainable-podcast>.

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to greatly benefit persons and communities around the world. Surely no one wants to unduly limit the deployment of such models. On the other hand, some models, especially those that are “open sourced,”⁸⁶ may cause significant, widespread, and irreversible harm.⁸⁷ Yet, due to the aforementioned lack of technical understanding, lawyers and others have yet to develop reliable and commonly accepted ways to distinguish “safe” models from those with unacceptable risk. As long as this lack of knowledge continues, AI models may be subject to rules developed in an ad hoc fashion upon lawyers learning more about the benefits and risks of that specific model.

Finally, unanticipated advances in generative AI models defy anticipatory rulemaking. Since ChatGPT ushered in the Age of AI,⁸⁸ AI labs continually research, develop, and deploy AI models with unknown capacities, processes, and impacts. The pace of such releases has continued to surprise and, perhaps, delay the establishment of meaningful regulation—though the EU AI Act may partially resolve this clash with the Rule of Law.⁸⁹

Characteristic #2: Prospectivity Rather Than Retroactivity

On October 24, 2023, Demis Hassabis, the chief executive of Google’s AI unit warned, “[w]e must take the risks of AI as seriously as other major global challenges, like climate change” and cautioned the global community against further delay in taking major regulatory action in response to such risks.⁹⁰ A few weeks later, Google announced and released “Gemini,” a large language model that Hassabis praised as a significant

86. Will Knight, *The Myth of ‘Open Source’ AI*, WIRED (Aug. 24, 2023), <https://www.wired.com/story/the-myth-of-open-source-ai/> (defining open source models as those that allow outsiders to access the model’s “underlying code as well as the ‘weights’ that determine how it behaves.”).

87. Cade Metz, *How could A.I. Destroy Humanity?*, N.Y. TIMES (June 10, 2023), <https://www.nytimes.com/2023/06/10/technology/ai-humanity.html>.

88. See Mat Honan, *Google CEO Sundar Pichai on Gemini and the coming age of AI*, MIT Tech. REV. (Dec. 6, 2023), <https://www.technologyreview.com/2023/12/06/1084539/google-ceo-sundar-pichai-on-gemini-and-the-coming-age-of-ai/> (marking the launch of ChatGPT-3.5 as the “kick[] off [of] an arms race” between AI companies).

89. See Adam Satariano, *E.U. Agrees on Landmark Artificial Intelligence Rules*, N.Y. TIMES (Dec. 8, 2023), <https://www.nytimes.com/2023/12/08/technology/eu-ai-act-regulation.html>.

90. Dan Milmo, *AI risk must be treated as seriously as climate crisis, says Google DeepMind chief*, THE GUARDIAN (Oct. 24, 2023), <https://www.theguardian.com/technology/2023/oct/24/ai-risk-climate-crisis-google-deepmind-chief-demis-hassabis-regulation>.

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improvement on prior models.⁹¹ Put simply, Hassabis celebrated the introduction of a model that could cause some of the significant and irreversible harms that, a few weeks earlier, appear to have been top of his mind. In the interim, no federal law had been passed to regulate AI. Pursuant to the Rule of Law, the absence of an anticipatory regulation of AI deployment may result in Hassabis and other Googlers having a get-out-of-jail-free card.

A quick hypothetical demonstrates the difficulty of holding emerging technology creators accountable without some sort of retroactive legislation. In this hypothetical, a bad actor uses Gemini to launch an influence operation that suppresses the vote in a federal election—surely a harm that Hassabis, or one of his colleagues, had in mind given widespread analysis of this possibility.⁹² As of this writing there is no federal law that directly prohibits voter suppression.⁹³ So, even if Congress managed to pass such a law following the election, adherence to this Rule of Law characteristic would likely prevent the prosecution of Hassabis despite him reasonably knowing Gemini could lead to such an outcome and despite him being one of a handful of people with the power to have delayed or paused the deployment of Gemini.

This analysis is not meant to single out Hassabis; instead, it is meant to show that emerging technologies, by virtue of their novelty and complexity, will carry latent risks understood by the creators of that technology more so than Congress and other regulators—thereby decreasing the odds of *ex ante* or “anticipatory” governance.⁹⁴ Furthermore, even if Congress were to learn of an emerging technology and attempt to take action ahead of its deployment, the unknown unknowns with respect to the risks of that technology as well as the rapid pace of subsequent innovations

91. David Pierce, *Google Launches Gemini, The AI model it hopes will take down GPT-4*, VERGE (Dec. 6, 2023), <https://www.theverge.com/2023/12/6/23990466/google-gemini-llm-ai-model>.

92. See, e.g., Carl Smith, *States Act, but Can Legislation Slow AI-Generated Election Disinformation?*, GOVERNING (Oct. 27, 2023), <https://www.governing.com/policy/states-act-but-can-legislation-slow-ai-generated-election-disinformation>.

93. FEDERAL PROSECUTION OF ELECTION OFFENSES, U.S. DEP'T OF JUST. 56 (Richard C. Pilger et al., eds., 8th ed. 2017) (interpreting 18 U.S.C. §§ 241 and 242 and reviewing related case law).

94. See Daniel Barben et al., *Anticipatory Governance of Nanotechnology: Foresight, Engagement, and Integration*, in THE HANDBOOK OF SCIENCE AND TECHNOLOGY STUDIES 979, 992-93 (Edward J. Hackett et al. eds., 3d ed. 2008) (defining “anticipatory governance” as “the ability of a variety of lay and expert stakeholders, both individually and through an array of feedback mechanisms, to collectively imagine, critique, and thereby shape the issues presented by emerging technologies before they become reified in particular ways.”).

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would likely render that governance effort outdated.⁹⁵ Consequently, even a proactive Congress will inevitably find itself attempting to play catch up or, in Rule of Law parlance, enforce retrospective laws on bad or negligent actors.

Characteristic #3: Conformity Between Law on the Books and the Application of the Law

This characteristic calls for conformity between enacted law and “real law.”⁹⁶ Sunstein labels this characteristic as a necessary condition for the Rule of Law because, absent alignment between the law on the books and the law as applied, then “generality, clarity, predictability, fair notice, and public accessibility are all sacrificed.”⁹⁷ Such alignment, of course, is difficult to achieve—whether a lack of alignment undermines the Rule of Law, then, hinges on the severity of the divergence between the law as written and as enforced as well as the frequency of such divergences.⁹⁸

The law applied to emerging technologies often looks different than the law codified because of information asymmetry. The developers of emerging technologies tend to have “a monopoly over the information that may aid external stakeholders in estimating the severity and likelihood of risks posed by [the technology] and, by extension, developing norms, standards, and regulations to reduce those risks.”⁹⁹ Not only do companies tend to hold on to key information, but policymakers and regulators have seemingly lost their capacity to understand and act on whatever information they receive.

Congressional aides report that “House and Senate leadership have either implemented strategies or allowed conditions to evolve that diminish the ability of individual Senators and Representatives to deeply consider and influence public policy.”¹⁰⁰ By way of example, Congress eliminated

95. See Gregory N. Mandel, *Regulating Emerging Technologies*, 1 LAW, INNO. & TECH. 75 (2009) (“[S]erious consideration of substantial legislative changes would involve a costly, resource-draining, lengthy, and highly uncertain process with no guarantee of an outcome that is more protective or efficient than the existing structure.”); see also Hagemann et al., *supra* note 81, at 67 (“[A]s regulations accumulate and required increased surveillance, the administrative state becomes less capable of adapting an gathering relevant information.”).

96. Sunstein, *supra* note 1, at 4.

97. *Id.*

98. *Id.*

99. Kevin Frazier, *The Case for Prioritizing the Creation of an AI Benchmarking Consortium*, LAWFARE (Sept. 5, 2023), <https://www.lawfaremedia.org/article/the-case-for-prioritizing-the-creation-of-an-ai-benchmarking-consortium>.

100. KATHY GOLDSCHMIDT, STATE OF THE CONGRESS: STAFF PERSPECTIVES ON INSTITUTIONAL CAPACITY IN THE HOUSE AND SENATE 6 (2017).

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the Office of Technology Assessment (“OTA”) back in 1995, reducing the institutional capacity of Congress with respect to understanding complex and novel technologies.¹⁰¹ In the absence of the OTA, “policymakers lack[] any systematic federal contribution to public discussions regarding digital technology’s upsides and downsides, or the role government should play in tech’s ongoing development.”¹⁰²

To the extent Congress and agencies do receive information on emerging technology, the dearth of expertise and resources means that such information may confuse rather than clarify regulatory efforts. Nathan Cortez has an example of this paradox: “The more the FDA learned about [medical] device software, the more overwhelmed it became.”¹⁰³ In fact, the FDA withdrew a regulating policy related to device software because of “the volume, variety, and complexity” of the technology.¹⁰⁴

If, and when, Congress or an agency decides to act, limited political capital, institutional resources, and technical knowledge lead to underenforcement of the resulting law or regulations.¹⁰⁵ Furthermore, even upon violations being detected and pursued, resulting judgments and settlements often go unenforced due to agencies lacking the funding and staffing to do so.¹⁰⁶ This phenomenon is so common that scholars have given it a name: “hollow government syndrome.”¹⁰⁷ “[A]n agency with expanded responsibilities, stagnant resources, and the consequent inability to implement or enforce its statutory mandates” has likely come down with HGS.¹⁰⁸ Of course, as HGS spreads so does the divergence between the law on the books and the law as applied—causing yet another characteristic of the Rule of Law to go unrealized.

101. *Id.* at 17; see Kevin Frazier, *Regulate technology? Congress needs to enlist expert help*, SAN FRANCISCO CHRONICLE (Jan. 6, 2021), <https://www.sfchronicle.com/opinion/openforum/article/Regulate-technology-Congress-needs-to-enlist-15849041.php> (calling for the reestablishment of the OTA).

102. Darrell M. West, *It is time to restore the US Office of Technology Assessment*, BROOKINGS (Feb. 10, 2021), <https://www.brookings.edu/articles/it-is-time-to-restore-the-us-office-of-technology-assessment/>.

103. Nathan Cortez, *Regulating Disruptive Innovation*, 28 BERKELEY TECH. L.J. 175, 203 (2014).

104. *Id.*

105. *Id.* at 222.

106. *Id.* at 223.

107. Peter Barton Hunt, *Recent Developments: The State of Science at the Food and Drug Administration*, 60 ADMIN. L. REV. 431, 432 (2008) (internal quotations omitted).

108. *Id.*

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Characteristic #4: Hearing Rights

Hearing rights fall within the Rule of Law umbrella because they increase the likelihood of legal decisions being reached only after consideration of accurate information.¹⁰⁹ Sunstein sets forth a broad formula for weighing the adequacy of the hearing rights afforded in any one case: “[a]s the likelihood of inaccuracy diminishes, it becomes less necessary to insist on extensive procedural safeguards.”¹¹⁰ The reciprocal conclusion—that more procedural affordances must be granted as the possibility of an inaccurate decision increases—presents a barrier for the realization of the Rule of Law with respect to disputes involving emerging technologies. Agencies, citing the complex and shifting nature of emerging technologies, have instead turned to regulatory mechanisms with fewer procedural safeguards—a trend that has calcified over a period of decades.¹¹¹

Regulators and scholars justify the decreasing use of traditional rule-making procedures with respect to emerging technologies for several reasons. Some argue that procedural hurdles such as notice and comment periods take an exorbitant amount of time—preventing the agency from making a timely regulatory intervention.¹¹² Tim Wu adds that beyond stalling agencies, such procedures often fail to live up to their potential—resulting in “law likely to last a long time based on poorly developed facts”¹¹³ Additionally, by virtue of being subject to judicial review, such rules may “invite[] long periods of uncertainty”¹¹⁴ Scholars such as Hagemann et al. are quick to note that such uncertainty, of course, conflicts with the Rule of Law and, of more concern to regulated entities, may hinder investment in emerging technologies. In short, the prevailing wisdom seems to be that regulatory procedures should be amended or avoided if doing so will reduce the odds of “bad” rules becoming binding and stifling innovation. Wu goes so far as to argue that the greater the

109. Sunstein, *supra* note 1, at 4.

110. *Id.*

111. See Michael D. Sant’Ambrogio, *Agency Delays: How A Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1383–87 (2011); Tim Wu, *Agency Threats*, 60 DUKE L.J. 1841, 1841 n.2 (2011) (identifying this trend and citing several studies confirming its longevity and spread) [hereinafter Wu Agency].

112. See Wu Agency, *supra* note 111, at 1841. This concern is surely merited in some contexts. One study calculated the average duration of rulemaking by the Department of Health and Human Services to be 817 days. Jacob E. Gersen & Anne Joseph O’Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 988 tbl. 12 (2008). The causes of such delays, though, are avoidable in many cases. See Cortez, *supra* note 103, at 218 (listing mechanisms to alter the timing and duration of certain regulatory procedures and interventions).

113. Wu Agency, *supra* note 111, at 1842.

114. *Id.*

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uncertainty posed by an industry, the more agencies should turn to informal governance mechanisms such as “threats.”¹¹⁵

This scholarly and agency opposition to more formal procedures seems likely to stick around. The aforementioned concerns have motivated the development of several new administrative theories to get around pesky regulatory hurdles—there’s the “new governance” or regulatory “experimentalism” camp,¹¹⁶ the “soft law” camp,¹¹⁷ and likely several others.

Yet, opposition to more formal regulatory procedures fails to fully consider how such end rounds chip away at the Rule of Law and reflect a failure among regulators to consider alternative means of expediting traditional rulemaking. Put differently, those in the “new governance” crowd impose a false binary between seeding innovation by reducing procedural safeguards and affording the public, regulated entities, and affected communities opportunities to learn about and help shape the regulation of emerging technologies that may have significant and irreversible impacts. A middle ground exists. As outlined in full by Cortez, legislators and regulators can alter the timing and duration of regulatory interventions to, on one hand, secure opportunities for public consultation, information gathering, and other hearing rights and, on the other, provide regulated entities with some degree of regulatory clarity and predictability.¹¹⁸ These creative regulatory steps include “mandatory deadlines, waiting periods, interim periods, phases, and sunsets.”¹¹⁹

The “new governance” crowd also fail to appreciate the limits of their own bypasses. For one, informal processes and guidance may take just as long to develop as alternative, more formal and inclusive procedures.¹²⁰ Likewise, informal guidance may nevertheless be enforced as if it was binding—a reality that places regulated entities in the unfortunate position of guessing whether an agency is going to initiate enforcement actions.¹²¹ Finally, guidance documents may be updated less frequently than rules.¹²² Each of these possibilities contradicts at least one of the

115. *Id.*

116. Michael C. Dorf & Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

117. *See, e.g.*, HAGEMANN ET AL., *supra* note 81.

118. Cortez, *supra* note 103, at 218 (internal citation omitted).

119. *Id.*

120. *Id.* at 216.

121. *Id.*

122. *Id.* at 211 (internal citation omitted).

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seven characteristics of the Rule of Law and conflicts with the assumptions of these scholars and regulators.

The upshot is that the economic potential and regulatory complexity of emerging technologies need not diminish the Rule of Law—specifically, by eliminating hearing rights and related procedural safeguards. However, as long as policymakers and regulators buy into the false dichotomy presented by the “new governance” community, this characteristic of the Rule of Law will not be actualized. Instead, the entities with the most profound lobbying team will be able to wield outsized influence over informal regulatory efforts.

Characteristic #5: Some Degree of Separation Between (a) Law-making and Law Enforcement and (b) Interpretation of Law

When adhered to, the degree of separation characteristic ensures that “the people who make the law, and who enforce the law, are not the same as the people who interpret the law.”¹²³ In short, “[t]he adjudicative task must be separate from the task of making or enforcing the law”¹²⁴ to realize this characteristic. The importance of this separation has been the subject of much administrative and constitutional debate—especially in the context of agencies tasked with overseeing complex regulatory topics. Yet, consolidation of power, more so than separation of powers, seems to be the norm with respect to regulating emerging technologies. Agencies such as the Federal Trade Commission and Consumer Financial Protection Bureau, for instance, commonly rely on various forms of administrative adjudication to fulfill their regulatory duties.¹²⁵

Theoretically, agency adjudicative forums, more so than federal district courts, allow an agency to “harness its regulatory expertise” and, as a result, facilitate more accurate and timely identification of violative behavior and the development of remedies most likely to deter bad actors.¹²⁶ It is possible to argue (and many have, including the Supreme Court¹²⁷)

123. Sunstein, *supra* note 1, at 5.

124. *Id.*

125. See Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. 141, 155-57 (2019) (detailing the prevalence of different types of agency adjudication).

126. Seth Frotman, *CFPB finalizes update to administrative enforcement proceedings*, CFPB (Feb. 24, 2023), <https://www.consumerfinance.gov/about-us/blog/cfpb-finalizes-update-to-administrative-enforcement-proceedings/>.

127. See *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (“[A]genc[ies] must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards.”); see also *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612 (1946) (stating, in reference to the FTC, that “[the FTC] is

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that this structural choice by Congress furthers several of the Rule of Law characteristics, such as preventing the likelihood of any “unduly rapid changes in the law,” which is discussed further below. Put differently, a case can be made that the degree of separation between law-making, law enforcement, and interpretation of that law may decrease in proportion to the complexity of the law at issue.¹²⁸ Others, though, contest this notion as conflicting with the Rule of Law.¹²⁹ Such concerns have not held sway in debates over how to govern AI.

The leading advocates of AI regulation seem to value expertise more so than fear the consolidation of regulatory powers. For example, U.S. Senators Richard Blumenthal (D-Ct.) and Josh Hawley (R-Mo.) have called for the creation of an “Independent Oversight Body” charged with a litany of powers including, but not limited to developing requirements for a license to develop AI models, processing applications for that license, conducting audits to ensure compliance with license requirements, and issuing reports on the AI advances and impact.¹³⁰ A preference for expertise also pervades a bill introduced by Senators Michael Bennet (D-Colo.) and Peter Welch (D-Vt.).¹³¹ They explicitly seek to perpetuate “a long history of Congress establishing expert, sector-specific federal bodies to oversee complex sectors of the economy”¹³² The similarities with historically analogous agencies do not end there. The Digital Platform Commission envisioned by the Democratic duo of Bennet and Welch would have the authority to “hold hearings, pursue investigations, conduct research,

the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices, which have been disclosed.”)

128. See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 (2010) (recognizing that agency expertise may be required to conduct some inquiries); Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Deja vu of Decisional Disparities in Agency Adjudication*, 28 J. NAT'L ASS'N ADMIN. L. JUDICIARY 158, 165-66 (2008) (discussing the role of specialist bureaucrats with “technical knowledge and expertise” in furthering an agency’s regulatory agenda and identifying agency adjudicators as “specialists” who are “selected because their background and expertise suits them to hear a particular type of case.”).

129. *Calcutt v. FDIC*, 37 F.4th 293, 354 (6th Cir. 2022) (Murphy, J., dissenting), *rev'd*, 598 U.S. 623 (2023) (contending that administrative adjudication may lead to an “accordion-like view of the rule of law [that] has no place in our constitutional order.”).

130. Sens. Richard Blumenthal & Josh Hawley, *Bipartisan Framework for U.S. AI Act*, U.S. SENATE (Sept. 7, 2023), <https://www.blumenthal.senate.gov/imo/media/doc/09072023bipartisansaiaframework.pdf>.

131. Press Release, Sen. Michael Bennet, Bennet, Welch Reintroduce Landmark Legislation to Establish Federal Commission to Oversee Digital Platforms (May 18, 2023), <https://www.bennet.senate.gov/public/index.cfm/2023/5/bennet-welch-reintroduce-landmark-legislation-to-establish-federal-commission-to-oversee-digital-platforms>.

132. *Id.*

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assess fines, and engage in public rule-making to establish rules of the road”¹³³ The Senators also tasked the Commission with collaborating with other federal entities involved in similar regulatory efforts.¹³⁴ This brief overview of leading AI proposals suggests a common belief among regulators and policymakers that governance of emerging technologies requires consolidating rather than separating powers.

Scholars concerned about the risks of emerging technologies seem to agree that the benefits of institutional designs intended to facilitate action outweigh concerns about the corresponding concentration of power. Cortez notes that “decisive, well-timed regulation” may be proper upon the release of a new technology.¹³⁵ Numerous others have likewise called for the creation of regulatory authorities that have the power and resources to “forg[e] piecemeal solutions” upon the identification of a possible harm posed by an emerging technology—even prior to that harm manifesting.¹³⁶ Advocates for such proactive regulation—referred to by others as “upstream governance”¹³⁷ or “anticipatory governance”¹³⁸—seem to agree that delegating a single entity the mandate (and the panoply of requisite powers associated with that mandate) to stay ahead of a specific technology would align with that regulatory approach.¹³⁹

Widespread concern among the Supreme Court Justices with respect to constitutional and due process concerns stemming from administrative adjudication suggests that the separation mandated by this characteristic will persist and, perhaps, spread.¹⁴⁰ In turn, the tension between

133. Michael Bennet & Peter Welch, *Digital Platform Commission Act of 2023*, MICHAEL BENNETT U.S. SENATOR FOR COLORADO (2023), https://www.bennet.senate.gov/public/_cache/files/1/2/12ae84c9-04fa-4fce-afef-b83726ef0b8b/7D763FFDBE9EEE69451A7C26EFCAC0F8.2023-dpca-one-pager.pdf.

134. *Id.*

135. Cortez, *supra* note 103, at 179-80.

136. HAGEMANN ET AL., *supra* note 81, at 55-57 (summarizing proposals of various scholars).

137. WENDELL WALLACH, *A DANGEROUS MASTER: HOW TO KEEP TECHNOLOGY FROM SLIPPING BEYOND OUR CONTROL* 72 (2015).

138. *See, e.g.*, Shin-Shin Hua & Haydn Belfield, *Effective Enforceability of EU Competition Law Under AI Development Scenarios: A Framework for Anticipatory Governance* 2, CTR. FOR THE STUDY OF EXISTENTIAL RISK (Aug. 29, 2023), <https://www.cser.ac.uk/resources/Effective%20Enforceability%20of%20EU%20Competition%20Law%20Under%20AI%20Development%20Scenarios:%20a%20Framework%20for%20Anticipatory%20Governance>.

139. *See* HAGEMANN ET AL., *supra* note 81, at 56-57 (introducing several proposals to regulate emerging technologies through single agencies).

140. Christopher J. Walker, *A Reform Agenda for Administrative Adjudication*, 44 *REGUL.* 30, 32 (2021), <https://www.cato.org/regulation/spring-2021/reform-agenda-administrative-adjudication>.

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emerging technologies and this characteristic may not be resolved in the near future.

Characteristic #6: No Unduly Rapid Changes in the Law

In response to the apparent jump in the speed and sophistication of emerging technologies, “the traditional tools of regulatory governance [have] struggled to keep pace.”¹⁴¹ This “pacing problem” or “the gap between the introduction of a new technology and the establishment of laws, regulations, and oversight mechanisms for shaping its safe development”¹⁴² often results in regulatory responses to emerging technologies occurring in fits and starts and here and there¹⁴³—an outcome wholly unaligned with this characteristic.

An assessment of privacy laws in the U.S. illustrates this dynamic. After completing such an assessment, Cameron Kerry concluded that “[o]ur existing laws developed as a series of responses to specific concerns, a checkerboard of federal and state laws, common law jurisprudence, and public and private enforcement that has built up over more than a century.”¹⁴⁴ The diversity of regulatory requirements across the U.S. has created the sort of headache for regulated entities that adherence to this characteristic would avoid. Some companies may have even experienced a migraine when the number of states with comprehensive privacy laws doubled at the conclusion of a single legislative year.¹⁴⁵ The rapidity of regulatory efforts has even caught regulators off-guard.

141. HAGEMANN ET AL., *supra* note 81, at 52.

142. WALLACH, *supra* note 137, at 251.

143. See, e.g., James R. Drabick, *Why U.S. States Should Take the Power Back: Avoiding Paralysis in the Siting of Wind Energy Systems*, 36 ENV'T L. REP. NEWS & ANALYSIS 10125, 10132 (2006) (arguing that “reactionary regulation” in the context of wind energy development caused “repetitious and contentious” debates among regulators with different jurisdictions that could have been avoided by the preparation and enforcement of a broader regulatory framework). This ad hoc approach to regulating emerging technologies, unfortunately, is evident around the world. See Antonio Garcia Pascual & Fabio Natalucci, *Fast-Moving FinTech Poses Challenge for Regulators*, IMF (Apr. 13, 2022), <https://www.imf.org/en/Blogs/Articles/2022/04/13/blog041322-sm2022-gfsr-ch3> (diving into the difficulties of regulators around the world with respect to identifying and mitigating the risks posed by FinTech companies).

144. Cameron Kerry, *Why Protecting Privacy is a Losing Game Today—and How to Change the Game*, BROOKINGS (July 12, 2018), <https://www.brookings.edu/articles/why-protecting-privacy-is-a-losing-game-today-and-how-to-change-the-game>.

145. Jennifer Huddleston & Gent Salihu, *The Patchwork Strikes Back: State Data Privacy Laws After the 2022–2023 Legislative Session*, CATO INST. (July 6, 2023, 1:25 PM), <https://www.cato.org/blog/patchwork-strikes-back-state-data-privacy-laws-after-2022-2023-legislative-session-0>.

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A case study on how not to avoid “unduly rapid changes in the law” developed in California following the passage of the California Privacy Rights Act (“CPRA”). Pursuant to the CPRA, the California Privacy Protection Agency (“CPPA”) was tasked with developing regulations but struggled to do so in a timely fashion.¹⁴⁶ As a result, regulated entities found themselves guessing as to which draft regulations would come into force.¹⁴⁷ Unsurprisingly, this delay led to litigation that only served to further complicate the regulatory field. As of August 2023, eight months after the entirety of the CPRA was supposed to have gone into effect, the regulatory chaos was obvious: a California court had ordered the Agency to delay such enforcement; yet, the CPPA “appear[ed]” to be implementing the Act, and the state’s Attorney General was actively planning “investigative sweeps” to assess compliance.¹⁴⁸

This has not just been a California problem. Colorado’s officials likewise had to delay enforcement of some aspects of that state’s privacy law.¹⁴⁹ Relatedly, European regulators have taken divergent and unpredictable approaches to enforcing the European Union’s major privacy law, the General Data Protection Regulation.¹⁵⁰ On the whole, both the regulators and the regulated have experienced the drawbacks of this characteristic of the Rule of Law being absent from privacy regulations.¹⁵¹

The regulatory framework pertaining to AI has similarly been punctuated by the introduction of a hodgepodge of proposed and, less frequently, enacted laws. The EU AI Act serves as a case in point. EU regulators

146. Kathryn Rattigan & Linn Freedman, *Businesses Struggle to Comply with CPRA Without Final Regulations*, NAT’L L. REV. (Nov. 10, 2022), <https://www.natlawreview.com/article/businesses-struggle-to-comply-cpra-without-final-regulations>.

147. *Id.*

148. F. Paul Pittman, Abdul M. Hafiz, & Yuhua Wang, *CPRA Enforcement Activity Underway Despite Court Ruling to Delay*, WHITE & CASE (Aug. 15, 2023), <https://www.whitecase.com/insight-alert/cpra-enforcement-activity-underway-despite-court-ruling-delay>.

149. Matthew H. Meade, Elizabeth Wilson, & Roger LaLonde, *The New Colorado and California Privacy Regulations Are Finalized: How Do They Compare?*, ECKERT SEAMANS (Apr. 27, 2023), <https://www.eckertseamans.com/legal-updates/the-new-colorado-and-california-privacy-regulations-are-finalized-how-do-they-compare>.

150. Anda Bologa, *Fifty Shades of GDPR Privacy: The Good, the Bad, and the Enforcement*, CEPA (Feb. 7, 2023), <https://cepa.org/article/fifty-shades-of-gdpr-privacy-the-good-the-bad-and-the-enforcement>.

151. Hossein Rahnama & Alex “Sandy” Pentland, *The New Privacy Rules of Data Privacy*, HARV. BUS. REV. (Feb. 25, 2022), <https://hbr.org/2022/02/the-new-rules-of-data-privacy> (noting that companies have “struggle[d] to keep up with compliance requirements across multiple jurisdictions.”).

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suggested the Act in 2019.¹⁵² Then, in reaction to a series of advances in AI, they amended it several times.¹⁵³ After three years of companies anticipating some regulatory intervention and guessing at its final rules, the EU finally rallied to pass the Act.¹⁵⁴ U.S. states have likewise entered the regulatory race—proposing, passing, and enforcing a litany of disparate regulations that will continue to leave AI labs in a never-ending guessing game.¹⁵⁵ Unsurprisingly, leading AI companies, such as Google, have pushed back on what they regard as a “very real risk of a fractured regulatory environment[.]”¹⁵⁶

The lag between emerging technology development and a comprehensive and coordinated regulatory environment seems destined to grow—further diminishing this characteristic of the Rule of Law. As pointed out by Hagemann et al., the pacing problem has accelerated in recent decades.¹⁵⁷ In terms of specific adoption windows, the telephone took thirty years to achieve popular use by more than a quarter of the U.S. population,¹⁵⁸ the Internet reached that mark in seven years;¹⁵⁹ and ChatGPT hit 100 million users in two months.¹⁶⁰ Given the shorter horizon over which regulators can respond to new technologies, there has also been more “regulatory disruption”—existing regulatory schemes being disrupted by new innovations.¹⁶¹ By necessity, regulators have become accustomed to hastily passing reactionary regulation that is “likely to be

152. Kelvin Chan, *Europe’s World-Leading Artificial Intelligence Rules are Facing a Do-or-Die Moment*, ASSOCIATED PRESS (Dec. 4, 2023, 12:11 AM), <https://apnews.com/article/ai-act-artificial-intelligence-regulation-europe-06ab334caa97778770f5f57f4d904447>.

153. *Id.*

154. Satariano, *supra* note 89.

155. Katarina Zhu, *The State of State AI Laws: 2023*, ELEC. PRIV. INFO. CTR. (Aug. 3, 2023), <https://epic.org/the-state-of-state-ai-laws-2023>.

156. Kent Walker, *A Patchwork of Rules and Regulations Won’t Cut it for AI*, THE HILL (Nov. 5, 2023, 11:00 AM), <https://thehill.com/opinion/technology/4292625-a-patchwork-of-rules-and-regulations-wont-cut-it-for-ai>.

157. HAGEMANN ET AL., *supra* note 81, at 57-59.

158. Rita Gunther McGrath, *The Pace of Technology Adoption is Speeding Up*, HARV. BUS. REV. (Sept. 25, 2019), <https://hbr.org/2013/11/the-pace-of-technology-adoption-is-speeding-up>.

159. Drew DeSilver, *Chart of the Week: The Ever-Accelerating Rate of Technology Adoption*, PEW RSCH. CTR. (Mar. 14, 2014), <https://www.pewresearch.org/short-reads/2014/03/14/chart-of-the-week-the-ever-accelerating-rate-of-technology-adoption/>.

160. Krystal Hu, *ChatGPT Sets Record for Fastest-Growing User Base - Analyst Note*, REUTERS (Feb. 2, 2023, 10:33AM), <https://www.reuters.com/technology/chatgpt-sets-record-fastest-growing-user-base-analyst-note-2023-02-01/>.

161. Cortez, *supra* note 103, at 177.

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more severe and potentially miscalibrated.”¹⁶² That is another blow to the Rule of Law.

Characteristic #7: No Contradictions or Palpable Inconsistency in the Law

Per Sunstein, adherence to this characteristic requires that regulated individuals and entities “not be placed under mutually incompatible obligations.”¹⁶³ If they are subject to competing regulatory regimes, then they may not be able to structure their affairs—thereby “exact[ing] a high toll on both liberty and prosperity.”¹⁶⁴ Emerging technologies lend themselves to such contradictions for manifold reasons. Some jurisdictions may be more “risk loving” and err on the side of cutting regulatory barriers to the development and deployment of emerging technologies. In contrast, “risk averse” jurisdictions may impose significant regulatory hurdles. In this patchwork environment, emerging technology developers may have no choice other than to leave the latter jurisdiction or, if they lack the financial resources to handpick a “risk loving” jurisdiction, to shut down or pause development. Of course, divergences between different jurisdictions are a problem only for national or international companies. Yet, the introduction and spread of emerging technologies often also give rise to different regulatory authorities within the same jurisdiction imposing competing obligations. This is the sort of regulatory inconsistency that raises the most Rule of Law red flags.

An overview of approaches to governing unmanned aircraft systems (UAS) or drones demonstrates the high probability of conflicting efforts to regulate emerging technologies popping up across different jurisdictions both at the sub-national level as well as the international level. At the sub-national level in the U.S., the Mercatus Center identified significant differences in the regulatory regimes of the various states.¹⁶⁵ While “risk loving” Oklahoma earned a 74—indicating a very friendly place to further drone research and development—Nebraska earned a 1.¹⁶⁶ This stark contrast makes clear that drone companies face a wildly different regulatory landscape across the U.S. Likewise, such companies must also

162. *Id.* at 204 (citing David A. Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 1451 (2011)).

163. Sunstein, *supra* note 1, at 6.

164. *Id.*

165. See generally Brent Skorup, *Is Your State Ready for Drone Commerce? The 2022 State-by-State Scorecard*, MERCATUS CTR. (June 27, 2022), <https://www.mercatus.org/research/research-papers/your-state-ready-drone-commerce-2022-state-state-scorecard>.

166. *Id.* at tbl. 1.

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fly through conflicting rules imposed by different nations. Such disparities, for instance, caused Amazon to test its drones outside of the U.S.,¹⁶⁷ the U.K. and Canada offered greener skies.¹⁶⁸

Emerging technology companies may also end up facing inconsistent regulations imposed by agencies under the same authority—leaving the company uncertain as to how to legally operate. This is true of financial companies operating in the U.S. As summarized by the U.S. Government Accountability Office, such companies often fall into the regulatory purview of several agencies with overlapping mandates.¹⁶⁹ Yet, these agencies have not collaborated to devise a comprehensive and cohesive regulatory framework.¹⁷⁰ This muddled regulatory setting comes at a cost: “[f]ragmentation and overlap have created inefficiencies in regulatory processes, inconsistencies in how regulators oversee similar types of institutions, and differences in the levels of protection afforded to consumers.”

The novelty and complexity of emerging technologies partially explain why this characteristic of the Rule of Law proves so hard to realize.¹⁷¹ Agencies unsure of whether they have sole authority over a specific technology may hold off from issuing binding, definitive rules, as discussed above. This hesitancy is understandable, anticipatable, and mitigatable (more on that below). Absent such mitigation, though, inconsistencies may abound. The “status quo serving nature” of institutions, explains Niklas Elert and Magnus Hendrekson, will persist and cause the “legal gap . . . to grow” and the “prevalence of institutional contradictions . . . to increase.”¹⁷²

This rundown of the seven characteristics makes clear that the application of the Rule of Law to emerging technologies such as AI necessitates some fundamental changes—changes that must be led by the Guardians

167. Mark Scott, *Where Amazon Tests Its Drones*, THE N.Y. TIMES (Oct. 1, 2016), <https://www.nytimes.com/2016/10/02/technology/britain-amazon-drone-test-delivery.html#:~:text=Amazon%20settled%20on%20Britain%20after,needed%20for%20its%20daily%20use>.

168. *Id.*

169. U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-175, FINANCIAL REGULATION: COMPLEX AND FRAGMENTED STRUCTURE COULD BE STREAMLINED TO IMPROVE EFFECTIVENESS (2016).

170. *Id.*

171. See Niklas Elert & Magnus Henrekson, *Entrepreneurship and Institutions: A Bidirectional Relationship* 43 (Rsch. Inst. Indus. Econ., IFN Working Paper No. 1153, 2017) (“Innovation causes rapid changes that do not jibe well with rigid top-down rules, especially not in the inherently unpredictable and fast-moving information technology markets.”).

172. *Id.* at 42-43.

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of the Rule of Law, lawyers. Out of respect for the reader and to practice what I preach,¹⁷³ this analysis was kept as short as possible to get a simple point across: the interdisciplinary lawyer is in short supply. Consider how the Rule of Law would have been furthered if, as of “ChatGPT Day,” more lawyers had a strong understanding of AI, deep connections to those working on its development, and significant practice developing rules to mitigate risks posed by AI and similar emerging technologies. In this alternate universe, ChatGPT’s release may have been minimally anticipated and, more likely, the cause of a proactive regulatory response to shape its release and integration into society. The challenge for the legal profession, then, is to lower the barriers preventing lawyers from developing that understanding, establishing those connections, and completing that practice. The profession must also develop the institutions, norms, and standards to resolve several outstanding questions ripe for resolution by lawyers, including:

- (1) What constitutes “clear, general, publicly accessible rules” with respect to emerging technologies?
- (2) What processes can ensure those rules are established as far in advance as possible?
- (3) Are existing institutions adequately designed to enforce and adjudicate complex rules while preserving sufficient separation between those activities? If not, how could those institutions be reformed?
- (4) What broad principles should inform the governance of emerging technologies so as to diminish contradictions in the law?

As outlined in the next Part, these questions are best answered by lawyers trained as “social architects.”

173. Kevin Frazier, *The Law Review Revolution*, 30 VA. J. SOC. POL’Y & L. 150 *passim* (2023).

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III. WHY INTERDISCIPLINARY LEGAL PROFESSION COULD EASE THE IMPOSITION OF RULE OF LAW ON EMERGING TECHNOLOGY

An interdisciplinary legal system—including but not limited to law schools that offered more interdisciplinary courses, law firms that included more technologists and the like, and judicial systems that ensured the participation of scientific and technological experts—could aid in aligning the Rule of Law with efforts to regulate emerging technologies. Interdisciplinarity, similarly to the Rule of Law, lacks a universal definition.¹⁷⁴ Unlike the Rule of Law, consensus around such a definition is not required; instead, legal stakeholders need to agree to an instrumental perspective to the term. This latter approach reflects the fact that legal education and training must take whatever form is necessary to ensure lawyers can fulfill their responsibility to solve individual and societal problems,¹⁷⁵ and, as set forth above, to protect and perpetuate the Rule of Law. This Part argues that a more interdisciplinary approach to legal education as well as a more formal and mandatory approach to incorporating expertise into judicial decision-making would better equip the profession as a whole to solve pressing societal problems that exceed the capacity of traditionally trained lawyers and judges.

If lawyers had a better understanding of the technical aspects of emerging technologies, they could better align the development and regulation of those technologies with the Rule of Law.¹⁷⁶ This theory is being confirmed in real time. The lawyers playing a significant role in governing AI tend to have interdisciplinary backgrounds and work in interdisciplinary institutions. A glance at Stanford Law School and its litany of interdisciplinary programs, scholars, and students illustrates this trend. The Director of the Stanford Program in Law, Science, and Technology, for instance, is producing scholarship that directly addresses how current legal frameworks apply to harms induced by AI.¹⁷⁷ The School's Regulation,

174. See, e.g. Douglas W. Vick, *Interdisciplinarity and the Discipline of Law*, 31 J. L. & SOC. 163, 164 (2004) (“[N]o clear consensus has emerged in the ensuing decades as to what exactly interdisciplinary research is or why it is valuable.”).

175. See David Sandomierski, *Catalytic Agents? Lon Fuller, James Milner, and the Lawyer as Social Architect*, 71 UNIV. TORONTO L. J. 91, 92-93 (2021) (summarizing the views of Lon Fuller—one of the chief exponents of lawyers as “social architects”).

176. See, e.g. Thomas Weber, *Artificial Intelligence and the Law*, 109 STAN. L. MAG. (Dec. 5, 2023) (interviewing legal scholars about how a lack of understanding of AI has hindered efforts to develop responsive regulations).

177. See, e.g. Mark Lemley, *How Generative AI Turns Copyright Upside Down*, SSRN (July 26, 2023) (forthcoming 2024), <https://ssrn.com/abstract=4517702>.

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Evaluation, and Governance Lab empowers students to evaluate the feasibility of proposals to regulate AI.¹⁷⁸ For instance, the Institute for Human-Centered AI (“HAI”) at Stanford has lent the expertise of its staff to the Federal Government, including a senior fellow who advises the White House on AI governance as a member of the National AI Advisory Committee.¹⁷⁹ In short, Stanford is actively training “social architects.” By extension, Stanford is working to safeguard the Rule of Law by helping rectify a lack of expertise within the federal government that has hindered its capacity to “craft law and policy.”¹⁸⁰

Of course, not every law school has the resources to develop numerous institutions, centers, and the like. Governments may not have the political will or financial freedom to maintain standing committees on X or Y technology. Nevertheless, the legal community ought to think through accessible interventions that can reduce the siloed nature of the profession. In particular, the community needs to increase the number of interdisciplinary lawyers and ensure expertise from other disciplines informs adjudication pertaining to emerging technology.

A. The “I Year”: A New Approach to the Third-Year of Law School

An interdisciplinary approach to legal education could cut down several of the factors Barton identified that contribute to the “siloing” of the legal profession.¹⁸¹ A requirement that all third-year students study a second discipline, for instance, could help aspiring lawyers use more accessible terms to describe legal concepts, foster professional norms of regular and robust engagement with scholars and practitioners in other fields, and provide lawyers with new measures with which to assess the “validity, success, and justice” of legal decisions, structures, and processes.

The exact details of this “Interdisciplinary Year” or “I-Year” merits a full paper given the extensive preexisting debate about the usefulness of a third year of law school¹⁸² and justifiable skepticism about whether all law schools have the means necessary to meaningfully educate students

178. Weber, *supra* note 176.

179. *Id.*

180. *Id.*

181. See Barton, *supra* note 15, at 9.

182. Erin Fuchs, “Like Watching Paint Dry”: Why the Third Year of Law School Is a Waste, SLATE (Aug. 30, 2013, 3:39 PM), <https://slate.com/business/2013/08/what-s-wrong-with-the-third-year-of-law-school.html>.

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in another discipline.¹⁸³ Moreover, as will become clear upon a review of this proposal, some aspects of this “I Year” are likely unfeasible without a major shift among the legal community and, in particular, law school administrators and accreditors. Still, this idea deserves to be set forth and examined given that undue fidelity to the status quo in the Age of AI—as made clear throughout this article—will hinder the Rule of Law; in other words, everything should be on the table, including ambitious ideas. In short, 3L students would have to complete half of their required credits in a “practical” experience and half in the study of one other discipline—akin to a “minor” at an undergraduate institution.

Previous ripples of reform related to 3L did not cause a sea change across law schools, despite having some powerful endorsers. In the late 2000s and early 2010s, widespread concern about student debt led many, including President Obama,¹⁸⁴ to call for a new approach to legal education. Some schools, such as N.Y.U., heeded those calls by designing a third-year curriculum intended to give students more practical experience by interning at a law firm, for instance.¹⁸⁵ Others, such as Stanford and Washington and Lee University School of Law, made similar changes.¹⁸⁶ Legal scholars forecasted that leadership from these elite schools might cause a wave of reform¹⁸⁷—fast forward a few years and those predictions appear to have been bad bets.¹⁸⁸ The low adoption rate may stem from two hurdles: first, tuition; and second, bureaucracy. On tuition, many law schools would find themselves in financial trouble if students no longer had to pay three full years of tuition.¹⁸⁹ On

183. Brian Tamanaha, *Why the Interdisciplinary Movement in Legal Academia Might be a Bad Idea (For Most Law Schools)*, BALKINIZATION (Jan. 16, 2008, 9:44 AM), <https://balkin.blogspot.com/2008/01/why-interdisciplinary-movement-in-legal.html>.

184. John Johnson, *Obama: Make Law School Two Years, Not Three*, USA TODAY (Aug. 24, 2013, 10:46 AM), <https://www.usatoday.com/story/news/nation/2013/08/24/newser-president-obama-law-school/2695265/>.

185. Peter Lattman, *N.Y.U. Law Plans Overhaul of Students' Third Year*, N.Y. TIMES (Oct. 16, 2012, 6:58 PM), <https://archive.nytimes.com/dealbook.nytimes.com/2012/10/16/n-y-u-law-plans-overhaul-of-students-third-year/>.

186. *Id.*

187. *See id.* (quoting Brian Tamanaha as being optimistic about elite schools setting a trend that others may soon follow).

188. *See, e.g.,* Steven Chung, *Next Fall, Replace The Third Year Of Law School With A One-Year Internship*, ABOVE THE LAW (May 6, 2020, 11:18 AM), <https://abovethelaw.com/2020/05/next-fall-replace-the-third-year-of-law-school-with-a-one-year-internship/>; Gary S. Lesser, *The Need For More 'Experiential Education' in Law School*, 97 FLA. BAR J. 4, 4 (2023), <https://www.florida-bar.org/the-florida-bar-journal/the-need-for-more-experiential-education-in-law-school/>.

189. *See* Lesser, *supra* note 188; Tamanaha, *supra* note 183.

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bureaucracy, the American Bar Association holds the keys to accreditation and is not known for embracing drastic reforms.¹⁹⁰

In addition to these institution-level concerns, Brian Tamanaha questioned such reforms from the perspective of students. Writing in 2008, Tamanaha asserted that “there is no evidence that it will make their students better lawyers.”¹⁹¹ Additionally, he feared that a push among law schools to offer more interdisciplinary courses could lead them to hire more professors with little to no experience practicing law—experience that would benefit students.¹⁹² Nevertheless, Tamanaha endorsed elite law schools going a more interdisciplinary route—in part because graduates of those schools could, in their role as faculty at lesser-ranked schools, pass along whatever they learned to students at those institutions.¹⁹³

Two events since 2008 have changed the legal education landscape in a way that not only increases the feasibility of the I-Year as proposed above, but also makes it more valuable to students. COVID-19 and the resulting transition to online education and work increased the number of remote opportunities to learn and gain practice experience.¹⁹⁴ The widespread and enduring adoption of distance learning mitigates some of the feasibility concerns raised by Tamanaha. For one, students can take courses at law schools and other graduate schools around the country at a lower cost to both the school and the student.¹⁹⁵ Second, the ABA eased some accreditation-related concerns by voting to permit students to earn as many as half of their credits through distance learning.¹⁹⁶

ChatGPT Day marked the second event. Generative AI tools have demonstrated remarkable and unanticipated capabilities with respect to

190. See Lesser, *supra* note 188.

191. Tamanaha, *supra* note 183.

192. *Id.*

193. *Id.*

194. James Leipold, *Access to Legal Education Expanded Through Increased Distance Learning*, LSAC (Aug. 17, 2023), <https://www.lsac.org/blog/access-legal-education-expanded-through-increased-distance-learning>.

195. *Id.*

196. Karen Sloan, *Law Students Can Take 50% of Classes Online, with ABA Rule Change*, REUTERS (May 12, 2023, 2:24 PM), <https://www.reuters.com/legal/government/law-students-can-take-50-classes-online-with-aba-rule-change-2023-05-12/>.

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legal research.¹⁹⁷ Though the tools still have significant limitations,¹⁹⁸ observers such as John Villasenor now have no doubts that lawyers would benefit from educational opportunities that prepare them to offer much more than the basics of legal practice such as legal research.¹⁹⁹ As AI continues to become more accurate and competent with respect to basic legal skills, whole practice areas, such as family law, may be primarily the domain of AI with some degree of human oversight; consequently, law students and young lawyers ought to focus on acquiring “wisdom” more so than “knowledge.”²⁰⁰

Post-COVID and ChatGPT Day, it is far more feasible and necessary to give law students opportunities to acquire practice experience and wisdom, such as how the law may apply to novel and complex technologies. Schools have increasingly realized that cross-registration programs can create “win-win” situations.²⁰¹ Such programs are also necessary if students are going to acquire the “wisdom” that is valuable to their clients and relevant to aligning the governance of emerging technology with the Rule of Law.

A hypothetical “I-Year” experience demonstrates how this reform could lower three of Barton’s barriers and, in doing so, increase the odds of lawyers having the knowledge and connections necessary to align emerging technology governance with the Rule of Law. Imagine if there were an

197. Sam McKeith, *ChatGPT is Putting the Future of Grad Lawyers Under the Microscope*, LSJ ONLINE (Mar. 23, 2023, 9:00 AM), <https://lsj.com.au/articles/chat-gpt-is-putting-the-future-of-grad-lawyers-under-the-microscope/>.

198. Shari L. Klevens & Alanna Clair, *Can Lawyers Trust AI?*, DENTONS (Nov. 20, 2023), <https://www.dentons.com/en/insights/newsletters/2023/december/8/practice-tips-for-lawyers/can-lawyers-trust-ai>.

199. John Villasenor, *How AI Will Revolutionize the Practice of Law*, BROOKINGS (Mar. 20, 2023), <https://www.brookings.edu/articles/how-ai-will-revolutionize-the-practice-of-law/>; see McKeith, *supra* note 195.

200. McKeith, *supra* note 197 (summarizing analysis by multiple individuals with varying degrees of formal legal training).

201. See, e.g., *Crosstown Colleges Share Academic Resources*, PA. COLL. OF TECH. (May 5, 2023), <https://www.pct.edu/news/article/2023/05/05/crosstown-colleges-share-academic-resources> (discussing the benefits reaped by institutions and students alike from a cross-registration program); *Collective Learning Power: UMASS Students Benefit from Five College Consortium*, UNIV. OF MASS. AMHERST, <https://www.umass.edu/gateway/umass-stories/collective-learning-power-umass-students-benefit-five-college-consortium> (last visited Nov. 14, 2023). Such cross-registration opportunities may even benefit students attending the same institution. See Chrissie Long, *The Growth of Cross-Registering*, HARVARD GAZETTE (Jan. 29, 2014), <https://news.harvard.edu/gazette/story/2014/01/the-growth-of-cross-registering/>; Jacob deNobel, *Johns Hopkins Will Move to a Universal Academic Calendar Across All Nine Schools*, JOHNS HOPKINS UNIV., HUB (Feb. 10, 2020), <https://hub.jhu.edu/2020/02/10/revised-academic-calendar-799-em0-art0-admin-news/>.

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ABA-designated specialty in “Law and AI” that students could earn by taking half of their 3L credits in AI-related courses. First, these soon-to-be lawyers, by virtue of having spent several months learning from and with students in another discipline, would have had meaningful practice explaining complex legal topics in terms understandable to a more diverse audience. This practice would go a long way toward easing future collaborative efforts. Second, and for the same reasons, this collaborative practice would also reverse a norm among lawyers to look solely within their own field for answers to complex questions. Finally, exposure to a different discipline would also introduce lawyers to new ways of evaluating different legal strategies and decisions.

This interdisciplinary approach, however, will not fundamentally alter the capacity of the legal profession to align emerging technology governance with the Rule of Law in the short run. That is why other efforts to ensure the participation of experts from different disciplines in legal processes deserve consideration.

B. Inserting Experts into Adjudication Related to Emerging Technology

Presently,²⁰² judges with minimal understanding of AI and other emerging technologies have near exclusive authority to “say what the law is.”²⁰³ Barton identifies this authority as one of the main barriers to the legal system being more interdisciplinary.²⁰⁴ The continuation of this barrier conflicts with the maintenance of the Rule of Law given that legal disputes over emerging technologies often precede regulation of that technology—effectively giving judges with limited knowledge the first strike at the pinata.²⁰⁵ This lack of knowledge combined with a judicial “first mover” advantage might result in confusing, contradictory, or technologically-flawed case law.²⁰⁶ These issues can have long-term effects on regulating an emerging technology. “The early stages of an emerging technology’s development,” per Gregory Mandel, “present a unique opportunity to shape its future. But it’s an opportunity that does not

202. Barton, *supra* note 15, at 9 (listing the allocation of interpretative power solely to judges as one of his five barriers to a more interdisciplinary legal profession).

203. *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *see also* Barton, *supra* note 15, at 9.

204. Barton, *supra* note 15, at 9.

205. Melissa Heikkilä . . . , *How Judges, Not Politicians, Could Dictate America’s AI Rules*, MIT TECH. REV. (July 17, 2023), <https://www.technologyreview.com/2023/07/17/1076416/judges-law-suits-dictate-ai-rules/>.

206. Adi Robertson, *A Court Just Blew Up Internet Law Because It Thinks YouTube Isn’t a Website*, THE VERGE (May 13, 2022, 11:22 AM), <https://www.theverge.com/2022/5/13/23068423/fifth-circuit-texas-social-media-law-ruling-first-amendment-section-230>.

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remain open forever. Interests, investment, and opinion can quickly begin to vest around certain regulatory and governance expectations.”²⁰⁷

Despite the significance of these early judicial decisions and the recognition that they may not have the expertise to fully understand the technology at issue,²⁰⁸ judges often rule without making full use of available tools to understand those technologies. In some jurisdictions, such as the United States, judges rarely exercise their authority to consult experts in cases pertaining to complex and technical issues.²⁰⁹ This lack of consultation directly contravenes the Rule of Law by increasing the odds of decisions that are inaccurate and inaccessible. Put bluntly, “[s]cientifically illiterate judges,” as coined by David Faigman, “pose a grave threat to the judiciary’s power and legitimacy.”²¹⁰ Notably, Faigman warned of this threat in 2006—long before the Age of AI. Decades of technological progress later, judges continue to opt not to regularly seek out education or expertise on the complexities presented by emerging technology cases.²¹¹

Two proposals could correct this troubling tendency among judges. The most straightforward would be to mandate that judges consult independent experts in certain cases. In the U.S., realization of this proposal could come about through a simple amendment to Federal Rule of Evidence 706. Rule 706, in relevant part, states, “[o]n a party’s motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations.”²¹² An amendment that removed a judge’s discretion and instead mandated the judicial appointment of an expert witness in certain cases could realize a long-accepted principle: “that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes.”²¹³ Which cases qualified for such mandatory appointment could

207. Mandel, *supra* note 95, at 92.

208. See Kevin Frazier, “We Really Don’t Know.” *Now is the Time for a New Approach to Judicial Education*, RICH. J. L. & TECH. (Mar. 28, 2023), <https://jolt.richmond.edu/2023/03/28/we-really-dont-know-now-is-the-time-for-a-new-approach-to-judicial-education/>.

209. Tahirih V. Lee, *Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence*, 6 YALE L. & POL’Y REV. 480, 481 (1988) (identifying a “natural reluctance of judges to appoint experts” under Rule 706 of the Federal Rules of Evidence, which codified the right of judges to identify expert witnesses).

210. David L. Faigman, *Judges as “Amateur Scientists,”* 86 B.U. L. REV. 1207, 1207 (2006).

211. Frazier, *supra* note 208.

212. FED. R. EVID. 706(a).

213. Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 40 (1901).

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be assessed on an annual basis to ensure that the mandate reflects an uptick in judicial consideration of certain emerging technologies.

The second, more ambitious, and potentially complementary proposal would be to require all decisions made in qualifying cases be subject to limited and highly deferential review by a panel of judges that have received extensive training on the applicable emerging technology. This proposal, of course, would require a much larger legislative effort and investment. A litany of outstanding questions arising from this proposal deserve more attention including, but not limited to, which judges would be eligible to serve on this emerging technology panel and what sort of education they would need to receive to remain on that panel.

These two proposals are by no means a complete list of possible interventions to decrease the odds of decisions being based on flawed understandings of emerging technology; I welcome and encourage more proposals. In fact, such proposals should become a regular part of legal scholarship in the coming months and years. This sort of scholarship would contribute to the Rule of Law by suggesting ways for the operation of the law to be far more inclusive of relevant expertise—expertise that our legal education systems and professional norms do not currently guarantee gets incorporated into legal advocacy and adjudication.

The legal profession cannot fulfill its role as Guardian of the Rule of Law in the Age of AI if it remains in its disciplinary container. The legal system has largely developed around the resolution of disputes with binary outcomes: “[p]articular land, for example, is either owned by one person or another; a person is either at fault, or not, for injury to another; is either guilty of a crime, or not”²¹⁴ Legal professionals developed their education, norms, and rules around these simple problems.²¹⁵ Problems arising from emerging technology, though, differ markedly from trying to identify the original owner of a cabin or cattle—the former present problems characterized by their “complexity, speed, [and] scale.”²¹⁶ A refusal among lawyers to update their profession and related processes of adjudication and legislation will result in a failure to govern these technologies pursuant to the Rule of Law.²¹⁷

214. Barton, *supra* note 15, at 15.

215. *Id.*

216. *Id.* at 17.

217. See M. ETHAN KATSH, LAW IN A DIGITAL WORLD 16 (Oxford Univ. Press eds., 1995) (defining law as “an institution and a process that is affected by the very media it is attempting to regulate. The new media, in other words, change law at the same time that law is used to regulate the use of the new media since the two forces relate to each other in a dynamic and interactive manner.”).

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Alterations to legal education and adjudication of disputes involving emerging technologies could bring about an interdisciplinary shift in the profession that better equips lawyers to regulate emerging technologies in a predictable, rational, and clear fashion. With respect to legal education, the shock of ChatGPT combined with the educational reforms brought about by COVID-19 have made this the proper moment to transform the third year of law school into the “I-Year.” On emerging technology adjudication, increased honesty among judges that complex scientific and technological disputes exceed their expertise should motivate lawyers and the public alike to consider new means to guarantee expert involvement in such disputes. These and other changes would increase the capacity of the entire profession and its processes to evolve as is required by the Age of AI.

CONCLUSION

The Rule of Law is not self-sustaining.²¹⁸ Every member of the legal profession has an obligation to defend and further it.²¹⁹ Yet, as threats to the Rule of Law have grown more complex, the legal profession has doubled down on practices and norms that may benefit its bottom line. Society, though, demands a more interdisciplinary legal system that can adjust to and help mitigate risks posed by novel threats. A first step to redirecting the legal profession toward societally beneficial ends is identifying and accepting a shared definition of the Rule of Law. Thankfully, Sunstein offers a set of seven characteristics that can, and should be, universally adopted.

Next, the legal system must undergo reform to include more regular and substantial input from experts in other disciplines. For instance, legal education should foster and require interdisciplinary experiences that introduce students to new concepts and intellectual communities. Likewise, adjudication must incorporate expertise from other disciplines by mandating their involvement in disputes involving emerging technologies. These proposals and others would empower students, scholars, advocates, and adjudicators to further the Rule of Law as emerging technologies continue to advance and spread.

218. Don McKinnon, *The Rule of Law in Today's Africa*, 32 COMMONWEALTH L. BULL. 649, 654 (2007) (U.K.) (outlining instances in which conflicts in certain countries have resulted in “the complete breakdown of the rule of law . . .”).

219. See MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 1983) (“A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”).

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“Any idea of the Rule of Law,” writes Robert Gordon, “has to presuppose the institutional arrangements and agents, and the political and social agreements supporting them, who will make it real and effective.”²²⁰ Emerging technologies have exposed the outdated nature of the assumptions that informed the development of our current legal processes and norms.²²¹ The proper response to this more complex and fast-paced regulatory environment “is not to hack away at the legal system and declare victory in the campaign for legal simplification.”²²² Instead, as argued by J.B. Ruhl and Daniel Katz, “adaptability and resilience” must be built into legal systems.²²³

220. Robert Gordon, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, 11 THEORETICAL INQUIRIES. L. 441, 447 (2010).

221. See Hagemann et al., *supra* note 81, at 41 (“[T]raditional regulatory models have already been strained to the breaking point.”).

222. J.B. Ruhl & Daniel Martin Katz, *Measuring, Monitoring, and Managing Legal Complexity*, 101 IOWA L. REV. 191, 209 (2015).

223. *Id.*

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