LESSONS FROM THE PRESENT: THREE CRISES AND THEIR POTENTIAL IMPACT ON THE LEGAL PROFESSION

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ABSTRACT

The United States faces three simultaneous crises: a pandemic, a civil rights reckoning, and a crisis of democracy. The first of these crises has sparked dramatic—though potentially temporary—changes to the practice of law: moving much legal work to remote settings almost overnight, after the profession had largely resisted making such accommodations for decades. The second has sparked an assessment of the extent to which the practice of law and the legal system are both riddled with racism and institutional bias. The third, the crisis of democracy, has lawyers at its center, filing frivolous claims and fomenting an armed insurrection with designs on overturning the results of a free and fair election. If the past is any guide, these crises will provoke a period of introspection within the legal profession and prompt calls for change. What the profession tends to do in the wake of such crises and in response to such calls, however, is tinker around the margins of the rules regarding the operation of the profession, leading to little substantive, long-term, formal change. It is entirely possible, if not likely, that the legal profession could respond to these crises according to this same pattern. It does not have to be that way, however. This Article calls on the profession—even as we are still in the midst of these crises in many ways—to seize the opportunity to advance real,

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lasting, and meaningful change and recommit to the central role it must play in the defense of the rule of law and democracy.

I. INTRODUCTION

Since early 2020, nations and communities across the world have had to confront a deadly pandemic.[1] In this same year, and into 2021, the United States has faced a confluence of three simultaneous crises[2]: the pandemic itself, as well as its economic fallout,[3] but also a renewed call for racial justice in the wake of highly publicized incidents of police misconduct (the racial justice crisis),[4] and a highly orchestrated and multi-pronged campaign to overturn the results of the 2020 election (the crisis of democracy).[5] These events, sandwiched by two presidential impeachments,[6] have led to trillions of dollars in economic intervention,[7] calls for police reforms and wide-ranging efforts to root out institutional racism and implicit bias,[8] and a profound sense that the rule of law is in

1. For a general discussion of the scope and impact of the pandemic, although the world will likely never get a full accounting of its devastation, see FAREED ZAKARIA, TEN LESSONS FOR A POST-PANDEMIC WORLD 1-11 (2020); *see also* SCOTT GALLOWAY, POST CORONA: FROM CRISIS TO OPPORTUNITY xv-xviii (2020) (providing an analysis of the early economic impacts of the pandemic).

2. On President Biden's first day in office, *The New York Times* ran a headline that read: "Biden Inaugurated as the 46th President Amid a Cascade of Crises." Peter Baker, *Biden Inaugurated as the 46th President Amid a Cascade of Crises*, N.Y. TIMES (Jan. 26, 2021), https://www.nytimes.com/2021/01/20/us/politics/biden-president.html.

3. *See* Kim Parker et al., *Economic Fallout from COVID-19 Continues to Hit Lower-Income Americans the Hardest*, PEW RSCH. CTR. (Sep. 24, 2020), https://www.pewsocialtrends.org/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest (describing economic impacts of COVID-19).

4. Amy Harmon et al., *From Cosmetics to NASCAR, Calls for Racial Justice Are Spreading*, N.Y. TIMES (Sept. 14, 2020), https://www.nytimes.com/2020/06/13/us/george-floyd-racism-america.html (describing wide-ranging efforts to address police misconduct in the wake of the Black Lives Matter protests of 2020). This is not to say that this crisis is new, particularly for the BIPOC community. Rather, the highly publicized videos of police killings of Black men and the murder of Breonna Taylor appeared to elevate this crisis in the public consciousness.

5. William Cummings et al., *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY: NEWS (Jan. 6, 2021, 10:50 AM), https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001 (describing the failure of the legal campaigns to overturn the results of the 2020 presidential election).

6. *See* Nicholas Fandos, *Trump Impeached for Inciting Insurrection*, N.Y. TIMES (Feb. 12, 2021), https://www.nytimes.com/2021/01/13/us/politics/trump-impeached.html (noting the unprecedented nature of President Trump's second impeachment).

7. *See How Is the Federal Government Funding Relief Efforts for COVID-19?*, USASPENDING.GOV, https://datalab.usaspending.gov/federal-covid-funding (last visited Apr. 1, 2021) (noting trillions of dollars in financial relief).

8. *See, e.g.*, Adam Serwer, *The New Reconstruction*, ATLANTIC, Oct. 2020, https://www.theatlantic.com/magazine/archive/2020/10/the-next-reconstruction/615475

jeopardy in the United States.[9] At the center of many of these crises are lawyers: lawyers who have played significant roles in efforts to address these crises, but have also made them worse in many ways.[10] These crises, and others like them, have also exposed some of the best and worst qualities of the legal profession. It is in the wake of crises like these that scholars, judges, and leaders of the bar often call for reform of the profession.[11] Indeed, events such as the Watergate scandal;[12] the Savings & Loan Crisis;[13] the impeachment of President Clinton and his subsequent suspension from the practice of law;[14] the Enron scandal;[15]

(highlighting the impact of police violence protests on public discourse and opinion, leading to greater acknowledgment of the need to address racial injustice).

9. *See, e.g.*, Charles Gardner Geyh, *In Trump Election Fraud Cases, Federal Judges Upheld the Rule of Law—But That's Not Enough to Fix US Politics*, CONVERSATION (Dec. 18, 2020, 8:55 AM), https://theconversation.com/in-trump-election-fraud-cases-federal-judges-upheld-the-rule-of-law-but-thats-not-enough-to-fix-us-politics-152060 (describing present threats to the rule of law in the United States and measures needed to address them).

10. In a recent publication, the contributors explore the role of lawyers in addressing crisis situations and examine the best practices in such settings. *See generally* CRISIS LAWYERING: EFFECTIVE LEGAL ADVOCACY IN EMERGENCY SITUATIONS (Ray Brescia & Eric K. Stern eds., 2021).

11. *See* Raymond H. Brescia, *Ethics in Pandemics: The Lawyer for the (Crisis) Situation*, 34 GEO. J. LEGAL ETHICS (forthcoming 2021) (manuscript at 19) (discussing the notion that calls for reform in the legal profession often following crises and scandals); s*ee also* William H. Simon, *Introduction: The Post-Enron Identity Crisis of the Business Lawyer*, 74 FORDHAM L. REV. 947, 951-54 (2005) (describing calls for reform in the wake of the Enron scandal); MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 4-14 (1994) (discussing the crisis in the profession as being represented by a widening gap between lawyers and the broader community as to perceptions about the role of law in society). Criticism of the profession is often cast as a crisis for the profession itself. *See, e.g.*, Eli Wald & Russell G. Pearce, *Being Good Lawyers: A Relational Approach to Law Practice*, 29 GEO. J. LEGAL ETHICS 601, 606-12 (2016) (describing "the crisis of professionalism" in the legal profession). Such criticism is not something that is new in American culture, however. *See, e.g.*, DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 11-13 (2000) (noting dissatisfaction with the profession is practically as old as the profession itself); Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1239-40 (1991) (describing crisis in legal profession and legal ethics as an ever-present "chronic grievance" associated with dissatisfaction with lawyers).

12. *See generally* JAMES E. MOLITERNO, THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE 96-107 (2013) (describing the involvement of lawyers in the Watergate scandal and the event's impact on the profession).

13. *See, e.g.*, William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243, 280-82 (1998) (discussing the changes effected upon the profession due to the Savings & Loan Crisis); Robert G. Day, *Administrative Watchdogs or Zealous Advocates? Implications for Legal Ethics in the Face of Expanded Attorney Liability*, 45 STAN. L. REV. 645, 649-59 (1993) (describing legal reforms instituted after the Savings & Loan crisis and their potential effects on legal ethics).

14. His punishment included being permanently disbarred from practice before the United States Supreme Court. Duncan Campbell, *Lewinsky Scandal Ends as Clinton Is Disbarred*, GUARDIAN (Oct. 1, 2001, 9:18 PM), https://www.theguardian.com/world/2001/oct/02/duncancampbell.

the detention and torture of enemy combatants in Iraq and the detention facility at Guantánamo Bay, Cuba;[16] the events that led to the Financial Crisis of 2008 and the foreclosure crisis that followed[17] all represent a few such examples where a crisis led to calls for reform of the legal profession.[18] Indeed, with these sorts of crises, a pattern often emerges. A scandal involves some significant violation of the law or the lawyers' rules of ethics. Lawyers have often participated in such conduct or failed to take steps to prevent it. There is handwringing and calls for reform. The profession tinkers around the edges of the rules that govern the legal profession and largely avoids dramatic change. Meaningful reform proves elusive.[19] Soon thereafter, another crisis emerges. Lather. Rinse. Repeat.[20]

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15. *See generally* Andrew A. Lundgren, *Sarbanes-Oxley, Then* Disney*: The Post-Scandal Corporate-Governance Plot Thickens*, 8 DEL. L. REV. 195, 197-204 (2006) (discussing legal reforms instituted after the Enron scandal).

16. Jesselyn A. Radack, *United States Citizens Detained as "Enemy Combatants": The Right to Counsel as a Matter of Ethics*, 12 WM. & MARY BILL RTS. J. 221, 224-27 (2003) (describing legal ethics surrounding detention of enemy combatants during the so-called "War on Terror"). *See* David Cole, *They Did Authorize Torture, but . . .*, N.Y. REV. BOOKS, Apr. 8, 2010, https://www.nybooks.com/articles/2010/04/08/they-did-authorize-torture-but (discussing legal ethics surrounding the preparation of the United States Department of Justice's so-called "torture memos").

17. *See* Raymond H. Brescia, *Leverage: State Enforcement Actions in the Wake of the Robo-Sign Scandal*, 64 ME. L. REV. 17, 19-27, 32 (2011) (describing deceptive practices carried out in foreclosure actions in the wake of the Great Recession, which led to multi-billion dollar settlements to compensate victims for such practices).

18. *See, e.g.*, Rachel F. Moran, *The Three Ages of Modern American Lawyering and the Current Crisis in the Legal Profession and Legal Education*, 58 SANTA CLARA L. REV. 453, 507-11 (2019) (noting historical changes in the profession since its inception that have often been a response to different crises and describing current "intensifying stratification and fragmentation" of the profession as a new crisis that could potentially lead to a new "age" in the history of the profession); James E. Moliterno, *Crisis Regulation*, 2012 MICH. ST. L. REV. 307, 308 (2012) (describing the history of regulation of the legal profession as representing "a largely crisis-management form of regulation"); Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1204 (2003) (exploring the role of lawyers in several corporate scandals); *id.* at 1210-16 (recommending reforms in wake of corporate scandals). *See generally* Donald T. Weckstein, *Watergate and the Law Schools*, 12 SAN DIEGO L. REV. 261 (1975) (noting the critical role lawyers played in the Watergate Scandal and identifying need for ethics reform).

19. Moliterno, *supra* note 18, at 308 (describing the legal profession's reform efforts in light of crises as being carried out "poorly, narrow-mindedly, and myopically").

20. As Robert Gordon has argued:

> After every wave of business failure resulting from corporate fraud, pressures mount to revise the rules to make lawyers and accountants better monitors—or at least less amiably cooperative enablers—of managers' misconduct. The lawyers and accountants sometimes lose a point or two, but their professional organizations and lobbies usually succeed in thwarting the reforms.

Gordon, *supra* note 18, at 1188.

If past is prologue, we will soon find the profession in the middle of this cycle once again with these three, concurrent crises. First, in the midst of the COVID-19 pandemic, the first public health crisis of this magnitude in roughly a century,[21] the practice of law has itself changed in light of the pandemic and its social distancing protocols.[22] As a result, we are in the midst of one of the most dramatic shifts in the practice and profession of law since the early twentieth century, when the profession first began to organize itself into what has become the model for the modern law firm.[23] Second, the Black Lives Matter protests have also led the profession to assess how it operates, whether it is the new wave of "progressive prosecutors" who seek to root out systemic bias in the criminal justice system,[24] or corporate firms exploring ways to diversify their ranks and take other steps to combat structural racism in the legal system.[25] Law schools are also examining ways to improve pedagogy in light of systemic and implicit bias and to improve the educational experience for students of color and those from other groups woefully underrepresented in the legal profession.[26] Third, add to this list the lawyers who supported the Trump campaign's flailing and failed attempt to overturn the results of the 2020 election, both in the courts and violently in the halls of the U.S. Capitol, by, for example, proclaiming before a fulminating crowd that claims of electoral fraud should be resolved through "trial by combat."[27] These actions and statements have

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21. *See, e.g.*, Kelsey Piper, *Here's How Covid-19 Ranks Among the Worst Plagues in History*, VOX (Jan. 11, 2021, 2:30 PM), https://www.vox.com/future-perfect/21539483/covid-19-black-death-plagues-in-history.

22. *See* Catherine Wilson, *'Awful Impact': The Long-Lasting Effects of COVID-19 on the Practice of Law*, LAW.COM (Dec. 7, 2020, 10:48 AM), https://www.law.com/dailybusinessreview/2020/12/07/awful-impact-the-long-lasting-effects-of-covid-19-on-the-practice-of-law.

23. On the emergence of the modern law firm, see JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 22-34 (1976).

24. On the growing trend toward progressive prosecution, see generally Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1 (2019).

25. Christine Simmons & Dylan Jackson, *From Big Law to Boutiques, George Floyd's Death Prompts Outrage, Some Action from Law Firm Leaders*, AM. LAW. (June 1, 2020, 6:24 PM), https://www.law.com/americanlawyer/2020/06/01/from-big-law-to-boutiques-floyds-death-prompts-outrage-some-action-from-law-firm-leaders (describing initial reactions from law firms to the death of George Floyd with respect to structural racism and diversity).

26. As one example of this effort, see *Law Deans Antiracist Clearinghouse Project*, THE ASS'N OF AM. L. SCHS., https://www.aals.org/antiracist-clearinghouse (last visited Apr. 1, 2021) (providing a space where the "collective voices" of several law school deans can engage their "institutions in the fight for justice and equality" and "strive to focus [their] teaching, scholarship, service, activism, programming, and initiatives on strategies to eradicate racism").

27. Jemima McEvoy, *'It's Unprecedented': New York State Bar Association Considering Expelling Rudy Giuliani*, FORBES (Jan. 11, 2021, 10:52 AM), https://www.forbes.com/sites/jemimamcevoy/2021/01/11/new-york-state-bar-association-

led to calls for sanctions, professional discipline, and lawsuits seeking billions of dollars in damages.[28]

It is clear that these crises have laid bare for all to see, not for the first time, the profound inequities in society and the practice of law itself. Tragically, the third crisis, the crisis of democracy, was brought on, in part, by a passionate defense of democracy itself: the pursuit of victory at the ballot box by those who desired a more robust government response to the first two crises.[29] Indeed, as I will explore in greater depth throughout this piece, the occasionally comical legal campaign that turned deadly, and ended in a murderous riot and failed coup at the U.S. Capitol was, in many ways, reactionary: an attempted rejoinder to the victory at the polls secured by those who were, in many respects, demanding a more effective government response to both the pandemic and the racial justice crisis in our midst.[30] These crises are thus inextricably intertwined.[31] Indeed, it is quite apparent that the legal campaign to overturn the election was often a thinly veiled effort to throw out not just any votes, but those of communities that had a high population of Black voters, many of whom had rallied around calls to "vote as if your life depends on it" in light of the disparate impact of the pandemic on people of color and the policing crises within their communities.[32] Thus, the third crisis of democracy is a byproduct of the effectiveness of communities to seek a meaningful government response to the pandemic and racial justice crises.

We can certainly celebrate the fact that the institutions of our democracy functioned as they must have if they are to survive as such, generating the most free and secure election in recent memory according to Trump Administration officials responsible for overseeing election

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considering-expelling-rudy-giuliani/ (describing comments by Rudy Giuliani before a crowd shortly before the invasion of the U.S. Capitol).

28. *See infra* Part IV.B.

29. Zeynep Tufekci, *Most House Republicans Did What the Rioters Wanted*, ATLANTIC (Jan. 13, 2021), https://www.theatlantic.com/ideas/archive/2021/01/more-dangerous-capitol-riot/617655 (linking the Capitol riots with voter suppression efforts). On the pandemic's disparate impact on communities of color in particular, see Steffie Woolhandler et al., *Public Policy and Health in the Trump Era*, 397 LANCET 705, 708 (2021) (explaining that "COVID-19's toll of death and misery" has fallen "most heavily on people of colour, workers in low-paid jobs where physical distancing is challenging, people who are incarcerated, and nursing home residents and others in frail health").

30. *See infra* Part IV.

31. *See infra* Part IV.A–IV.B (demonstrating that the Capitol riots occurred in the midst of a legal campaign to invalidate votes in an election where issues regarding the pandemic and racial justice were at the forefront).

32. Emma González, *Vote as if Your Life Depends on It—Because It Does*, VOGUE (Oct. 19, 2020), https://www.vogue.com/article/emma-gonzalez-voting-essay (linking the three crises).

security.[33] At the same time, lawyers led the way in instigating the third crisis that emerged in the wake of efforts to respond to the first two.[34] The three crises are connected in these ways, and they were both shaped by lawyers, who will continue to play a role in shaping the response to them.[35] Lawyers must serve as champions of change to respond to these crises by offering real paths toward effective reform of the law, government, civil society, and the justice systems that are all implicated by these crises. To the extent that these crises, like so many that came before, also inspire a period of introspection within the legal profession to assess the role that lawyers have played in such crises, that process should yield insights about the need for reform of the profession itself in these crises' wake. Again, while these crises are necessarily connected in society more generally, with respect to the legal profession, at least, they are deeply entwined.

What is more, these crises indicate that we are in the midst of the legal profession's crisis-response cycle described above.[36] As with prior crises, though, not only should we look to transform the profession to respond to its current failures to uphold its ideals with respect to the current crises, but we also have a chance to "break the wheel" of this cycle—to bring about transformative institutional change.[37] Such change could include greater diversity and flexibility in where lawyers physically work. It could transform when and how they work, making the practice of law more flexible, inclusive, and humane. It could help us develop a greater appreciation for the ability of lawyers to capture and sway public imagination, particularly with respect to the machinery of democracy. In the end, and in response to these crises, the legal profession should commit to change and social justice, making its membership and leadership more diverse and training those who join it

33. Jen Kirby, *Trump's Own Officials Say 2020 Was America's Most Secure Election in History*, VOX (Nov. 13, 2020, 4:40 PM), https://www.vox.com/2020/11/13/21563825/2020-elections-most-secure-dhs-cisa-krebs.

34. *See infra* Part IV.B (discussing role of lawyers in efforts to undermine results of the 2020 presidential election).

35. *See infra* Parts II.A, II.C, III.B, IV.B, IV.D.

36. *See supra* notes 18-20 and accompanying text.

37. The television series "Game of Thrones," based on novels by George R.R. Martin, depicts a fantasy world, Westeros, stuck in a seemingly endless cycle of bloody wars, with rotating, brutal dictatorships: i.e., the wheel. One character who seeks to seize the seat of power, Daenerys Targaryen, claims that she does not intend to stop this wheel, but to break it. *Game of Thrones: Hardhome* (HBO television broadcast May 31, 2015); *see also* Ilya Somin, *Breaking the Wheel of Westeros: Why Heroes Aren't Enough*, LEARN LIBERTY (Aug. 25, 2017), https://www.learnliberty.org/blog/breaking-the-wheel-of-westeros-why-heroes-arent-enough (arguing Targaryen's "breaking the wheel" implies she seeks to bring about "systemic institutional reform").

not just to appreciate, but also to honor, defend, and strengthen, the rule of law and the institutions through which it is realized.

This Article is a preliminary effort to understand these crises and examine the potential reforms that might emerge in their wake. It is quite possible that such reforms could transform the practice of law for the immediate future and perhaps for decades to come; I believe that they should. To address these issues, this Article is organized as follows. Part II explores the impact of COVID-19 on the practice of law, now and what it might be in the future, with a particular emphasis on the potential benefits and risks of remote work.[38] Part III looks at the racial reckoning that emerged in the wake of the Black Lives Matter protests in the spring and summer of 2020 and examines the ways in which the profession has responded and should respond to this crisis.[39] Finally, I examine the potential fallout from, and best approaches to, the crisis of democracy that followed the presidential election of 2020.[40] The litigation that ensued in the aftermath of the election, and the riot that took place at the U.S. Capitol on January 6, 2021, are the manifestations of this crisis. Since members of the legal profession advanced those lawsuits, which, in turn, likely supplied some of the fuel for the Capitol riot, the legal profession should not just take stock of the extent to which the current system's professional norms and values may have played a role in checking this crisis, but should also recognize that that system's failings may have helped contribute to it.[41] Throughout this work, I review how these crises have shaped and will continue to shape society, and the legal profession, today and tomorrow. I will also examine the ways in which the profession could, in response to these crises, pursue meaningful reform in their wake—reform that could make the practice of law more diverse, inclusive, and protective of the rule of law.

Generally, crises can both expose deep problems in society and also galvanize support for meaningful change that addresses such problems. These three crises, happening simultaneously, have both shaped the legal profession, at least temporarily, and, in return, have been shaped by it in many ways. With respect to the legal profession, the causes of these crises are indeed connected, as are their potential cures. This Article is an attempt not only to identify the threads that tie these crises together, but also to examine ways to connect the responses to them and weave together such strands in a way that creates real and meaningful change.

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38. *See infra* Part II.
39. *See infra* Part III.
40. *See infra* Part IV.
41. *See infra* Part IV.B.

II. THE PANDEMIC

The global crisis caused by COVID-19, which appeared to first hit the United States in late February 2020,[42] has shaken the American legal profession as it has all industries and sectors of the U.S. economy.[43] That change has not led to what many expected to be a significant contraction of the size of the legal market, a reduction in demand for services, or a significant loss in profits.[44] Instead, the legal profession has proven itself quite adaptive and resilient, particularly in its adoption of technology to deliver legal services to comply with social distancing protocols.[45] In this Part, I will explore the effect of the global pandemic on the practice of law in the United States and how the legal profession's response has accelerated the profession's need to embrace, at least temporarily, a new mode of practicing law: i.e., one in which remote work is not just tolerated, but actively encouraged.[46] The broad potential that this new mode of practice offers to the legal profession, to make it more inclusive and to expand the opportunities for greater access to justice, are just two of the likely benefits of this new approach to the practice of law. Here, I will explore the threats posed, the ethical questions raised, and the opportunities made available by this new mode of technology-enabled practice.[47] I will also assess what it might mean for the broader introduction of technology into the practice of law in the future.[48]

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42. *See* Mike Baker, *When Did the Coronavirus Arrive in the U.S.? Here's a Review of the Evidence*, N.Y. TIMES (June 1, 2020), https://www.nytimes.com/2020/05/15/us/coronavirus-first-case-snohomish-antibodies.html (explaining that the COVID-19 virus probably first reached our shores in January 2020).

43. Mark A. Cohen, *Covid-19 Is Transforming the Legal Industry: Macro and Micro Evidence*, FORBES (Sept. 15, 2020, 6:18 AM), https://www.forbes.com/sites/markcohen1/2020/09/15/covid-19-is-transforming-the-legal-industry-macro-and-micro-evidence/?sh=43b3242a3269 (describing changes to a range of industry sectors in light of the pandemic, with a particular emphasis on trends in the legal profession).

44. *Cf.* Todd Babbitz et al., *COVID-19: Implications for Law Firms*, MCKINSEY & CO. (May 4, 2020), https://www.mckinsey.com/industries/financial-services/our-insights/covid-19-implications-for-law-firms (describing lessons from previous economic downturns and what they might portend for the effects of the pandemic on the legal sector).

45. Lyle Moran, *Will the COVID-19 Pandemic Fundamentally Remake the Legal Industry?*, A.B.A. J. (Aug. 1, 2020, 12:00 AM), https://www.abajournal.com/magazine/article/will-the-covid-19-pandemic-fundamentally-remake-the-legal-industry (describing the legal profession's efforts to utilize technology to adapt to public health protocols in light of the pandemic).

46. *See infra* Part II.A.

47. *See infra* Part II.B–C.

48. *See infra* Part II.D.

A. The Crisis and the Legal Profession's Response

In the years following the Financial Crisis of 2008, law firms scaled back hiring, delayed the start dates for some newly hired attorneys, and withdrew offers of employment altogether from others.[49] Law school admissions and enrollments plummeted as many questioned the value of a law degree in light of diminishing employment prospects for law school graduates.[50] In the early days of the COVID-19 pandemic, some feared similar forces would emerge: job opportunities would dry up, law offices would shutter, and interest in attending law school would wane.[51] But few of these fears have materialized as the economy has performed better than expected in the midst of the pandemic, and many law firms, particularly the larger ones, are faring better than originally anticipated.[52] While there was a dip in business in some practice areas, like new business startups and commercial real estate transactions,[53] at least some personnel have shifted, understandably, to restructuring—that is, law

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49. *See* Eli Wald, *Foreword: The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 2051, 2051-52 & n.5 (2010) (identifying employment practices of law firms in the wake of the Great Recession).

50. *See Law School Enrollment*, LST DATA DASHBOARD, https://data.lawschooltransparency.com/enrollment/demand-for-law-school (last visited Apr. 1, 2021) (showing a dip in law school applicants after the Financial Crisis of 2008).

51. *See, e.g.*, N.Y.C. BAR, REPORT ON IMPACT OF COVID-19 ON NYC AREA SOLO AND SMALL FIRMS BY THE SMALL LAW FIRMS COMMITTEE COVID-19 TASK FORCE SUBCOMMITTEE 3-4 (2020), https://s3.amazonaws.com/documents.nycbar.org/files/2020715-SmallLawFirmCOVID_FINAL_6.5.20.pdf (describing anticipated impacts of the pandemic on practice); *see also* Sara Lord, *Analysis: What the Covid-19 Downturn Means for Lawyer Careers*, BLOOMBERG L. (May 18, 2020, 4:27 AM), https://news.bloomberglaw.com/business-and-practice/analysis-what-the-covid-19-downturn-means-for-lawyer-careers (describing early impacts of the economic downturn in the midst of the pandemic).

52. *See, e.g.*, Dylan Jackson, *Good News, Associates. The COVID Recession Isn't 2008 All Over Again*, LAW.COM (Nov. 4, 2020, 4:02 PM), https://www.law.com/americanlawyer/2020/11/04/good-news-associates-the-covid-recession-isnt-2008-all-over-again (describing the less volatile legal market in the midst of the pandemic compared to that in the aftermath of the Great Recession); Zach Needles, *Law.com Litigation Trendspotter: COVID-19 and Its Aftermath Promise to Keep Employment Lawyers Busy*, LAW.COM (Jan. 14, 2021, 8:06 PM), https://www.law.com/2021/01/14/law-com-litigation-trendspotter-covid-19-and-its-aftermath-promise-to-keep-employment-lawyers-busy. *But see* Elizabeth Olson, *Pandemic Clobbers Job Starts for Law Graduates*, BLOOMBERG L. (July 15, 2020, 6:14 PM), https://news.bloomberglaw.com/us-law-week/covid-crisis-clobbers-lawyer-job-starts (noting some firms delayed start dates for new graduates and, in some instances, rescinded offers).

53. *See, e.g.*, Ryan Abbott, *COVID-19's Impact on Tech Startups*, LAW.COM (May 22, 2020, 5:07 PM), https://www.law.com/therecorder/2020/05/22/covid-19s-impact-on-tech-startups (noting that startup capital has been harder to obtain and new ventures still face legal challenges); Andrew McIntyre, *5 Ways Coronavirus Is Roiling the Real Estate Market*, LAW360 (Mar. 6, 2020, 6:23 PM), https://www.law360.com/articles/1250660/5-ways-coronavirus-is-roiling-the-real-estate-market (describing the impact of COVID-19 on real estate transactions).

firms have seen their bankruptcy practice groups expand.[54] In addition, the number of law school applications has increased considerably in the last few years, with a particular rise in the midst of the pandemic.[55]

Admittedly, many law firms changed their recruiting practices for new attorneys, shifting the timing of the recruitment calendar.[56] Prior to the pandemic, firms seeking to fill summer associate positions often interviewed candidates in late summer and early September, at the beginning of the academic calendar.[57] With the summer 2021 associate class, at least some firms have simply shifted their hiring to later in the academic year (if they have returned to considering candidates at all).[58] This afforded such firms an opportunity to determine their recruitment strategy in light of their clients' legal needs; it also allowed entry-level candidates to obtain grades from the fall 2020 semester, thus permitting firms to consider two semesters of grades as opposed to just the one reflected on students' 2019–2020 transcripts—a result of many schools opting for a pass/fail system of grading in light of the pandemic.[59]

At the same time, while many law firms have maintained close to a consistent level of business—indeed, some boast that business is as strong as ever[60]—many law firms, large and small, reviewed their staffing patterns, particularly their retention of non-legal staff, and compensation.[61] For many firms, this review has resulted in a reduction

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54. *See* Christine Simmons, *Some Firms Are Ahead in 2020*, LAW.COM (Aug. 10, 2020, 7:01 AM), https://www.law.com/americanlawyer/2020/08/10/recession-highs-how-some-firms-are-ahead-in-2020 (noting firms that have succeeded in the midst of the pandemic have robust or expanded bankruptcy practices). But this pivot to bankruptcy work actually preceded the pandemic, beginning with the economic slowdown that had already begun to occur in 2019. Meghan Tribe, *Big Law Builds Up Bankruptcy as Economic Slowdown Threatens*, BLOOMBERG L. (Oct. 22, 2019, 4:56 AM), https://news.bloomberglaw.com/us-law-week/big-law-builds-up-bankruptcy-as-economic-slowdown-threatens.

55. LAW SCH. ADMISSIONS COUNCIL, YTD ABA 2021 APPLICANT AND APPLICATION COUNTS (2021), https://report.lsac.org/VolumeSummaryOriginalFormat.aspx; *see also* Karen Sloan, *Law School Applicants Are Way Up. Is It an 'RBG Moment'?*, LAW.COM (Nov. 17, 2020, 1:39 PM), https://www.law.com/2020/11/17/law-school-applicants-are-way-up-is-it-an-rbg-moment (noting rise in law school applications after the death of Supreme Court Justice Ruth Bader Ginsburg).

56. Nicholas Alexiou, *Legal Recruiting in the Time of Covid-19*, ABOVE L. (Apr. 9, 2020, 11:48 AM), https://abovethelaw.com/2020/04/legal-recruiting-in-the-time-of-covid-19 (describing shifts in the law firm recruitment calendar for summer 2021 internship positions).

57. *See Prelaw — What Is the Timetable for Legal Recruitment?*, NALP, https://www.nalp.org/pre-law_timetable (last visited Apr. 1, 2021).

58. Alexiou, *supra* note 56.

59. *Id.* (describing the impact of pass/fail grading policies on law firm recruitment).

60. Sara Randazzo, *Big Law Firms Prosper Despite Covid-Impaired Economy*, WALL. ST. J. (Oct. 5, 2020, 5:30 AM), https://www.wsj.com/articles/big-law-firms-prosper-despite-covid-impaired-economy-11601890200 (noting that "many large law firms have excelled financially" in the midst of the pandemic).

61. ALM Staff, *Pay Cuts, Layoffs, and More: How Law Firms Are Managing the Pandemic*, LAW.COM (July 31, 2020, 5:00 AM), https://www.law.com/americanlawyer/2020/07/31/pay-cuts-

of such non-attorney staff through furloughs and layoffs.[62] In some respects, as law firms adopted new technologies and their lawyers became more adept at their use, this reduction in non-lawyer staff was likely inevitable, but the pandemic accelerated firms' self-review and the actions taken in light of them.[63]

The legal profession, like many white-collar industries, found that technology offered a way for staff at firms and their clients to stay connected.[64] Private firms, in-house counsel, government legal departments, and non-profit legal services providers continued practicing law even as the pandemic essentially closed the physical law offices where such attorneys had, until that point, typically practiced law.[65] While many employers in industries other than law had already begun the process of exploring ways to offer their employees more flexible schedules and enable more work-from-home opportunities prior to COVID-19, the legal profession had not been eager to embrace this trend.[66] The pandemic changed all of that.[67]

Businesses employing white-collar workers, like law firms, found that the transition to remote work was not as difficult as many had feared it might have been when the pandemic first hit.[68] Traditionally, lawyers have been leery of the technology that would facilitate remote work, and, more importantly, have not believed the practice of law was

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layoffs-and-more-how-law-firms-are-managing-the-pandemic (describing steps that a range of firms took in response to the economic downturn caused by the pandemic).

62. *Id.*

63. *See* Kate Beioley, *Coronavirus Forces Lawyers to Face Their Digital Future*, FIN. TIMES (Sept. 23, 2020), https://www.ft.com/content/4b5ad372-050a-4ab3-b2b9-4ac032cf8725 (describing ways in which law firms have incorporated technology in their practice in response to the pandemic); Zach Warren, *Restructured Roles Are Coming for Post-Pandemic Offices*, LAW.COM (Jan. 14, 2021), https://www.law.com/2021/01/14/restructured-roles-are-coming-for-post-pandemic-offices (describing the belief within firms that their lawyers have become more adept at use of technology, meaning there is less need for non-lawyer staff at many firms).

64. *See, e.g.*, CLIO, LEGAL TRENDS REPORT 23-24, 49-59 (2020), https://www.clio.com/wp-content/uploads/2020/08/2020-Legal-Trends-Report.pdf (showing that a large majority of legal providers surveyed are using technology like the "cloud" and meeting with clients virtually).

65. *Id.* at 4, 55-56.

66. *See, e.g.*, Tracey Welson-Rossman, *The Implications of Remote Working as the Workplace of the Future*, FORBES (Apr. 28, 2020, 2:53 PM), https://www.forbes.com/sites/traceywelsonrossman/2020/04/28/the-implications-of-remote-working-as-the-workplace-of-the-future (noting pre-pandemic trend toward more remote work in many industries); Danielle Braff, *Thanks to the COVID-19 Pandemic, Law Firms Are Starting to Embrace Virtual Offices—but Will It Last?*, A.B.A. J. (Feb. 1, 2021, 1:10 AM), https://www.abajournal.com/magazine/article/thanks-to-the-covid-19-pandemic-law-firms-are-starting-to-embrace-virtual-officesbut-will-it-last (describing pre-pandemic resistance to encouraging remote-work arrangements in practice).

67. Lord, *supra* note 51.

68. On the shift to remote work in many higher paying job titles, see GALLOWAY, *supra* note 1, at 17-23. On the pandemic's effect on the legal profession, see Moran, *supra* note 45.

conducive to the style of work such technology could enable.[69] Indeed, law firms have historically resisted the shift to remote work, claiming that the practice of law is typically a group effort, and lawyers need to be able to communicate easily and quickly in a face-to-face fashion, but also because it would be impossible to monitor the work of lawyers and non-legal staff if they were not together.[70] Moreover, the work product would suffer without constant communication between supervising lawyers and their more junior counterparts.[71] The onset of the pandemic and the requirement that law offices had to adopt socially distanced workflow protocols on the fly put these concerns to the test. So far, at least, many lawyers are finding that they can function effectively even while operating in a remote fashion.[72]

A profession that is used to not just internal collaboration among individuals who practice together, but also in-person interactions outside of the firm, like court appearances, arbitrations, client meetings, and negotiating sessions, suddenly found itself thrust into a situation that rendered such in-person opportunities mostly impossible.[73] The judiciary worked to keep the courthouse doors open for in-person, emergency court functions, like arraignments and the consideration of temporary restraining orders.[74] Still, courts limited such opportunities, and, even when they offered avenues for redress in an emergency, they carried

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69. *See* Leonard Bierman & Michael A. Hitt, *Globalization of Legal Practice in the Internet Age*, 14 IND. J. GLOB. LEGAL STUD. 29, 30-31 (2007).

70. *Id.* (identifying growing acceptance of remote work in the legal profession pre-pandemic, but also noting that only roughly four percent of practicing attorneys took advantage of such an option).

71. Charles Lundberg, *Quandaries and Quagmires: Legal Ethics, Risk Management in Pandemic*, MINN. LAW. (Mar. 30, 2020), https://minnlawyer.com/2020/03/30/quandaries-and-quagmires-legal-ethics-risk-management-in-pandemic (describing risks of remote work for lawyers); *see also* Moran, *supra* note 45 (describing the legal profession's shift to remote work).

72. *See, e.g.*, Roy Strom, *This Big Law Firm Has Permanent Plans for Remote Working*, BLOOMBERG L. (July 16, 2020, 4:56 AM), https://news.bloomberglaw.com/business-and-practice/this-big-law-firm-has-permanent-plans-for-remote-working (describing the benefits one firm has seen by adopting a "work-from-anywhere" model); Jeff John Roberts, *'Best Three Months of My Life': Overworked Lawyers Are Actually Loving Lockdown*, FORBES (May 30, 2020, 10:00 AM), https://fortune.com/2020/05/30/lawyers-coronavirus-lockdown-work-from-home-law-firms-covid-19 (describing benefits of remote work for lawyers).

73. *See, e.g.*, *As Courts Restore Operations, COVID-19 Creates a New Normal*, U.S. CTS. (Aug. 20, 2020), https://www.uscourts.gov/news/2020/08/20/courts-restore-operations-covid-19-creates-new-normal (describing the remote functions of federal courts); Rob Abruzzese, *Brooklyn Attorneys Struggle with Closed Courts and Offices During COVID-19 Pandemic*, BROOKLYN DAILY EAGLE (Mar. 27, 2020), https://brooklyneagle.com/articles/2020/03/27/brooklyn-attorneys-struggle-with-closed-courts-and-offices-during-covid-19-pandemic (describing some of the impacts of court closures on law practice in one community).

74. *See Archive of COVID-19 Content*, NYCOURTS.GOV, https://www.nycourts.gov/covid-archive.shtml (last visited Apr. 1, 2021).

them out under highly constraining protocols that did not resemble the voluble, chaotic, and overcrowded environment in which such proceedings typically occur.[75]

Out of necessity, then, courts and law offices had to adapt to operating, working, and collaborating virtually.[76] The pandemic forced many lawyers to change their whole approach to the practice of law. Lawyers who may have been used to working in a law office, having a legal assistant or secretary at their disposal and junior attorneys in offices just down the hall, had to adapt overnight to working from home and connecting with their colleagues, associates, and support staff over video conferencing portals.[77] Lawyers are generally considered "knowledge workers,"[78] and as many knowledge workers discovered in the midst of the pandemic, they did not need to be physically present in an office to get their work done.[79] In fact, with no commutes and fewer interruptions from coworkers throughout the day, some have even found they were more productive working from outside the office.[80] This was likely not wholly true for those who might have had family obligations to attend to at home—like managing their school-age children who were also adapting to remote schooling—but at least some individuals with such obligations found that certain aspects of their lives were easier to manage from home.[81]

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75. *See, e.g.*, *Coronavirus and the New York City Family Court: General Court Operating Procedures*, NYCOURTS.GOV, http://ww2.nycourts.gov/coronavirus-and-new-york-city-family-court-29611 (last visited Apr. 1, 2021) (providing an example of state court procedures); *As Courts Restore Operations, COVID-19 Creates a New Normal*, *supra* note 73 (providing an example of federal court procedures).

76. Martin Cogburn, *[Survey Results] How Law Firms Are Responding to COVID-19 – Remote Work*, MYCASE BLOG, https://www.mycase.com/blog/2020/04/survey-results-how-law-firms-are-responding-to-covid-19-remote-work (last visited Apr. 1, 2021) (surveying law firms across the country and finding that over eighty percent of surveyed firms were operating remotely as a result of the pandemic).

77. *How to Navigate Working from Home During Time of COVID-19*, YOURABA, May 2020, https://www.americanbar.org/news/abanews/publications/youraba/2020/youraba-may-2020/working-from-home-during-covid (describing law offices' "abrupt" shift to remote work).

78. PETER F. DRUCKER, THE UNSEEN REVOLUTION: HOW PENSION FUND SOCIALISM CAME TO AMERICA 143 (1976) (describing knowledge workers).

79. Roberts, *supra* note 72 (describing lawyers' favorable view of remote work in the midst of the pandemic).

80. David Lawson, *The Coronavirus Pandemic Could Mark the Dawn of the Virtual Office Revolution in the Legal Industry*, A.B.A. (Apr. 2, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/04/virtual-office-revolution.

81. *See* The Young Law. Ed. Bd., *The New Abnormal: How Firms and Lawyers Can Adapt to the Pandemic-Altered Present*, LAW.COM (Sept. 28, 2020, 3:36 PM), https://www.law.com/americanlawyer/2020/09/28/the-new-abnormal-how-firms-and-lawyers-can-adapt-to-the-pandemic-altered-present. As with the pandemic generally, it is probable that these impacts have fallen disproportionately on women attorneys. Kemberley Washington & Korrena Bailie, *Covid-19 Is Forcing Women from the Workplace in Record Numbers—And We Don't Know*

In addition, lawyers also found that, apart from office work, they could still carry out many of the tasks they would otherwise perform outside of the office in in-person settings, including court appearances. When courts across the country moved much of their functions online, through video conferencing portals like Zoom and Skype,[82] lawyers argued motions, engaged in scheduling appearances and arbitrations, and conducted mediations and negotiated deals and settlements all from the comfort of their homes.[83] The United States Supreme Court, not generally recognized as an early adopter of contemporary technologies, even held oral arguments remotely.[84] In their efforts to respond to the crisis by carrying out many of their functions remotely, lawyers found that much of what they had assumed required them to be in person worked just fine over video links.[85] As a result, lawyers have spent less time traveling to and from the settings where these in-person functions usually occurred.[86] Lawyers could therefore devote more time to their work, eliminating otherwise unnecessary time and effort.[87] This shift, for paying clients at least, could translate into cost savings.[88] Where a lawyer might travel across the country to conduct a deposition or convene with a client for what might amount to a brief, in-person meeting, now, can be carried out without travelling, while expending less energy, and while charging their clients for less time.[89]

It has been hard for lawyers to function in any other way where social distancing protocols require limits on such in-person activities, or lawyers have legitimate concerns about the safety of different types of travel. Out of necessity, the legal profession had few options other than

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When They'll Be Back, FORBES (Oct. 19, 2020, 9:49 AM), https://www.forbes.com/sites/advisor/2020/10/19/women-are-leaving-the-workplace-in-record-numbers-and-we-dont-know-when-theyll-be-back (describing impact of the pandemic on employment opportunities for women).

82. *See As Courts Restore Operations, COVID-19 Creates a New Normal*, *supra* note 73.

83. *See* The Young Law. Ed. Bd., *supra* note 81. For analysis of the potential impact of online courts in the future and the potential access-to-justice implications of remote adjudication, see generally RICHARD SUSSKIND, ONLINE COURTS AND THE FUTURE OF JUSTICE (2019).

84. Richard Wolf, *Supreme Court Makes Historic Change to Hear Oral Arguments over the Phone and Stream Them Live*, USA TODAY (Apr. 30, 2020, 4:00 AM), https://www.usatoday.com/story/news/politics/2020/04/30/supreme-court-justices-lawyers-prepare-live-telephone-hearings/3019003001.

85. *See* Lawson, *supra* note 80.

86. *Id.*

87. Lawson, *supra* note 80; Braff, *supra* note 66 (discussing potential productivity in the remote, post-pandemic law office).

88. Braff, *supra* note 66 (describing potential costs savings because of pandemic protocols).

89. *Id.* Of course, with the advent of technology to permit greater remote collaboration before the pandemic, lawyers could have taken advantage of it prior to the introduction of social distancing protocols; the pandemic has perhaps given lawyers the excuse to explore its use and its potential.

to proceed using remote technologies.[90] Because of that, it is difficult to question the legal ethics of this approach, at least as far as the change took place in the midst of the pandemic.[91] But that does not mean we should not assess the virtue of remote work for lawyers, now, and once the immediate threat of the pandemic passes. This is especially true where, as at least some predict, the future of work generally, and for knowledge workers in particular, is likely to embrace more remote, flexible approaches.[92] In some ways, the question of whether lawyers *should* embrace such remote options moving forward likely rests on whether they *can* under existing ethical constraints. At the same time, if the profession should open itself up to more flexible work arrangements (and at least this author believes there is an imperative to do so for various reasons), and we conclude that the rules of the profession preclude lawyers from doing so, then the profession and its rule-making bodies should consider changes to those rules moving forward to allow such greater flexibility.

Many now predict that we will never go back[93] to the more traditional way of conducting business—that is, with employees working all or most of the time in a physical office with their colleagues on a regular schedule.[94] The legal profession has traditionally resisted efforts to make the work of lawyers more flexible, and there is likely to be some lingering opposition to maintaining remote work options once the pandemic subsides and employees can get back into the office.[95] The pandemic has perhaps made it more likely that this resistance will weaken because many of the traditional arguments for opposing such

90. *See* Lawson, *supra* note 80.

91. The Model Rules of Professional Conduct ("MRPC" or "the Model Rules") recognize that lawyers may take such action that is "reasonably necessary" in an emergency. *See* MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 3 (AM. BAR ASS'N 2020). Although that provision is reserved for the rendering of legal advice in such emergencies, one could extrapolate that the pandemic has presented an emergency situation in which lawyers needed to heed the safety protocols of the pandemic, while also striving to provide competent services.

92. ZAKARIA, *supra* note 1, at 97-121 (describing the likelihood that remote work will continue, even after the threat from the pandemic subsides).

93. Juliette Kayyem, *Never Go Back to the Office*, ATLANTIC (May 19, 2020), https://www.theatlantic.com/ideas/archive/2020/05/never-go-back-office/611830; Claire Cain Miller, *The Office Will Never Be the Same*, N.Y. TIMES (Aug. 20, 2020), https://www.nytimes.com/2020/08/20/style/office-culture.html.

94. *See, e.g.*, Dror Poleg, *The Future of Offices When Workers Have a Choice*, N.Y. TIMES (Jan. 4, 2021), https://www.nytimes.com/2021/01/04/upshot/work-office-from-home.html.

95. *See, e.g.*, Zach Abramowitz, *'Be Careful What You Wish For': Why Remote Work Might Not Be a Long-Term Solution*, LAW.COM (June 28, 2020, 3:58 PM), https://www.law.com/americanlawyer/2020/06/28/be-careful-what-you-wish-for-why-remote-work-might-not-be-a-long-term-solution (describing tensions in and potential objections to remote legal work after the conclusion of the pandemic).

flexible arrangements have withered in the face of the reality brought on by the pandemic. Legal services providers mostly found that remote work was not only possible, but that at least some of their lawyers thrived in such arrangements.[96] Although some providers expressed fear that legal malpractice claims would rise in the wake of the pandemic,[97] there is little to show that the work product during this period diminished in quality, or that lawyers faced increased charges of incompetence for reasons related to remote work or other aspects of the pandemic's restrictions on practice.[98]

What follows is a description of some of the concerns of remote work as well as an analysis of the current ethical constraints on such work.[99] Following that, I explore the value, to both the practice of law and to society as a whole, of moving the profession to a more flexible approach toward remote work for lawyers.[100] If it is ethical to do so, it is also likely inevitable as a new economic imperative, and market forces, like the competition for talent and clients' desires for more efficient practices, will likely drive the profession in that direction.[101]

B. The Challenges of the Post-Pandemic Law Offices: The Ethics and Risks of Remote Work

Once the immediate public health threat of the pandemic passes, the question will most certainly arise: Can and should the profession return to the "in-person-first" approach common across the profession? Any discussion of the settings in which lawyers operate in the real world

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96. *See, e.g.*, LOEB LEADERSHIP, THE LEGAL INDUSTRY'S HANDLING OF THE DISRUPTION CAUSED BY COVID-19: THE FINDINGS REPORT 2 (2020), https://static1.squarespace.com/static/5c26b8695b409b7ffc6ca248/t/5ed7fbe8b7a089356dfd20ff/1591213033267/Legal+Industry+Survey+-+May+2020.pdf (surveying practicing lawyers regarding their experiences with remote work in the pandemic and finding that two-thirds of those surveyed expressed a desire to be able to work remotely at least part time once the threat of the pandemic subsides).

97. Dan Packel, *Legal Malpractice Payouts Climb, and with COVID-19, No Crest in Sight*, LAW.COM (May 27, 2020, 6:00 AM), https://www.law.com/americanlawyer/2020/05/26/legal-malpractice-payouts-climb-and-with-covid-19-no-crest-in-sight; Cara Bayles, *Expect More Malpractice Claims After COVID-Fueled Slump*, LAW360 (Apr. 10, 2020, 9:52 PM), https://www.law360.com/articles/1262545/expect-more-malpractice-claims-after-covid-fueled-slump.

98. Zack Needles, '*Terror of an Invisible Virus': COVID-19 Brought with It a Whole New Set of Legal Malpractice Risks*, LAW.COM (Dec. 16, 2020, 5:18 PM), https://www.law.com/2020/12/16/covid-19-brought-with-it-a-whole-new-set-of-legal-malpractice-risks (describing lawyers' fear of the risk of malpractice due to the restrictions on practice caused by the pandemic).

99. *See infra* Part II.B.

100. *See infra* Part II.C.

101. *See infra* Part II.C.

should recognize that at least a portion of the profession is made up of solo practitioners, and at least some of those practitioners operate out of law offices that are in, connected to, or located fairly close to their homes.[102] And some law offices continue to function in locations not subject to lockdown orders in the midst of the pandemic.[103] Nevertheless, although there is little hard data about the ways in which law offices have operated during the pandemic, we know that many court systems curtailed their in-person proceedings, governments limited their in-person functions, and many law firms and non-profit organizations have shifted to remote work.[104] What is more, for the reasons described in Part II.C, even after the pandemic's most immediate threats from in-person activities fade, it is likely that forces will still create pressure for the legal profession to accept more remote-work arrangements.[105] While I argue that legal services providers should do so, I also explore the ethical considerations such a shift might raise.[106]

1. Confidentiality, Competence, and Supervision in Remote Work Settings

With the availability of remote work options, several questions remain as to whether such approaches enable lawyers to function in ways that are consistent with their ethical obligations. The first of these concerns is whether remote work ensures the confidentiality of attorney communications and work product: that is, can lawyers provide sufficient assurances that the new tools they are using and the methods of working they have instituted—including video conferencing, Slack channels,[107] and remote access to law firm databases or repositories of records—provide sufficient security from unauthorized access to

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102. Carolyn Elefant, *Is Going Solo the Best Choice for Parents Who Practice?*, ABOVE THE L. (Mar. 17, 2014, 12:59 PM), https://abovethelaw.com/2014/03/is-going-solo-the-best-choice-for-parents-who-practice (discussing the pros and cons of working from home as a solo practitioner).

103. *See* Lyle Moran, *Law Firms Are Considered Essential Businesses in Some States Amid the Coronavirus*, A.B.A. J. (Mar. 26, 2020, 10:53 AM), https://www.abajournal.com/web/article/lawyers-considered-essential-workers-in-some-states-amid-coronavirus (describing instances of law firms continuing to work in their physical offices during the pandemic).

104. *See, e.g.*, *COVID-19 Information & Resources for Clients*, LEGAL AID SOC'Y, https://legalaidnyc.org/get-help/covid-19/covid-19-information-for-clients (Mar. 9, 2021) (describing remote options for clients to access non-profit services).

105. *See infra* Part II.C.

106. *See infra* Part II.B.1–2.

107. Slack is a "channel-based messaging platform" widely used throughout American businesses—big and small. *What Is Slack?*, SLACK HELP CTR., https://slack.com/help/articles/115004071768-What-is-Slack (last visited Apr. 1, 2021).

confidential information?[108] Here, there are at least two ethical provisions that are directly related to remote practice and the technologies that enable it.

First and foremost, lawyers have an ethical obligation to act competently in the preservation of client confidences.[109] This obligation is elaborated on in the commentary to Model Rules of Professional Conduct ("MRPC" or "the Model Rules") 1.6, which provides that it is not a violation of the Rule if there has been an unauthorized disclosure of confidential information where the lawyer "made reasonable efforts to prevent the access or disclosure."[110] The factors that determine what is required of the lawyer in a particular situation include:

> [T]he sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).[111]

The use of technology for remote work opens up the possibility that such information is more easily breached than when it is shared in the privileged setting of a law office. What is more, when lawyers in remote settings engage in otherwise privileged conversations in settings where third parties could overhear such communications—whether it is roommates, family members, or even the next-door neighbor—this heightens the risk that such acts will result in a waiver of the attorney-client privilege.[112]

Similarly, a second concern, one that is directly related to the use of technology in the practice of law, is that lawyers must also "maintain the requisite knowledge and skill"[113] to provide competent services to their clients, which includes, in part, that they "should keep abreast of changes in the law and its practice, including the benefits and risks

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108. *See* MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2020) (obligating lawyers to keep select client information confidential).

109. *Id.* r. 1.6 cmt. 18 (providing that "[p]aragraph (c) [of Rule 1.6] requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision").

110. *Id.*

111. *Id.*

112. *See, e.g.*, *In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) (noting that even if the disclosure of confidential information to a third party is inadvertent, courts "will grant no greater protection to those who assert the privilege than their own precautions warrant").

113. MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2020).

associated with relevant technology."[114] This requirement means that lawyers must develop an awareness of the ways in which new technologies might raise new threats to confidentiality.[115] It also requires that lawyers are able to use such technological tools in a competent fashion.[116] With regard to the confidentiality piece, the introduction of the new remote-work technologies brought with it new security threats, as any time documents are held on a server open to the internet, hackers can infiltrate that server and access those documents.[117] While we still do not know the full scope of recent, high-profile security breaches—such as the SolarWinds breach, for example—it is likely that hackers were able to gain access to a wide range of otherwise confidential information.[118] There are also other, similar incidents involving infiltration of law firm systems, some of which we might know of, many of which we might not.[119] On the question of competence and the use of technology, there was at least one highly publicized incident in the midst of the pandemic in which lawyers found themselves unable to file court documents in a timely fashion because they were unfamiliar with how to use the technology that facilitated the remote preparation of work and drafting of those filings.[120] And the entire profession seems to have empathized with the lawyer who had to announce during a court conference, carried out over Zoom, that he was "not a cat" because a filter made his video image appear as if he were.[121] The deployment of such new technologies—and the risks they pose, not just for embarrassment, but also for the possibility that lawyers will not be able

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114. *Id.*

115. *See, e.g.*, Jamie J. Baker, *Beyond the Information Age: The Duty of Technology Competence in the Algorithmic Society*, 69 S.C. L. REV. 557, 558-67 (2018) (describing the duty of technological competence).

116. *See, e.g.*, Cal. State Bar Standing Comm. on Pro. Resp. and Conduct, Formal Op. 2010-179 (2010) (noting the importance of understanding threats to confidentiality posed by new technologies).

117. Liz Allison, Note, *You Can't Hack This: The Regulatory Future of Cybersecurity in Automobiles*, 21 J. TECH. L. & POL'Y 15, 18 (2016) (noting that "anything connected to the Internet is a point of entry" for hackers).

118. David E. Sanger et al., *As Understanding of Russian Hacking Grows, So Does Alarm*, N.Y. TIMES (Jan. 5, 2021), https://www.nytimes.com/2021/01/02/us/politics/russian-hacking-government.html (describing the scope of the SolarWinds data breach).

119. *See, e.g.*, Debra Cassens Weiss, *BigLaw Firm and Bar Groups Report Data Breaches*, A.B.A. J. (Nov. 13, 2020, 4:40 PM), https://www.abajournal.com/news/article/biglaw-firm-and-bar-groups-report-data-breaches (describing recent data breaches at law firms).

120. *See* Unopposed Plaintiffs' Motion to File Responsive Brief Late at 1-2, Gohmert v. Pence, No. 6:20-CV-660, 2021 WL 17141 (E.D. Tex. Jan. 1, 2021), *aff'd*, 832 F. App'x 349 (5th Cir. 2021) (requesting an extension to file a pleading late because the lawyers had encountered difficulties with Google Docs and Microsoft Word software).

121. Daniel Victor, *'I'm Not a Cat,' Says Lawyer Having Zoom Difficulties*, N.Y. TIMES (Feb. 9, 2021), https://www.nytimes.com/2021/02/09/style/cat-lawyer-zoom.html.

to perform their duties competently and protect their clients' confidences—suggests that, at a minimum, firms and law schools will need to do more to ensure lawyers and law graduates have basic technological competence.

What this second concern points to is yet a third concern, which is often raised as an objection to remote-work arrangements. Supervisors have a responsibility to ensure that a firm's subordinate lawyers and non-lawyers deliver services to clients in a competent fashion and exercise appropriate professional judgment.[122] Remote work means such supervision might be harder to carry out if supervising lawyers do not maintain contact of the same quality or frequency with these staff members as in more traditional, in-person settings.[123] If social distancing protocols and remote work cause supervision to suffer so much that the level of oversight provided does not satisfy the supervisory lawyer's own standard of care, then the supervisor is not upholding their ethical obligations to ensure that the individuals they supervise are acting in compliance with their ethical obligations more generally.[124] I will return to these issues in Part II.D, as I attempt to chart a course forward to enable remote work options even as the need for social distancing protocols subsides.[125]

2. Creativity and Remote Work

Another concern, which is, in part, connected to the fears that lawyer competence is compromised in remote-work settings, is that such settings are not conducive to lawyer creativity. While anyone who has practiced law knows that at least some of the lawyer's daily practice is routine and does not require much creativity, the ability to discover and raise novel claims and articulate innovative arguments is what makes the

122. *See* MODEL RULES OF PRO. CONDUCT r. 5.1 (AM. BAR ASS'N 2020) (setting standard for supervisory obligations); *see, e.g.*, Disciplinary Couns. v. Maley, 893 N.E.2d 180, 184 (Ohio 2008) (outlining the duty of supervision and collecting cases holding lawyers accountable for the failure to uphold the duty); *see also* Jones v. Barnes, 463 U.S. 745, 751-54 (1983) (noting the critical role of professional judgment in practice of law).

123. In many ways, the supervisory concerns related to overseeing remote work are similar to those raised by the relatively recent trend of offshore outsourcing of legal work, or even the increase in the use of lawyers outside of a particular firm engaged in "contract" work. For a discussion of the ethical issues in the use of offshore services, see generally Martha A. Mazzone, *Ethics Rules Require Close Supervision of Offshore Legal Process Outsourcing*, 55 BOS. BAR J. 25 (2011). On supervision of contract attorneys, see ABA Comm. on Ethics and Pro. Resp., Formal Op. 88-356 (1988).

124. MODEL RULES OF PRO. CONDUCT r. 5.1 (AM. BAR. ASS'N 2020).

125. *See infra* Part II.D.

lawyer most valuable to their clients and perhaps society itself.[126] Thus, good, effective, and interesting legal work often requires a degree of creativity, meaning that the lawyer must seek inspiration, collaborate with colleagues, and test out ideas with those who can help them work through thorny issues and complex challenges.[127] While popular culture sometimes portrays the "lone genius" toiling away in obscurity by themselves until a bolt of inspiration comes out of the blue and they have a "eureka!" moment, in reality, the study of creative endeavors often shows that they are group efforts, mostly accomplished in teams or across networks, with important breakthroughs occurring in the clash of divergent thinking and the cacophony of diverse voices and perspectives.[128]

Creative and productive brainstorming sessions[129] and serendipitous meetings are more likely to happen in in-person settings, where people

126. Over the last seventy years, lawyers have been at the forefront of some of the most creative and impactful law reform efforts in our nation's history. *See, e.g.*, RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 543-616 (2d prtg. 1980) (1976) (describing litigation that culminated in the landmark decision that held racial segregation in education unconstitutional and explaining the role of lawyers in that effort). *See generally* WILLIAM N. ESKRIDGE, JR. & CHRISTOPHER R. RIANO, MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS (2020) (describing the campaign for marriage equality); NATHANIEL FRANK, AWAKENING: HOW GAYS AND LESBIANS BROUGHT MARRIAGE EQUALITY TO AMERICA (2017) (describing the campaign for marriage equality). On creative lawyering for social change, see generally, Raymond H. Brescia, *Creative Lawyering for Social Change*, 35 GA. ST. U. L. REV. 529 (2019) (providing examples of creative lawyering in the United States since the U.S. Civil War).

127. For research identifying creativity as a critical lawyering skill, see MARJORIE M. SHULTZ & SHELDON ZEDECK, IDENTIFICATION, DEVELOPMENT, AND VALIDATION OF PREDICTORS FOR SUCCESSFUL LAWYERING 24-26 (2008); *see also* Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97, 102-03 (2001) (describing the importance of creative problem solving in legal advocacy). On creative practices generally, see BARRY NALEBUFF & IAN AYRES, WHY NOT?: HOW TO USE EVERYDAY INGENUITY TO SOLVE PROBLEMS BIG AND SMALL 135-44 (2003); KURSAT OZENC & MARGARET HAGAN, RITUALS FOR WORK: 50 WAYS TO CREATE ENGAGEMENT, SHARED PURPOSE AND A CULTURE THAT CAN ADAPT TO CHANGE 29-71 (2019).

128. *See, e.g.*, MATTHEW SYED, REBEL IDEAS: THE POWER OF DIVERSE THINKING 23-25 (2019) (describing the power of diversity in thought, demographics, and experiences for the generation of creative ideas); WALTER ISAACSON, THE INNOVATORS: HOW A GROUP OF HACKERS, GENIUSES, AND GEEKS CREATED THE DIGITAL REVOLUTION 85 (2014) (explaining that "the main lesson to draw from the birth of computers is that innovation is usually a group effort, involving collaboration between visionaries and engineers, and that creativity comes from drawing on many sources. Only in storybooks do inventions come like a thunderbolt, or a lightbulb popping out of the head of a lone individual in a basement or garret or garage."); *see also* STEVEN JOHNSON, WHERE GOOD IDEAS COME FROM: THE NATURAL HISTORY OF INNOVATION 51 (2010) (noting the role that collaboration and networks play in advancing innovation).

129. For strategies for effective brainstorming, see, for example, Jennifer Gerarda Brown, *Creativity and Problem-Solving*, 87 MARQ. L. REV. 697, 698-99 (2004).

are physically close to one another.[130] For these reasons, the critique of the remote mode of work is that without such opportunities for these sorts of in-person gatherings—whether scheduled or fortuitous—the creative energy that often goes into some of the most important work a lawyer does is threatened. And when that work is threatened, the lawyer's effectiveness, and perhaps even their competence, is also under threat.[131]

At the same time, creativity can also flourish in the spaces in between, when people are on their own and not distracted by interruptions: that is, when they can engage in "deep work."[132] It is in these moments, when one has had a chance to think about a problem, and perhaps is focusing on some other task or simply mulling over a concept on their own, that they might make a breakthrough on a tough issue that requires a creative solution.[133] While brainstorming sessions serve an important function—especially ones that are conducted with a group of people who trust each other, have relevant expertise, and are willing to share their ideas[134]—such group efforts often work best when they occur periodically, and are punctuated by times when the participants take the information they glean from the group session and work independently to consider the issues in the privacy of their own office, during a walk in the woods,[135] while doing household chores, or while on a run. Creativity occurs in both places: in-person groups and private, solitary settings.[136]

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130. *See, e.g.*, JON GERTNER, THE IDEA FACTORY: BELL LABS AND THE GREAT AGE OF AMERICAN INNOVATION 151 (2012) (describing the physical structure of IBM's Bell Labs as designed to promote collaborative work and chance encounters in the facility's long hallways); *see also* ED CATMULL & AMY WALLACE, CREATIVITY, INC.: OVERCOMING THE UNSEEN FORCES THAT STAND IN THE WAY OF TRUE INSPIRATION 303 (2014) (describing the purposeful construction of headquarters for Pixar, overseen by Steve Jobs, to result in "cross-traffic—people encountered each other all day long, inadvertently, which meant a better flow of communication and increased the possibility of chance encounters").

131. *See, e.g.*, SHULTZ & ZEDECK, *supra* note 127, at 24-26 (including creativity as a core competency for the legal profession).

132. For a background on the concept of "deep work," see generally CAL NEWPORT, DEEP WORK: RULES FOR FOCUSED SUCCESS IN A DISTRACTED WORLD (2016).

133. Shelly L. Gable et al., *When the Muses Strike: Creative Ideas of Physicists and Writers Routinely Occur During Mind Wandering*, 30 ASS'N PSYCH. SCI. 396, 401 (2019) (noting breakthrough ideas often emerge when someone is occupied with other tasks).

134. On the characteristics of highly effective teams, see CHARLES DUHIGG, SMARTER FASTER BETTER: THE TRANSFORMATIVE POWER OF REAL PRODUCTIVITY 43-51 (2016).

135. For research showing the creative benefits of walking in nature, see generally, for example, Ruth Ann Atchley et al., *Creativity in the Wild: Improving Creative Reasoning Through Immersion in Natural Settings*, PLOS ONE, Dec. 12, 2012.

136. Eric F. Rietzschel, *What* Are *We Talking About, When We Talk About Creativity? Group Creativity as a Multifaceted, Multistage Phenomenon*, *in* CREATIVITY IN GROUPS 1, 5-18 (Elizabeth

While creativity often requires both group activities and private processes, at least some of the group settings and their benefits can be replicated over video conference. One of the things that the business world and academia are coming to appreciate is that in-person business and academic conferences are not necessary for collaboration: indeed, some are wondering whether many of the benefits of such settings can be replicated in an online format.[137] And any marginal benefits that might exceed those that can be achieved through online gatherings might not outweigh the trouble and expense of travel and the fact that individuals with disabilities, or those with family obligations, find such travel difficult—at times prohibitively so.[138]

Moreover, some of the most important creative work a lawyer does is communicating in writing.[139] And anyone who has tried to compose something through writing-by-committee knows how difficult that can be. Perhaps one can brainstorm around a few sentences on the margins and change the language in places, but in order to really compose—to get a good piece of writing done, even a first draft of something that others can comment on and revise—the writer's work in this mode is mostly solitary.[140]

A. Mannix et al. eds., 2009) (describing different phases of creative activity, including group and individualistic methods).

137. Elizabeth Grace Saunders, *4 Tips for Effective Virtual Collaboration*, HARV. BUS. REV. (Oct. 13, 2020), https://hbr.org/2020/10/4-tips-for-effective-virtual-collaboration (describing methods for creative collaboration in remote settings).

138. *See, e.g.*, Carol Glazer, Opinion, *After the Pandemic: New Work at Home Rules Could Help People with Disabilities Land Jobs*, USA TODAY (Apr. 20, 2020, 12:08 PM), https://www.usatoday.com/story/opinion/2020/04/19/after-pandemic-retain-telework-option-people-disabilities-column/5145468002 (describing the fact that remote work offers individuals with disabilities more employment opportunities); GALLOWAY, *supra* note 1, at 20-21 (describing how in-person work arrangements are harder on people with family obligations, most notably women). One popular gathering, the annual conference of the American Association of Law Schools, was held virtually in January of 2021, and the convening had "near-record" attendance, due to, at least in part, the remote format. *See, e.g.*, Karen Sloan, *Ahead of the Curve: The Good, the Bad, the Surreal of AALS 2021*, LAW.COM (Jan. 12, 2021, 12:06 PM), https://www.law.com/2021/01/12/ahead-of-the-curve-the-good-the-bad-the-surreal-of-aals-2021.

139. On the importance of the lawyer's ability to communicate in writing, see, for example, SHULTZ & ZEDECK, *supra* note 127, at 24.

140. Writing is, itself, a solitary act. Michelle Monet, *Writing Is a Solitary Endeavor*, MEDIUM (July 27, 2019), https://medium.com/writers-guild/writing-is-a-solitary-endeavor-2ff50e10b9dc (describing writing as a solitary affair, but also recognizing the value of a community of writers who can provide mutual support). In describing the work of the law professor, for example, Paul Hayden explained that "teaching and writing is not, as a rule, [a] team sport." Paul T. Hayden, *Professorial Conflicts of Interest and "Good Practice" in Legal Education*, 50 J. LEGAL EDUC. 358, 367 (2000). Having worked for nearly fifteen years in different law offices prior to joining academia full-time, I would agree that this description applies to any lawyer's composition of written artifacts and work product.

There are certainly creative benefits to in-person settings, but there are also costs. Distractions can undermine creativity[141] and commute times can mean that workers have less time and energy to channel into creative pursuits.[142] This massive experiment that remote work presents is for lawyers and other knowledge workers to strive to get the best of both worlds, having opportunities for in-person interactions but also leaving open the possibility for greater incubation of ideas in less distracting environments that are more conducive to creative, individual work.[143] Of course, this assumes that the professional has a distraction-free environment where they can work, something that is more challenging to obtain for some, as well as adequate technological capacity to carry out such remote work.[144]

When it comes to creativity in the practice of law, then, the pandemic, and the remote-work protocols imposed to fight it, present both risks and opportunities. While lawyers traditionally appreciate the extent to which they can engage in a variety of in-person brainstorming sessions, remote work, by definition, has meant that lawyers have had more time away from the office, where creative ideas can germinate and flower.[145] Probably the best approach when it comes to fostering creative practice moving forward is to have a blend of in-person and remote

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141. *See generally* NEWPORT, *supra* note 132 (explaining the value of distraction-free work).

142. Susan Peppercorn, *How to Stay Creative When Life Feels Monotonous*, HARV. BUS. REV. (Nov. 2, 2020), https://hbr.org/2020/11/how-to-stay-creative-when-life-feels-monotonous (describing opportunities for creativity in the midst of the pandemic).

143. As the study of innovation has become more popular, more and more research into creative endeavors reveals that work environments that provide their employees with a greater range of freedom than more strictly controlled environments are able to produce some of the most innovative products and ideas. *See, e.g.*, PATTY MCCORD, POWERFUL: BUILDING A CULTURE OF FREEDOM AND RESPONSIBILITY 11 (2017) (describing the approach at entertainment company Netflix as "finding the best creative talent with the skills to execute, and then giving those creators the freedom to realize their vision"). It has also been argued that this type of freedom is critical at the societal level. *See* MATT RIDLEY, HOW INNOVATION WORKS: AND WHY IT FLOURISHES IN FREEDOM 359-60 (2020) (arguing that "[i]nnovative societies are free societies, where people are free to express their wishes and seek the satisfaction of those wishes, and where creative minds are free to experiment to find ways to supply those requests—so long as they do not harm others"); MICHELE GELFAND, RULE MAKERS, RULE BREAKERS: HOW TIGHT AND LOOSE CULTURES WIRE OUR WORLD 46 (2018) (arguing that "creativity requires out-of-the-box thinking and acceptance of ideas that might violate preestablished norms, which gives loose cultures a clear innovation advantage").

144. Suzanne M. Edwards & Larry Snyder, *Yes, Balancing Work and Parenting Is Impossible. Here's the Data.*, WASH. POST (July 10, 2020, 6:00 AM), https://www.washingtonpost.com/outlook/interruptions-parenting-pandemic-work-home/2020/07/09/599032e6-b4ca-11ea-aca5-ebb63d27e1ff_story.html (noting the unequal access to distraction-free environments when working remotely).

145. Darren Menabney, *In 2021 We Need to Focus on Remote Work Creativity*, FORBES (Dec. 28, 2020, 7:20 AM), https://www.forbes.com/sites/darrenmenabney/2021/12/28/in-2021-we-need-to-focus-on-remote-work-creativity.

work, where lawyers and non-legal staff can bring their expertise and insights to group discussions, but can also retreat to places of seclusion where their ideas can take hold, or can be brought to life in briefs, deal sheets, settlements, and other written artifacts. Lawyers and law offices will have to find the equilibrium that is right for their teams, and when recruiting and retaining staff, they will have to explore what works best for which individuals and what teams the office might need to assemble. They will assess who is most comfortable in blended settings, with a mix of in-person and remote work, and who prefers a higher degree of one rather than the other, and then make staffing decisions accordingly. They can seek out quality, in-person time over its quantity, by dedicating what time is spent in the office and in in-person meetings to securing the most important benefits of gathering, like developing trust, brainstorming as a group, and building relationships.

One of the most likely outcomes when it comes to how the profession practices in the post-pandemic world is that new lawyers and those who are seeking new employment opportunities will likely have a range of work-setting options from which to choose, and they will also have some opportunity to experiment with what setting works best for them. Providers will also have to market the work setting or approaches they offer to prospective employees. Based on what options are available at a particular office, they could serve as a recruitment tool for potential hires or repel some talented prospects who prefer a different range of options than that which a particular entity might offer.

More than just offering the opportunity for law offices to create the settings that are most conducive to creativity and effectiveness in lawyering, though, one of the more important benefits flexible work options might offer, which will also affect recruitment, retention, creativity, and diversity, is that flexible work settings are likely to open up opportunities for lawyers who might have found it harder to excel, or even practice, within the profession altogether, an issue I take up next. As the following discussion shows, the technology-enabled, flexible workplace offers the profession a chance to be more inclusive and diverse and holds out the prospect of increasing access to justice for more marginalized communities.[146] Since achieving greater diversity in the workplace and increasing access to justice are two core imperatives for the profession,[147] it is crucial that we explore the affordances of technology to help the profession achieve these critical goals.

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146. *See infra* Part II.C.

147. Michelle J. Anderson, *Legal Education Reform, Diversity, and Access to Justice*, 61 RUTGERS L. REV. 1011, 1015-18 (2009).

C. The Opportunity and Imperative of the Post-Pandemic Law Office: Flexibility, Inclusion, and Access to Justice

The American Bar Association ("ABA") recently expressed a renewed commitment to both diversity and inclusion,[148] and has made improving access to justice a core responsibility of the practicing bar.[149] While I explore the diversity and inclusion imperative in greater depth in Part III, to the extent that technology-enabled, flexible work arrangements can help the profession meet these diversity and inclusion and access-to-justice imperatives, we should fully examine the ways in which technology in general, and remote work in particular, can help the profession realize these twin imperatives.[150] This section explores these questions.[151]

1. Greater Inclusion

The legal profession has long known that it has a significant diversity problem, particularly around race and gender, not to mention class, sexual orientation, and sexual identity.[152] Apart from outright discrimination, the structure of the profession and how it operates tends to perpetuate entrenched privilege.[153] The most prestigious law firms

148. In 2016, the American Bar Association ("ABA") passed Resolution 113 which "urges all providers of legal services, including law firms and corporations, to expand and create opportunities at all levels of responsibility for diverse attorneys." AM. BAR ASS'N, DIVERSITY & INCLUSION 360 COMM'N, REPORT TO THE HOUSE OF DELEGATES RESOLUTION 113, at 1 (2016). It also "urges clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys." *Id.*

149. *ABA Mission and Goals*, A.B.A., https://www.americanbar.org/about_the_aba/aba-mission-goals (last visited Apr. 1, 2021) (describing ABA mission, including the goals to "[e]liminate [b]ias and [e]nhance [d]iversity" and "[a]dvance the [r]ule of [l]aw").

150. *See infra* Part III.B.

151. *See infra* Part II.C.1–2.

152. *See, e.g.*, Allison E. Lalfey & Allison Ng, *Diversity and Inclusion in the Law: Challenges and Initiatives*, A.B.A. (May 2, 2018), https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiatives; *The Business of Inclusion: Raising the Bar on LGBT Diversity*, LGBT BAR, http://lgbtbar.org/wp-content/uploads/2015/01/LGBT-Bar-Corporate-Counsel-Diversity-Toolkit.pdf (last visited Apr. 1, 2021).

153. *See, e.g.*, Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1046-60 (2011) (describing the barriers faced by lawyers from underrepresented groups that tend to deepen and perpetuate exclusion); Marcus Sandifer, *How White Right Can Fight Wrong: The Plight of White Male Privilege*, A.B.A. (May 16, 2019), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future/white-right-can-fight-wrong; Karen Sloan, *Want to Hire Minority Lawyers? Look Beyond the T-14 Law Schools*, LAW.COM (Feb. 1, 2021, 3:23 PM), https://www.law.com/2021/02/01/want-to-hire-minority-lawyers-look-beyond-the-t-14-law-schools

recruit and hire from the most prestigious law schools,[154] which themselves have a legacy of exclusion.[155] Once attorneys are hired, many law offices operate in ways that exacerbate these inequities: they demand a work style that is not conducive to anyone with familial and other commitments outside of the office, or who themselves have physical disabilities or family members with special needs.[156] When an attorney has small children, elderly parents, or is a first-generation professional with obligations to care for an extended family, with few economic supports or familial wealth that make such obligations easier to manage, that attorney has fewer opportunities to flourish within the profession and advance their career.[157] Indeed, expecting lawyers to work long hours according to a highly-demanding, inflexible work schedule, with a heavy reliance on physical presence in an office, is not conducive to anyone except those that either have no such outside commitments, or have others in their lives who can manage such obligations.[158] These forces tend to drive many able lawyers from positions of seniority and influence within the profession—where they could have some say over the way the profession operates to make it more inclusive. Many leave the practice of law altogether, making the profession as a whole less diverse and leading to greater exclusion of

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(noting that the legal industry's focus on recruiting graduates from top law schools is impacting diversity in the profession).

154. DANIEL MARKOVITS, THE MERITOCRACY TRAP: HOW AMERICA'S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE 203-04 (2019) (noting that most elite companies, including law firms, hire from the "most elite colleges and universities"); JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 25-26 (1976) (describing pretextual arguments for law firm hiring practices that discriminated against underrepresented groups in the profession).

155. *See, e.g.*, Vernellia R. Randall, *The Misuse of the LSAT: Discrimination Against Blacks and Other Minorities in Law School Admissions*, 80 ST. JOHN'S L. REV. 107, 108-36 (2006) (describing institutional racism evident in law school admissions practices); *see also* RICHARD L. ABEL, AMERICAN LAWYERS 85, 89-90 (1989) (describing history of discriminatory law school admissions practices); Ilana Kowarski, *Why Big Law Firms Care About Which Law School You Attend*, U.S. NEWS & WORLD REP. (Aug. 1, 2018), https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2018-08-01/why-big-law-firms-care-about-which-law-school-you-attend.

156. For a discussion of the barriers that prevent advancement in the legal profession for women who are primary caregivers, see, for example, Judith S. Kaye, *Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality*, 57 FORDHAM L. REV. 111, 120-21 (1988). For the argument that such barriers impact lawyers and law firms adversely, see generally Note, *Why Law Firms Cannot Afford to Maintain the Mommy Track*, 109 HARV. L. REV. 1375 (1996).

157. Kaye, *supra* note 156, at 120-21; Leigh McMullan Abramson, *Making One of the Most Brutal Jobs a Little Less Brutal*, ATLANTIC (Sept. 10, 2015), https://www.theatlantic.com/business/archive/2015/09/work-life-balance-law/404530; Deborah Rhode, *Balanced Lives for Lawyers*, 70 FORDHAM L. REV. 2207, 2207 (2002).

158. *See, e.g.*, Rhode, *supra* note 153, 1048 (describing barriers to advancement within the profession for those with obligations to care for family members); Rhode, *supra* note 157, at 2207.

groups that find it difficult to work in inflexible settings that are not conducive to these outside commitments, otherwise known as life.[159]

For those attorneys with such commitments, the pandemic is making it easier, to a certain extent, to balance such commitments with their professional obligations.[160] They spend less time commuting, and can join conference calls and video conferences from their homes, their cars, or a physician's office where they are taking a loved one for care or treatment.[161] There is less of an emphasis on "face time": not the video conference app, but the expectation that supervising lawyers physically see their colleagues in the office and that expectation be used as a heuristic for how hard one works, how effective a lawyer is, or the dedication one exhibits to their clients and their colleagues.[162]

In addition, the pandemic has proven a challenge for many of those with disabilities, not only because they are at greater risk of poor outcomes should they contract COVID-19, but also because they have fewer opportunities to leave their homes if they are, for example, immunocompromised.[163] At the same time, legal practice in the pandemic has also been beneficial to lawyers with disabilities.[164] A recent commentary in an ABA journal explained how the pandemic has made the practice of law more accessible for such lawyers.[165] There, Calandra McCool, who self-identifies as living with Post-Traumatic Stress Disorder and motor coordination issues in one of her hands, argues as follows:

> [T]he pandemic provides disabled attorneys unparalleled access to telecommuting, which also allows for increased access to alternative

159. *See* Deborah L. Rhode, *Law Is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That.*, WASH. POST (May 27, 2015, 8:25 AM), https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that.

160. *See* Lawson, *supra* note 80.

161. *Id.*

162. *See, e.g.*, NALP FOUND. FOR RSCH. & EDUC., BEYOND THE BIDDING WARS: A SURVEY OF ASSOCIATE ATTRITION, DEPARTURE DESTINATIONS & WORKPLACE INCENTIVES 62 (2000) (noting that law firms often equate presence in the office with commitment to the firm); Keith Cunningham, Note, *Father Time: Flexible Work Arrangements and the Law Firm's Failure of the Family*, 53 STAN. L. REV. 967, 985 (2001) (arguing that "[b]illable hours have not only become a measure of commitment to the client, but increasingly associates view billable hours as the key to 'success, promotion, and prestige' in a long-term career").

163. *People with Disabilities*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-disabilities.html (Feb. 19, 2021).

164. *See* Calandra McCool, *How Working Remotely Builds the Case for Accessibility*, A.B.A.: L. PRAC. TODAY (Aug. 14, 2020), https://www.lawpracticetoday.org/article/working-remotely-builds-case-accessibility (describing advantages of remote work for lawyers with disabilities).

165. *Id.*

> scheduling and, for some, increased comfort, because it allows us to stay in the environment that is likely most tailored to our needs. Efforts by law firm management and firm Human Resources departments to support the continuation of alternative workplace and scheduling policies post-pandemic would provide disabled attorneys with inclusive access to the workplace.[166]

Even with remote work, and in some ways because of it, the pandemic has been particularly hard on primary caregivers. Such caregiver-lawyers find themselves having to manage children who must attend classes remotely while those lawyers are also doing their "day jobs."[167] Remote work has assisted in some ways; more flexible work schedules have enabled many to shift the times in which they work to accommodate their children's schedules. They also spend less time commuting and shuttling children between school and other activities.[168] Admittedly, the pandemic has, in some ways, made it more difficult for lawyers with such commitments to meet their obligations to their employers and clients, which could end up exacerbating unequal access to opportunities for recognition and advancement that already plagued the pre-pandemic practice of law.[169]

Still, for practicing attorneys, as with other professional settings, the pandemic has shown that many legal staff can work remotely, while also working effectively and competently.[170] What is more, pre-pandemic, lawyers from traditionally marginalized groups often faced barriers to entry and advancement, at least some of which were the result of unrealistic demands from leadership in law practice settings.[171] Workplace expectations often included a high number of hours spent physically in the office,[172] and subordinate lawyers had little control over their schedules.[173] What law office leadership is learning is that remote

166. *Id.*

167. Misty L. Heggeness & Jason M. Fields, *Working Moms Bear Brunt of Home Schooling While Working During COVID-19*, U.S. CENSUS BUREAU (Oct. 30, 2020), https://www.census.gov/library/stories/2020/08/parents-juggle-work-and-child-care-during-pandemic.html.

168. *See* Lawson, *supra* note 80.

169. Meghan Tribe & Stephanie Russell-Kraft, *Virus Crisis Could Be Big Test of Law Firms' Diversity Efforts*, BLOOMBERG L. (Apr. 27, 2020, 5:40 AM), https://news.bloomberglaw.com/us-law-week/virus-crisis-could-be-big-test-of-law-firms-diversity-efforts (describing risks to diversity and inclusion efforts brought on by the social distancing protocols of the pandemic).

170. *See* Lawson, *supra* note 80; *see also* Bierman & Hitt, *supra* note 69, at 31 (describing pre-pandemic stigmatization of remote work within the profession).

171. *See* Tribe & Russell-Kraft, *supra* note 169.

172. *See supra* note 162 and accompanying text.

173. *See* Abramson, *supra* note 157. For a description of the burdensome work schedules at law offices prior to the pandemic, and efforts to reform these practices, see NALP FOUND. FOR RSCH. & EDUC., *supra* note 162, at 62.

work, coupled with an appreciation for the challenges lawyers with familial obligations or disabilities face in the midst of the pandemic, may make the practice of law more humane, and may also help the profession become more diverse and inclusive along a number of dimensions.[174] The pandemic has exposed the fact that many of the barriers to advancement created by unreasonable expectations are shibboleths: outmoded customs that are, at best, unproductive and ineffective, and at worst, discriminatory.[175]

What lawyering during the pandemic is showing is that a new approach to legal practice is possible. This new, more flexible approach is much more conducive to those lawyers who find their family commitments or physical disabilities impede their ability to practice primarily in a physical office not suited to their needs.[176] As a result, the profession has the opportunity to build on the lessons learned from the pandemic and open its doors to those who might thrive in a more flexible workplace, one that finds ways to accommodate the needs of at least some of those who have traditionally been excluded from the profession, or found themselves driven out of it.

But just as more flexible work arrangements might enable more lawyers to provide better and more efficient services to their clients, such arrangements also hold out the promise that they can help the legal profession serve more clients, particularly those who are otherwise difficult to reach and are often denied access to justice altogether. The legal profession's pandemic response shows that the profession might just also mine its lessons for ways to expand access to justice, an issue I address next.[177]

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174. Debra Cassens Weiss, *Law Firms May Be at 'Tipping Point' for Change Because of COVID-19 Pandemic, New Report Says*, A.B.A. J. (Jan. 12, 2021), https://www.abajournal.com/news/article/law-firms-may-be-at-tipping-point-for-change-due-to-pandemic-state-of-the-market-report-says. For an argument that all places of employment, and not just law offices, can and should be more inclusive post-pandemic, see Kirk Adams, Opinion, *'A Moment of Inclusion': Will the Post-Pandemic Workplace Be More Friendly to People with Disabilities?*, HRDRIVE (June 30, 2020), https://www.hrdive.com/news/a-moment-of-inclusion-will-the-post-pandemic-workplace-be-more-friendly/580788.

175. For a description of some of the barriers experienced by groups historically marginalized within the profession, see, for example, Tsedale M. Melaku, *Why Women and People of Color in Law Still Hear "You Don't Look Like a Lawyer,"* HARV. BUS. REV. (Aug. 7, 2019), https://hbr.org/2019/08/why-women-and-people-of-color-in-law-still-hear-you-dont-look-like-a-lawyer; *see also* Kowarski, *supra* note 155.

176. There are certainly also concomitant risks associated with pandemic practice, including social isolation and an "always-on" approach to work. Michelle F. Davis & Jeff Green, *Three Hours Longer, the Pandemic Workday Has Obliterated Work-Life Balance*, BLOOMBERG (Apr. 23, 2020, 7:00 AM), https://www.bloomberg.com/news/articles/2020-04-23/working-from-home-in-covid-era-means-three-more-hours-on-the-job.

177. *See infra* Part II.C.2.

2. Increased Access to Justice

While this Article addresses the three crises that face the legal profession in the early years of the 2020s, the United States has long faced another crisis when it comes to the legal profession: a widespread and deep lack of access to justice for most Americans, particularly those of low- and moderate-income.[178] And the pandemic has only worsened this crisis.[179] By recent estimates, eighty percent of low-income Americans and approximately forty to sixty percent of middle-income Americans face their legal problems without seeking legal help.[180] This delta between who *needs* a lawyer and who *has* one is often referred to as the "justice gap."[181] Even in the best of times, Americans face their legal needs without a lawyer for a range of reasons, as a study of one U.S. metropolitan area showed.[182] Survey respondents reported that the reasons they did not access a lawyer were varied, including that they could not afford one, they did not know any lawyers who could help them, or they did not recognize that they even had a legal problem.[183] In the pandemic, as in many previous crisis situations—like the aftermath of the attacks of September 11th in New York City or the fallout from the Great Recession—the need for legal assistance has risen, especially in low- and moderate-income communities.[184] In the midst of the

178. For background on and thoughtful ideas about how to address the access-to-justice crisis in the United States, see DÆDALUS, Winter 2019, https://www.amacad.org/daedalus/access-to-justice.

179. For an analysis of legal needs during the COVID-19 pandemic, see AM. BAR ASS'N, TASK FORCE ON LEGAL NEEDS ARISING OUT OF THE 2020 PANDEMIC (2020), https://documentcloud.adobe.com/link/track?uri=urn:aaid:scds:US:4f7c11ac-fc44-428a-88a9-6c1b0d101b80#pageNum=1.

180. Rebecca Buckwalter-Poza, *Making Justice Equal*, CTR. FOR AM. PROGRESS (Dec. 8, 2016), https://cdn.americanprogress.org/content/uploads/2016/12/07105805/MakingJusticeEqual-brief.pdf?_ga=2.15954934.175951316.1617835088-917484960.1617835088.

181. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1 (2009), https://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf (defining the term "justice gap").

182. REBECCA F. SANDEFUR ET AL., ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 11-13 (2014).

183. *Id.* at 11-14.

184. For a description of the legal needs that arose in the wake of the events of September 11, 2001, and the legal profession's response to them, see generally, ASS'N OF THE BAR OF THE CITY OF N.Y. FUND, INC. ET AL., PUBLIC SERVICE IN A TIME OF CRISIS: A REPORT AND RETROSPECTIVE ON THE LEGAL COMMUNITY'S RESPONSE TO THE EVENTS OF SEPTEMBER 11TH, 2001 (2004), https://www.citybarjusticecenter.org/wp-content/uploads/2016/10/public-service-time-crisis.pdf [hereinafter NYC BAR REPORT] (describing volunteer legal effort to support direct and indirect victims of the September 11th attacks). For a description of legal needs in the wake of the Great Recession, and one community's response to them, see generally, Robin S. Golden & Sameera

pandemic, technology has improved the ability of legal entities to provide services to such individuals and families.[185] The lessons learned from such experiences can help us improve access to justice after the most serious threats from the pandemic recede and we are able to once again deliver services to the communities in need under more typical conditions.

Prior to the pandemic, legal services offices and private firms offering their services on a pro bono basis leveraged technology to improve access to justice more generally, and have shown that such service-delivery techniques can improve access to justice for communities that have been traditionally harder for practitioners to serve.[186] Unbridled by geographic constraints, lawyers and non-legal staff can utilize remote technology to expand access to justice to those who might have difficulty getting to a physical law office.[187] For example, remote communication technologies can assist volunteer lawyers in urban hubs, where lawyers are more prevalent, to reach communities that have less access to lawyers generally.[188] For example, New York State ("NYS") has both the nation's largest city, with a great density of practicing lawyers per capita,[189] and also rural communities that are woefully underserved by the legal profession, as a recent survey of rural practice in New York revealed.[190] As remote-work technology

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Fazili, *Raising the ROOF: Addressing the Mortgage Foreclosure Crisis Through a Collaboration Between City Government and a Law School Clinic*, 2 ALB. GOV'T L. REV. 29 (2009).

185. On the importance of utilizing technology to promote access to justice during the pandemic, see Deborah L. Rhode & Jason M. Solomon, *Access to Justice During COVID-19*, LAW.COM (May 12, 2020, 7:10 PM), https://www.law.com/therecorder/2020/05/12/access-to-justice-during-covid-19.

186. *See generally* J.J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 VAND. L. REV. 1993 (2017) (discussing the impact of an online platform on access to justice in state court systems). For a pre-pandemic survey of the use of technology to close the justice gap, see Liz Keith, *Innovations in Technology-Enabled Pro Bono*, A.B.A.: DIALOGUE (May 19, 2016), https://www.americanbar.org/groups/legal_services/publications/dialogue/volume/19/spring-2016/innovations-in-technology-enabled-pro-bono.

187. For a description of pre-pandemic efforts to use technology to improve rural access to justice, which offers some insights into how to address the post-pandemic justice gap using remote technologies, see generally Ray Brescia, *Using Technology to Improve Rural Access to Justice*, 17 GOV'T L. & POL'Y J., no. 1, 2018, at 58.

188. *Id.* at 59-60.

189. AM. BAR ASS'N, ABA PROFILE OF THE LEGAL PROFESSION 2020, at 2 (2020), https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf (noting that the United States as a whole has four lawyers for every 1,000 residents, while in New York City, there are four*teen* lawyers for every 1,000 residents).

190. N.Y. STATE BAR ASS'N, REPORT & RECOMMENDATIONS OF THE TASK FORCE ON RURAL JUSTICE: INTERVENTIONS TO AMELIORATE THE ACCESS-TO-JUSTICE CRISIS IN RURAL NEW YORK 7-14 (2020), https://nysba.org/app/uploads/2020/03/Report-and-Recommendations-of-the-Task-Force-on-Rural-Justice-as-of-3.18.2020.pdf (describing shortage of lawyers in upstate New York).

has been used by one local provider to assist harder-to-serve communities, insights from such an approach can inform the post-pandemic delivery of legal services to close the justice gap.[191]

When it comes to law schools, many schools, particularly in their clinical programs, have utilized telecommunications technology to target resources to communities that are both hardest hit by the pandemic and hardest to serve, like prison populations and those in immigration detention.[192] Because the profession as a whole, and courts and law schools in particular, has become more capable of working with remote technologies and more comfortable using such technologies to serve clients and supervise student work product, this has meant that lawyers and law students have been able to reach and serve those who might have previously gone without assistance.[193] As lawyers have become more familiar with working remotely themselves and, more importantly, supervising students remotely, there are greater possibilities for students to support the work of these practicing attorneys without having to commute to the lawyer's office, which has opened up volunteer opportunities with offices that are not directly adjacent to law schools.[194]

In addition, when court or administrative hearings can proceed using video conferencing technologies, a mode of operating to which many tribunals have shifted in the midst of the pandemic, lawyers and their clients do not have to take the time and expense of travelling to such appearances.[195] What is more, clients will not have to miss work to attend such appearances, a barrier to many low-income and

191. *See* Brescia, *supra* note 187, at 60-61.

192. On the use of technology to provide legal services to immigrants, including those in detention, see Fatma Marouf & Luz Herrera, *Technological Triage of Immigration Cases*, 72 FLA. L. REV. 515, 523-36 (2020). For a description of one law school's shift to remote work in its clinical program, see Kelsey J. Griffin, *During COVID-19 Pandemic, Harvard Law School Continues Clinics Virtually*, HARV. CRIMSON (Apr. 2, 2020), https://www.thecrimson.com/article/2020/4/2/harvard-coronavirus-hls-clinics.

193. For a description of one such pre-pandemic effort, see Lindsay M. Harris, *Learning in "Baby Jail": Lessons from Law Student Engagement in Family Detention Centers*, 25 CLIN. L. REV. 155, 165-85 (2018).

194. This has been true for students at Albany Law School, who have been able to volunteer with a local legal services organization with field offices located several hours' driving distance from the school. *Albany Law, Legal Aid Society Form COVID Response Corps*, ALB. L. SCH. (June 11, 2020), https://www.albanylaw.edu/about/news/2020/Pages/Albany-Law-Legal-Aid-Society-Form-COVID-Response-Corps.aspx.

195. Carol Schiro Greenwald, *Videoconferencing: Love It, Hate It, Need It*, N.Y. L.J. (Jan. 8, 2021), https://www.law.com/newyorklawjournal/2021/01/08/videoconferencing-love-it-hate-it-need-it.

working-poor clients seeking and obtaining relief, or risk dismissal of their actions nor a loss by default for non-appearance.[196]

Moving forward, particularly when it comes to closing the justice gap for those who have a hard time accessing legal services due to distance or disability, lawyers and law schools may find that technology can improve their ability to serve such previously hard-to-serve clients.[197] While their representation will still pose some challenges, such technologies may make these individuals a little less difficult to serve.[198] Thus, technology can both help attorneys assist potential clients who might not have received representation otherwise and allow such attorneys to spend more time working and less time commuting or traveling to far-flung sites and geographically dispersed court appearances. In these ways, then, technology may help close the justice gap if the time previously dedicated to such activities is channeled to serving more clients and help lawyers assist those who they might have had a hard time reaching without remote technologies.[199]

D. Getting to Yes: Regulation, the Market, and Innovation

The pandemic has accelerated the legal profession's adoption of technology, mostly with respect to remote work, including video conferencing technology, workflow management programming, and cloud computing.[200] In addition to forcing law offices to create systems

196. *See, e.g.*, Earl Johnson, Jr., *Thinking About Access: A Preliminary Typology of Possible Strategies*, *in* 3 ACCESS TO JUSTICE: EMERGING ISSUES AND PERSPECTIVES 1, 9-10 (Cappelletti & Garth eds., 1978) (describing economic barriers to access to justice for low-income and working poor people).

197. Kathleen Elliott Vinson & Samantha A. Moppett, *Digital Pro Bono: Leveraging Technology to Provide Access to Justice*, 92 ST. JOHN'S L. REV. 551, 560-70 (2018) (describing how law schools can leverage technology to promote access to justice).

198. John O. McGinnis, *Machines v. Lawyers*, CITY J., Spring 2014, https://www.city-journal.org/html/machines-v-lawyers-13639.html (describing the potential impact of technology on the practice of law). On some of the barriers to effective use of technology to close the justice gap, including the fact that some communities have less access to high-speed internet and may not have a means of accessing the internet through mobile technologies, see generally Raymond H. Brescia, *The Downside of Disruption: The Risks Associated with Transformational Change in the Delivery of Legal Services*, *in* IMPACT: COLLECTED ESSAYS ON EXPANDING ACCESS TO JUSTICE 113 (2016).

199. In addition to facilitating remote-work arrangements, there are many ways in which technology and service-delivery innovation can expand access to justice and provide opportunities for lawyers to spend more time in the more meaningful, rewarding, and impactful aspects of their jobs. *See, e.g.*, Raymond H. Brescia, *Uber for Lawyers: The Transformative Potential of a Sharing Economy Approach to the Delivery of Legal Services*, 64 BUFF. L. REV. 745, 759-66 (2016) (describing the possibility that automation and service-delivery innovations in the legal profession could permit lawyers to devote more time to the more challenging and rewarding aspects of their jobs and serve more clients in meaningful ways).

200. Katherine Bishop, *Trend to Continue Remote Work on the Rise*, ATT'Y AT L. MAG. (Sept. 11, 2020), https://attorneyatlawmagazine.com/trend-to-continue-remote-work-on-the-rise; Ian

that enable remote work, the pandemic has also led many to realize that remote work for legal professionals is not only possible, but it is as effective—if not more effective—than the historically prevalent mode of practicing: i.e., a group of lawyers physically proximate and housed under the same roof.[201] What can we learn from this shift, carried out in response to a public health emergency, and what might it mean for the practice of law once the immediate threat passes? The imperative of remote work in the midst of the pandemic, enabled through technology, could potentially change the practice of law dramatically. This experience can teach the profession how to transform the practice of law to make it more diverse, inclusive, and humane for its members, while also helping to improve access to justice for those typically left out of the legal system. Thus, remote work has the potential to reshape the practice of law in critical ways that will help the profession meet the twin goals of making the legal system and the profession more diverse and improving access to justice. If the profession concludes that the benefits of remote work are, on the whole, net positive, what are the forces that might prevent, or further accelerate, the potential shift to more remote work?

The force that could derail such efforts is potential opposition from regulatory bodies and courts that might resist the continuation of more flexible work arrangements and practices after the immediate crisis passes. In the midst of the pandemic, at least some of these bodies have chosen to highlight best practices for remote work and have relaxed some requirements regarding the unauthorized practice of law.[202] For example, in June 2020, the Pennsylvania Bar Association issued guidance on remote work, emphasizing the duty to preserve confidentiality of client information and laying out best practices with respect to maintaining confidentiality while working remotely.[203] This guidance noted in particular that it is acceptable to utilize cloud services for the transmission and storage of confidential material.[204]

Lopez et al., *Remote Work May Change Attorneys' Habits After Pandemic*, BLOOMBERG L. (Mar. 30, 2020, 6:01 AM), https://news.bloomberglaw.com/ip-law/remote-work-may-change-attorneys-habits-after-pandemic.

201. Brenda Spano Jeffreys, *Legal Professionals Want to Keep Working from Home, but Will That Last?*, LAW.COM (June 11, 2020, 4:36 PM), https://www.law.com/americanlawyer/2020/06/11/legal-professionals-want-to-keep-working-from-home-but-will-that-last (describing the interest of many lawyers to continue having remote work options after the pandemic ends).

202. *See* ABA Comm. on Ethics and Pro. Resp., Formal Op. 495 (2020) (describing relaxed requirements).

203. Pa. Bar Ass'n Comm. on Legal Ethics and Pro. Resp., Formal Op. 2020-300 (2020).

204. *Id.*

Even though an attorney may only be serving clients located within their authorized jurisdiction, questions could arise as to whether the lawyer is engaged in the unauthorized practice of law merely by being physically present in a jurisdiction where they are not authorized to practice law. Remote work has permitted lawyers to relocate to jurisdictions where they are not admitted to practice law in an effort to find more comfortable and safe accommodations in the midst of the pandemic.[205] In response to this phenomenon, the ABA recently issued Formal Ethics Opinion 495, which provides that physical presence in a jurisdiction where one is not licensed to practice law is not tantamount to the unauthorized practice of law, as long as the lawyer does not hold themselves out as licensed to practice law in that jurisdiction.[206] It is hard to argue that such an approach is inconsistent with the rules moving forward, and this guidance should operate to facilitate remote work even after the present pandemic abates.

When it comes to ensuring lawyers in a firm meet the standard of care owed their clients while utilizing remote-work options, supervisory lawyers need only "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the [Model] Rules of Professional Conduct."[207] This obligation applies to both remote and in-person work, and all of the settings in between.[208] The truth is, violations of the Model Rules take place even when lawyers are located within the same physical space as their supervisory lawyers.[209] In fact, if the typical mode of practice for most lawyers has included working from a traditional office setting, and such an office setup prevented ethical breaches, then we would never see such lapses—but this is certainly not the case. Lawyers in traditional settings are capable of violating their ethical obligations even with the best supervision.

A mix of training and trust helps supervising lawyers discharge their own ethical duties, while ensuring those they supervise are

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205. *See, e.g.*, Fla. Bar Standing Comm. on the Unlicensed Prac. of L., Proposed Advisory Op. 2019-4 (2020) (noting presence of attorney at home, in-state, although not practicing in that state, is not improper).

206. ABA Comm. on Ethics and Pro. Resp., Formal Op. 495 (2020).

207. MODEL RULES OF PRO. CONDUCT r. 5.1(a) (AM. BAR ASS'N 2020).

208. *See* Melissa Heelan, *Tech Skills, Ethical Awareness Virtual Practice Keys, ABA Says*, BLOOMBERG L. (Mar. 10, 2021, 10:01 PM), https://news.bloomberglaw.com/us-law-week/tech-skills-ethical-awareness-virtual-practice-keys-aba-says.

209. *See, e.g.*, *In re* Cohen, 847 A.2d 1162, 1162, 1164-67 (D.C. 2004) (affirming an attorney's thirty-day suspension for failure to exercise proper supervisory responsibilities).

complying with theirs.[210] Supervisory lawyers cannot oversee every move by the lawyers and non-legal staff under their guidance, even in traditional, non-remote work settings.[211] There is nothing inherently improper when it comes to remote-work arrangements; supervisory lawyers and those they supervise must simply ensure that there are meaningful opportunities for oversight, guidance, feedback, and communication to maintain their respective ethical obligations.[212] If lawyers fall into bad habits, are not adequately overseeing those they supervise, or, as lawyers under supervision, are not maintaining meaningful lines of communication with their supervisors, ethical lapses could occur. Remote work certainly has its risks. Lawyers might feel more prone to lapses in communication; supervisors might feel less comfortable with digital communication; or human nature might allow lawyers to lapse into an "out of sight, out of mind" approach, which may result in matters falling through the proverbial cracks.[213] Practices by supervisors and their supervisees that are mindful of these tendencies and risks would go a long way toward ensuring that all lawyers can adequately discharge their ethical obligations. Thus, an existing permission structure does seem to exist that allows remote work to continue even after the immediate need for it subsides, so long as such remote-work systems provide "reasonable assurances" that lawyers are indeed satisfying their ethical obligations to their clients, the community, and the legal system.[214]

Once comfortable—as I am—that existing regulations will permit ongoing experimentation with remote work when it is thoughtful,

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210. On the duty of supervision, see generally Rachel Reiland, Note, *The Duty to Supervise and Vicarious Liability: Why Law Firms, Supervising Attorneys and Associates Might Want to Take a Closer Look at Model Rules 5.1, 5.2 and 5.3*, 14 GEO. J. LEGAL ETHICS 1151 (2001).

211. While cases interpreting this obligation are rare, at the extremes, a lawyer left to "sink or swim" on his or her own, without any supervision, will clearly violate the duty to provide adequate supervision. *In re* Barry, 447 A.2d 923, 926 (N.J. 1982) (Clifford, J., dissenting); *see also* Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties*, 70 NOTRE DAME L. REV. 259, 289 (1994). On the scarcity of reported decisions on the duty to supervise, see Miller, *supra*, at 292-93.

212. Again, all the Model Rules require is that supervisory lawyers make "reasonable efforts." *See supra* note 207 and accompanying text. On the supervisory lawyer's duties, see Miller, *supra* note 211, at 282-85. For an exploration of the ways in which technology can foster what I call "synthetic social capital," a form of trust enabled by new modes of communication available in the Internet Age, see Raymond H. Brescia, *The Strength of Digital Ties: Virtual Networks, Norm-Generating Communities, and Collective Action Problems*, 122 DICK. L. REV. 479, 528-38 (2018).

213. *See* Patrick Smith, *As Remote Work Brings Isolation, How Can Firms Keep Lawyers in the Fold?*, AM. LAWYER (Mar. 31, 2020, 4:48 PM), https://www.law.com/americanlawyer/2020/03/31/as-remote-work-brings-isolation-how-can-firms-keep-lawyers-in-the-fold (describing efforts to keep lawyers engaged and connected even when they are working in remote settings).

214. *See supra* note 207 and accompanying text.

thorough, and mindful of the risks of working in this fashion, it is necessary to consider the compelling forces and dynamics that are likely to accelerate the shift to more technology-enabled remote work. The first of these is cost-conscious clients.[215] Such clients have been the main drivers of change in the practice of law over the last thirty years or so.[216] They will continue to serve in this capacity as they begin to appreciate that they save money if lawyers are not able to bill time for travel to and from brief court appearances that could otherwise be handled through video conference. They will also appreciate those law firms that are able to reduce overhead costs—savings which could presumably be passed along to clients. Firms can reduce their office footprint because more lawyers are able to work remotely and can move physical files to the cloud and store them in more remote locations that are less expensive to maintain.[217] In addition, if lawyers are able to work from less expensive locations and would be willing to accept a lower salary in exchange for a better quality of life and lower housing costs, that may also translate into budget savings for firms and, in turn, clients. The firms that figure out how to reduce such costs and pass them along to clients without sacrificing effectiveness, attentiveness to client needs, or the quality of their services will likely have a strategic advantage over other firms that continue to operate through traditional practices at a higher cost.[218]

Similarly, law firm recruits will likely prefer more flexible work arrangements that will translate into greater quality of life, a greater capacity to meet their outside obligations, more affordable housing options, and less time spent commuting.[219] Law firms will have to

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215. Bruce A. Green, Foreword, *Stein Center Conference: Professional Challenges in Large Firm Practices*, 33 FORDHAM URB. L.J. 7, 14-17 (2005).

216. *See, e.g.*, *id.* (describing client desire for lawyers to reduce the costs of legal services). On the general lack of alignment between cost-conscious clients and the standard law firm business model, see RICHARD SUSSKIND, THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES 142-45 (2010).

217. On the trend of law firms reducing the size of their physical offices during the pandemic, see Patricia Kirk, *Law Firms Are Dumping a Significant Amount of Office Space*, NAT'L REAL EST. INV. (Oct. 26, 2020), https://www.nreionline.com/office/law-firms-are-dumping-significant-amount-office-space; *see also* Timothy Bromiley & Carlos Posada, *For Law Firms, COVID-19 Has Accelerated the Inevitable*, GENSLER (Apr. 29, 2020), https://www.gensler.com/research-insight/blog/for-law-firms-covid-19-has-accelerated-the-inevitable (describing law firms' reconsideration of the size their offices post-pandemic).

218. For a description of strategies lawyers are likely to pursue after the pandemic, see Neil Franklin, *Law Firms Plan Overhaul of Business Structures in Wake of Pandemic*, INSIGHT (June 23, 2020), https://workplaceinsight.net/law-firms-plan-overhaul-of-business-structures-in-wake-of-pandemic.

219. On the value of flexible work arrangements in the competition for employees and the potential for expanding the candidate pool through such arrangements, see Lynn Kier, *Remote Work: The Ultimate Equalizer for Talent Acquisition and Employee Experience*, FORBES (Aug. 10,

compete for such talent by offering work arrangements that cater to these needs and interests. As in other areas, law students have proven a driving force in a great deal of reform of the practice of law, particularly surrounding issues of discrimination.[220] They can also play an important role in speeding up the transition to more accommodating and inclusive work arrangements.

Because of these and other forces at play, which were already impacting the practice of law before the onset of the pandemic, the adoption of technology to improve the practice of law is likely to accelerate the dynamic that the late Clayton Christensen called the "innovator's dilemma."[221] Christensen identified a business-cycle phenomenon that appears to have affected many industries in recent memory, particularly those involving new technologies.[222] In this cycle, an incumbent business faces threats from new entrants into that incumbent's market, threatening to siphon customers away from that business.[223] Those new entrants tend to experiment and innovate to generate less expensive versions of the incumbent's product.[224] The incumbent cedes potential customers from the lower end of the customer base, choosing instead to offer more sophisticated and complex products to its customers on the higher end of the consumer market.[225] Eventually, the new entrants to the market learn how to improve their products and are able to win over a larger and larger share of the customer base by offering it more of what it wants from those products.[226] This occurs as the incumbent is creating greater distance between the products it offers and what its customers want.[227] The new entrants are ultimately able to

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2020, 8:30 AM), https://www.forbes.com/sites/forbescommunicationscouncil/2020/08/10/remote-work-the-ultimate-equalizer-for-talent-acquisition-and-employee-experience.

220. Law students, particularly at elite schools, have routinely organized to influence reform of law firm practices. *See, e.g.*, Stephanie Francis Ward, *A Group of Harvard Law Students Is Trying to Get Rid of Mandatory Arbitration Clauses*, A.B.A. J. (Sept. 1, 2019, 1:20 AM), https://www.abajournal.com/magazine/article/parity-to-the-people; Patrick Smith, *Law Students Protest Outside Paul Weiss's New York Office over Firm's Exxon Representation*, LAW.COM (Oct. 9, 2020, 5:48 PM), https://www.law.com/americanlawyer/2020/10/09/law-students-protest-outside-paul-weisss-new-york-office-over-firms-exxon-representation.

221. CLAYTON M. CHRISTENSEN, THE INNOVATOR'S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL x (1997).

222. *See, e.g.*, *id.* at 87-93 (explaining this phenomenon using the steel industry as an example).

223. *Id.* at 87.

224. *Id.* at 87-88.

225. *Id.* at 91.

226. *Id.* at 89-91.

227. *Id.* at 92-93; *see also* Ray Worthy Campbell, *Rethinking Regulation and Innovation in the U.S. Legal Services Market*, 9 N.Y.U. J.L. & BUS. 1, 18-19 (2012).

capture a large enough share of the market to weaken the incumbent so much so that it is no longer a serious market threat or fails altogether.[228]

The legal profession has long been ripe for this sort of disruption.[229] Due to the fact that many firms have accelerated their experimentation in and adoption of new technologies to improve the delivery of legal services, and have done so quite successfully, it is likely that we will see more firms explore ways to continue a technology-enhanced approach to the practice of law. This will give them a market advantage. We already know that there is what Richard Susskind calls a "latent legal market"[230]: a large segment of the population that is underserved, if they are served at all, by the legal profession.[231] Could law firms that are able to use technology to make their services more efficient and, in turn, less costly, also begin to tap into this latent legal market, where other incumbents might not be willing, or able, to operate? Could the legal profession thus find itself in the throes of the dynamic Christensen identified, where firms that are willing to experiment—and provide technology-assisted services that are less costly to offer—continue to improve their services, slowly seizing market share and edging out more traditional incumbents? If so, the pandemic has possibly accelerated this cycle. Will firms that were unwillingly thrust into the position of having to use technology to deliver services in a more efficient manner retreat to more path-dependent approaches for finding and retaining clients or will they continue to experiment—and quite possibly improve—the practice of law while also reducing the justice gap?

With respect to access to justice, at least, one jurisdiction has introduced the concept of a regulatory "sandbox."[232] Such a mechanism

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228. One of the examples Christensen used to demonstrate the functioning of this cycle was the steel industry, where large companies slowly ceded market share to smaller mills, which incorporated new methods for creating steel that, at first, only appealed to customers on the low end of the steel market. CHRISTENSEN, *supra* note 221, at 87-93. As they perfected their steel manufacturing process, they slowly captured a larger and larger share of the market, until they completely drove the incumbent manufacturers out of business. *Id.*

229. For a discussion of the extent to which the legal industry is susceptible to Christensen's cycle, see generally Campbell, *supra* note 227. *See also* Raymond H. Brescia et al., *Embracing Disruption: How Technological Change in the Delivery of Legal Services Can Improve Access to Justice*, 78 ALB. L. REV. 553, 562-65 (2014/2015). For a critique of Christensen's theories, see Jill Lepore, *The Disruption Machine*, NEW YORKER (June 16, 2014), http://www.newyorker.com/magazine/2014/06/23/the-disruption-machine.

230. RICHARD SUSSKIND, THE FUTURE OF LAW: FACING THE CHALLENGES OF INFORMATION TECHNOLOGY 27 (1996).

231. *Id.*

232. *Regulatory Sandbox*, STATE OF UTAH DEP'T OF COM., https://commerce.utah.gov/sandbox.html (last visited Apr. 1, 2021) ("Utah's Regulatory Sandbox program allows participants to temporarily test innovative financial products or services on a limited basis without otherwise being licensed or authorized to act under Utah State law.").

allows organizations to experiment with arrangements and practices that might otherwise test the outer limits of the rules, if not exceed them, in order to identify ways in which those rules impede greater access to justice.[233] Such regulatory experimentation is designed to examine rules that are worth preserving and those that can no longer be justified because they present legacy barriers to closing the justice gap, if they were ever justified in the first place.[234] Since we have been in a giant experimental sandbox when it comes to remote work,[235] the profession has learned a great deal of what it can do to facilitate remote work and the ways in which such remote work can make the practice of law more inclusive and more accessible to practitioners and clients.[236] As argued here, I believe the permission structure currently exists within the rules governing the profession to allow for even more remote-work arrangements, facilitated by modern technology. To the extent that lawyers fear further experimentation might run afoul of ethics rules, jurisdictions could create sandboxes to provide some leeway for practitioners to explore ways to make their offices more accommodating, which, in turn, will make the profession itself more inclusive. Such experimentation will also likely result in greater access to justice.

As I hope I have shown, the legal profession has exhibited resilience, inclusion, and an ability to accelerate trends in the wider adoption of technology that could improve the practice of law more generally. By making service delivery more effective, efficient, and inclusive, the legal profession could become more diverse and accommodating for attorneys for whom the traditional mode of practice has made it more difficult to participate or advance in the profession. Improving service delivery can also strengthen access to justice more generally, again, with particular emphasis on the provision of services to

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233. Hon. Deno G. Himonas & Tyler J. Hubbard, *Democratizing the Rule of Law*, 16 STAN. J. C.R. & C.L. 261, 273-78 (2020) (describing implementation of a regulatory sandbox in the state of Utah to explore reform that could improve access to justice); *see also* Dan Packel, *Utah Justices Give OK to 'Regulatory Sandbox,'* LAW.COM (Aug. 14, 2020, 10:26 AM), https://www.law.com/americanlawyer/2020/08/14/utah-justices-give-ok-to-regulatory-sandbox/?slreturn=20210202090750 (noting that a regulatory sandbox will allow lawyers to experiment with new types of businesses that aim to reduce the "access-to-justice gap").

234. JORGE GABRIEL JIMÉNEZ & MARGARET HAGAN, LEGAL DESIGN LAB, A REGULATORY SANDBOX FOR THE INDUSTRY OF LAW 2 (2009), http://www.legalexecutiveinstitute.com/wp-content/uploads/2019/03/Regulatory-Sandbox-for-the-Industry-of-Law.pdf (noting that a regulatory sandbox allows regulatory agencies to test regulations to see if they work).

235. Rani Molla, *Office Work Will Never Be the Same*, VOX (May 21, 2020, 7:30 AM), https://www.vox.com/recode/2020/5/21/21234242/coronavirus-covid-19-remote-work-from-home-office-reopening (describing remote work protocols put in place as a "giant forced experiment of remote working en masse").

236. *See supra* Part II.C.1.

groups historically underserved by the practicing bar. Long before the pandemic hit, the profession faced the twin imperatives that it become more inclusive and diverse and that it expand access to justice.[237] The pandemic opened the door for innovation that could enable the profession to adapt after the crisis recedes and to make strides toward satisfying these larger imperatives. As the next section shows, though, the imperative that the practice of law become more inclusive, particularly as it relates to attracting and retaining more attorneys of color, has only become more acute in light of the renewed attention being paid to issues of racial justice specifically, and diversity and inclusion more generally.[238] Indeed, the policing crisis that emerged in the late spring and early summer of 2020 has brought these issues into high relief, and it is to this policing crisis, one that captured almost every American's attention as it unfolded, and its implications for the legal profession, to which I turn next.[239]

III. THE CIVIL RIGHTS CRISIS SPARKED BY THE POLICE PROTESTS

A. The Crisis

A series of high-profile incidents involving police killing Black Americans sparked a string of protests across the nation and the globe, with some estimates placing the number of participants in such protests exceeding twenty million.[240] Some have claimed that this was the largest set of mass protests in United States history.[241] The public outrage about these incidents also provoked some early spasms of violence, but after the initial shock to the system wore off, the protesters mostly raised awareness about issues of structural racism within the broader public—from the boardroom to the classroom, and many sites in between.[242] Indeed, public outrage over these incidents of police abuse against Black

237. *ABA Mission and Goals*, *supra* note 149.

238. *See infra* Part III.

239. *See infra* Part III.A.

240. Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html.

241. *Id.*

242. *See, e.g.*, Melissa Repko et al., *Hashtags Won't Cut It. Corporate America Faces a Higher Bar in a Reckoning on Racial Inequality*, CNBC (June 12, 2020, 5:20 PM), https://www.cnbc.com/2020/06/12/action-wanted-corporate-america-faces-a-higher-bar-on-racial-inequality.html (describing demands for greater diversity and inclusion in American businesses); Justine Calma, *Black Scientists Call Out Racism in Their Institutions*, VERGE (June 11, 2020, 9:02 AM), https://www.theverge.com/21286924/science-racism-strike-stem-black-lives-matter-protests (describing efforts to highlight racism in higher education).

Americans raised the profile of these issues in the public consciousness and led many in corporate America and institutions of higher education to assess their practices; commit to greater diversity in their ranks; and support community-based efforts to address racial discrimination, both implicit and explicit.[243] Many organizations, following the lead of professional athletes, channeled their attention and energy toward combatting voter suppression, particularly of BIPOC voters, with the players in the Women's National Basketball Association and the National Basketball Association demanding that ownership in both leagues provide support for get-out-the-vote efforts, including insisting that many teams make their stadiums available as voting sites in communities of color.[244]

The response of the legal profession has, in many ways, mirrored these trends in broader society. At first, during the initial outbreak of sporadic violence, federal prosecutors charged two lawyers with engaging in acts involving the use of Molotov cocktails: crude, improvised weapons designed to ignite on contact when thrown.[245] At the same time within the legal profession—from private law firms and in-house counsel offices to non-profit legal services providers, law schools, government agencies, and the courts—employees and clients began to ask why the leadership in many of these organizations was not diverse, not only in terms of racial diversity but also with regard to gender, disability, sexual orientation, and gender identity.[246] As I describe below, the response of the legal profession has followed, in

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243. *See supra* note 242; Justin Worland, *America's Long Overdue Awakening to Systemic Racism*, TIME (June 11, 2020, 6:41 AM), https://time.com/5851855/systemic-racism-america (describing effects of the Black Lives Matter movement on institutional racism).

244. For a description of the role that advocacy by Black athletes has played in the wake of the killing of George Floyd, see Keeanga-Yamahtta Taylor, *The Players' Revolt Against Racism, Inequality, and Police Terror*, NEW YORKER (Sept. 9, 2020), https://www.newyorker.com/news/our-columnists/the-players-revolt-against-racism-inequality-and-police-terror.

245. *See* James Stout, *A Brief History of the Molotov Cocktail*, HUCK (Oct. 21, 2020), https://www.huckmag.com/perspectives/a-brief-history-of-the-molotov-cocktail. For a profile of the arrests of two lawyers for participation in Black Lives Matter protests in Brooklyn in May 2020, see Lisa Miller, *The Making of a Molotov Cocktail: Two Lawyers, a Summer of Unrest, and a Bottle of Bud Light.*, N.Y. MAG.: INTELLIGENCER (Aug. 4, 2020), https://nymag,com/intelligencer/article/lawyers-arrested-molotov-cocktail-nyc-protest.html.

246. While much of the attention on diversity and inclusion efforts has centered around law firms and law schools, diversity and inclusion are also critically important in non-profit settings as well. *See, e.g.*, *Law Firm & Law School Responses to the Black Lives Matter Movement*, VAULT (June 11, 2020), https://www.vault.com/blogs/vaults-law-blog-legal-careers-and-industry-news/law-firm-law-school-responses-to-the-black-lives-matter-movement. On the importance of diversity and inclusion in non-profits generally, see *Why Diversity, Equity, and Inclusion Matter for Nonprofits*, NAT'L COUNCIL OF NONPROFITS, https://www.councilofnonprofits.org/tools-resources/why-diversity-equity-and-inclusion-matter-nonprofits (last visited Apr. 1, 2021).

many respects, this broader response to the crisis: the legal profession has begun to assess the lack of diversity in its ranks, and lawyers have channeled their energy into combatting voter suppression and assisting with get-out-the-vote efforts in the 2020 election.[247]

B. Legal Profession Response: Addressing Diversity and Inclusion

The legal profession has a lot of work to do—from top to bottom, in all of the institutions of the profession, from firms large and small, to the judiciary, non-profit organizations, and academia—to promote greater diversity and inclusion across a number of dimensions.[248] Historically, many such institutions, including the ABA itself, have been exclusive clubs, keeping out those who were not White and male.[249] Indeed, the denial of entry to nonwhite, non-male lawyers by the ABA led to the creation of the National Bar Association and the National Lawyers Guild.[250] Famously, Thurgood Marshall, arguably the twentieth century's greatest lawyer, was denied entry to the University of Maryland's law school on account of his race.[251] Trailblazing civil rights lawyer and jurist Constance Baker Motley faced discrimination as a young attorney of color, including almost being denied entry to the library of the New York Bar Association on account of her race because the librarian did not believe a Black woman could be an attorney and a member of the bar association.[252] These are just two examples of the countless indignities that lawyers of color and those from other diverse groups have faced as they pursue law school, obtain their law degree, and enter the practicing bar, whether in private practice or public service.[253] The leadership and partner classes of many firms are still

247. *See, e.g.*, Devin Dwyer, *Record Surge of Voters Call Election Hotline Run by 12K Lawyers*, ABC NEWS (Sept. 22, 2020, 1:36 PM), https://abcnews.go.com/Politics/record-surge-voters-call-election-hotline-run-12k/story?id=73086314 (describing Election Protection Hotline coordinated by the Lawyers' Committee for Civil Rights Under Law); *see also infra* Part III.B–C.

248. *See, e.g.*, David Douglass, *Just Actions, Not Just Words*, A.B.A. J., Winter 2019-2020, at 30, 30 (advocating for a new rule of professional conduct that would require that every lawyer must "undertake affirmative steps to remedy de facto and de jure discrimination, eliminate bias, and promote equality, diversity and inclusion in the legal profession").

249. GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 6 (1983).

250. *Id.*

251. Leland Ware, *Turning Back the Clock: The Assault on Affirmative Action*, 54 WASH. U. J. URB. & CONTEMP. L. 3, 11 n.45 (1998).

252. LINN WASHINGTON, BLACK JUDGES ON JUSTICE: PERSPECTIVES FROM THE BENCH 131 (1994).

253. *See, e.g.*, Karen Zraick, *Lawyers Say They Face Persistent Racial and Gender Bias at Work*, N.Y. TIMES (Sept. 6, 2018), https://www.nytimes.com/2018/09/06/us/lawyers-bias-racial-gender.html (describing discrimination in the legal profession).

mostly White and male.[254] Law faculties and the judiciary exhibit similar characteristics.[255]

The explicit and implicit bias exhibited in all aspects of the profession is probably most prominent in the court system, particularly in courts like urban housing courts and family courts, which are often seen as "poor people's courts."[256] This is certainly true of the housing courts where I worked as a young attorney.[257] Housing court was never fun, and stiff questioning from a judge, or sharp tactics from adversaries, were not uncommon. But attorneys of color, particularly women, were often singled out and subjected to degrading treatment, especially from judges.[258] When seeing a female attorney of color step up to counsel table, the judge would often check the case file and note that the tenant was represented. That judge would then question the lawyer before them, often in a condescending tone: "Where is your lawyer? Your. Law. Yer?"[259]

Tenants fared no better. Housing court in New York City is mostly a poor people's court, and one where the tenants are mainly people of color, disproportionately women, and overwhelmingly of low income.[260] For some tenants, if not many, English is not their first language.[261] Court personnel appeared to hold particular disdain for litigants they perceived as being low-income. In housing court during the time that I practiced there, the court funneled all cases filed in the entire borough of Manhattan through a single courtroom, at least initially. If the litigants and their lawyers could not settle the matters there, and few did, the court would then refer them out to individual courtrooms, where judges

254. *See infra* discussion and text accompanying notes 294-97.

255. *See infra* discussion and text accompanying notes 298-313.

256. *See* Tonya L. Brito, *Producing Justice in Poor People's Courts: Four Models of State Legal Actors*, 24 LEWIS & CLARK L. REV. 145, 147 (2020) (describing poor people's courts as "state civil courts hearing family, housing, administrative, and consumer cases [which] present serious challenges to the civil justice system because they are characterized by a substantial volume of cases, socioeconomically disadvantaged litigants, and an absence or asymmetry of representation").

257. Litigants in such courts are often of low income, and many are people of color. Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 107-08 (1997).

258. N.Y. STATE JUD. COMM. ON WOMEN IN THE CTS., GENDER SURVEY 2020, at 10-11 (2020), https://www.nycourts.gov/LegacyPDFS/IP/womeninthecourts/Gender-Survey-2020.pdf.

259. While I witnessed this treatment in the 1990s, no one should be shocked that similar treatment continues to this day. *See generally, e.g.*, *id.* (surveying experiences of women in New York State courts).

260. Oksana Mironova, *Race and Evictions in New York City*, CMTY. SERV. SOC'Y (June 22, 2020), https://www.cssny.org/news/entry/race-evictions-new-york-city (describing racial disparities in New York City Housing Court); Engler, *supra* note 257, at 107-08.

261. Engler, *supra* note 257, at 108.

could try to settle cases and, on rare occasion, resolve them through trial. The courtroom where this initial calendar call took place was large and boisterous, occupied by hundreds of nervous tenants. The court would systematically call the roll of the cases according to the order in which they were listed on the court's calendar, which would often include over one hundred cases each day. Landlords rarely appeared there because their lawyers handled their cases on their behalf. Since, at the time, the overwhelming majority of tenants (roughly ninety-five percent of them), faced their eviction without the benefit of legal representation, such tenants would have to appear in this courtroom on their own.[262]

To make this experience less difficult for parents with young children, who would otherwise have to wait for their case to be called in order, the court would consider cases out of turn so that such litigants could try to dispose of their cases as quickly as possible. While this was a positive step taken by the court to accommodate the needs of such litigants, the court officers would often take the liberty of executing it in a particularly abusive way. One court officer in particular seemed to relish this task. He would walk up to a tenant, most likely a young woman of color who, this court officer determined based on her appearance, must speak Spanish. He would then bellow at her in a loud and menacing tone, for all in the room to hear: "*Da me sus papeles!*" Give me your papers. The purpose behind this request, which the court officer never explained, was that he wanted to find out the litigant's name and case number so that the court could call the case immediately and out of turn. The woman (and every incident that I remember involved a woman) was understandably terrified, not knowing why she was being singled out for this treatment. The court officer would gather what information he needed from the litigant's papers, toss them back in her lap, and march away, never informing the litigant of the purpose of his inquiry or what was likely to happen next. Thus, this gesture, designed to accommodate the needs of tenants with young children, became yet another method by which the court system engaged in discriminatory, harmful practices toward women of color.

Experiences such as these occur every day in courtrooms across the country.[263] A recent report prepared at the behest of the Chief Judge of

262. *Id.* at 107 & n.121.

263. Court systems, bar associations, and advocacy groups have issued reports addressing many different issues related to diversity and inclusion in the legal system and the legal profession. One representative example is the New York State Bar Association ("NYSBA") annual report cards. The Committee on Diversity and Inclusion of the NYSBA makes regular requests to all NYSBA members to complete a "diversity profile" as a way "to evaluate the level of diversity in Section leadership, membership and activities" and reports the results with recommendations to achieve diversity goals. *See, e.g.*, N.Y. STATE BAR ASS'N, COMM. ON DIVERSITY & INCLUSION,

the NYS court system echoes the anecdotal experiences described above.[264] On June 9, 2020, Chief Judge Janet DiFiore appointed former United States Secretary of Homeland Security Jeh Johnson to conduct a review of racial bias in the NYS court system.[265] Specifically, Johnson and his team were tasked with reviewing "existing policies, practices and organizations within the [NYS] court system that are intended to address racial bias and recommend any changes or expansion of those policies, practices and organizations."[266]

In carrying out their work, the team conducted 96 interviews with 289 participants;[267] reviewed several unsolicited submissions from individual members of the public and organizations;[268] examined past reports focused on racial bias in the NYS court system;[269] and reviewed the policies and practices of the Office of Court Administration ("OCA") regarding hiring, promotion, workplace conduct, and bias training.[270] Their findings are not surprising to anyone, like this author, who has practiced in the state's courts.

Many interviewees complained that the court system was "under-resourced" and "over-burdened" and had a "dehumanizing effect" on its litigants, particularly people of color.[271] The "court officer community" was presented as another problem, with several interviewees noting that behavior exhibited by court officers "evidences a broader institutional acceptance of racist behavior."[272] Furthermore, attorneys of color still face bias in the court system, including, among

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DIVERSITY REPORT CARD 4 (2018), https://archive.nysba.org/2017reportcard. Another exemplary study was undertaken by The Brennan Center for Justice at the New York University School of Law in order to examine the level of diversity on the state bench; it provided a list of ten best practices with the goal of decreasing implicit bias and increasing diversity in the judiciary. *See* CIARA TORRES-SPELLISCY ET AL., BRENNAN CTR. FOR JUST., IMPROVING JUDICIAL DIVERSITY 1-3 (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_Improving-Judicial-Diversity.pdf. The Diversity and Inclusion 360 Commission of the ABA reviewed the state of diversity in the legal profession, judicial system, and ABA with the goal of "moving the needle" in diversity and inclusion. *See* KAREN CLANTON, AM. BAR. ASS'N, DIVERSITY & INCLUSION 360 COMMISSION: EXECUTIVE SUMMARY 2 (2016), https://www.americanbar.org/content/dam/aba/administrative/diversity-portal/diversity-inclusion-exec-summ-360-comm.pdf. Based on those results, they formulated creative online tools, videos, surveys, templates, and policies. *Id.* at 2-3.

264. *See* JEH CHARLES JOHNSON, REPORT FROM THE SPECIAL ADVISER ON EQUAL JUSTICE IN THE NEW YORK STATE COURTS 1-2 (2020), http://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf.

265. *Id.* at 1.

266. *Id.* at 2.

267. *Id.* at 1.

268. *Id.* at 2.

269. *Id.*

270. *Id.* at 13-14.

271. *Id.* at 54.

272. *Id.* at 61-62.

other things, being mistaken for a criminal defendant.[273] Although bias training does exist, interviewees noted that it was "inconsistent" and "insufficient."[274] Some individuals also expressed concern for juror bias.[275] In addition, although overall progress has been made in the judiciary's diversity, there is still more work to be done.[276]

Johnson and his team provided a range of recommendations for how to address diversity and inclusion in the courts. First and foremost, there must be "commitment from the top" to confront such issues.[277] The team recommends that OCA leadership "embrace a 'zero tolerance' policy for racial bias, along with an expression that the duty to uphold this policy extends to all those workings within the [NYS] court system."[278] Furthermore, the team recommended the strengthening of existing institutions tasked with addressing racial justice as well as an expansion of mandatory bias training to all judicial and non-judicial personnel in the court system.[279] The report also suggested that the courts address juror bias by incorporating an implicit bias segment in the orientation video shown to jurors, creating new rules to allow questioning of prospective jurors regarding implicit bias, and developing jury instructions that explain implicit bias.[280] It also called on OCA to adopt a social media policy that clearly defines restrictions for employees, whether in an official or a personal capacity.[281] Finally, the report recommended that the court system follow through on the implementation of these recommendations by assigning an entity or committee in order to make lasting change.[282]

The sorts of issues identified by Johnson and his team are prevalent across the nation, for both litigants in courts and lawyers in legal settings that are not diverse nor inclusive.[283] Indeed, such discrimination does not just happen to litigants in court. Attorneys of color, women attorneys, women attorneys of color, disabled attorneys, and attorneys who identify as LGBTQ+ have historically experienced these sorts of aggressions, macro and micro, which are the products of implicit and explicit bias,

273. *Id.* at 66.
274. *Id.* at 72.
275. *Id.* at 74-75.
276. *Id.* at 67-70.
277. *Id.* at 79.
278. *Id.* at 80.
279. *Id.* at 80-83.
280. *Id.* at 83-84.
281. *Id.* at 84-87.
282. *Id.* at 100.
283. Melaku, *supra* note 175.

ranging from slights and abusive behavior to employment decisions, like hiring, promotion, and compensation.[284]

What is more, these same forces operate to further entrench inequality. Spaces of power and authority in American society that are dominated by White males have historically been hostile to those who are not members of that group.[285] Such dominance clings to power and to the barriers to entry, creating and perpetuating a vicious cycle; it maintains an environment that prevents those outside the dominant group from gaining access to the halls and levers of power.[286] Without the ability to make changes to that system due to the limits on access to such power, those in authority simply perpetuate exclusion.[287] Such a system also often promotes the myth of progress, exemplified by the outliers who have achieved some degree of status within the system or the efforts that have dismantled some of the components of structural racism.[288] Indeed, these examples of limited success within the system are often used to perpetuate that system and deny its discriminatory nature.[289] Americans elected a Black president after all—a lawyer, no less—who had been the "first" to achieve so much.[290] America is

284. For a social history of the experiences of marginalized groups within the legal profession and early efforts to bring diversity to its ranks, see generally Kenneth Walter Mack, *A Social History of Everyday Practice: Sadie T.M. Alexander and the Incorporation of Black Women into the American Legal Profession, 1925–1960*, 87 CORNELL L. REV. 1405 (2002).

285. The literature on this topic is vast, to say the least. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (noting the history of racial segregation and White supremacy in the United States, with particular emphasis on the last fifty years of its history). The 1619 Project, a product of *The New York Times*, also identifies structural racism as integral to American history and places the struggle for racial justice at the center of the American story. *The 1619 Project*, N.Y. TIMES MAG. (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html.

286. *See, e.g.*, Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA. L. REV. 805, 805-17 (2019) (describing historical discrimination in the legal profession); Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 755-63, 785-87 (2000) (describing historical discrimination in the legal profession).

287. Martinez, *supra* note 286, at 815-17 (describing efforts to maintain barriers to entry to the profession to protect dominance of White males).

288. *See, e.g.*, DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 134-35 (2004) (arguing success in litigation to dismantle the Jim Crow system helped to mask ongoing structural forces perpetuating inequality).

289. The other side of this story, "the tale" as Erin Carr calls it, which "has been so effectively told, is that those who fail to achieve the American dream do so not because of racism, structural inequities, or historical (and ongoing) oppression, but because they lack the intellect, work ethic, and gusto to succeed." Erin M. Carr, *Educational Equality and the Dream That Never Was: The Confluence of Race-Based Institutional Harm and Adverse Childhood Experiences (ACEs) in Post-*Brown *America*, 12 GEO. J.L. & MOD. CRITICAL RACE PERSPS. 115, 126 (2020).

290. *See, e.g.*, Donna E. Young, *Post Race Posthaste: Towards an Analytical Convergence of Critical Race Theory and Marxism*, 1 COLUM. J. RACE & L. 503-09 (2012) (describing post-racial discourse); *see also* Nancy LeTourneau, *Obama's Firsts*, WASH. MONTHLY (Jan. 5, 2017), https://washingtonmonthly.com/2017/01/05/obamas-firsts.

therefore a post-racial society, right?[291] Nothing could be farther from the truth, as the following information on the demographics of the profession reveals.

In 2020, the population of active attorneys was 63% male and 37% female.[292] In 2010, these percentages were 69% male and 31% female.[293] In 2019, women made up 21% of equity partners, 31% of non-equity partners, and 47% of law firm associates, with 24% of those associates being women of color.[294] Those who self-identify as LGBTQ+ made up 4% of associates and 2% of equity partners.[295] People of color made up only 9% of equity partners.[296] Persons with disabilities made up less than 1% of equity partners.[297]

In 2020, the legal profession was 86% Caucasian/White, 5% Black, 2% Asian, 5% Hispanic, and 2% multiracial.[298] The demographics of race and ethnicity of lawyers have remained fairly consistent since 2010.[299] The ABA reported in 2011 that 6.87% of its members identified themselves as having a disability.[300] That same year, 41% of ABA entities reported having a lawyer with a disability in a leadership position.[301]

As of 2019, 73% of federal judges were male, 27% were female, 80% were white, 10% were Black, 6% were Hispanic, and 2.6% were Asian American.[302] Judges who identified as LGBTQ+ made up less than 1% of federal judges.[303]

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291. *See, e.g.*, John A. Powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. U. L. REV. 785, 788-89 (2009).

292. AM. BAR ASS'N, ABA NATIONAL LAWYER POPULATION SURVEY (2020), https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-demographics-2010-2020.pdf [hereinafter ABA POPULATION SURVEY]. The 2020 survey from which these numbers are derived included questions relating to LGBTQ+ persons and persons with disabilities, but such results were not included in the report due to insufficient responses. *Id.*

293. *Id.*

294. NAT'L ASS'N OF WOMEN LAWS., 2019 SURVEY REPORT ON THE PROMOTION AND RETENTION OF WOMEN IN LAW FIRMS 3-5 (2019).

295. *Id.* at 2, 5.

296. *Id.* at 5.

297. *Id.*

298. ABA POPULATION SURVEY, *supra* note 292.

299. *Id.*

300. AM. BAR ASS'N, ABA DISABILITY STATISTICS REPORT 1 (2011) https://www.americanbar.org/content/dam/aba/administrative/market_research/20110314_aba_disability_statistics_report.pdf.

301. *Id.*

302. Danielle Root et al., *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019, 8:15 AM), https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary.

303. *Id.*

When it comes to the pipeline to the profession, the characteristics of those enrolled in law school show some signs that the future of the profession might be more diverse than the past. In 2020, 38,202 students enrolled their first year in law school, of which 20,829 (approximately 54.52%) were female, 17,206 were male (approximately 45.04%), and 167 identified as "other" (approximately 0.44%).[304] 12,471 of these students were minorities (approximately 32.64%).[305] 5,084 of these first-year students identified as Hispanic (2,123 were male, 2,948 were female, and 13 identified as other), which is approximately 13.31% of total students.[306] 2,551 of first-year law students in 2020 were Asian (958 were male, 1,586 were female, and 7 identified as other), which is approximately 6.68% of total students.[307] 2,975 first-year students were Black (1,004 were male, 1,964 were female, and 7 identified as other), which is approximately 7.79% of total first-year students.[308] In 2011, the ABA reported that 3.4% of law students were provided testing accommodations, noting that this percentage had increased from previous years.[309] The percentage of law students that identify as having a disability is not clear, however.[310] The National Association for Law Placement ("NALP") suggests that the percentage of law school graduates who self-identify as having a disability is between 2.5% and 3.5%.[311]

In law school faculties, there is still far to go, however. In 2013, 64.1% of law professors were male while 35.9% were female.[312] That same year, 79.3% of law professors were non-Hispanic White, 9.7% were Black, 4.4% were Asian American/Pacific Islander, 4.7% were Hispanic, 0.6% were Native American, and 0.4% were 2 or more races.[313]

There is no shortage of recommendations for how to make the practice of law and the justice system more diverse and inclusive, both in terms of the number of attorneys, partners at law firms, judges, professors, and law school administrators who identify as members of

304. AM. BAR ASS'N, 2020 1L ENROLLMENT BY GENDER & RACE/ETHNICITY (AGGREGATE) (2020), https://www.americanbar.org/groups/legal_education/resources/statistics.

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. AM. BAR ASS'N, *supra* note 304, at 4.

310. NAT'L ASS'N FOR L. PLACEMENT, 2019 REPORT ON DIVERSITY IN U.S. LAW FIRMS 8 (2019), https://www.nalp.org/uploads/2019_DiversityReport.pdf.

311. *Id.*

312. James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013*, 39 HARV. J.L. & PUB. POL'Y 89, 146 (2015).

313. *Id.* at 143.

historically marginalized groups, and also the extent to which such lawyers, no matter their position or sector in which they practice, are treated with dignity and respect, and offered the same opportunities as lawyers who are not from such historically marginalized and underrepresented groups.[314] In a recent work in which she analyzes the experiences of women of color in legal academia, Meera Deo provides a summary of some of the strategies that law schools can use to bring greater diversity to their faculty and administration.[315] "Because intersectional discrimination, implicit bias, and gender privilege are institutional rather than purely individual problems," she argues, "only structural solutions can truly ameliorate them."[316] Such solutions require several things to succeed, including "allies in the administration who are aware of the obstacles facing women of color and proactively work to overcome them."[317] Schools have to work to "stock the pipeline, to

314. Representative efforts to articulate the need for and recommendations to accomplish diversity, inclusion, and equity in the legal profession include, but are by no means limited to, the following. *See, e.g.*, Eric H. Holder, Jr., *Fifty-Third Cardozo Memorial Lecture: The Importance of Diversity in the Legal Profession*, 23 CARDOZO L. REV. 2241 (2002) (describing the imperativeness of diversity for the legal profession); Alex M. Johnson, Jr., *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective*, 95 MICH. L. REV. 1005, 1042-62 (1997) (providing recommendations for eliminating institutional bias in the legal profession); Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective*, 96 IOWA L. REV. 1549 (2011) (describing the imperative of diversity in legal education); Edward Williams, Note, *Diversity, the Legal Profession, and the American Education Crisis: Why the Failure to Adequately Educate American Minorities Is an Ethical Concern for the Legal Profession*, 26 GEO. J. LEGAL ETHICS 1107 (2013) (describing the ethical imperative of diversity in the legal profession); Elizabeth B. Cooper, *The Appearance of Professionalism*, 71 FLA. L. REV. 1, 40-62 (2019) (recommending measures that the legal profession can take to improve diversity and inclusion); Ediberto Roman & Christopher B. Carbot, *Freeriders and Diversity in the Legal Academy: A New Dirty Dozen List?*, 83 IND. L.J. 1235, 1239-42 (2008) (describing the importance and value of an increasing number of Latinx professors in legal academia). *But see* Jason P. Nance & Paul E. Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 CONN. L. REV. 271, 316-17 (2014) (comparing diversity in the legal profession with that in other, similarly prestigious professions and finding that diversity in law is greater than in many other professions, particularly with respect to younger lawyers); Christian Sundquist, Note, *Equal Opportunity, Individual Liberty, and Meritocracy in Education: Reinforcing Structures of Privilege and Inequality*, 9 GEO. J. ON POVERTY L. & POL'Y 227, 235-36 (2002) (cautioning that efforts to improve diversity in education can reinforce and perpetuate privilege).

315. MEERA E. DEO, UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA 139-70 (2019). For a selection from the vast literature on the experiences of law faculty from historically underrepresented groups, see generally, for example, Marjorie E. Kornhauser, *Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender Among Law Professors*, 73 UMKC L. REV. 293 (2004); Ann C. McGinley, *Reproducing Gender on Law School Faculties*, 2009 BYU L. REV. 99 (2009); Reginald Leamon Robinson, *Human Agency, Negated Subjectivity, and White Structural Oppression: An Analysis of Critical Race Practice/Praxis*, 53 AM. U. L. REV. 1361 (2004); Rachel F. Moran, Foreword, *Taking Stock: Women of All Colors in Legal Education*, 53 J. LEGAL EDUC. 467 (2003).

316. DEO, *supra* note 315, at 158.

317. *Id.*

prepare greater numbers of nontraditional students for careers in legal academia."[318] Furthermore, because of subjective hiring procedures that create barriers for the recruitment of diverse faculty, schools must "think outside the box, with regard to recruitment, retention, and leadership potential."[319] Last, Deo makes it clear that "faculty diversity and inclusion can transform legal education only with perseverance and persistence—and they must invest time, money, and effort in this endeavor to improve our unequal profession."[320]

If law schools, which are the entryway to the profession, could adopt some of these changes, including improving and redoubling efforts to recruit more students and faculty from groups historically underrepresented in the profession and making themselves more welcoming and supportive of faculty and students from such groups, it is more likely that such changes will improve the pipeline to the profession for attorneys from such groups.[321] In addition, sustained support for practicing lawyers, law students, and faculty from diverse groups could enable them to pursue the careers they desire and stay with the practice of law until they can assume leadership roles throughout all levels and sectors of the profession.

In addition to academia, and like different industries and sectors across the economy, many in the private and non-profit sectors of the legal profession reacted to the Black Lives Matter protests in the late spring and summer of 2020 by reviewing their hiring practices, assessing

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318. *Id.*

319. *Id.*; *see also* Meera E. Deo, *Trajectory of a Law Professor*, 20 MICH. J. RACE & L. 441, 458 (2015) (arguing that "racial and gender disparities in legal academia cannot be blamed on a lack of . . . qualified candidates," but rather on criteria that tends to exclude such qualified candidates for consideration). In a forthcoming work, Carliss Chatman and Najarian Peters describe legal academic hiring as "follow[ing] a script that is steeped in racist practices," and that "business as usual" in this hiring process "means that there are always moving goal posts and shifting standards, undisclosed hiring criteria, and people who become part of the faculty in ways that are beyond the known 'process.'" Carliss N. Chatman & Najarian Peters, *The Soft-Shoe and Shuffle of Law School Hiring Committee Practices*, 69 UCLA L. REV. DISCOURSE (forthcoming 2021) (manuscript at 2-3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3789952.

320. DEO, *supra* note 315, at 158. My colleague Christian Sundquist has described similar strategies for reform, drawing from the voices of students of color presently enrolled in law schools. *See* Christian Sundquist, *The Future of Law Schools: COVID-19, Technology, and Social Justice*, 53 CONN. L. REV. ONLINE 3, 11-16 (2020); *see also* Eman Bare, *Open Letter to Our Law School Deans*, MEDIUM (June 14, 2020), https://medium.com/@eman.bare/open-letter-to-law-school-deans-fd6d621bceab (providing a statement from student organizations representing a wide range of traditionally underrepresented groups in the legal profession).

321. For a description of efforts by law schools across the country to address racial and social justice in wake of the protests held in the summer of 2020, see, for example, Keeshea Turner Roberts, *Law Schools Push to Require Anti-Racism Training and Courses*, A.B.A. (Dec. 14, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/rbgs-impact-on-civil-rights/law-schools-push.

the diversity within their ranks, and determining ways in which these entities could be more inclusive toward marginalized groups, especially lawyers from communities of color.[322] Whether this trend will continue remains to be seen, but many institutions appear engaged in the process of conducting a meaningful review of their policies and practices.[323] Let us hope such efforts produce real change and do not fall into traditional and bogus objections to greater diversity, in all of its forms, that continue to extend and further entrench existing inequalities.

But such reviews, and any interventions legal organizations may undertake, must be considered long-term strategies. Will the leadership of these organizations continue with such efforts? In addition, despite such potential commitment to diversity and inclusion, those who are encouraging such organizations to improve their practices will likely face implicit and explicit bias, institutional obstacles, intransigence, or outright resistance to such efforts. As long-term strategies, they will require stamina and sustained commitment to undo centuries of practices designed to protect White male privilege.[324] To borrow the words of Billie Holiday: "The difficult I'll do right now. The impossible will take a little while."[325]

There is much long-term work to do, and some progress is being made toward important, long-range goals. As with the general response to the crisis, however, over the summer and fall of 2020, lawyers also took immediate steps to address systemic and structural racism, using "tools from the master's house"—that is, supporting the hard-won right to vote.[326] Indeed, lawyers joined athletes and others by channeling their energies toward promoting get-out-the-vote efforts[327] and combatting

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322. *See, e.g.*, Eilene Spear & Rachel Popa, *Legal Industry Updates from the National Law Review: Law Firm Moves, Hires and Response to Racial Injustice*, NAT'L L. REV. (June 29, 2020), https://www.natlawreview.com/article/legal-industry-updates-national-law-review-law-firm-moves-hires-and-response-to (describing some legal industry efforts in response to demands for greater racial justice and equality).

323. *See, e.g.*, *Law Firm & Law School Responses to the Black Lives Matter Movement*, VAULT (June 11, 2020), https://www.vault.com/blogs/vaults-law-blog-legal-careers-and-industry-news/law-firm-law-school-responses-to-the-black-lives-matter-movement.

324. *See* Cory Collins, *What Is White Privilege, Really?*, LEARNING FOR JUSTICE, Fall 2018, https://www.learningforjustice.org/magazine/fall-2018/what-is-white-privilege-really.

325. BILLIE HOLIDAY, CRAZY HE CALLS ME (Decca Records 1949).

326. Of course, the phrase is that "the master's tools will never dismantle the master's house." AUDRE LORDE, SISTER OUTSIDER 112 (Rev. Ed. 2007). *But see* Pamela S. Karlan, *The Partisan of Nonpartisanship: Justice Stevens and the Law of Democracy*, 74 FORDHAM L. REV. 2187, 2192 (2006) (arguing that Justice Stevens's jurisprudence in a range of redistricting cases was intended to "do just that" (i.e., use the master's tools to dismantle the master's house)).

327. *See* PR Newswire, *Young Black Lawyers' Organizing Coalition Launches Black Ballots, Black Futures-Georgia GOTV Voter Protection Effort to Empower Black Voters During the Georgia Run-Off Elections*, YAHOO! (Dec. 11, 2020), https://www.yahoo.com/now/young-black-

voter suppression in the lead up to the election of 2020,[328] heeding the call to lend their support to voter protection interventions, as the following section describes.[329]

C. Channeling Efforts Toward Combatting Voter Suppression

As with the efforts of advocates and athletes to direct their energy toward voter engagement, many lawyers—including the Lawyers Committee for Civil Rights Under Law and former elected officials who are also lawyers, such as Stacey Abrams—continued and expanded efforts to ensure that anyone who wanted to vote in the 2020 election would be able to do so.[330] Advocates coordinated a massive outpouring of volunteer support designed to push back against potential voter suppression measures.[331] Such push back included engagement with the post-election litigation foisted on the legal system by the Trump campaign and its supporters.[332] The representation of the Biden campaign was certainly partisan, and government lawyers represented state election officials in a defensive posture in the courts.[333] When it came to election-related voter assistance, however, that work was non-partisan.[334] Regardless of whether it was partisan or not, it is easy to see these efforts—both the campaign to prevent voter suppression and the campaign to defend the results of the election—as racial justice work.

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lawyers-organizing-coalition-134100542.html?guccounter=1; *see also* Will Leitch, *The Athletes Have More to Say*, NEW YORK MAG.: INTELLIGENCER (Mar. 2, 2021), https://nymag.com/intelligencer/2021/03/the-athletes-have-more-to-say.html.

328. *See* PR Newswire, *supra* note 327 (describing the voter protection effort in Georgia).

329. *Id.*; *see infra* Part III.C.

330. *See, e.g.*, Brittany Gibson, *How Georgia Got Organized*, THE AM. PROSPECT (Jan. 2, 2021), https://prospect.org/politics/how-georgia-got-organized-stacey-abrams-democrats-elections (describing voter mobilization efforts in Georgia); Dwyer, *supra* note 247.

331. *See* Dwyer, *supra* note 247 (describing the voter protection effort).

332. *See* Aaron Morrison et al., *Trump Election Challenges Sound Alarm Among Voters of Color*, AP NEWS (Nov. 22, 2020), https://apnews.com/article/joe-biden-donald-trump-race-and-ethnicity-georgia-wisconsin-a2f5155019a0c5aa09a7a6a82fb7d14b.

333. *See, e.g.*, Amy Howe, *States Tell Justices to Deny Texas Request to Overturn 2020 Election*, SCOTUSBLOG (Dec. 10, 2020, 5:28 PM), https://www.scotusblog.com/2020/12/states-tell-justices-to-deny-texas-request-to-overturn-2020-election (noting that in a lawsuit filed in the Supreme Court by State of Texas and other states seeking to overturn the results of the elections in the states of Georgia, Michigan, Pennsylvania and Wisconsin, such states "were represented by their attorneys general and other state officials" with Georgia "also represented by several private lawyers"); Alana Abramson, *Marc Elias Fought Trump's 2020 Election Lawsuits. Can He Win the Battle over Voting Rights?*, TIME (Apr. 6, 2021, 2:00 PM), https://time.com/5952523/marc-elias-voting-laws-challenge (describing work of partisan election lawyer, Marc Elias).

334. Dwyer, *supra* note 247 (summarizing the efforts of nonpartisan persons).

Indeed, as would soon become apparent after Election Day, the challenges to the outcome of the vote in critical states where then candidate Joseph Biden defeated Donald Trump, giving Biden the victory in the Electoral College, often had racial overtones.[335] Lawyers for the Trump campaign, a handful of Republican voters, and a small number of elected officials often engaged in thinly veiled efforts to have the courts toss out the votes from districts that were disproportionately occupied by people of color who voted overwhelmingly for Biden, like in precincts in and around Philadelphia, Pennsylvania and Atlanta, Georgia.[336] It is deeply shameful that the successes of positive, get-out-the-vote efforts that utilized the levers of democracy as they were intended, which we should rightly celebrate, also triggered a seditious, racist crisis. It is to this final crisis, in which lawyers have played a central role, that I now turn.[337]

IV. THE INSURRECTION

A. The Crisis

On the afternoon of January 6, 2021, a riotous mob descended on the U.S. Capitol and overwhelmed the security detail in place, which was unprepared and inadequate in size to defend the building and its occupants, which included members of both houses of Congress who were assembled to close the book on the presidential election of 2020.[338] Engaging in what has been, historically, a ceremonial, ministerial act, Congress and the Vice President gathered to recognize the results of the election, certifying then President-Elect Biden as its winner.[339] Thousands of protesters had gathered on the Mall in Washington, D.C., in what was called the "Save America March," where they assembled to, in their words, "stop the steal," signifying the claim that the election was fraudulent, and that Trump had actually won.[340] Trump himself appeared

335. *See, e.g.*, Morrison et al., *supra* note 332 (describing the focus of the Trump campaign legal challenges on rejecting votes from voters of color).

336. *Id.*

337. *See infra* Part IV.A.

338. Paul Kane, *Inside the Assault on the Capitol: Evacuating the Senate*, WASH. POST (Jan. 6, 2021, 9:50 PM), https://www.washingtonpost.com/politics/reporter-senate-evacuated/2021/01/06/3e7d5456-5061-11eb-83e3-322644d82356_story.html (describing the occupation of the Capitol).

339. Luke Mogelson, *Among the Insurrectionists*, NEW YORKER (Jan. 15, 2021), https://www.newyorker.com/magazine/2021/01/25/among-the-insurrectionists.

340. *Id.*; Peter Baker, *A Mob and the Breach of Democracy: The Violent End of the Trump Era*, N.Y. TIMES (Jan. 6, 2021), https://www.nytimes.com/2021/01/06/us/politics/trump-congress.html (describing the Save America March).

before the crowd, urging them to march to the Capitol: "We're going to walk down to the Capitol, and we're going to cheer on our brave senators and congressmen and women, and we're probably not going to be cheering so much for some of them . . . ."[341] He added, "[Y]ou'll never take back our country with weakness. You have to show strength, and you have to be strong."[342] This followed previous tweets where he had encouraged his supporters to come to the rally on January 6th, telling them, "Be there, will be wild."[343]

In addition to the President's encouraging words at the rally, one of the lawyers who represented him through his doomed effort in the courts to overturn the results of the election, Rudy Giuliani, also bellowed at the crowd: "If we're wrong, we will be made fools of, but if we're right a lot of them will go to jail. Let's have trial by combat."[344] Moments after these speeches, the crowd marched on the Capitol.[345] Soon thereafter, many of the crowd's members overwhelmed the security detail and stormed the seat of government, sending elected officials, including the Vice President and Speaker of the House, into hiding.[346] It took hours to clear the trespassers.[347] Later that night, Congress reconvened and certified the election over the objections of a group of more than 100 Republican Representatives and a few Senators, led by Senators Josh Hawley and Ted Cruz, both lawyers.[348]

What were the events that led to this crisis of democracy and, apart from a belligerent pronouncement from the podium by Giuliani, what other roles did lawyers play in the efforts to challenge the results of the election? If the riot at the Capitol can be tied to the campaign to overturn the election, and it would be hard not to, it would seem clear that lawyers were at the center of these events. Since mob violence is the very antithesis to the rule of law,[349] and given the legal profession's

341. Charlie Savage, *Incitement to Riot? What Trump Told Supporters Before Mob Stormed Capitol*, N.Y. TIMES (Jan. 12, 2021), https://www.nytimes.com/2021/01/10/us/trump-speech-riot.html.

342. *Id.*

343. Dan Barry & Sheera Frenkel, *'Be There. Will Be Wild!': Trump All but Circled the Date*, N.Y. TIMES (Jan. 8, 2021), https://www.nytimes.com/2021/01/06/us/politics/capitol-mob-trump-supporters.html?searchResultPosition=1.

344. Alan Feuer, *A State Senator Referred Rudy Giuliani for Disbarment*, N.Y. TIMES (Jan. 14, 2021), https://www.nytimes.com/2021/01/11/us/giuliani-disbarment.html.

345. Mogelson, *supra* note 339.

346. Kane, *supra* note 338.

347. *Id.*

348. *Id.*; Jenny Gross & Luke Broadwater, *Here Are the Republicans Who Objected to Certifying the Election Results.*, N.Y. TIMES: POL. (Jan. 8, 2021), https://www.nytimes.com/2021/01/07/us/politics/republicans-against-certification.html.

349. For an overview of the core meaning of the rule of law, see generally PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD (2016).

obligations to uphold the rule of law,[350] efforts to examine the root causes of the crisis of democracy must also engender introspection by the legal profession: What was the role of lawyers in the origins of this crisis and the actions that worsened it? Furthermore, did failures of our system of professional ethics lead to this moment? This Part explores this question and offers ways to curtail lawyer conduct that threatens the rule of law in the future.[351]

B. The Role of Lawyers in the Legal Campaign to Overturn the Results of the Election and the Capitol Coup

Without being present in the room for the strategy sessions involving Trump and his legal team as they explored ways to challenge the 2020 presidential election results, it is hard to know exactly what decisions the campaign made and what choices they had before them. Still, reporting by the news outlet *Axios* paints a desperate picture, one where the campaign apparently had two options before it.[352] The first was deemed a long shot by his supporters: win enough votes in Arizona and Georgia, where the election was close, and then challenge the results in Wisconsin.[353] A second, which was promoted by Rudy Giuliani, on-again-off-again attorney for the Trump campaign, Sidney Powell,[354] and others, involved outlandish claims of a deep conspiracy to manipulate voting machines, falsify ballots, and destroy votes in favor of Trump.[355] The *Axios* report describes the discussions between the teams that supported these two different strategies as follows:

> The[] meetings [involving the teams] would begin with official staff raising plausible legal strategies. Then Giuliani and Powell, a lawyer

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350. Richard E. Levy, *The Tie That Binds: Some Thoughts About the Rule of Law, Law and Economics, Collective Action Theory, Reciprocity, and Heisenberg's Uncertainty Principle*, 56 U. KAN. L. REV. 901, 903 (2008) (arguing that "the legal profession has a special obligation to respect, preserve, and nurture the rule of law, especially because once the rule of law is lost, it is not clear how it can be regained").

351. *See infra* Part IV.B–D.

352. Jonathan Swan & Zachary Basu, *Episode 2: Barbarians at the Oval*, AXIOS: OFF THE RAILS (Jan. 17, 2021), https://www.axios.com/trump-lawyers-biden-election-victory-debf79bc-750b-457b-a736-789b501d62a7.html. For more on the meetings of the lawyers who discussed the different strategies the Trump campaign had at its disposal, see Jim Rutenberg et al., *77 Days: Trump's Campaign to Subvert the Election*, N.Y. TIMES (Feb. 12, 2021), https://www.nytimes.com/2021/01/31/us/trump-election-lie.html.

353. Swan & Basu, *supra* note 352.

354. Maggie Haberman & Alan Feuer, *Trump Team Disavows Lawyer Who Peddled Conspiracy Theories on Voting*, N.Y. TIMES (Dec. 19, 2020), https://www.nytimes.com/2020/11/22/us/politics/sidney-powell-trump.html (noting the Trump campaign's statements distancing itself from Ms. Powell).

355. *Id.*

> with a history of floating "deep state" conspiracy theories, would take over, spewing wild allegations of a centralized plot by Democrats—and in Powell's view, international communists—to steal the election.[356]

The strategy that the Trump campaign would ultimately adopt—one which involved wild allegations in the press and somewhat less far-fetched allegations in actual pleadings—seems, in part, to have incorporated elements of both approaches.[357] To date, the court campaigns have resulted in a remarkable, possibly unmatched string of losses, the likes of which one does not see from anyone but the most misguided litigants, i.e., those who file suits over the oft-maligned "little green men."[358] According to one of the lawyers who has held a prominent role in defending against challenges to the results of the 2020 election, Mark Elias, such efforts have resulted in Trump and his allies "losing 59 total cases and winning one case that only affected a few dozen ballots."[359]

Trump supporters have filed cases in state and federal courts, and have appealed at least some of their many losses, at times seeking

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356. Swan & Basu, *supra* note 352.

357. Zach Montague and Alan Feuer, *Trump Campaign Lawyers Step Up but Are Swiftly Knocked Down*, N.Y. TIMES (Nov. 25, 2020), https://www.nytimes.com/2020/11/20/us/politics/trump-election-lawsuits.html.

358. In the decisions of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court found that allegations raised in civil cases in the federal courts needed to meet a newfound "plausibility" standard. *See Iqbal*, 556 U.S. at 678 (quoting *Bell Atlantic Corp.*, 550 U.S. at 570). In his dissent in *Iqbal*, Justice Souter, the author of the *Bell Atlantic Corp.* decision, explained the import of the prior ruling as follows:

> *Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be. . . . The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel.

Id. at 696 (Souter, J., dissenting) (citations omitted). At least one complaint in the post-election litigation seems to meet Justice Souter's fantastical test, as it references the mythic land of Gondor from the epic fantasy trilogy *The Lord of the Rings*. *See* Amended Motion for Temporary Restraining Order at 2 & n.2, Latinos for Trump v. Sessions, 6:21-CV-43 (W.D. Tex. Jan. 21, 2021), https://www.courtlistener.com/recap/gov.uscourts.txwd.1120287/gov.uscourts.txwd.1120287.6.0_1.pdf [hereinafter Amended Motion for TRO]; *see also Stewards of Gondor*, FANDOM: THE ONE WIKI TO RULE THEM ALL, https://lotr.fandom.com/wiki/Stewards_of_Gondor (last visited Apr. 1, 2021). In that lawsuit, advocates asserted that, due to fraud in the 2020 election, the legislative and executive branches of the federal government should be placed "into a state of stewardship" just as in Gondor, wherein stewards managed the land for time immemorial because the line of kings had apparently been broken. *See* Amended Motion for TRO, *supra*, at 2 & n.2; *see also Stewards of Gondor*, *supra* (describing the reign of the stewards of Gondor).

359. Marc Elias, *On the Docket: December 2020*, DEMOCRACY DOCKET, Dec. 2020, https://www.democracydocket.com/2020/12/december-2020.

review from the Supreme Court,[360] with one such case being summarily dismissed and in others, the Supreme Court has denied review.[361] Judges have routinely excoriated the lawyers who file these cases as having presented them with no provable facts to support their claims.[362] At least one federal district court judge has decided that he will refer to disciplinary authorities the lawyers who filed one of these cases for the frivolous nature of the claims they interposed and their conduct before him.[363] After noting that in order for him to rule in favor of the plaintiffs, the court would have to overturn recent Supreme Court precedent, including *Bush v. Gore*,[364] Judge Boasberg noted that the plaintiffs did not

> explain how this District Court has authority to disregard Supreme Court precedent. Nor do they ever mention why they have waited until seven weeks after the election to bring this action and seek a preliminary injunction based on purportedly unconstitutional statutes that have existed for decades—since 1948 in the case of the federal ones. It is not a stretch to find a serious lack of good faith here.[365]

The court then noted that the plaintiffs failed "to make any effort to serve or formally notify any Defendant—even after reminder by the

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360. There were many unsuccessful challenges to the results of the 2020 presidential election. *See* Trump v. Biden, No. 20-882, 2021 WL 78068, at *1 (U.S. Jan. 11, 2021) (denying a motion to expedite consideration of a petition for writ of certiorari for Trump's challenges to the Wisconsin election results after an unfavorable ruling from the Wisconsin Supreme Court in *Trump v. Biden*, 951 N.W.2d 568, 577 (2020)); Trump v. Boockvar, No. 20-845, 2021 WL 78067, at *1 (U.S. Jan. 11, 2021) (denying a motion to expedite consideration of a petition for writ of certiorari for Trump's challenges to the Pennsylvania election results after the unfavorable rulings from the Pennsylvania Supreme Court in the cases of *In re* Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d 1058, 1079 (Pa. 2020), and *In re* Canvassing Observation, 241 A.3d 339, 351 (Pa. 2020)); Texas v. Pennsylvania, No. 155 ORIG., 2020 WL 7296814, at *1 (U.S. Dec. 11, 2020) (finding that Texas did not have standing to challenge the manner in which another state conducts its elections); Donald J. Trump for President, Inc. v. Sec'y of Pa., 830 F. App'x 377, 382 (3d Cir. 2020) (denying an injunction pending appeal that would have tossed out millions of mail-in ballots).

361. Texas, 2020 WL 7296814, at *1 (finding that Texas did not have standing to challenge the manner in which other states conduct their elections); Trump v. Wis. Elections Comm'n, No. 20-883, 2021 WL 850635 (U.S. Mar. 8, 2021) (denying certiorari after an unsuccessful challenge to Wisconsin's appointment of electors in Trump v. Wisconsin Elections Comm'n, 983 F.3d 919 (7th Cir. 2020)); Republican Party of Penn. v. Degraffenreid, 141 S. Ct. 732 (2021) (denying certiorari after an unsuccessful challenge to the election procedures in Pennsylvania).

362. Aaron Blake, *Trump Lawyers Suffer Embarrassing Rebukes from Judges over Voter Fraud Claims*, WASH. POST (Nov. 11, 2020, 11:53 AM), https://www.washingtonpost.com/politics/2020/11/11/trump-lawyers-suffer-embarrassing-rebukes-judges-over-voter-fraud-claims (describing judges' criticisms of lawyers seeking to file claims to challenge the results of the 2020 presidential election).

363. Wis. Voters All. v. Pence, No. 20-3791, 2021 WL 23298, at *3 (D.D.C. Jan. 4, 2021).

364. 531 U.S. 98 (2000).

365. *Wis. Voters All.*, 2021 WL 23298, at *3.

Court in its Minute Order—renders it difficult to believe that the suit is meant seriously."[366] Making it clear that the courts "are not instruments through which parties engage in such gamesmanship or symbolic political gestures,"[367] the court went on to state that "at the conclusion of this litigation, the Court will determine whether to issue an order to show cause why this matter should not be referred to its Committee on Grievances for potential discipline of Plaintiffs' counsel."[368] Echoing arguments I have made here, in a subsequent order, Judge Boasberg has, in fact, referred the lawyer for the plaintiffs in the action for a review by local disciplinary authorities, stating as follows:

> The Court ends by underlining that the relief requested in this lawsuit is staggering: to invalidate the election and prevent the electoral votes from being counted. When any counsel seeks to target the processes at the heart of our democracy, the Community may well conclude that they are required to act with far more diligence and good faith than existed here.[369]

As in this case and others, there are certainly questions about the claims filed on behalf of the Trump campaign regarding their nature and their potential frivolity, and what they helped to instigate in the courts, as well as in the court of public opinion and the halls of the U.S. Capitol, raise much deeper concerns for the legal profession and the preservation of the rule of law.

The lawyers who filed many of these cases are likely to find themselves facing ethics complaints, both in court and in disciplinary proceedings. Without going into detail with respect to each case the Trump campaign and its supporters filed, the actions of Rudy Giuliani, in particular, as detailed in a complaint filed against him before disciplinary authorities in NYS seeking "professional discipline"[370] are instructive and illuminating. Not only is it alleged that Giuliani filed frivolous claims and offered evidence he knew to be false, and then failed to retract it as required by the rules that govern the legal profession,[371] the complaint also argues that Giuliani's statements before the Save America March, outlined above and in other fora, reveal that:

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366. *Id.*

367. *Id.*

368. *Id.*

369. Order at 4, *Wis. Voters All.*, 2021 WL 23298 (No. 20-3791).

370. *See* Letter from Ronald C. Minkoff et al., to Jorge Dopico, Chief Counsel, Att'y Greivance Comm., First Jud. Dep't, at 3 (Jan. 21, 2021) (on file with author) [hereinafter Giuliani Complaint Letter]. In the interest of full disclosure, the author is a signatory to the letter, though had no role in its drafting.

371. MODEL RULES OF PRO. CONDUCT r. 3.1, 3.3 (AM. BAR ASS'N 2020).

> Mr. Giuliani consistently violated [New York's Rules of Professional Conduct] 8.4(c), (d), and (h), the provision that prohibits a lawyer from engaging in conduct that "involv[es] dishonesty, fraud, deceit or misrepresentation," that is "prejudicial to the administration of justice," and that "adversely reflects on the lawyer's fitness." Over the last two months, Mr. Giuliani, on behalf of the Trump Campaign, publicly and in front of multiple tribunals, alleged that Democrats engaged in a grand conspiracy of election fraud, while failing to produce any facts to back up his assertions.[372]

Throughout the course of the litigation and extrajudicial efforts to overturn the results of the 2020 election (such extrajudicial efforts included speaking at rallies, including the Save America March and press conferences, and before legislative tribunals), it is hard to conclude anything other than that the baseless allegations and unsupportable claims, none of which have been upheld by any court in any significant way, with many of them disposed of summarily, not only propped up the President's quixotic desire to overturn the results of the election, but they also likely fueled the sentiments that motivated many of the rioters who stormed the Capitol on January 6, 2021.[373] But there was another aspect of the legal campaign that was particularly insidious, and ties from the discussion from Part III into this discussion of the crisis that followed the 2020 election.[374]

Another aspect of the campaign to overturn the results of the election included thinly veiled efforts to engage in what would amount to voter suppression based on race. People of color, primarily Black people, voted overwhelmingly for candidate Biden, particularly in such critical swing states like Pennsylvania, Michigan, Wisconsin, and Georgia; thus, it is no accident that at least some, if not most, of the efforts to overturn the results of the election were directed not only at these states, but also at particular precincts across the country—almost always located in urban areas where people of color reside and vote.[375] Such actions were not just odious, but an argument could be made that they were also a violation of professional rules surrounding diversity and inclusion. Indeed, Rule 8.4(g) of the MRPC provides that it is professional misconduct for an attorney to "engage in conduct that the

372. Giuliani Complaint Letter, *supra* note 370, at 11.

373. Annette John-Hall, Opinion, *The Capitol Insurrection Was Never About the Election. It Was About White Supremacy*, WHYY (Jan. 16, 2021), https://whyy.org/articles/the-capitol-insurrection-was-never-about-the-election-it-was-about-white-supremacy (arguing that the riot was motivated by efforts to further suppress votes by people of color).

374. *See supra* Part III.A.

375. Morrison, et al., *supra* note 332.

lawyer knows or reasonably should know is harassment or discrimination on the basis of race . . . [or] ethnicity . . . in conduct related to the practice of law."[376] At the same time, this provision does not "preclude legitimate advice or advocacy consistent with these Rules."[377] While some might argue that lawsuits challenging the results in particular districts was a form of "legitimate advice or advocacy,"[378] when that advocacy appears to have been misguided at best, and frivolous and discriminatory at worst, it is hard to conclude that such efforts could qualify as legitimate. Thus, in addition to charges that their claims had no merit, their factual assertions were unsubstantiated, and their conduct was designed to undermine the rule of law, it is also likely that the conduct of lawyers who presented claims that seemed directed at disenfranchising voters of color, particularly Black voters, violated Rule 8.4(g)'s prohibitions.

In addition to the campaign's lawyers and their enablers, other lawyers have also played a pivotal role in the effort to overturn the results of the election. Senators Josh Hawley and Ted Cruz are not just politicians, but also lawyers with Ivy League pedigrees: Hawley a graduate of Yale Law School, and Cruz a graduate of Harvard Law School.[379] Nevertheless, and despite both professing some particular affinity for or knowledge of constitutional law,[380] their allegations presented in support of their votes against certification of the results of the election,[381] if made in bad faith and with an utter disregard for the truth, might also constitute a violation of the provisions against "engag[ing] in conduct involving dishonesty, fraud, deceit or

376. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2020). The subsection prohibits, in its entirety, "harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." *Id.* On the history of the adoption of this rule, see Martinez, *supra* note 286, at 820-27.

377. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2020).

378. *Id.*; Morrison, *supra* note 332.

379. Zack Budryk, *Nearly 6,000 Lawyers and Law Students Call for Disbarment Proceedings Against Cruz and Hawley*, HILL (Jan. 11, 2021, 9:48 AM), https://thehill.com/homenews/senate/533604-nearly-6000-lawyers-and-law-students-call-for-disbarment-proceedings-against.

380. Senator Hawley's official webpage describes him as a "constitutional lawyer." *Biography*, JOSH HAWLEY: U.S. SENATOR FOR MO., https://www.hawley.senate.gov/biography (last visited Apr. 1, 2021). Senator Cruz is described as having campaigned as a "constitutional conservative." Ben Jacobs & Olivia Nuzzi, *Ted Cruz's Former Staffers Are 'Disgusted' by His New Low for Trump*, N.Y. MAG.: INTELLIGENCER (Jan. 14, 2021), https://nymag.com/intelligencer/2021/01/ted-cruzs-former-staff-disgusted-by-his-new-low-for-trump.html.

381. Valerie Strauss, *Thousands of Law School Alumni and Students Push for Disbarment of Sens. Hawley and Cruz*, WASH. POST (Jan. 10, 2021, 11:54 AM), https://www.washingtonpost.com/education/2021/01/10/thousands-law-school-alumni-students-push-disbarment-sens-hawley-cruz.

misrepresentation,"[382] or that which is "prejudicial to the administration of justice."[383] As I discuss shortly, and as it relates to all of the lawyers involved in the events described here, the actions of these professionals were not just frivolous and dishonest, but the fact that they were quite literally designed to undermine the rule of law makes them even more unprofessional. But to what extent has the system for preventing professional misconduct and preserving the rule of law worked as designed? And if it has (or will), are existing rules and norms sufficient to hold these lawyers accountable and prevent such similar conduct from occurring in the future? It is to these questions that I turn next.[384]

C. To What Extent Did Institutional and Professional Norms Hold?

It remains to be seen whether the legal profession's disciplinary machinery will hold the lawyers that advanced these claims and made some of these statements accountable for their actions. In the throes of this legal and, quite literally, extralegal campaign, despite these lawyers' behavior and statements, and those who acted upon them in furtherance of the broader campaign, American institutions have mostly persisted to this point.[385] It was not always clear that this would be the case.[386]

In the lead-up to the election, upon the death of Justice Ruth Bader Ginsburg, President Trump and his supporters in the Senate made it clear that they wanted to fill the seat quickly, and with someone with a strong conservative pedigree.[387] Of course, despite the fact that Justice Ginsburg died less than two months before the election,[388] the Senate rushed to confirm the President's nominee, Judge Amy Coney Barrett,

382. MODEL RULES OF PRO. CONDUCT r. 8.4(c) (AM. BAR ASS'N 2020).

383. *Id.* r. 8.4(d). This provision is the closest thing to a rule that could be seen as incorporating the Preamble's reference to the lawyer's role in preserving the rule of law. *Id.* pmbl.

384. *See infra* Part IV.C–D.

385. *See, e.g.*, Kathleen Gray et al., *Michigan Republicans Backtrack After Refusing to Certify Election Results*, N.Y. TIMES (Nov. 20, 2020), https://www.nytimes.com/2020/11/17/us/politics/michigan-certify-election-results.html.

386. A pivotal moment in the post-election legal maneuvers involved a relatively obscure administrative board—a board of electors in Michigan from the critical precincts around Detroit. At one point during the vote certification, it had appeared that this board might deadlock, leaving Michigan's critical votes in the electoral college in doubt, which might have set off a series of actions by state legislatures sympathetic to Trump's efforts to challenge the results of the election. *Id.*

387. John Wagner et al., *Trump Says He Will Nominate Woman to the Supreme Court Next Week*, WASH. POST (Sept. 20, 2020, 12:20 PM), https://www.washingtonpost.com/politics/2020/09/19/ruth-bader-ginsburg-death (describing Trump's goal of appointing a conservative judge to fill Justice Ginsburg's seat on the Supreme Court).

388. *Id.*

then a judge on the Seventh Circuit Court of Appeals.[389] In no uncertain terms, the President stated that he wanted to fill the seat before the election so as to have as many potentially favorable votes for him in the event that his campaign would have to challenge the results of the election in court.[390] In other words, the President knew full well the polls showed that he was not likely to win reelection, and if that were the case, he needed a legal strategy that could overturn the results.[391] It is apparent that he saw filling the seat would increase his chances of securing sufficient votes to support any challenge he might pose to the outcome of the election.[392] This effort to fill a third Supreme Court vacancy during his term followed a broader, four-year effort to remake the federal judiciary and fill as many judicial vacancies with conservative judges as possible.[393]

It turns out, though, the success in filling those Supreme Court and lower federal court vacancies with such conservative judges did not translate into victory in efforts to overturn the election.[394] Even judges appointed by President Trump and other Republican presidents still found the allegations of voter fraud and other irregularities wanting.[395] For example, Judge Stephanos Bibas of the Third Circuit Court of Appeals, nominated by President Trump in June 2017,[396] and writing for a unanimous panel of that court on one of the many challenges to the voting procedures utilized by Pennsylvania in the 2020 election, found as follows: "Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here."[397]

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389. Tyler Olson, *Senate Confirms Amy Coney Barrett to Supreme Court, Cements 6-3 Conservative Majority*, FOX NEWS (Oct. 26, 2020), https://www.foxnews.com/politics/senate-amy-coney-barrett-vote.

390. Ronald Brownstein, *What the Rush to Confirm Amy Coney Barrett Is Really About*, ATLANTIC (Oct. 15, 2020), https://www.theatlantic.com/politics/archive/2020/10/amy-coney-barrett-supreme-court-gop/616727.

391. *Id.*

392. *Id.*; Aaron Blake, *The Most Remarkable Rebukes of Trump's Legal Case: From the Judges He Hand-Picked*, WASH. POST (Dec. 14, 2020, 10:37 AM), https://www.washingtonpost.com/politics/2020/12/14/most-remarkable-rebukes-trumps-legal-case-judges-he-hand-picked.

393. Brownstein, *supra* note 390.

394. Blake, *supra* note 392.

395. *Id.* (noting that several rulings against efforts to overturn the election came from judges appointed by President Trump).

396. *See Bibas, Stephanos*, FED. JUD. CTR., https://www.fjc.gov/history/judges/bibas-stephanos (last visited Apr. 1, 2021).

397. Donald J. Trump for President, Inc. v. Sec'y of Pa., 830 F. App'x 377, 381 (3d Cir. 2020).

In an opinion piece for *The New York Times*, Tim Wu explains that our institutions held and preserved democracy not because of the operation of laws, but because of what he calls "civic virtue"—the institutional norms that motivated individuals to act according to professional norms and the dictates of personal conscience:

> The survival of our Republic depends as much, if not more, on the virtue of those in government, particularly the upholding of norms by civil servants, prosecutors and military officials. We have grown too jaded about things like professionalism and institutions, and the idea of men and women who take their duties seriously. But as every major moral tradition teaches, no external constraint can fully substitute for the personal compulsion to do what is right.[398]

If this is the case, it is critical that we shore up these professional norms and institutional systems to encourage those covered by them to act in accordance with them.[399] This will require professional accountability for past behavior, and enforcement of rules after the fact in a way that both punishes those who violated such norms and discourages others from engaging in such conduct in the future.[400] As with the discussion in Part I, this will also require that the profession engage in a review of the rules to determine if there is a way to strengthen those areas where guidance is less clear, where the potential punishment or lax enforcement is likely to encourage behavior that flouts the law, or where existing provisions are not suited to the task of curtailing what many would consider unethical conduct despite the absence of existing prohibitions against it.[401] We can perhaps rely on civic virtue to prevent future misconduct, but I would prefer stricter

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398. Tim Wu, Opinion, *What Really Saved the Republic from Trump?*, N.Y. TIMES (Dec. 10, 2020), https://www.nytimes.com/2020/12/10/opinion/trump-constitution-norms.html. As another example of this civic virtue in action, lawyers at the U.S. Department of Justice are reported to have resisted President Trump's efforts to remove the acting Attorney General so that he could install someone who would take steps to challenge the certification of the results of the Electoral College. Katie Benner, *Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General*, N.Y. TIMES (Jan. 22, 2021), https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justice-department-election.html.

399. *See, e.g.*, Sherrilyn A. Ifill, *Lawyers Enabled Trump's Worst Abuses*, N.Y. TIMES (Feb. 12, 2021), https://www.nytimes.com/2021/02/12/opinion/politics/trump-lawyers.html (noting the role of lawyers in undermining the rule of law and the need for reform of professional ethics in light of such efforts).

400. *See, e.g.*, La. State Bar Ass'n v. Hinrichs, 486 So. 2d 116, 120 (La. 1986) (noting that sanction of an attorney for an ethical violation must "be of sufficient detriment to discourage others from the commission of similar violations").

401. *See infra* Part IV.D.

rules, clearer guidance, and an enforcement regime that punishes violators of such norms in a way that will deter such future conduct.[402]

While the full contours of what a strengthened regime might look like are beyond the scope of this Article, and should be the subject of robust and careful debate, allow me to make several suggestions that might deter conduct similar to that which occurred in the aftermath of the 2020 election.[403]

D. Moving Forward to Preserve the Rule of Law

First, it remains to be seen, and at least some disciplinary authorities will be asked to determine, whether the lawyers who filed these cases did so in accordance with the rules of professional ethics and the requirements of the applicable rules of procedure in each instance. For example, Rule 3.1 of the MRPC provides as follows: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."[404]

The Model Rules provide further that a lawyer shall not present evidence the lawyer knows to be false.[405] If a lawyer later comes to know of the falseness of some evidence already presented, they have a duty to correct the record, either by presenting accurate information or testimony, or disclosing to the court the fact that such evidence is false, even if to do so requires them to reveal otherwise confidential information.[406] A critical question concerning this provision is when and whether a lawyer truly "knows" that a particular piece of evidence is false. The Model Rules require "actual knowledge" but such knowledge can be "inferred from circumstances."[407] In other words, in determining whether to discipline an attorney for presenting false evidence, or for failing to correct the record when such evidence turns out to be false, a court or disciplinary authority can assess the broader facts surrounding what the lawyer knew and when they knew it to determine whether it

402. The purposes of a disciplinary proceeding against an attorney vary, but they include punishment, "purification of the legal profession," protection against "substandard practitioners," and "deter[rence of] future misconduct." State *ex rel* Okla. Bar Ass'n v. Andre, 957 P.2d 545, 548-49 (Okla. 1998).

403. *See infra* Part IV.D.

404. MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2020).

405. *Id.* r. 3.3.

406. *Id.*

407. The Model Rules' terminology section provides: "'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." *Id.* r. 1.0(f).

could be inferred from those facts and circumstances that the lawyer must have known such information was false.[408]

Similarly, Rule 11 of the Federal Rules of Civil Procedure ("FRCP") states that any lawyer who presents a "pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it,"[409] is certifying that, "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,"[410] the document "is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation."[411] A signature operates as a certification by the signing party that the "claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law,"[412] and that any factual contentions contained in that document "have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery."[413]

Now, there are certainly times when litigants and their lawyers use legal process to make it more difficult and costly for an adversary to achieve its goals.[414] A viable and wholly ethical legal strategy may include the use of procedural maneuvers that delay a proceeding, or involve the interposition of cutting edge and novel claims that might take some skill and creativity for the party pursuing them to prevail.[415] In fact, much of law reform litigation, whether prosecuted by lawyers on the left or the right, involves claims such as these.[416] Many lawyers, particularly those who find themselves litigating for social change, have

408. *Id.*

409. FED. R. CIV. P. 11(b).

410. *Id.*

411. FED. R. CIV. P. 11(b)(1).

412. FED. R. CIV. P. 11(b)(2).

413. FED. R. CIV. P. 11(b)(3).

414. Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 317 (1995) (describing the role of lawyers as sometimes making matters more complex in order to serve their clients' interests).

415. In the recent litigation challenging the Trump Administration's policies regarding the Deferred Action for Childhood Arrivals (DACA) program, the successful legal campaign involved highly technical administrative law claims. *See generally* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

416. For an overview of efforts by progressive and liberal groups to use litigation to advance social change, see, for example, Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 209-18 (1976). On the adoption of the tactics, including litigation, of progressive lawyers by conservative groups, see Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of "Public Interest Law,"* 52 UCLA L. REV. 1223, 1266-73 (2005).

filed such creative claims, sometimes successfully and sometimes not.[417] Such a practice is wholly consistent with the MRPC and constitutes protected speech.[418] What is more, the lawyers who succeed in such efforts are often held up as paragons of the profession.[419]

There are also times when a failed campaign can still generate positive outcomes.[420] Yet a lawsuit or a legal claim that fails is far different from one that is frivolous.[421] What is more, a frivolous complaint and other legal activities, like providing testimony before a state legislature in a bid to convince that body to reject the will of the voters they represent, are explicitly designed to strike at the heart of the rule of law, and such conduct requires the profession's special attention.[422]

Whether the lawyers who filed cases designed to overturn the results of the election knew or later advocated positions with no basis in fact or law is a question that scholars will likely debate for years, but courts and state disciplinary authorities are likely going to have to deal with them in the immediate future. A larger question for such deliberative bodies and those who think about how they operate is whether the quality of the claims (in addition to their sheer quantity), evince a deeper problem, not just with these claims, but also their very nature, and the goals such lawyers had in bringing them. These were not run-of-the-mill, slip-and-fall cases where a lawyer representing the victim might engage in fraudulent kickback schemes with doctors to exaggerate the extent of their clients' injuries to squeeze a few thousand dollars out of an insurance company. In contrast, the challenges that

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417. Some creative litigation can also result in backlash, perhaps making matters worse for the communities that the lawyers serve. *See, e.g.*, Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 473-82 (2005) (describing backlash to marriage equality litigation before such litigation succeeded in the mid-2010s).

418. *See, e.g.*, *In re* Primus, 436 U.S. 412, 426-32 (1978) (holding that law reform efforts are a form of protected, political speech).

419. *See, e.g.*, Garland L. Thompson, *The Most Important Lawyer of the 20th Century*, BALT. SUN (June 30, 1991), https://www.baltimoresun.com/news/bs-xpm-1991-06-30-1991181108-story.html (describing the professional accomplishments of Justice Thurgood Marshall); Jill Lepore, *Ruth Bader Ginsburg, the Great Equalizer*, NEW YORKER (Sept. 18, 2020), https://www.newyorker.com/news/postscript/ruth-bader-ginsburg-supreme-court-the-great-equalizer-obituary (describing the impact of Ruth Bader Ginsburg on the law).

420. On the potential positive impacts of a loss in a legal campaign on social movements, see generally Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011).

421. *See, e.g.*, Patterson v. United Steelworkers of America, 381 F. Supp. 2d 718, 721 (N.D. Ohio 2005) (holding that "just because a plaintiff in a civil rights case loses on summary judgment does not mean that the case was frivolous").

422. *See* Jerusalem Demsas, *Rudy Giuliani's Bizarre Legal Strategy, in Two Clips*, VOX.COM (Dec. 3, 2020, 2:40 PM), https://www.vox.com/2020/12/3/22150194/trump-rudy-giuliani-michigan-results-election-fraud-voter-suppression-detroit-melissa-carone (describing testimony before the Michigan State legislature).

sought to overturn the results of the 2020 election struck at the heart of the rule of law, and were designed not just to overturn an election, but also to undermine the very institutions of democracy in an effort to reject the will of the voters.[423] They were part of a larger strategy to take advantage of potential political power—namely elected officials in key swing states like Pennsylvania and Michigan—that might be convinced to step in to reject the results of the election simply by virtue of there being sufficient doubt about the propriety of the election.[424] It is one thing to press claims in an effort to undermine the goals of an adversary by interposing only good faith legal claims and presenting only facts that have a basis in reality. It is entirely different when one does so without such a legal or factual basis. And as lawyers have a particular duty to uphold the rule of law, to take such frivolous action with the goal of undermining the rule of law requires the courts, and the profession, to take special notice.

Paragraph six of the Preamble to the MRPC provides, in part, as follows:

> As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system . . . .[425]

One would be hard pressed to find a statement that violates this sentiment more than the one Rudy Giuliani bellowed before an already whipped-up crowd, claiming there should be "trial by combat" to resolve disputes over the 2020 election.[426] Indeed, as the Preamble provides, "[L]egal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."[427] What Giuliani

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423. Rosalind S. Helderman & Elise Viebeck, *'The Last Wall': How Dozens of Judges Across the Political Spectrum Rejected Trump's Efforts to Overturn the Election*, WASH. POST (Dec. 12, 2020, 2:12 PM), https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8_story.html (describing Trump's legal campaign to overturn results of the election).

424. Michael Martina et al., *Trump's Election Power Play: Persuade Republican Legislators to Do What U.S. Voters Did Not*, REUTERS (Nov. 19, 2020, 3:35 PM), https://www.reuters.com/article/us-usa-election-trump-strategy/trumps-election-power-play-persuade-republican-legislators-to-do-what-u-s-voters-did-not-idUSKBN27Z30G.

425. MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 2020).

426. *See supra* note 344 and accompanying text.

427. MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 2020).

and others on the Trump legal team have done, by asserting frivolous claims and unsupported allegations with the goal of undermining faith in our democratic system, demands that disciplinary authorities hold these lawyers accountable for their actions. The quality of such actions—that they were designed to undermine the rule of law and were infused with racial animus—is something such bodies should seriously take into account.

Moving forward, because of the distinct obligations that legal professionals have to comply with the law in a general sense,[428] and to engage in acts that are not "prejudicial to the administration of justice"[429] and uphold the rule of law, disciplinary bodies could consider stricter consequences for those who violate those provisions of the Model Rules that prohibit frivolous claims and contentions when such actions strike directly at the rule of law by seeking to undermine public faith in and the functioning of the courts and our other democratic institutions.[430] Presently, Comment 2 to Rule 8.4 provides, in part, as follows:

> Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.[431]

The Model Rules thus contemplate that disciplinary authorities may take into account acts involving "violence" and "serious interference with the administration of justice," but only when determining whether to mete out discipline generally. The Model Rules do not specify the nature and extent of the punishment, nor do they ask disciplinary authorities to take special care when such acts constitute a direct assault on the rule of law.

But there are other ways in which a violation of an explicit Rule itself could undermine the rule of law. There are, for example, rules

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428. Rule 8.4(b) renders it professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," and 8.4(c) prohibits lawyers from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation." MODEL RULES OF PRO. CONDUCT r. 8.4(b), (c) (AM. BAR ASS'N 2020).

429. *Id.* r. 8.4(d).

430. *See, e.g.*, *In re* Petition for Disciplinary Action Against Montpetit, 528 N.W.2d 243, 246 (Minn. 1995) (stating that "[t]he rationale behind discipline is not to punish the lawyer, but to deter misconduct by members of the bar").

431. MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 2 (AM. BAR ASS'N 2020).

against ex parte communications.[432] One could imagine such a communication motivated by a judge or litigant's financial interests, nominal or significant. While one can view virtually any violation of the prohibitions on ex parte communications as an effort to undermine the rule of law, when such communications are carried out in an effort to protect entrenched power, or to undermine democratic institutions overtly and explicitly, disciplinary bodies and judicial tribunals reviewing such conduct should consider more serious punishment for that type of conduct.

In addition, the Model Rules could be strengthened to make it clear that lawyers have an independent duty to uphold the rule of law. Language in the preamble and a provision that states that it is misconduct to take acts prejudicial to the administration of justice are both beneficial; one could imagine an explicit amendment to Rule 8.4 that would expressly identify as misconduct action or inaction designed to undermine the rule of law. Such an amendment to this Rule could provide as follows: "It is a professional misconduct for a lawyer to engage in conduct that is knowingly designed to undermine the rule of law." While the concept is itself somewhat nebulous,[433] encouraging a violent crowd to storm a building through force of arms in the hope that its members would find elected officials who are in the process of certifying an election, with that mob having express designs on halting that process, should serve as a paradigmatic example of such rule-of-law-undermining actions.[434]

Similarly, since federal judges have a wide range of discretion when determining whether to sanction a lawyer or litigant for misconduct under FRCP 11, and what type of punishment to issue,[435] judges could take into account the extent to which a lawyer or litigant had, through their conduct, intended to undermine the rule of law and democratic institutions.[436]

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432. MODEL RULES OF JUD. CONDUCT r. 2.9 (AM. BAR ASS'N 2020) (prohibiting ex parte communications); MODEL RULES OF PRO. CONDUCT r. 3.5(b) (AM. BAR ASS'N 2020) (prohibiting ex parte communications).

433. Bridgette Dunlap, *Anyone Can "Think Like a Lawyer": How the Lawyers' Monopoly on Legal Understanding Undermines Democracy and the Rule of Law in the United States*, 82 FORDHAM L. REV. 2817, 2841 (2014) ("The rule of law is a nebulous concept . . . .").

434. Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 549 (2018) (noting mob rules are the "antithesis" of the rule of law).

435. *See* FED. R. CIV. P. 11 advisory committee's notes to 1993 amendment.

436. After the 1993 amendments to Rule 11, the advisory committee provided guidance to judges when considering the nature of sanction to impose, including "[w]hether the improper conduct was willful, or negligent," whether it was a part of a "pattern of activity, or an isolated event," and "whether it infected the entire pleading, or only one particular count or defense." *Id.* A

Another area where we have seen much damage done, especially in today's supercharged social media environment, is where attorneys have taken to traditional and new media to spread disinformation about the election.[437] Both Giuliani and at least one other lawyer, Sidney Powell, now each face $1.3 billion defamation suits by the company Dominion Voting Systems for claims they made about that company's vote tabulating machines,[438] as well as another lawsuit by a different voting machine company, Smartmatic, which has sued not just Giuliani and Powell, but also Fox News and several of its on-air personalities, also for defamation, and seeking nearly three billion dollars in damages.[439] These types of suits are likely to have quite a chilling effect, and we could see this mechanism used against lawyers and news outlets alike, with a potentially harmful consequence: that is, lawyers in the future might be leery of advocating their client's position in the court of public opinion for fear that they might face a similar claim against them. Legal advocates on the left and right often use the media to press their clients' interests.[440] The good-faith nature of their claims should be enough to insulate them against charges of defamation, but the threat of such litigation is likely to dissuade advocates from seeking to present their arguments over media networks, even if their claims have some viability, for fear they will face similar efforts to rein in their speech—particularly if such advocates are challenging entrenched and

judge should also consider "whether the person has engaged in similar conduct in other litigation," whether such conduct "was intended to injure," what impact it had "on the litigation process in time or expense," and whether the person charged with a violation was "trained in the law." *Id.* Courts should also take into account what is needed in terms of a financial penalty to "deter that person from repetition in the same case" and "what amount is needed to deter similar activity by other litigants." *Id.* The advisory committee also noted that courts have "significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons." *See id.*

437. Jonah E. Bromwich & Ben Smith, *Fox News Is Sued by Election Technology Company for Over $2.7 Billion*, N.Y. TIMES (Feb. 9, 2021), https://www.nytimes.com/2021/02/04/business/media/smartmatic-fox-news-lawsuit.html; Nick Corasaniti, *Rudy Giuliani Sued by Dominion Voting Systems Over False Election Claims*, N.Y. TIMES (Feb. 10, 2021), https://www.nytimes.com/2021/01/25/us/politics/rudy-giuliani-dominion-trump.html.

438. Corasaniti, *supra* note 437 (describing lawsuit against Giuliani); Emma Brown, *Dominion Sues Pro-Trump Lawyer Sidney Powell, Seeking More Than $1.3 Billion*, WASH. POST (Jan. 8, 2021, 9:08 AM), https://www.washingtonpost.com/politics/dominion-sues-pro-trump-lawyer-sidney-powell-seeking-more-than-13-billion/2021/01/08/ebe5dbe0-5106-11eb-b96e-0e54447b23a1_story.html (describing lawsuit against Powell).

439. Bromwich & Smith, *supra* note 437.

440. *See* Brown, *supra* note 438.

well-heeled persons with sufficient finances to use the courts to advance their interests.[441]

At the same time, the ethics rules surrounding lawyers and their dealings with the press are somewhat contradictory, and there exists a large exception surrounding publicity that might not deter future efforts to undermine the rule of law. The Supreme Court has weighed in on a version of MRPC 3.6 adopted by the state of Nevada and found that portions of that provision did not provide proper guidance to lawyers—particularly the piece that offers a "safe harbor" to lawyers who may have as their goal engaging in media advocacy to impact a jury in a case in which they are representing a party, even where they are merely responding to adverse publicity directed at their client by someone else.[442] But there is a bigger loophole in the rule. Rule 3.6 provides as follows:

> A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.[443]

This provision thus applies only to the lawyers who are actually representing a party, or who have represented a party, in a particular matter.[444] If a lawyer is not directly involved in representing a party, that lawyer can speak on the matter however they see fit, even if that communication is explicitly designed to "materially prejudic[e] an adjudicative proceeding."[445] Here, we could see a supplement to the Model Rules, perhaps to the commentary to 3.6, that would remind practitioners that even though they might not be involved in a case such that 3.6 would apply to them, they still must refrain from conduct

441. Advocates will no doubt have in the back of their minds a recent, high-profile privacy dispute, funded by billionaire Peter Thiel, involving the dissemination of a sex tape in which a jury awarded the plaintiff $140 million in damages for invasion of privacy. Lukas I. Alpert, *Gawker Media Settles with Hulk Hogan in Privacy Suit*, WALL ST. J. (Nov. 2, 2016, 4:48 PM). The case was ultimately settled for $31 million. *Id.*

442. *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1048-51 (1991) (holding provisions of Nevada rule on trial publicity void for vagueness).

443. MODEL RULES OF PRO. CONDUCT r. 3.6 (AM. BAR ASS'N 2020).

444. *See also id.* cmt. 3 (emphasizing that "the rule applies only to lawyers who are, or who have been involved" in the case because "the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small").

445. *Id.*

involving dishonesty or fraud, uphold the rule of law, and not engage in acts prejudicial to the administration of justice.[446]

What is more, one could certainly say that the rule regarding trial publicity is itself a "rule-of-law-advancing" rule of professional conduct because any effort to prejudice an adjudicative proceeding could be seen as undermining the rule of law. When such public pronouncements seek to impede the functioning of democratic institutions and to undermine faith in such institutions explicitly, however, disciplinary authorities should take such designs into account when meting out discipline for violations of MPRC 3.6. One could also see an enhancement to the rule that increases penalties where a lawyer engages in public statements that target the institutions that advance the rule of law and are designed to undermine faith in those institutions when that lawyer utters baseless charges in an effort to dissuade the public from accepting the actions of those institutions and encourage vigilante justice.[447]

It is one thing for a lawyer to utilize the tools that they have at their disposal to advance social change through efforts to honor the rule of law. It is entirely different when the advocate's weapons are turned on the rule of law itself. As a young lawyer, I worked with other lawyers from across New York City to represent squatters who had taken over otherwise abandoned buildings in order to avoid homelessness. We never counseled such squatters how to break the law, and our defense of them was designed around ensuring that, at a minimum, the City of New York, which had assumed ownership over many of these buildings, would use legal process to evict them, and not engage in forcible, extrajudicial evictions.[448] In fact, our defense of these individuals, who might be considered by some as outlaws, was actually designed to

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446. *See, e.g.*, Vanessa Blum, *Culture of Yes: Signing Off on a Strategy*, LEGALTIMES (June 14, 2004), https://www.law.com/nationallawjournal/almID/900005409598; Christopher Brauchli, *Ashcroft's Problem with Ethics*, ALBION MONITOR (Apr. 7, 2003), http://albionmonitor.com/0304a/ashcroftethics.html (noting that a disciplinary grievance was filed against Attorney General John Ashcroft for press statements he made regarding the trial of "American Taliban" John Walker Lindh).

447. There is always the risk that such prohibitions may fall disproportionately on those advocating for the interests of marginalized groups, especially when they might seek to call out institutions that are, themselves, apparently undermining the rule of law, i.e., when prosecutors' offices fail to seek meaningful charges in incidents of police brutality. Disciplinary machinery will have to pay particular attention to ensuring that a rule-of-law-enhancing provision is not, in turn, utilized to perpetuate institutional racism or other, similar defects in the present system.

448. Advocates were sometimes successful in these efforts, sometimes not. *See, e.g.*, Walls v. Giuliani, 916 F. Supp. 214, 218 (E.D.N.Y. 1996) (enjoining the City of New York from using extrajudicial techniques to evict squatters from City-owned property); Paulino v. Wright, 210 A.D.2d 171, 172 (1994) (holding extrajudicial evictions of squatters permissible).

uphold the rule of law by ensuring that city officials would not use "self-help" to evict these occupants.[449]

Of course, any rule enhancements or strengthening of punishment for violations of the rule of law should reflect concerns that such reforms should not chill good-faith claims, particularly those of marginalized groups that need to utilize creativity to bend the arc of justice.[450] I am also mindful that entrenched interests could seek to wield such prohibitions against marginalized groups seeking to press wholly legitimate claims.[451] The approach could entail simply noting in the comments to the rule regarding frivolous claims that lawyers who make such extrajudicial statements should always act in a manner that is consistent with their obligations to refrain from conduct that involves "dishonesty, fraud, deceit or misrepresentation;"[452] their duty to preserve the rule of law;[453] and their responsibility to refrain from making "false statement[s] of material fact or law to a third person."[454] Of course, such

449. *See Walls*, 916 F. Supp at 218; *Paulino*, 210 A.D.2d at 172. On the role squatters often play in improving the law, see EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP 18-19 (2010).

450. Research conducted in the years after the 1983 amendments to FRCP 11 tended to show that, under the rule, courts applied sanctions disproportionately against civil rights litigants. For example, one study showed that although civil rights cases made up approximately eleven percent of case filings in the federal courts, they also represented nearly twenty-three percent of the cases in which sanctions were imposed under Rule 11. Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 965-66 (1992). For further analysis of this phenomenon, *see, e.g.*, Melissa L. Nelken, *Sanctions Under Amended Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1327 (1986); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200-02 (1988); Gerald F. Hess, *Rule 11 Practice in Federal and State Court: An Empirical, Comparative Study*, 75 MARQ. L. REV. 313, 337-41 (1992). *But see* ELIZABETH C. WIGGINS ET AL., FED. JUD. CTR., RULE 11: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES § 1C (1991); Stephen B. Burbank, *The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11: An Update*, 19 SETON HALL L. REV. 511, 521-23 (1989) (showing less of a disproportionate effect of sanctions on civil rights litigants than some of the other studies).

451. The Supreme Court has recognized the particular importance of the freedom to associate, particularly as it relates to bringing litigation to vindicate the rights of marginalized groups:

> The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association.

NAACP v. Button, 371 U.S. 415, 431 (1963); *see also* NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP 80-81 (2018) (describing rules against hate speech as often being used to further oppress the very groups they were originally designed to protect).

452. MODEL RULES OF PRO. CONDUCT r. 8.4(c) (AM. BAR ASS'N 2020).

453. *Id.* pmbl. ¶ 6.

454. *Id.* r. 4.1.

restrictions must also comport with First Amendment protections;[455] when lawyers engage in speech that constitutes incitement to violate the rule of law, especially because it emanates from an officer of the court, it should raise special concerns.[456]

Another procedural enhancement involving actions that might undermine the rule of law could include having courts give priority to motions to dismiss involving claims that appear baseless, but yet, if pressed, might contribute to an environment that challenges the functioning of democratic institutions. In recent decades, powerful litigants have used the courts to inhibit the exercise of free expression and the pursuit of economic and civil rights, as when an employer files a lawsuit to stop a union from engaging in legitimate union organizing[457] or a landlord sues a tenant organizing group for efforts to rally the tenants in the landlord's building to press for their rights.[458] Such litigation, labeled Strategic Lawsuits Against Public Participation or "SLAPP" litigation, is typically meritless but the groups against which such lawsuits are filed must expend time, energy, and resources fighting the claims, which often diminishes their ability to engage in the very organizing that is the subject of the suit.[459] The parties that advance such litigation can sometimes succeed in halting the organizing that was the subject of the suit in the first place, even if it turns out the claims themselves had no merit.[460] State legislatures from across the country have passed legislation that allows courts to identify such lawsuits when they arise and prioritize motions to dismiss against such cases, so that

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455. *See* U.S. CONST. amend. I.

456. *See, e.g.*, MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 2020) ("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.").

457. *See, e.g.*, Cnty. of Riverside v. Serv. Emps. Int'l Union Local 721, No. E070206, 2019 WL 6835714, at *1 (Cal. Ct. App. Dec. 16, 2019) (affirming a trial court order dismissing an action brought by a hospital against a union as a Strategic Lawsuits Against Public Participation ("SLAPP") suit).

458. *See, e.g.*, New Line Realty V Corp. v. United Comms. of Univ. Heights, No. 1021/2004, 2006 N.Y. Misc. LEXIS 2872, at *4, *9, *13 (Sup. Ct. June 19, 2006) (dismissing as a SLAPP suit an action filed by a landlord designed to prevent a housing organizing group from entering its buildings and from criticizing the bank for lending to landlord).

459. Lori Potter & W. Cory Haller, *SLAPP 2.0: Second Generation of Issues Related to Strategic Lawsuits Against Public Participation*, 45 ENV'T L. REP. 10136, 10136-37 (2015) (defining SLAPP litigation).

460. *See, e.g.*, Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1, 55 (2009) (describing SLAPP litigation filed by a retail store against a community organizing group as an "attempt[] to neutralize" the group's efforts to boycott the store and "bring public pressure to bear on" the group to settle, which "thus struck at the heart of the advocates' attempt to integrate law and organizing").

they can be heard quickly and disposed of if they prove meritless.[461] For the most part, courts handled the litigation that followed the election of 2020 with some speed, recognizing the importance of resolving post-election disputes along an accelerated timeframe due to the various critical deadlines related to the certification of the election. Indeed, the lawsuit that the Supreme Court considered, and rejected summarily, took all of four days, from the initial filing to the Court's ultimate decision.[462] Since judges generally have a wide deal of discretion in managing their dockets and the timing of the motions and proceedings they entertain,[463] courts could ensure that they give priority to those cases in which litigants' claims appear baseless and designed to undermine the rule of law, providing them a fair hearing of course, but also disposing of them quickly if appropriate.

V. CONCLUSION

In the wake of crises that seem to reveal that lawyers may have strayed from their obligations to abide by professional norms and standards and to uphold the rule of law, the legal profession seems to take notice, and consider ways in which the rules that govern the practice might require some review to determine whether they are up to the task of responding to the fallout from the most recent crisis and to avoid the next. What we are learning from the three crises that are affecting the practice of law simultaneously—the global pandemic; the growing calls for greater diversity and inclusion throughout American life, including the legal profession; and the threats to democratic institutions revealed in the months following the election of 2020 that led to the attack on the U.S. Capitol in January 2021—is not just that the practice of law has changed, but also that it should continue to do so in ways that are more inclusive, particularly with respect to traditionally marginalized groups. What is more, the legal profession contributed, at least in part, to these crises, especially the threat to democracy and the

461. *See, e.g.*, GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 201-05 (1996) (describing procedural components of a model SLAPP statute); *see also* MASS. GEN. LAWS ANN. ch. 231, § 59H (West 2019) (providing for a "special motion" under the Massachusetts anti-SLAPP statute which "[t]he court shall advance . . . so that it may be heard and determined as expeditiously as possible").

462. *See* Motion for Leave to File Bill of Complaint at 35, Texas v. Pennsylvania, No. 155 ORIG., 2020 WL 7296814, at *1 (U.S. Dec. 11, 2020), https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/SCOTUSFiling.pdf; Texas v. Pennsylvania, No. 155 ORIG., 2020 WL 7296814, at *1 (U.S. Dec. 11, 2020) (summarily dismissing action).

463. *See, e.g.*, Landis v. N. Am. Co., 299 U.S. 248, 254-55 (1936) (noting courts have broad and inherent power to manage their dockets).

rule of law. But it has also made itself less inclusive and diverse for centuries.[464] We are at an inflection point because of these three crises. To the extent that we can craft a response that is meaningful and restorative, open and inclusive, and seeks to rebuild faith in the rule of law and the profession itself, the opportunities presented by these crises will not have been wasted.

464. *See supra* Part III.B.