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## **Sweet Are the Uses of Adversity**

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## PRECIS

Throughout history, positive change and progress emerged from periods of daunting adversity. William Shakespeare, Isaac Newton, Alexander Hamilton, Harriet Tubman, Elizabeth Cady Stanton, Mahatma Gandhi, Nelson Mandela and John Lewis are among the remarkable leaders who made sweet use of the terrible adversity of their times. They persevered through crises, political upheaval, injustice and oppression to find and clear new paths forward for the benefit of all people and the world. In America the 1960s era is a more recent reminder of how sweeping social and legal change can arise from tumultuous, frightening circumstances. The prospect of learning lessons from a deadly pandemic, or the injuries inflicted by racial and social injustice, as well as the already costly harbingers of existential threats to the very world in which we live, are little comfort to anyone who has suffered losses from these calamities. We must honor and empathize with the pain of victims and those who love them and be motivated not to waste the contemporary crises that have cost so many so dearly. For starters we should try not to forget or repeat mistakes whether made during recent economic meltdowns, natural and human-made disasters, or other more distant historic cataclysms. The global COVID-19 emergency combined with a storm of disfunction and unrest on many fronts made 2020 a historic *annus horribilis*; that is, another test of our will and ability to overcome fearsome adversity. Once again we need good leaders and personal perseverance if we are to achieve and benefit from progress. It is also a time for legal education and the legal profession to do more than simply follow and eventually catch up with yesterday's changes. Law Schools and practitioners can serve as civilization's essential guides navigating through the challenges of relentlessly accelerating change and strive to advance law and policy on myriad issues that matter. Technological advancements will continue to change how law is practiced, and legal education must not only keep up, but also help develop and determine new best practices. By welcoming innovative curricula, creating inclusive learning environments, and exploring new roles for technology, legal education can equip new lawyers with the tools to keep law relevant to the core elements of the human condition. Legal education should also embrace the role it can play in civic education for the public, and thus serve to strengthen the foundations of our democracy. Finally, legal educators should continue the pandemic initiated momentum to re-evaluate old fashioned licensing requirements for new lawyers. We can exploit the unexpected opportunity to consider how best to prepare and measure lawyers' readiness to serve the public without creating barriers to entry that undermine the imperatives of diversity, equity and inclusion. As we begin to emerge from our dark winter of discontent, legal

educators and practitioners have an opportunity, indeed a responsibility to lead us toward a better, stronger, and more equitable future.

## SWEET ARE THE USES OF ADVERSITY

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## SWEET ARE THE USES OF ADVERSITY\*

By Nicholas W. Allard\*\*

## PROLOGUE

“Is it 2021 Yet?” Those words were on the marquee of the pandemic-shuttered movie theatre in my hometown for most of 2020. This succinct yet poignant expression of concern, frustration, wit, and hope is not the first time that particular cinema neon sign gave top billing to surreal circumstances. For a young man coming of age in the tumultuous late 1960s, the message above the entrance to the Lafayette Theater in Suffern, New York became an emblem of perverse absurdity. Back then we locals smirked at the out-of-town crowds of human moths perpetually drawn in by the brightly lit dramatic announcement: “Showing Now: The Sound of Music – Starring Julie Andrews.”<sup>1</sup> In that pre-Multiplex, pre-Netflix streaming era, our small town art deco movie house featured only this one film over an impossibly long run lasting years, not weeks. It became a running joke that so many urbane visitors from “the City” were drawn to the romanticized sweet saga put to music about the Von Trapp family’s escape from the Nazis. Those perpetually movie house-filling audiences were usually on their way to or from the Catskills, or kitschy nearby attractions like the roadside Red Apple Rest and, for wannabe jet-setters for what then passed for exotic, the nearby Japanese style “Motel on the Mountain.” The tourists’ appetite for the syrupy feel-good musical film seemed insatiable. Undeniably, the box office hit was a fine movie. No doubt it appealed to many vacationing visitors who, like the Von Trapps, just wanted to get away. They sought at least to briefly forget, the real life tension, turmoil, and rapid transitions of those tough edgy days that rocked us all and fundamentally changed the world around us. Meanwhile, we resident young tweeners were caught in the eternal predicament of all adolescents. We were decidedly not sentimental about the past and certainly not beholden to tradition and norms. Yet despite our acute impatience to drive toward a better future, which we were confident was just about anywhere new and different, our provisional license as underage mere students made unchaperoned progress along new paths difficult to do on our own.

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\* William Shakespeare, *As You Like It*, act 2, scene 1 (Duke Senior): “Sweet are the uses of adversity/ Which like the toad ugly and venomous/ Wears yet a precious jewel in his head/ And this our life, exempt from public haunt/ Finds tongues in trees, books in running brooks,/ Sermons in stones, and good in everything.” In light of the *annus horribilis* we all experienced in 2020 I am borrowing, with apologies, Shakespeare’s optimistic theme from one of his most popular plays.

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I am grateful for the invitation to submit this fourth essay for the biennial deans’ leadership volume. This latest piece follows: *Loves Labors Found*, 50 U. TOL. L. REV. 199 (2019) (A love letter to legal education, in particular to BLS’s faculty, staff, students, alumni, and community); *Nonsense You Say*, 48 U. TOL. L. REV. 189 (2017) (Observations both tongue-in-cheek and serious relating to the

Admittedly, we young townies hardly had any good reason to be condescending either to visitors or our elders. It was a time not long after our village became an exit on the recently completed New York State Thruway. In New York, Rockland County residents still called our area “upstate” and everything else “downstate.” No one laughed much at the description as they do now, even though on a clear day you could, and still can, see the top of the Empire State Building going south from the crest of the nearby Route 17 Northway. That New York-Northern New Jersey state line region had not become what it is today, a bedroom community of the greater tri-state New York metropolitan region. More boring than quaint, a lively time on a weekend night in relatively bucolic Suffern could be dragging a lawn chair to the Thruway overpass and watching taillights over a six-pack. In that still insular salt of the earth community the accidents threatening to limb and life that we talked about most involved, with surprising

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avalanche of communications law deans receive and answer); *A Dean Grows in Brooklyn*, 46 U. TOL. L. REV. 273 (2015) (Commentary by a new law dean about learning the opportunities and challenges in perhaps the toughest time for legal education – until now).

I should acknowledge that some of the ideas, themes, and arguments in this essay were adumbrated in previous articles, commentaries, speeches, and other writings, plus a significant amount of draft commentary that never saw the published light of day beyond friends’ and colleagues’ helpful critiques. As my brutally frank, wisenheimer once comedian now lawyer son Nate quipped, “Dad, can you just send me a final draft so that I only have to hit delete once?” No worries, that is gentle compared to his infamous roast of me at a charity event raising money for the School of Justice public high school down the street from BLS (Described in: <https://brooklyneagle.com/articles/2014/11/03/no-good-deed-goes-unskewered-at-upcoming-brooklyn-law-school-roast/>; <https://brooklyneagle.com/articles/2014/11/17/brooklyn-law-school-dean-nick-allard-stars-in-charity-roast/>; and <https://www.legalcheek.com/2014/11/should-english-law-school-chiefs-follow-us-example-of-being-roasted/>).

For this essay I am especially grateful for what I have learned from, and my collaborations with Professor Heidi K. Brown, who is the BLS director of legal writing, and an extraordinary pioneer in the legal communications field, not to mention an advocate for individualism and for the mental health of lawyers. *See, e.g.,* Allard and Brown, “The Future of Training Powerful Legal Communicators,” N. Y. BAR ASS’N JOURNAL 10 (September 2018); Similarly, I am also especially grateful for working with Jurist and PreLaw magazine’s President and Editor-in-Chief (Cypress Magazines) Jack Crittenden on several columns addressed to aspiring law students and their counselors about why law is worth studying. The most recent of this series shaped the similarly captioned section below: *Help Wanted: Lawyers for the Future of All People*, PreLaw Magazine 23-25 (Fall 2020). Very special thanks are due once again to Drew Lichtenberg, the Washington D.C. Shakespeare Theatre Company’s superb dramaturg. He continues as he has for some time far beyond his extraordinary work for the theatre and audiences with his efforts to educate this writer. For this essay, Drew has shared among other insights material he has written that I have relied on about *As You Like It*, *The Tempest* and *Timon of Athens* from the Shakespeare canon. It is my good fortune to have such an admirable learned teacher.

1. *The Sound of Music* (1965) starring Julie Andrews and Christopher Plummer, directed by Robert Wise, is an adaption of the 1959 hit Broadway musical by the same name, composed by Richard Rogers with lyrics by Oscar Hammerstein II. *The Sound of Music* was the biggest box office hit of 1965 and by 1966 surpassed *Gone with the Wind* as the highest grossing film of all time. It was based on the memoir of Maria Von Trapp about her musically talented Austrian family’s escape from the Nazis at the start of World War II. Raindrops and roses, silver linings, and sweet uses of adversity indeed!

frequency, cars rolling over or falling on people who were working on them.<sup>2</sup> I may have been the only, but certainly one of very few, classmates of our fairly big regional high school to become a lawyer. Similarly, there was but one future physician in our class. She was the daughter of our neighborhood general practitioner. After earning her M.D. she returned to Suffern and continued to examine patients as her dad had out of the home she grew up in, but with fewer house calls.

Nostalgia is not a fitting word to describe reflections about that complex era which actually seemed to start in the 1950s. As small children we were terribly frightened by "the Russians" flying shiny things over our heads that were sometimes visible by day and at night.<sup>3</sup> We were scared by the prospect of having to squat under elementary school desks with our hands clasped behind our heads to protect our tiny necks as well as watching neighbors building and preparing to hide in bomb shelters from atomic weapons hurled at us by faceless enemies from afar or as close as Cuba.<sup>4</sup> As our shared experiences continued through the 1960s and bled into the 1970s we saw the streets fill with protests over the denial of racial and civil rights, the Vietnam War, and the Watergate political scandal. We were horrified and cried over the assassinations of John F. Kennedy, Dr. Martin Luther King, and Robert F. Kennedy. Television news and photo magazines brought unbearably heart-wrenching violence into our homes if not actually present in our own communities. We witnessed beatings, snarling dogs, fire hoses, and bombings inflicted on demonstrators for racial equality, young volunteer freedom riders and even little children attending church. There were destructive riots in Detroit and Washington D.C., student takeovers of Universities and shootings of unarmed undergraduates at Kent State University. We cringed at images of preemptory executions and napalm bombings of Vietnamese soldiers and civilians, while our own local high school alumni heroes serving in the armed forces returned home from the war in caskets or badly broken in many different ways. Vietnam veterans who appeared intact were often disrespected or pushed out of sight.

Somehow the news also incongruously highlighted a spectrum of progress including the enactment of Great Society legislation including the Civil Rights Act

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2. At a milestone reunion of my wife's and my high school class, a well-meaning but rather morbid remembrance of departed classmates noted that a leading cause of death among departed classmates was when automobiles under repair fell on them.

3. On October 4, 1957, the then Soviet Union launched the world's first artificial satellite named Sputnik 1. Though it orbited only for a few weeks before falling back to earth, when Sputnik was in its low orbit, as often were later Soviet space vehicles, it was often visible to the naked eye of Americans. This event was electrifying to the American public. The ensuing technological competition intensified the arms race and Cold War between the United States and the U.S.S.R.

4. For example, the so-called Cuban Missile Crisis was a frightening episode lasting one month and four days, from October 16 to November 20, 1962 when the deployment of Soviet ballistic missiles in Cuba led to a tense confrontation between the U.S. and the U.S.S.R. It is regarded by many as the closest the Cold War came to escalating to a full-blown nuclear conflict. School children of that era vividly remember the mandatory safety training in classrooms, and the neighbors who were building bomb shelters in the event of nuclear attack. See ROBERT F. KENNEDY, *THIRTEEN DAYS* (W. W. Norton eds. 1969) published a year after Robert Kennedy's assassination. It is a riveting memoir and leadership study of the climax of this disturbing episode.

of 1964,<sup>5</sup> the Voting Rights Act of 1965<sup>6</sup> and national triumphs like the Apollo 11 moon landing in 1969. Harbingers of tectonic shifts of entrenched behavior and dramatic social changes included the FDA's 1960 approval of the birth control pill and the Supreme Court's 1965 landmark decision upholding the right of married couples to use contraceptives,<sup>7</sup> the U.S. Surgeon General's 1964 report and Congressional mandated warnings in 1965 and 1969 about the health hazards of smoking cigarettes,<sup>8</sup> and in 1970 the first Earth Day and the founding of the Environmental Protection Agency.<sup>9</sup> We learned just before that giant step for mankind of the disturbing fall from grace of the only survivor of the iconic Kennedy brothers in the scandalous Chappaquiddick incident.<sup>10</sup> The Vietnam War wound down, the draft ended, and the last U.S. soldiers and diplomats retreated from Saigon. Then the political drama of the Watergate investigation presented the riveting spectacle of the United States Congress and Supreme Court exercising their sad constitutional power and duty through peaceful legal means to facilitate the removal of a corrupt President who, under pressure from his own party, resigned from office.<sup>11</sup>

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5. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

6. Voting Rights Act of 1965, Public L. No. 89-110, 79 Stat. 437 (1954).

7. *Griswold v. Connecticut*, 381 U.S. 479 (1965)

8. On January 11, 1964, Luther L. Terry M.D., Surgeon General of the U.S. Public Health Servicer released the first report of the Surgeon general's Advisory Committee on Smoking and Health. Then Congress passed The Federal Cigarette Labeling and Advertising Act 1965 of and the Public Health Cigarette Smoking Act of 1969.

9. The first Earth Day on April 22, 1970, was created by environmental crusader Senator Gaylord Nelson (D. WI). Twenty million Americans participated in one of the largest grassroots movements in U.S. history as of that time. Soon after, President Richard M. Nixon proposed and Congress approved establishment of the Environmental Protection Agency on December 2, 1970, which was done by executive order on December 4, 1970, (EA Order 1110.2). My first job in Washington D.C. was working the new agency's Office of Public Affairs in a GS-4 position as a summer clerk when William Ruckelshaus served as the EPA's first Administrator. A large part of our work focused on the unglamorous logistics of finding and "borrowing" desks and other needed office equipment to move into the new agency's consolidated headquarters on the Waterside Mall, at 401 M Street N.W. Ever since then, a framed letter of commendation from President Nixon hangs in a small room in our home where I and others can look at his signature when we go about our business.

10. On July 20, 1969, when the Apollo 11 Lunar Landing Module named Eagle settled own on the surface of the moon, Commander Neil Armstrong radioed back to earth, "The Eagle has landed." Soon after Armstrong opened the hatch, climbed down a small ladder, and became the first human to set foot on the moon. Half a billion television viewers worldwide were transfixed and heard him say, "One small step for man, one giant step for Mankind." It mattered not that the huge audience did not hear that he actually said: "One small step for *a* man ...." I experienced along with tens of millions Americans of all ages a sense of fascination, pride, relief, and optimism that swept over the country. The shocking and scandalous incident on Chappaquiddick Island which resulted in the death of 28 year Mary Jo Kopechne and for all purposes ended the prospect of Senator Edward M. Kennedy of becoming President of the United States happened only a few days before the moon landing, sometime during the evening of July 18 to July 19, 1969. The public's transfixion with the lunar landing diverted public attention from news of the tragic Chappaquiddick events.

11. In *United States v. Nixon*, 418 U.S. 683 (1974), a unanimous 8-0 decision of the Court ruled against President Richard M. Nixon. The Court ordered President Nixon to deliver tape recordings and other subpoenaed materials to the U.S. District Court in the District of Columbia which was investigating the so-called Watergate scandal. This decision resulted in the release of several taped

Meanwhile, through it all, we could not resolve the conflicting tugs of popular culture from the likes of the wildly popular James Bond iconography (R.I.P. Sean Connery 1930-2020), the first Pro Football Super Bowls, the perennial pinstriped champion Yankees improbably swapping places with the Amazin' Mets atop baseball's mountaintop, the British rock invasion spearheaded by the Beatles battling the likes of the Ballad of the Green Berets in the Billboard Top 100, the Woodstock music festival featuring "sex & drugs & rock 'n roll," not to mention lots of mud, only a short distance away in upstate New York, but in many ways light years away from our staid Suffern home. The vast wasteland of television<sup>12</sup> featured only three broadcast networks of reverentially regarded news<sup>13</sup> and less than Golden Age entertainment, although no disparagement is intended or deserved for my favorites such as Perry Mason, Star Trek, Rawhide, The Man From Uncle, and the classic: Get Smart. Other "rube tube" choices that have weathered less well included Bonanza, the unabashedly down-home country Hee Haw and the self-consciously hip Rowan & Martin's Laugh In. Perhaps signaling a complete departure from conventional norms, Mel Brooks' intentionally crude and provocative politically incorrect film Blazing Saddles, to our delight, broke almost all silver screen conventions. Yearbook photos of the era contrasted sharply with those of the not-too-distant wholesome uniformity of The Ozzie and Harriett Show and Father Knows Best milieu. They featured a visual mélange of long hair, crew cuts, bell bottoms, chinos, platform shoes, penny loafers, fishnet stockings, miniskirts, western fringed or Nehru style jackets, Jersey Boy-style razor thin laped awful-colored prom tuxedos, Dads' army jackets, tie-dyed everything and peace symbols everywhere. We were just certain that nothing like the late 1950s to mid-1970s epoch had ever been experienced before. Yet somehow we survived

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conversations containing evidence of criminal behavior by Nixon on August 5, 1974. Then a delegation of Republican members of party, led by the Republican party's 1964 presidential candidate Senator Barry Goldwater (AZ), and its party congressional leaders Senator Hugh Scott (PA) and representative John Rhodes (AZ), met Nixon in the White House and told him that impeachment was inevitable. Nixon resigned from office on August 9, 1974.

12. "Television and the Public Interest," Newton Minow (May 9, 1961). In perhaps the most famous speech by any Chair of the Federal Communications Commission, Minow referred to American commercial television as a "vast wasteland" and advocated for more programming in the public interest.

13. CBS, NBC, and ABC. The leading revered television newsmen, and they were almost exclusively men, in the Edward R. Murrow tradition were old school journalists; patriotic and trusted highly influential sources of information that shaped public opinion to a degree almost hard to imagine in the 21<sup>st</sup> century. The most influential news broadcaster in the 1960s was the anchor of CBS News Walter Cronkite, lovingly referred to as Uncle Walter by his regular viewers. Though whether President Lyndon Baines Johnson actually said it is debated today, it was widely reported and believed that in January 1968 when Cronkite began to raise questions about the war in Vietnam, Johnson said, "If I've lost Cronkite I have lost the country" and decided not to run for re-election. Mark Bowden, *When Walter Cronkite Pronounced the War a 'Stalemate,'* N. Y. TIMES, (Feb. 26, 2018). W. Joseph Campbell, *When I lost Cronkite-or 'something to that effect,'* (Feb. 26, 2010). When Cronkite took off his glasses, twice, once in 1963 in a rare show of emotion, after he pronounced President Kennedy dead and later in 1969 after the lunar landing, America's eyes welled up. When he concluded his evening broadcast with "And that's the way it is," we believed. On March 6, 1981, the oft-described "Most Trusted Man in America" gave his trademark valediction for the final time.

and adapted to almost unimaginable stress and constant change, while simultaneously yearning for continuity; which, after all, is the essence of the human experience for every generation of people over the entire course of civilization. And so here we are, again. At the cusp of same old, new old, very new times.

## II. ARE WE THERE YET?

Now that it is actually 2021 the Suffern Theater Marquee at last has changed to “Happy New Year Sooo Looong 2020!”<sup>14</sup> Perhaps it should now read: “Are We There Yet?” The universal impatient whine of children during seemingly endless journeys seems pertinent, because humanity has once again endured but not fully escaped the lasting consequences of unforgettable and almost unimaginable difficulties. The COVID-19 pandemic has been concurrent with horrible and unnatural mankind-exacerbated fires, storms, floods and other climate-driven calamities of near biblical proportion, acutely painful upheavals over inequality, economic disparity, racial and social injustice, political dissension, tribalism, xenophobia, corruption, fearsome violence, and interference and intentional political, economic, and social disruption threatened or carried out by governments, nonstate organizations, and individuals who abhor our way of life. These are all contemporary epic forces that have shaken but not destroyed the foundations of our democratic free society governed by the rule of law.

In 2021 we are still standing, wobbling a bit like a heavyweight boxer in a late round. It feels as if we are recovering notwithstanding disturbing ongoing pressure on the public health, economy, government institutions, the public policy process and our legal system. The pressures have revealed deep fractures that have not yet and will not be healed by either miraculous vaccines or by the conclusion of the unusual 2020 election.<sup>15</sup> Former Vice President Walter Mondale’s simple,

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14. The words of the new Lafayette Theater marquee message and photographic confirmation courtesy of my sisters Heather Elizabeth Allard Pampolina, and Amy Lee Allard.

15. The persistent pressures on the future of democratic institutions and the rule of law in America are obvious. For starters, in the 2020 election 74 million votes, the second most votes in the history of Presidential elections were received by the losing candidate, Donald J. Trump. The sharp partisan divide between his supporters and the 80 million who voted for Joseph R. Biden is apparent in the failure of either camp to see eye to eye on many basic facts or most policies. After the election the New York Times asked readers to send in their recommendation for what should be the top priority for the new Biden Administration. Every single letter published called for Biden to bring the country together. Letters to the Editor, N. Y. TIMES (Nov. 30, 2020). Ruth Marcus, *A President Biden’s Uphill Battles*, WASH. POST at A15 (Nov. 5, 2020), George F. Will, *An outcome the nation needed to avoid*, WASH. POST at A15 (November 5, 2020). In this vein, I have joined many others who call for new laws and policies to address dangerous weaknesses in our election infrastructure. See, e.g. Benjamin L. Ginsberg, *America may not be so lucky next time*, WASH. POST at A29 (December 6, 2020); Fareed Zakaria, *Trump shows that we need to reform U.S. democracy*, WASH. POST (December 3, 2020); Allard, *Biden democracy challenge: Fix voting and the Electoral College to head off a 2024 crisis*, USA TODAY, Dec. 4, 2020 (with James K. Glassman); Allard, *Conventional Values Prevail in Unconventional Ways and Surreal Times*, BROOKLYN DAILY EAGLE (Nov. 20, 2020); Allard, *E-Voting Could Be Faster, Cheaper, More Accurate, Than Voting in Person or By Mail*, TECHNATIVE (Oct. 21, 2020), TECHZONE360 (Sept. 30, 2020) (with John Gentry). See also

magnanimous, and magnificent statement upon conceding a crushing loss in the presidential election to former California Governor Ronald Reagan 36 years ago in 1984 had been the norm before and up until now for the peaceful legal transfer of government power in the United States.<sup>16</sup> Upon accepting defeat and the honor of returning to the status of private citizen Mondale acknowledged that: “The American people quietly wielded their staggering power, and peacefully, without intimidation, made their choice.”<sup>17</sup> The contrast of this past routine with recent circumstances underscores the current precarious state of affairs in our still sharply politically divided country.<sup>18</sup>

Now as much as ever before, legal administrators, faculty, and practicing lawyers can and must play a central role if America and the world are to continue to be governed by the rule of law, and if we the people of the United States are to preserve and abide by our Constitution; a republic which as Benjamin Franklin

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Richard H. Pildes, *State Legislatures Threaten Fair Elections*, N. Y. TIMES at A27 (Dec. 11, 2020) (Calling for Congress to revise or eliminate the “failed election” statute which provides state legislatures power to override or ignore voters and select presidential electors).

16. Former Vice President Walter Mondale lost the 1984 Presidential election to incumbent President Ronald Reagan in a stinging defeat. Mondale carried only 13 electoral votes to Reagan’s 525. He and running mate Representative Geraldine Ferraro (D. NY) won only the District of Columbia and Mondale’s home state of Minnesota—coming within less than 3,800 votes of losing there too. In his concession speech Mondale noted, “In over 24 years, never once have the people of Minnesota turned me down.” They did years later after the 2002 death of Minnesota Senator Paul Wellstone in a plane crash. Mondale accepted the Democratic party nomination to take Wellstone’s place on the ballot, and then was narrowly defeated by Republican Norm Coleman. *See Presidential Also Rans*, TIME (Nov. 2020).

17. Quoted in *Mondale Farewell*, N. Y. TIMES p.1 (Nov. 6, 1984).

18. To say that Donald Trump has been ungracious after decisively losing the 2020 election is an understatement, like referring to the *annus horribilis* of 2020 as a bad year. His behavior and statements, active interference with the smooth transition of power, and failure to concede are hardly surprising and even sadly pathetic, but contrary to established norms. See for, example, Jay Cannon, *Concession Speeches: How McCain, Bush, Clinton, Gore conceded*, USA TODAY, Nov. 10, 2020; Gillian Brockwell, *Trump’s refusal to concede defies long tradition of classy speeches by losing candidates*, WASH. POST (Nov. 8, 2020). When looking at Trump’s antics I empathize with the sentiment expressed by Adlai Stevenson: “It hurts too much to laugh, but I am too old to cry.” Jenna Macgregor, *Remembering a speech from ‘the most beautiful loser’ after Trump won’t commit to accept results*, WASH. POST, Oct. 20, 2016 (in retrospect it was a telling precursor of what has transpired after the 2020, when prior to the 2016 election which he likely expected to lose, Trump refused to commit to accepting the results).

The divisions in our country go far beyond the behavior of one defeated president, who after all is more a result than a cause of our present political circumstances. However, President Trump consistently exacerbated division and did little to unite people beyond his base of supporters. Colorado State Attorney General Phil Weiser, who previously served as the Dean of the University of Colorado Law School, addressed this phenomenon in a truly remarkable post-election speech “Leading With Empathy” before the Colorado Bar Association (December 11, 2020). He noted that in 2014 Pew Research found that “38% of Democrats and 43% of Republicans now view the opposite party in deeply negative terms. And because of social media and other forces demonizing different groups and parties, things are much worse. Quoting Jonathan Rauch’s essay, *Rethinking Polarization*, General Weiser noted, “the essence of the U. S. Constitution is to require compromise as a condition of governing. In rejecting compromise, Americans are rejecting governance.”

famously cautioned, requires effort to keep.<sup>19</sup> The challenges and opportunities for teachers, scholars and the profession are enormous. They are called upon to help us anticipate, understand, study, train for and contribute to the new world of law in the 21<sup>st</sup> century in the service and well-being of society and all people. With so much at stake, and so much work left to be done it is worth attempting to use this small space to make a start of the unfinished business ahead by asking: what have we learned, what can we expect, and what can we, should we do?

### III. SWEET ARE THE USES OF ADVERSITY.

History offers many examples of playwright William Shakespeare's observation that "sweet are the uses of adversity."<sup>20</sup> It is a source of reassurance and guidance for law schools and the profession while coming to a forced reckoning with the tough circumstances of our age. At present in responding to the

19. At the Constitutional Convention of 1787, a question to Benjamin Franklin about whether the new government was to be a monarchy or a republic is attributed to Elizabeth Willing Powell, one of the pivotal political thinkers and raconteurs of the founding era. As the legend goes, Franklin replied, "A republic if you can keep it." Zara Anishanslin, *What we get wrong about Ben Franklin's 'A republic if you can keep it,'* WASH. POST (Oct. 29, 2019). Whatever the etymology of the story, it is understandably trenchant with broad appeal used across the ideological spectrum from House of Representatives Speaker Nancy Pelosi to Supreme Court Justice Neil Gorsuch in the title of his 2019 book. See the description of Franklin's final speech at the Constitutional Convention in David O. Stewart, *THE SUMMER OF 1787*, Ch. 19, "With All Its Faults" (2007).

20. This poetic phrase is consistent with several biblical references. *E.g.*, *Ecclesiastes* 2:5 relates directly to Duke Senior's impromptu sermon: "For as gold and silver are tried in the fire, even so are men acceptable in the furnace of adversity." And *Ecclesiastes* 7:14, "When times are good, be happy; but when times are bad, consider: God has made the one as well as the other." Several other similar themes may be found in *James* 1:2-4, "Consider it pure joy my brothers, whenever you face trials of many kinds, because you know that the testing of your faith develops perseverance. Perseverance must finish its work so that you may be mature and complete, not lacking anything." *James* 1:12, "Blessed is the man who perseveres under trial, because when he has stood the test, he will receive the crown of life that God has promised to those who love Him." *Hebrews* 12:11, "No discipline seems pleasant at the time, but painful. Later on, however, it produces a harvest of righteousness and peace for those who have been trained by it." *1 Peter* 1:7, "These have come so that your faith—of greater worth than gold, which perished even though refined by fire—may be proved genuine and may result in praise, glory and honor when Jesus Christ is revealed." Drew Lichtenberg notes that "there is a hint of Stoic philosophy as well, going back to Seneca, of remaining steadfast in the face of adversity, in this case a political coup. The idea of toads, and their 'precious jewels,' being venomous, originates in Pliny's *Natural History* and was a Renaissance commonplace. In the context of the play, Duke Senior is used symphonically, establishing a series of motifs that are developed, in a proto-Wagnerian manner, through the rest of the action. His calm and biblical platitudes, expressed in classical rhetoric, at odds with Jaques's more Hamlet-like misanthropy and the disordered stream of his philosophizing over the corpse of the wounded stag a few scenes later. They are both responses to man's inhumanity to man and lend all the action in the Forest of Arden a philosophical cast (cf. Touchstone), serving as a melancholy background out of which the optimistic love plot of Rosalind and Orlando blossoms. See his reference to "tongues" which becomes literalized later in the play with Orlando's love poetry, his "Tongues I'll Hang on Every Tree." Email from Drew Lichtenberg (December 3, 2020) (on file with author). See also Drew Lichtenberg, "Wanderlust", *Asides* vol. 1, pp. 10-13. (Shakespeare Theatre Company 2014-2015 season) (describing time spent away from daily life in society in the Forest of Arden and other locations, and the melancholy fool Jaques's famous Seven Ages of Man speech).

COVID-19 emergency, while there have been setbacks, mishaps, disappointments, and severe challenges providing for the paramount safety of people and maintaining the financial sustainability of each institution and firm, by and large law schools and lawyers have made impressive adjustments to unexpected emergencies. This is not to say that students and other constituencies are pleased or satisfied.<sup>21</sup> We are learning a lot about how to do even better as experience dictates.<sup>22</sup> Uncharacteristically pedagogical and administrative operational changes are being made nimbly almost overnight with a viral gun to our heads and often at significant sacrifice. This includes many changes that ordinarily faculty, staff, students, managers, judges, lawyers and their clients would have preferred to adopt, if at all, gradually over a much longer period of time.<sup>23</sup> To be candid,

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21. One indicator is that by the end of the 2019-20 academic year more than seventy universities have been sued in class action cases seeking tuition and fee refunds by students. Angelica Cappelino, *More than 70 Universities Sued for Refunds Following COVID-19 Campus Closures*, EXPERT INSTITUTE (June 25, 2020); Thomas H. Winter, Matilda S. McGee-Tubb, *COVID-19 Tuition and Fee Lawsuits: Defending University Practices and Defending Class Actions*, NAT'L L. REV., Vol. X (Dec. 2, 2020); Melba Newsome, *More than 60 Colleges Hit With Lawsuits As Students Demand Tuition Refunds*, NEWSWEEK (June 23, 2020). These suits are different but reminiscent of the ultimately unsuccessful class action cases filed against many Law Schools based graduates in ability to find jobs in the wake of the great recession which began in 2008. There are other grounds for pandemic related grievances including inequities in the distribution of hardships caused by shutdown and the imposition of remote learning, the alleged poor quality of virtual teaching offerings, and the inadequacy and unfairness of available hardship funds for students with unexpected needs and expenditure, for example. See as merely illustrative a small sample of the press coverage from one national daily newspaper, e.g., Lauren Lumpkin, *Freshman year looks different than they planned*, WASH. POST at B1 (Aug. 20, 2020); John Bickley, *Australia offers preview for U.S. college students*, WASH. POST at A15 (Aug. 14, 2020); Danielle Douglas-Gabriel and Lauren Lumpkin, *Tensions rise over tuition as college life is transformed*, WASH. POST, A8 (Aug. 5, 2020); Daniel Doudlas Gabriel, *Colleges dealing with spikes in requests for financial aid*, WASH. POST at A12 (July 12, 2020); Ronin Rodkey and Cole Garber-Mitchell, *Will shutting down our college help?*, WASH. POST at A23 (Mar. 12, 2020); Shawn Hubler, *Big Brother IS Watching Your Final Exams*, N. Y. TIMES at A12 (May 11, 2020). With the respect to recent law graduates, there also have been widespread debates and various responses to emergency measures to administer bar admission exams during the pandemic.

22. One particularly useful summary of the key questions and what we are learning from the pandemic forced changes that focuses on practice but is applicable to legal education may be found in Sara Lord, et al., *Future of the Legal Industry*, BLOOMBERG LAW, [https://assets.bbhub.io/bna/sites/7/2020/12/BLAW\\_future\\_legal\\_industry\\_2021-12-7-2020.pdf?utm\\_campaign=BLAW\\_Confirmations\\_Report&utm\\_medium=email&utm\\_source=Eloqua](https://assets.bbhub.io/bna/sites/7/2020/12/BLAW_future_legal_industry_2021-12-7-2020.pdf?utm_campaign=BLAW_Confirmations_Report&utm_medium=email&utm_source=Eloqua). The report and preview for 2021 begins: "Never let a crisis go to waste...." See also Patricia E. Salkin and Pamela Ho, *Should I Stay or Should I Go, Remote Instruction, Campus Policies and COVID-19* (Dec. 15, 2020), 50 Urban Lawyer 371 (Feb. 2021), available at SSRN: <https://ssrn.com/abstract=3748864>.

23. Salkin and Ho, *supra* note 23; Hans Taparia, *The Future of College is Online* N. Y. TIMES at A23 (May 26, 2020); David Geiles, *Online Learning Is Thriving*, N. Y. TIMES at B5 (June 15, 2020). Law schools are busy perfecting remote teaching, testing, and trying to provide for experiential or practical training while necessarily observing health protocols. They have cancelled or held virtual convocations and commencements and are making myriad other changes with unprecedented speed. Firms are responding remarkably well in the midst of the pandemic. With astonishing speed and skill many have successfully transitioned to provide legal services working remotely. Anecdotally, I know from my own firm's experience that many lawyers also are benefitting from constant internal communication with colleagues, teamwork, and training, while generating an enormous volume of external materials and information for existing and prospective clients. Amazingly, we see lawyers

sometimes it did not go as well as was hoped. Generally though, operations have continued reasonably well through forced departures from or suspensions entirely of business as usual, and by making continuous adjustments. We also are discovering innovations that are worth continuing and improving.<sup>24</sup> The experience reminds us that despite people around the world experiencing a roiling storm of problems and even existential threats to every aspect of our lives, we do have reasons to be optimistic. Rather than regress and deteriorate, legal education and law practice can and will evolve to be better and more useful in new and perhaps radically different ways. Eventually, the surreal disruption of our lives and work caused by the awful COVID-19 health crisis will also create unexpected change for the better. In an odd way this dangerous virus, which is causing so much suffering and hardship, in the long run also could help push us to cure some of what ails our society, economy, government, and educational institutions.

The prospect of learning lessons from a deadly pandemic that no sane person would wish for is little comfort to anyone who is enduring severe illness or the loss of family and friends. My own family understands this emphatically.<sup>25</sup> Perhaps feeling and empathizing with the pain of victims and those who love them can motivate us all not to waste the COVID-19 crisis. For starters we should try not to forget or repeat mistakes whether from recent economic meltdowns, natural and human-made disasters or other more distant historic cataclysms.

It is the conceit of people in every era, as I described was the case for us in those rollercoaster 1960s, to believe that they live in unprecedented times. In fact, in many respects there is “no new thing under the sun.”<sup>26</sup> Not ever. We can learn from experiences within memory like the great recession of 2008, devastating hurricanes, earthquakes, fires, floods, 9/11 and since that pivotal terrorist attack numerous other frightening examples of hostile violent acts against innocent

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recognizing the need and doing more than ever in terms of volunteer service to the community that includes but is not limited to pro bono legal work.

Courts have moved in many instances to remote case status calls, hearings of some types, and other changes which do not require the presence of attorneys in person. Even the United States Supreme Court sat for virtual oral arguments. Courts such as those in the United States Second Circuit have also engaged in service through promoting civic education to enhance the public’s understanding of how the justice system is supposed to work.

In truth all the adaptations to date are only the beginning of what to expect: accelerating reinventions of what and how lawyers are and what they do. No doubt the future role of lawyers in society will be at least as exciting and important as it ever has been in history.

24. Salkin and Ho, *supra* note 23; Lord, *supra* note 23; Frank Bruni, *How to Go to College During a Pandemic*, N. Y. TIMES at A3 (Aug. 2, 2020); Jennifer Senior, *Dear Students You Haven’t Been Robbed*, N. Y. TIMES (July 13, 2020); Lauren Lumpkin, *New college presidents see crises as opportunity*, WASH. POST at B1 (July 14, 2020).

25. Allard, *When the Coronavirus Strikes Someone Near and Dear*, PRO BONO BARRISTER, BROOKLYN DAILY EAGLE (Apr. 14, 2020). *See also* Matt DaSilva, Jack Allard: *Covid-19 Took Me to My Knees, Grateful for Lacrosse Family*, USLACROSSE MAGAZINE (Apr. 22, 2020); Randy Whitehouse, *Former Bates College lacrosse player released from hospital after battling coronavirus*, SUN JOURNAL (Apr. 18, 2020); Michael Sheridan, *New Jersey man recovers from coronavirus after being in medically induced coma*, N. Y. DAILY NEWS (Apr. 23, 2020). *See also, e.g.* the moving observations of Sarah Finerock, *What it’s like to watch your loved one die from covid-19*, WASH. POST at A19 (Dec. 17, 2020).

26. *Ecclesiastes*, 1:9. The Prophet.

unsuspecting people. Using a longer lens we also can look far into the past for examples of both mistakes to avoid and for encouraging instances of the triumph of human spirit.

For historical context and reassurance, I can, for example, recommend James Shapiro's *The Year of Lear*.<sup>27</sup> It is readable, rich in detail, and was a fascinating way to spend some time while sheltering at home. The book is about 1606, a year of turmoil in England. Theaters and businesses closed because of reemergence of bubonic plague. The so-called "black death" is estimated to have killed between thirty to sixty percent of the population of Europe during the 14th to 17th centuries when it lingered over the continent.

1606 was also the immediate aftermath in England of the November 1605 Gunpowder Plot, mass assassination attempts, and a time of brutal political repercussions which underlined unprecedented religious, social, economic, and partisan ideological divisions. Sound familiar? We could have an interesting debate over whether circumstances were even worse back then than they are now. Remarkably, in that bleak, early 17th century period Shakespeare wrote three of his greatest plays: *King Lear*, *Macbeth*, and *Antony and Cleopatra*. In the previous years after Queen Elizabeth's death under King James' rule he "only" managed to co-author the rarely performed *Timon of Athens*.<sup>28</sup> Yet in the midst of the untold misery of the world's worst and centuries-long pandemic, Shakespeare rose to new heights writing classic plays for the ages. Around the same time, similarly, shaming me for being a little less prolific and for my complaints about being stir-crazy stuck at home, Sir Walter Raleigh even managed to write the first volume of his *History of the World* while jailed with his wife in the Tower of London (The couple also conceived and delivered their third child while incarcerated).<sup>29</sup>

A little more than half a century later, from 1665-1666, a quarter of London's population died from one of the last major outbreaks of the plague in the 400 years that it ravaged Europe. Isaac Newton, a student at Cambridge, left the University to work remotely at home and used the time well. His quarantined writings on Math became the basis for modern Calculus, and he also completed important work in the field of Optics. It was also that time when the young, not yet Sir Isaac,

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27. JAMES S. SHAPIRO, *THE YEAR OF LEAR: SHAKESPEARE IN 1606* (2015).

28. *Id.* at 5, 229-230, 296. Until recently when the play was reimaged in a sparkling revival co-produced by Washington D.C.'s Shakespeare Theatre Company and Brooklyn's Theatre for a New Audience, *Timon* has been considered to be one of the bard's worst duds and a sign he was in decline. The new *Timon* was co-edited by Emily Burns and Simon Godwin, directed by Godwin, and featured diminutive human dynamo British actor Kathryn Hunter in the lead, traditionally male role. Ironically the new production was halted due to the 21<sup>st</sup> Century COVID-19 pandemic. When it becomes possible it is must see classical theater, holding up a mirror to the universal conundrums of the human condition. The reconstituted *Timon* could not be timelier for the moral and political questions of our day. See, Simon Godwin, *An unsung masterpiece finds its moment*, WASH. POST at C4 (Mar. 29, 2020); Drew Lichtenberg, *Program Notes, Asides, Shakespeare Theatre Company*, Vol. 5 (2020); Peter Marks, *'Timon of Athens' is tricky Shakespeare. A fearless director gets it right*, WASH. POST (Feb. 25, 2020).

29. Raleigh spent 13 years imprisoned in the tower. Raleigh Trevelyan, *SIR WALTER RALEIGH ... THE CONTROVERSIAL HERO OF THE ELIZABETHAN AGE* (2004).

developed his theories of gravity and motion while social distancing near the apple trees of his family country estate.<sup>30</sup>

In contrast, an anecdote from Samuel Pepys' famous diary in that same period is a reassuring reminder that human foibles are timeless.<sup>31</sup> To wit, the penchant for hoarding consumer items in tough times is hardly new. In 1666, when England was in disarray, after a particularly nasty outbreak of bubonic plague and in the midst of the Great Fire of London, Pepys wrote in his diary that before evacuating the residential area near St. Paul's Cathedral, with flames actually licking at his heels, he and his neighbors dug holes in their back yards to bury their Parmesan cheese, wine, papers, and "some other things."<sup>32</sup> Apparently those modern airline safety admonitions warning that "in the case of emergency when exiting the aircraft leave your overhead luggage and personal items behind" are necessary after all. Come to think of it, it was not long ago when the coronavirus pandemic made many people worry about problems that literally were behind them, causing runs on toilet paper stocked in stores that regularly kept our favorite soft tissues out of reach.

Well, the consequences of massively harsh events obviously extend well beyond the sweet uses individual geniuses and scribblers make of them, or the bemusing familiarity of others like Pepys who, like us today, have tried to cope with serious adversity. The bubonic plague, for example, accelerated the discovery and settlement of the New World (not a blessing for indigenous people).<sup>33</sup> The break with the past of the so-called Middle Ages embodied in the High Renaissance and Age of Enlightenment, and the rise of common law and civil legal systems was also propelled by the cascading repercussions of the black death.<sup>34</sup>

We certainly do not need to look so far back or at such epochal upheavals for lessons and inspiration. There are ample lessons from more recent history. For example, Lin-Manuel Miranda was moved to create his hit Broadway musical about one of the most important founders of the United States when he read about how a devastating hurricane played a key role in Alexander Hamilton's life.<sup>35</sup> A

30. Annalee Newitz, *What Social Distancing Looked Like in 1666*, N. Y. TIMES at A21 (Mar. 30, 2020). Whether or not the story is apocryphal of how a falling apple led Newton to conceive of gravity, there were apple trees near his home and visible from his window.

31. *Id.* Recounted in *Id.* From the DIARIES OF SAMUEL PEPYS, IX Volumes edited by Robert Latham and William Matthews (1970-1983); and THE SHORTER PEPYS, edited by Robert Latham (1985).

32. *Id.*

33. For example, 90 percent of the 70 million indigenous people alive in the Americas in 1492 died from infectious diseases introduced into the New World by Europeans. Witt, *infra* at note 61, p. 6. The journals of Lewis and Clark are replete with examples of the negative impact of European settlement and interaction on the native American peoples they encountered.

34. Three recent books emphasize how medieval plagues contributed to past intellectual upheavals, breaking free from conventional wisdom and leading to acceptance of new values and eras such as the Reformation, Enlightenment and more recently the Jazz Age and women's suffrage. Nicholas Christakis, *APOLLO'S NEW ARROW: THE PROFOUND AND ENDURING IMPACT OF CORONAVIRUS ON THE WAY WE LIVE* (2020); Fareed Zakaria, *TEN LESSONS FOR A POST PANDEMIC WORLD* (2020); *See also*, John Micklethwait and Adrian Woolridge, *THE WAKE UP CALL: WHY THE PANDEMIC HAS EXPOSED THE WEAKNESS OF THE WEST, AND HOW TO FIX IT* (2020).

35. Bob Henson, *How storm drove Hamilton to America*, WASH. POST at E2 (Oct. 13, 2020). Ron Chernow, *ALEXANDER HAMILTON* (2004).

powerful hurricane hit teenage Hamilton's Caribbean home island of St. Croix on August 31, 1772. This prompted young Hamilton to write a description of the storm for the local newspaper. His vivid account so impressed people there that a collection raised enough money to send Hamilton to the American colonies for formal education. The rest is literally history which today school children sing about all over the United States.<sup>36</sup>

We can learn from modern history about the importance of how well you "winter," that is, how the use of forced down time and managing through hardship, is often critical to the long term success of difficult endeavors involving setbacks, loss, and unexpected dangers. Consider General George Washington's encampment at Valley Forge in 1777<sup>37</sup> and Lewis & Clark's Corps of Discovery Expedition of America's barely-charted Louisiana Territory from 1803 to 1806.<sup>38</sup> One of my favorite examples of intrepid leadership is Sir Ernest Shackleton's "splendid failure" saving the lives of every crew member of his ill-fated 1914-1917 Imperial Trans-Antarctic expedition to the South Pole.<sup>39</sup> Their ship, the *Endurance*,

36. *Id.* The hurricane is captured in the lyrics of the musical's eponymous opening number, "Alexander Hamilton" and again in the second act song "Hurricane." Henson, *supra*. See Walter Isaacson, *This plague is not a hurricane* WASH. POST at A19 (Mar. 31, 2020).

37. James E. Night, *THE WINTER AT VALLEY FORGE, SURVIVAL AND VICTORY* (1983); John Buchanan, *THE ROAD TO VALLEY FORGE: HOW WASHINGTON BUILT THE ARMY THAT WON THE REVOLUTION* (2007); Joseph Lee Boyle, *WRITINGS FROM THE VALLEY FORGE ENCAMPMENT* (2007); Nancy K. Loane, *FOLLOWING THE DRUM: WOMEN AT THE VALLEY FORGE ENCAMPMENT* (2009); Russell Freedman, *WASHINGTON AT VALLEY FORGE* (2020).

38. *THE ESSENTIAL LEWIS AND CLARK*, Landon Jones, ed. (2003), is a slender volume of a little over 200 pages that contains the actual journal entries of Merriweather Lewis and William Clark. Jones has excluded most of the technical geographical, navigational, scientific information including drawings and descriptions of flora, fauna, and geological features, along with celestial and navigational notations of their historic exploration. Instead he focuses on their firsthand accounts of the human drama of the exploration of the thirty-six person Corps of Discovery and their interactions with the numerous indigenous tribes and native Americans they encountered and depended upon for their survival. The notations about the young Shoshone woman, Sacagawea, who accompanied them throughout the journey with her newborn son and brutish French trader husband are particularly fascinating. She served as an interpreter, guide and peacemaker. Lewis shrewdly understood that because native war parties never contained women that Sacagawea's mere presence would signal that the expedition's intentions were not hostile. The scope of her contributions to the success of the expedition went considerably beyond acting as a human flag of truce.

39. Of the many books, documentaries and films depicting this spellbinding, almost unbelievable story, my favorite is the telling in his own words by the great Antarctic Explorer, Sir Ernest Shackleton C.V.O., *SOUTH* (Signet 1999). Shackleton and his explorers including many serving in the British military set sail from England in August 1914 just as World War I began. Believing that England might have other uses for his men Shackleton wrote to Winston Churchill, then the First Lord of the Admiralty asking what to do, in light of the imminent outbreak of war? Churchill sent back a one-word message: "Proceed." And they did after the King presented Shackleton with a Union Jack to carry on the expedition. In what became known as the "Splendid Failure" Shackleton returned to England in 1917 with every single man home alive and well after 3 horrific years. The men were shocked to learned that the war was still being fought. In a sad twist of fate many of the Shackleton survivors were assigned because of their cold weather experience to active duty in winter conditions on the Russian front. A shocking number were killed in action not long after returning from Antarctic. Shackleton himself died in January 1922 of a massive heart attack on South Georgia Island where he was preparing for another expedition. He never again made it back to Antarctica to complete his quest.

was trapped and crushed by unseasonably early and fearsome pack ice. It eventually sank, forcing the explorers to abandon their quarters on board before they could get to solid ground. Shackleton and his men lived for two years on drifting ice floes. Eventually when the ice floes began to melt and break up, Shackleton and a handful of men made a desperate dash for help by traversing more than 800 miles in a rowboat through the world's most dangerous seas, followed by an impossible mountain crossing without food, climbing gear, or navigational equipment. (Almost a century later, experts using the best gear and navigational devices attempted but could not replicate the feat). Finally arriving at the end of the South Georgia Island mountains, exhausted, terribly cold, and starving, Shackleton and his small party came to a sheer cliff, tantalizing and within earshot of the safety of a small village. They opted to body surf over the cliff and down a freezing waterfall in order to reach a remote whaling station far below. Surviving the last treacherous stage of the gauntlet, Shackleton organized a return and rescue of every person in his party who he had left behind.<sup>40</sup> His waiting men were ready with packed bags when the rescue ship finally arrived after several attempts to get to them. Shackleton left his men with orders to pack, unpack, and repack their bags each day until he returned.<sup>41</sup>

The details of such case studies in leadership are instructive in situations like our present predicaments. They demonstrate that while it is important how well you do in fair weather, in fact, how you cope with difficulty and even disaster, and prepare for metaphorical spring, summer, and fall during the tough times of whatever you call winter, determines how well you can fare when conditions are better. A lesson that is often difficult to accept for educators and lawyers is that simply hunkering down and hoping to outlast tough times, waiting for a return to the status quo and the good old days is neither optimal nor realistic. What is more, the impossible – and even the unthinkable – can be doable.

American 20<sup>th</sup> Century history before the tempestuous 1960s of my youth is rich with examples that teach us not to underestimate ourselves acting as a nation *e pluribus unim*. Chief among them are how the United States emerged from the last hundred year pandemic: the 1918 Flu Epidemic which killed over 50 million people worldwide and 675,000 deaths in the United States,<sup>42</sup> the Great Depression, the Second World War and the Cold War. As a nation, America survived and evolved imperfectly but stronger and having made progress on issues that matter.<sup>43</sup>

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40. *Id.*

41. *Id.*

42. My maternal great grandfather died in the flu epidemic. His son, my maternal grandfather Clarence and five of Clarence's surviving siblings grew up in the Brooklyn Klamath Swedish orphanage. They were there because their mother, my widowed great grandmother Edith, took a job as a housekeeper at the orphanage so that she and her children could live under the same roof. The New York census of the time listed my grandfather and his brothers and sisters as "inmates" which was the designation for wards of an orphanage at that time.

43. Obviously there are large numbers of excellent histories of these events. Truly great accounts include two classic documentary series created by Ken Burns. See *The Roosevelts: An Intimate History* (especially episodes 5 and 6 depicting how FDR and America responded to the Great Depression and World War II) and *The War* (which traces the experiences throughout World War Two of Americans from four U.S. communities, a documentary that is not without controversy but nevertheless stunning and thought provoking.).

Today as a matter of leadership of institutions, and certainly law schools, law firms, and the courts, instead of fixating exclusively on the news about the spread and effort to contain the virus, which we are all understandably and appropriately making a priority, we also can be looking for silver linings that might emerge from the health crisis. We can focus on new priorities to pursue, test, and develop.

For starters, as self-administered therapy and motivation I have been collecting ideas, insights, and spirit-lifting stories, as anyone can, from family, friends, work colleagues and the news media about encouraging developments arising in the midst of all the terrible news.<sup>44</sup> Their sparkling nuggets include, for example, the uses people are making of the unexpected gift of time, such as engaging more at home with those closest to each of us, suggested reading, recordings of programs, performances, reconnecting virtually with others outside of our bubbles who we each care about to check in on their wellbeing and if possible assist, and to reconsider how best to take care of ourselves and others.

We also get to re-evaluate all the many things we are doing without. We all are learning about and experimenting with new ways to function on an unplanned emergency basis. As we make do we have the chance to determine what can be done better, and to appreciate even more what we are missing and cannot ever replace: the warmth of a handshake, hug or kiss, sharing a performance or sports event with others in a live audience, reacting as a performer or teacher to a live in-person audience (“reading the room”), hearing a community waking up in the early morning on the way to work, the fragrance of spring blossoms, the taste of someone else’s cooking, or the smug naughty feeling of superiority that comes with knowing to stand to the right on an escalator, or perhaps when a barista or

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44. I am fortunate to have had many pandemic shut-in hours spent on worthwhile reading, much of it recommended by our youngest child Tyler, often passed along dog-eared from his own collection, while he was sheltering with us finishing up a judicial clerkship and then beginning work as a legislative aide in Annapolis. Thanks to Tyler, my reading included: Mark Harris, *FIVE CAME BACK* (2014) (Five famous Hollywood directors who left to film World War II); Erik Larsen, *THE SPLENDID AND THE VILE* (2020) (The London Blitz viewed through the diaries of privileged British—e.g. Churchill’s young daughter and his personal secretary—and Nazi correspondence); Jones, *THE ESSENTIAL LEWIS AND CLARK*, *supra* note 39; Shapiro, *THE YEAR OF LEARN*, David W. Blight, *FREDERICK DOUGLAS: PROPHET OF FREEDOM* (2018); Terry Teachout, *THE SKEPTIC* (2003) (Biography of H.L. Mencken a fascinating man and awful person which rises to literature and a compelling history of the City of Baltimore); Preet Bharara, *DOING JUSTICE* (2020); and Wes Moore, *FIVE DAYS* (in Baltimore the reckoning after the murder of Freddie Gray). I managed to find on my own Jennifer Haupt, *ALONE TOGETHER* (2020) (Leading writers offer short perspectives on love grief, comfort in the time of COVID-19); David O. Stewart, *THE SUMMER OF 1787* (2007); Ilya Shaprio, *SUPREME DISORDER* (2020); Witt, *AMERICAN CONTAGIONS EPIDEMICS AND THE LAW* (2020), and several recent important books on higher education leadership, e.g., Derek Bok, *HIGHER EXPECTATIONS* (2020); Stephen J. Trachtenberg, Gerald B. Kauvar, and Gee E. Gordon, *LEADING COLLEGES AND UNIVERSITIES* (2018); and Joshua S. Wyner, *WHAT EXCELLENT COMMUNITY COLLEGES DO* (2014) among others. In truth, I cannot remember a time since I was very young when I was able to enjoy and learn from as much reading, truly a silver lining in the clouded annus horribilis. Especially since I now have exhausted all the reruns of all the lawyer, police procedural, and mystery television programs that only seem to appear on stations featuring advertisements for reverse mortgages, walk-in tubs, and hearing aids.

bartender recognizes you as a regular customer and calls out your order before you do.

Amidst our heavily alarming daily news one does not have to look very hard to find stories that can bemuse and boost spirits. Indeed, in this most recent modern plague, the second person of the general public anywhere in the West to receive an approved COVID-19 vaccine was named William Shakespeare. Mr. Shakespeare, 81 years old and apparently no relation to the Bard, was vaccinated on December 9, in Coventry, England, twenty miles from Stratford on Avon. Social media users predictably had a field day tweeting about the “Taming of the Flu,” the “Second Gentleman of Corona,” and asking, if the first recipient, Margaret Keenan was patient 1A, whether Mr. Shakespeare was “2B or not 2B?”<sup>45</sup> One of my favorite stories is about the Italians who, when ordered to stay at home in various cities, serenaded health workers in gratitude from their separated balconies. New Yorkers have their more clamorous and less harmonious ritual of banging pots, cymbals, and sounding other noisemakers at dawn each morning to express gratitude to our heroic health care providers. Then there are the restaurants donating food, manufacturers converting their production lines to needed health equipment, and the 3-D printing companies volunteering to make ventilators. We can never acknowledge or thank enough all those in the front lines of delivering services that enable us to carry on our daily lives: the postal workers and delivery and distribution workers of every description, cashiers, tellers, grocery and convenience store, pharmacy, gas station attendants, and repair staff, police, firefighters, first responders and so many others. In Washington D.C. and the fifty states there are even some harbingers of nonpartisan cooperation. Who would have thought?

Certainly, we all can agree that the terrible COVID-19 experience can teach us how to be better prepared and what to do next time. We can hope that our government leaders will do more than throw money at the current problem with the always-false notion that “we have no other choice.” Remember that the policy of bread and circuses is said to have marked the decline and eventual fall of Rome.<sup>46</sup> Let’s also encourage law enforcement and lawmakers to guard the public from the worst of human nature that always slithers to the surface in emergencies: predatory pricing, profiteering through abuse of public trust, and fraud.

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45. *In England, William Shakespeare receives a COVID-19 vaccine*, REUTERS (Dec. 4, 2020). After a Thanksgiving that was both strange and bleak, a rapturous letter of appreciation for the “profound and touching” ways writers and columnists observed the holiday gave this reader even more joy and pleasure than reading what was, in fact, soup to nuts an exceptional feast of our capital newspaper’s Thanksgiving holiday issue. See *Dizzy with Gratitude, Free for All*, Letter by Eleanor Elson Heginbotham, WASH. POST at A12 (Dec. 5, 2020). Ms. Heginbotham highlights the profound and touching stories of columnists Marc A. Thiessen (his mother’s fight for freedom), Sosha Lewis (brother’s struggles with addiction), Leana S. Wen (compassion for current plight of schoolchildren, teachers and parents), and Metro section feature writer John Kelly’s rendition of trumpeter Dizzy Gillespie’s dinners with D.C. Jazz musicians hosted by one of their mothers. The news aint all bad. And some is eloquently presented and food for the soul.

46. The politics of distraction and the tactic of generating public approval with popular gestures rather than good policy can be traced as far back as the late declining Roman Empire. The Roman poet Juvenal coined the phrase “Bread and Circuses” in CE 140 to describe the practice of buying votes and holding on to power through distribution of cheap food and entertainment.

Throughout the founding and 245-year history of the United States, when in the course of human events it becomes necessary, its people have made good use of unwanted terrible adversity. An irritating piece of grit causes an oyster to make a pearl; something new, different, and beautiful. It is up to us all, and I believe lawyers now especially, to determine how to use the impetus of today's public health and other crises to renew and strengthen our world and make it even better in the future.

#### IV. HELP WANTED: LAWYERS FOR THE FUTURE OF ALL PEOPLE<sup>47</sup>

"History does not repeat itself; it rhymes." That pithy observation often attributed to Mark Twain wonderfully describes the dynamic, ever-evolving essence of law.<sup>48</sup> After all, law is written in the past, stretched to fit the present, and already late for the future. It is rarely, if ever, exactly the same. The tension between continuity and change is inherent in the nature of law. That means that every generation of lawyers most resonate with the past and harmonize precedents, listen and respond, collaborate, adjust to different procedural rhythms, and improvise to best serve people in the fresh and novel world where humanity always exists. Performing as a good lawyer involves more than following written notes on a page. It can be downright jazzy.

Throughout history prophets, philosophers, missionaries, forced migrants, refugees, scientists, adventurers, sailors, soldiers, pilots and astronauts have led explorations of the unknown. In the 21<sup>st</sup> Century lawyers have the exciting opportunity, in truth duty, to help society to navigate through a perfect storm of transformational forces testing the limits of our established values, norms, practices and rules. Lawyers will be called on to make us all better than our differences.

The challenges facing law schools and practitioners are daunting and humbling. For some time our honorable profession has been serving as guides for people to cope with constantly accelerating change, certain uncertainty, and risk. These forces are all driven by several megatrends: technological disruption, increasing competition, consumer-centric demands, and the transborder, polycentric reality of our world. The COVID-19 pandemic is a vivid example of our global interconnection and interdependence. All this makes law and public policy a multidimensional chess game at high speed rather than a leisurely linear game of checkers on a single flat board without a timer.

In the United States and around the world we are at an inflection point. Lawyers will be needed to chart a course for people, organizations, and communities toward greater economic growth and opportunity, equality, social

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47. An earlier iteration of this section appeared in the Fall 2020 pre-Law magazine which is updated, revised and expanded here with permission. Email from Jack Crittendon to Nicholas W. Allard, President and CEO of Cyprus Magazines (including PreLaw and Jurist) (December 2020) (on file with author).

48. Although this popular maxim is often attributed to Mark Twain, there is considerable uncertainty about its origin. *E.g.*, Jeff Sommer, *Funny I've Heard This Market Song Before*, N. Y. TIMES (June 19, 2011).

and racial justice, peace and well-being as well as sustaining the health of the earth which is our home. What lawyers do will matter whether in firms big or small, or as solo practitioners and in-house lawyers. They can contribute through their work in the private sector, for nonprofits, government or other forms of public service including providing legal aid for the poor and underrepresented. They can be excellent entrepreneurs and make a difference in any of the wide variety of fields that the study and intellectual rigor of law gives one an edge such as business, diplomacy and politics.

Good lawyers will be wanted by all kinds of people in all sorts of places doing ever more new and different things because in this moment many of the old rules do not quite fit and new rules have not yet been written. Moreover, we all are involved in struggles in which the outcomes are in the balance. Lawyers will prove to be instrumental determining whether or not we continue to enjoy the benefits of the rule of law in democracies governed by and for the people with the consent of the governed. Sadly, it is possible to imagine devolving into a dystopian worsening state of chaos, violence, and danger. Our system of law, however, is what protects us from outcomes determined by autocratic power, brute force, influence, arbitrariness, corruption, bigotry, hatred, immorality, and random happenstance. Lawyers can help make sure that this remains so and that departures from legal order are exceptions that highlight what is right.

The rule of law never has been perfect. It should not be taken for granted. As always patience and persistence will be essential. Now is not the time to mope or give up. Paraphrasing Churchill's quip about democracy, our Constitutional system of government and justice is the worst system until you consider the others.<sup>49</sup> Our troubling times once again will test our determination and faith that we can make it better once again.

## V. THE IMPORTANCE OF BEING EARNEST ADAPTIVE LEADERS

So there are indeed compelling reasons for those seeking to have an impact, who want to engage in the world's great fights, to choose the lifelong open book continuous learning experience that law entails. A big question is what qualities and skills will lawyers need? The answer is that every established and new field of law will need lawyers with courage, perseverance, empathy, creativity, and the ability to adapt to changing and unforeseen circumstances.<sup>50</sup>

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49. Churchill said this, or something like it, for example, (House of Commons, 11 November 1947), but it generally is believed he was quoting or paraphrasing unknown antecedents. CHURCHILL BY HIMSELF 574.

50. Allard, *Improving Law for the Future By Adapting Education and Practice To the Certain Uncertainty of Our World*, Presentation prepared for SPHERE: A Program of the Saint Petersburg International Legal Forum 2021 (SPILF 2021) and available on the SPILF Website <https://protect-eu.mimecast.com/s/RJ0GCVpwwuBNg18UNKiHm?domain=lfacademy.ru>; "What Every Lawyer Will Need to Know and Be Able To Do in the 21<sup>st</sup> Century—Continuity and Changes in the Education of Future Lawyers everywhere. Keynote remarks at the Opening Plenary Session of the Seventh SPILF (May 18, 2018), available on the SPILF Website and published at Paul Caron's TAXPROFBLOG as Paul Caron, *Allard, the Future of the Legal Profession*, TAXPROFBLOG (June 30, 2018), [https://taxprof.typepad.com/taxprof\\_blog/2018/06/allard-the-future-of-the-legal-profession.html](https://taxprof.typepad.com/taxprof_blog/2018/06/allard-the-future-of-the-legal-profession.html). See Chris Shipley and Heather E. McGowan, THE ADAPTATION ADVANTAGE: LETS,

Adaptability will be especially crucial. It requires learning how to deal with risk, making prudent decisions and taking action based on the best available but imperfect and incomplete information. It involves learning from mistakes and failure, and understanding that it helps to rely on the teamwork of truly diverse colleagues. Adaption also is a process of reflection and discernment leading to continuous self-invention and reinvention. We lawyers tend to be not as used to change and adaptation as we will need to be.<sup>51</sup> It should be no surprise that law schools and employers of legal talent are developing techniques for cultivating and honing these skills.<sup>52</sup> They are tools that were relied on by history's pioneers and now they will serve lawyers well as necessary leaders clearing paths forward in a new age of discovery that tests the limits of society's existing rules.

To prepare for any possible future legal mission it is helpful and frankly interesting to think about and emulate your own favorite heroes from history and

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GO, LEARN FAST, AND THRIVE IN THE FUTURE OF WORLD (2020), and especially the book's foreword by Thomas L. Friedman. Compare those businesses that survive for long periods of time by not changing and consistently sticking to their original core business model. Ben Dooley and Hisake Ueno, *This Japanese Shop is 1,200 Years Old. It Knows a Bit About Surviving crises*, N. Y. TIMES (Dec. 2, 2020) (Business story about 1000 year old Japanese shop selling toasted mochi rice cakes). On the other hand there is Samsung, founded in 1938 as a shop that sold vegetables and fish. *Apples, Cows and Pantsdrunk*, N. Y. TIMES at A4, (Jan. 1, 2021); Or Lehman Brothers humble origins as a small farm supply shop in Atlanta to a global financial powerhouse until its demise in 2008, dramatically portrayed in Sam Mendes play, *The Lehman Trilogy*. Entities with monopoly power and little competition are able to resist change, improvements in quality, choice and service and remain viable if not profitable; but not forever.

51. Allard, SPILF, *supra* note 45. Lawyers and legal educators are notoriously late adaptors, perhaps more so than any other learned profession. There are many very good reasons why this is so. Among other things, those schooled in the law give credence to evidence and we value the probative value of give-and-take argument, which both can take time to develop. We are comfortable with precedent and understand that departure from generally established principles and practices can be disruptive, can have unintended consequences and can be unintentionally unfair, especially to those who may have relied on *stare decisis*. The status quo is also anchored by many factors contributing to institutional inertia and by the weight given to conventional wisdom that what is tried and true is best. It is not an inventive ethos, but a preference to avoid experimentation and innovation. However, in an age of accelerating disruptive change lawyers and legal educators should and must push to consider improvements that need to be made, and how to do things ever better. Business as usual and rigid resistance to adapting to new technological, economic, political, climactic and other societal circumstances is not a viable option. Indeed it is a formula for failure. See Shipley and McGowan, *Loves Labors Found*, *supra* note 46 (relaying anecdote about the opening speaker at a program on innovative technology in legal education during the Seventh annual SPILF program, and stubbornly asserting that though he did not understand or use technology to teach his trial practice students he knew it was not good for teaching. Not a rare sentiment even in this advanced digital age.).

One major development is that law schools are responding to demands for better practical training while often also satisfying students interests in not waiting for graduation to make an impact on significant public issues. Law Schools are rapidly beginning to find pedagogical uses of virtual reality and AI. The most popular course in the history of Georgetown University Law Center with over 300 students enrolled is "Lawyers as Leaders." This new course taught by Dean Bill Treanor is offered online and engages students in discussions about how lawyers can lead progress on the issues of our day. Susan Svrluga, *Learning to fight for Justice*, WASH. POST at B1 (Nov. 9, 2020). Not coincidentally the activity and work of the relatively new leadership section of the American Association of Law Schools stands out. See e.g., the AALS Section on Leadership Newsletter on the AALS website.

from your own lives; heroes who may be famous or relatively unsung. Their virtues can be your lodestar.

With the time afforded by the surreal isolating health emergency aspiring and established lawyers alike might make sweet use of adversity by studying and learning more about remarkable people whose virtues and habits are worth adopting. Role models for future lawyers do not need be lawyers themselves. They can be teachers, creative and performing artists, inventors, medical care givers, and members of one's own family. The universal lessons of exemplary lives translate well to what future lawyers will be expected to do. Throw out your preconceptions about lawyers' jobs. Do not trust the well-meaning outdated ideas of others, like the beloved grandmother who bought a brass spittoon at a village lawyer's estate sale. She thought her young grandchild would need it when as she hoped he became a lawyer. True story. I was that teenager. And she was right. Every day when I see that old fashioned spit bucket in my office it reminds me of her aspirations, unqualified confidence in me, and positive influence as a role model.<sup>53</sup>

You might, by way of example, find time to read through the fascinating words that Merriweather Lewis and William Clark wrote almost every day in the elk-skin covered journals they carried during their epic expedition of discovery across the wild vast largely unmapped expanse of the Louisiana Territory.<sup>54</sup> Clark wrote "Ocean in view! O! The Joy" in November 1805 when they finally could see but not yet hear the distant crashing waves of the Pacific.<sup>55</sup> Those words literally never would have been known if Sacagawea, the only woman in the thirty-six person exploration troop, had not been on the journey. As Lewis and Clark note, while serving as guide, interpreter, and peacemaker she gave birth to a son who she cared for during the entire arduous trip. Their various rivercraft capsized more than once. Unlike others who could not or would not swim, unprompted Sacagawea dove into the rough water and rescued the journals and navigation instruments that fell overboard, perhaps even while holding her baby. The unvarnished truth of this young Lemhi Shoshone Native American's often overly romanticized, difficult, extraordinary and sad life is a poignant and impressive uplifting example of the perseverance and strength of character against all odds.<sup>56</sup>

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53. My irrepressible Grandma Edna was a divorced, twice widowed, three times married severely diabetic Navy Nurse who is hands down the most influential person in my life. As a teenager she left the family farm to study nursing, join the Navy and see the world. Instead, she ended up in the Brooklyn Navy Yard hospital where she met my maternal grandfather, a Swedish immigrant Navy seaman, who grew up in a Brooklyn orphanage. We lived with and nearby with Grandma Edna for many years, including for a long time in rooms above a gift shop that was attached to an ice cream parlor and a deli. The stories about the unforgettable character and impact of this remarkable woman are legion. Some of them are recorded in a tribute by Congressman, Representative Bob Mrazek (D. NY) on her 80<sup>th</sup> birthday. Robert J. Mrazek (D. NY), A Tribute to Shermer Grossman, R.N.: VA Nurse, 131 Cong. Rec. 29308-29309 (Oct. 28, 1985). My own father's difficult path starting with the G.I. bill making it possible for him to attend college, and my wife's grandparents David and Rose, holocaust survivor immigrants from eastern Poland who ran a tailor shop and made it possible for their three children to earn advanced engineering degrees and lead lives of distinguished service, are also powerful motivators.

54. Landon Jones, *supra* note 35.

55. *Id.*

56. *Id.*

During the 100th anniversary of the Nineteenth Amendment we acknowledged the difficult slow progress of women's rights in the United States. It is worth celebrating all the women who were not allowed to be lawyers at the time but who made such an indelible mark on improving equal rights under our Constitution, statutes, and cases. Consider Harriet Tubman bravely and selflessly fighting slavery. Admire the abolitionists-turned-leaders of the women's suffrage movement, Susan B. Anthony and Elizabeth Cady Stanton. They worked long and tirelessly, propelling progress toward equality which was not fully realized during their lifetimes and to this day remains unfinished business for future lawyers.

In America sports are about more than physical achievement and entertainment. They are a window into the soul of our nation and offer exquisite leadership lessons. Even a small sample list of names of the many athletes and sports executives who championed breakthroughs and causes beyond themselves drive home the point: Jim Thorpe, Babe Didrikson Zacharias, Jesse Owen, Wilma Rudolf, Muhammad Ali, Billie Jean King, Arthur Ashe, Serena and Venus Williams, Jackie Joyner Kersee, Simone Biles, Willie Shoemaker, Wilt Chamberlain, John Thompson, Magic Johnson, Greg Louganis, Caitlin Jenner, Sandy Koufax, Hank Greenberg, Hank Aaron, Roberto Clemente, Tony Oliva, Mariano Rivera, Branch Rickey and Kim Ng to mention a few.

Indeed baseball, our national pastime, like the way our nation's idiosyncratic brand of law and jazz, enjoys elements borrowed from other cultures but is quintessentially uniquely American. It mirrors our character. We all should know and respect the progressively-connected legacies from Jackie Robinson breaking the color barrier, to Hall of Famer Lou Brock, a young sharecropper's son in Louisiana who never thought about baseball until he heard a radio broadcast from St. Louis about Robinson and Roy Campanella playing for the Brooklyn Dodgers, and then to Curt Flood who refused to let major league baseball treat him like property to sell without his consent.

Flood lost his own Supreme Court challenge to the so-called "baseball reserve clause," but he won in the game of life.<sup>57</sup> Eventually other players of all races benefitted from the freedom he fought for but could not gain for himself. There are many more women and men who no doubt might be added to the list of athletes who are models of the best human qualities and causes for future lawyers to adopt. Then there is the late Rep. John Lewis, a heroic nonlawyer champion of civil rights and racial justice who became a great lawmaker in Congress. His life demonstrates that courage and fortitude can come to people and motivate others in unexpected ways. Although he had been a rather shy young man, in the 1960s Lewis chaired the Student Nonviolent Coordinating Committee as a leader on the forefront of the civil rights movement. He faced and overcame unspeakable indignities, hardships, violence and physical harm. To the very end of his

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57. Professor Brad Snyder, *A WELL PAID SLAVE: CURT FLOOD'S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS* (2006). It took until December 2020 for Major League Baseball to officially recognize more than 3,400 players from seven distinct "Negro leagues" that operated between 1920 and 1948 as major leaguers and to include their statistics in baseball's official record books. *See, e.g.*, Tyler Kepner, *Baseball Rights a Wrong by Adding Negro Leagues to Official Records*, N. Y. TIMES (Dec. 16, 2020).

extraordinary life Lewis tirelessly carried on the cause of equal justice and freedom for all. While inspiration may come from all walks of life and points of the compass, there is no shortage of lawyer role models. Abraham Lincoln, a legendary American lawyer in both private practice and government service, learned about law by reading and through practical experience. He never went to law school or took a bar exam, and Lincoln lost his only argument before the Supreme Court. Mahatma Gandhi and Nelson Mandela were lawyers who became iconic statesmen for their people and beacons for all people. Closer to home in the United States, we can think about lawyers in the nation's service and in the service of all people such as Alexander Hamilton, Presidents John Adams, Thomas Jefferson, Gerald Ford and more recently Barack Obama, Joe Biden and Kamala Harris. Groundbreaking Justices of the Supreme Court include Louis Brandeis, Thurgood Marshall, Sandra Day O'Connor, Antonin Scalia, Ruth Bader Ginsberg, Sonia Sotomayor and Elena Kagan. You get the idea. Do not quibble with the names on the list. Build your own list. Or better yet live a life and have a career in law, or teach others how to make a contribution that earns the gratitude of those who are well served.

In recent years there has been a very real debate over whether robots will replace human lawyers. What is emerging from experts and learned discussions is that, yes, a great deal of work and even many jobs of lawyers will be automated, digitized, or performed robotically. Work, certainly a lot of drudge work, will be taken away from humans by machines. However, technology will also free up time and create new work and jobs for human lawyers, as it has always done throughout history for human labor of all sorts. Expect that a great deal of more interesting legal work will be transferred and created for people to do which cannot so easily be automated, including analysis, advice, and advocacy.

By continuously adapting over a career, lawyers can help determine how best to use technology consistent with societal norms and values, to augment themselves to do what technology cannot do better, faster, and cheaper, and to keep law relevant to the core elements of the human condition. There are unprogrammable elements of the human condition that are not done justice by algorithms. Flesh and blood lawyers will be needed because of humanity's penchant for understanding, wisdom, judgment, purpose, abstractions, creativity, poetry, metaphor, unpredictability, love, friendship, compassion, empathy, joy, inspiration, dedication, generosity, sacrifice, surprise, error, sadness, grief, physical and mental pain, fear, laziness, complacency, negligence, stubbornness, irrationality, deceit, meanness, bias, hatred, deviance, antisocial behavior, illness, death and, of course, faith, hope, and charity. Our desires for relationships, liberty, privacy, and safety also make every one of us more like Captain Kirk than Mr. Spock. And only humans need to be reminded that brevity is the soul of wit. While it was not verbosity that killed the tedious old fool Polonius, it is a heavy cross that human speakers often make others bear. This point was drolly made to me at the opening plenary session of the VIII Saint Petersburg International Legal Forum by a very distinguished observer who said that I could outtalk any robot. I took it as a compliment.

Legal change, hopefully for the better, is inevitable. How lawyers respond and adapt to the future will be crucial and important not only for our own success and fulfillment but also for society. That is because law is not for lawyers alone.

## VI. THE MOTHERS OF INVENTION

The epigram “necessity is of the mother of invention” sounds as if it could have been, but in fact, was not coined by Shakespeare.<sup>58</sup> Nor will, in contrast with the Bard’s last play, the resolution of our modern cauldron of tempests be achieved by magic.<sup>59</sup> Wishful thinking or depending on the mere passage of time to solve our problems also are unlikely to produce anything but missed opportunities and more tragedy. What is called for is leaning into problems and change with hard work, fortitude, creativity, innovation, emotional intelligence and empathy by lawyers adapting to the new world of law. Having compared law to jazz, in which slang for a great musician is “Mother,” and in light of the growing majority of women becoming lawyers, it seems apt to call on lawyers to be mothers of innovation leading society forward.<sup>60</sup>

The future necessities pressuring us to adapt and improve are apparent in four illustrative areas: (A) the uncharted legal territory opened by breathtaking scientific advancement, (B) the reality that how people actually acquire knowledge, learn from experience, communicate with others, and function has been transformed irrevocably and law schools and practitioners need to keep keeping up, (C) a profound gap which law schools and lawyers are uniquely able to fill in civic education about the founding and workings of our Constitutional system of governance and law, as well as the necessity of their leadership in public policy discussions about how to preserve democracy at a time of institutional disfunction and sharp political division, and (D) the increasingly obvious and costly failure of the traditional bar exam to serve either the public need or the profession’s interest in the availability of good affordable legal services from new lawyers.

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58. The phrase is frequently attributed to Plato from a volume in *The Republic*. There are many well-known variations such as the slightly different version, “Necessity is the mother of all invention,” sometimes attributed to Albert Einstein; “If necessity is the mother of invention, then resourcefulness is the father,” by Beulah Louise Henry; and “Necessity is the mother of invention, it is true, but its father is creativity, and knowledge is the midwife,” by Jonathan Schattke.

59. *The Tempest* (1610-1611) is not only the great playwrights touching farewell, but also an homage to discovery, changing times, and itself is full of cutting-edge theatrical experimentation. An exquisite analysis of this uniquely inventive play which was literally Shakespeare’s last word on theater may be found in Drew Lichtenberg’s short essay *A Brave New World*, *Asides*, Issue 2, p. 10 (Shakespeare Theatre Company D.C., 2014-2015 season).

60. Frank Zappa chose to name his inventive jazz/rock band in 1964 – “The Mothers of Invention.” The band’s original R & B name was the “Soul Giants” which after an artistic change to more experimental rock-jazz-blues music Zappa changed to “The Mothers.” Concerned about the profanity of a common crass usage of “Mother” record executives insisted that the name be changed. Zappa later quipped that “out of necessity we became the Mothers of Invention.”

--A. *Scientific Breakthroughs Rewriting the Codes of Life and Digital Technology Make Rethinking and Reshaping Legal Codes Necessary*

Paradoxically, there is nothing new about epidemics changing everything. That includes law and policy which shape society's responses to a health crises. Laws, regulations and procedure in turn are themselves also shaped or more substantially revamped entirely during health emergencies.<sup>61</sup> However, the COVID-19 pandemic arose during the eruption of what clearly is an age of seismic movement in the life sciences. Concurrently continuing unabatedly and often synergistically with the advances in life sciences is the astounding accelerating age of digital invention that began fifty years ago based on the microchip.<sup>62</sup> Moreover, we are learning that the increased incidence of the outbreak of new devastating diseases is not unrelated to global economic development activity, population growth, and climate change. All of the most recent serious spreads of contagions have resulted from "zoonotic diseases," ones that humans acquired from natural animal reservoirs.<sup>63</sup> Human intrusion into the natural world and vice versa, compounded by such egregious behaviors as bushmeat consumption and often illegal trade on animal products for "alternative medicine" or purportedly health-giving products have often led to infection of people with animal-originated diseases. The confluence of all these trends is generating an unprecedented amount of unanswered cross-disciplinary questions involving law, science, ethics, morals, and politics. Legal educators should expect in response to rapidly growing demand and the rise of many new fields of scholarship, teaching, training, and practice.

Yale Law Professor John Fabian Witt's book "American Contagions: Epidemics and the Law from Smallpox to Covid-19"<sup>64</sup> offers a timely and useful blueprint for thinking about many of the pandemic-driven issues. He documents how in U.S. history pandemics do more than change us. As we have learned painfully with the spread of COVID-19, health crises spotlight and exacerbate our underlying problems: economic, racial, and social disparities, biases, and sharply

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61. Jill Fillipovic, *Epidemics and Change our policies; do policies change epidemics?* Book Review, WASH. POST, Outlook at B1 (Nov. 15, 2020). Reviewing John Fabian Witt's book, *infra* note 59.

62. An obvious example is how the mapping of the human genome was sped up, if not made possible, by computer technology. Author and best-selling biographer Walter Isaacson who most recently has been writing about the scientists who have broken the so-called "Code of Life" predicted that the next needed vaccine will only take "two days to develop in contrast to the record breaking several months it took to discover and make a COVID-19 vaccine." Consequently, according to Isaacson, we may have experienced our last viral pandemic. Interview by Joe Scarborough and Mika Brezinski, MSNBC (Dec. 9, 2020). Isaacson's latest book is *THE CODE BREAKER: JENNIFER DOUDNA, GENE EDITING, AND THE FUTURE OF THE HUMAN RACE* (2021).

63. I am hardly an expert in this area. I am relying on the expertise of several colleagues who are, whose views were briefly expressed and summarized in the 1974 Class Letter, *The American Oxonian* (both the Winter 2020 and 2021 issues) which I compose. The print issues are forthcoming. The online versions are available at the website of the Association of American Rhodes Scholars.

64. Yale (2020). See also the three books discussing history's lessons and predictions for the post-pandemic future at *supra* note 35: *THE WAKE UP CALL*; *TEN LESSONS*; and *APOLLO'S ARROW*.

divergent ideologies. They reveal both our weaknesses and our strengths. Professor Witt's warnings about past legal responses to epidemics and the choices ahead are well worth considering. Today as the COVID-19 pandemic persists we face numerous tough, unanswered questions about how to oversee research, development, and delivery of medicine and services, and regulate public and private behavior to best protect the public health, who gets relief and when, who pays and how are costs paid, and even how many survive, and who lives or dies. Not surprisingly the ongoing debate over religious exceptions to laws and regulations has already arisen in the COVID-19 context and will likely be a significant issue.<sup>65</sup> The very fact that the COVID-19 crisis has a numeral after it strongly suggests that there might be additional iterations of this germ, and other dangerous new ones in the future. Such topics could keep many law professors and law firms busy for many years to come.<sup>66</sup>

The likely growth of biomedical related legal scholarship and work in practice will hardly be limited to pandemic centric issues. The 2020 Nobel Prize in Chemistry was awarded to two spectacular relatively young scientists for their work rewriting the Code of Life; more specifically for their 2012 research on Crispr-Cas9, which enables DNA to be edited.<sup>67</sup> This is an invention that could transform the human race and life as we know it. Experiments with Crispr across the world are looking into cures for genetic disorders like sickle cell anemia, creating new crops and even bringing extinct species back to life. It has been used by a Chinese scientist to alter human embryos and yield the world's first genetically engineered embryo.<sup>68</sup>

The advent of Crispr technology should brace us for the profound and truly novel issues presented by the life science age that the world is only beginning to fully appreciate. For example, considering only the western tradition, the concept of the nature of human beings and life was historically always taken as a given. Consequently, understandings about the inherent and immutable nature of people

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65. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 1 (2020). On November 25, 2020, the Supreme Court ruled that the State of New York cannot limit attendance in houses of worship due to public health concerns about COVID-19. This decision amounted to a partial reversal of other recent decisions and a departure from a long string of precedents dating back to the early 19<sup>th</sup> century involving state administered safety programs during epidemics. *See e.g.* Witt, *supra* at Chapter 2, pp. 21-26, and Chapter 3.

66. Unlike the chimerical much-ballyhooed turn of the 21<sup>st</sup> Century expected boom-let of so-called Y2K software glitch related work; work which never materialized, at least to the degree forecast. Whenever one catches themselves predicting what others should make their life's work it's helpful to remember one word: "Plastics!" It was, of course, the word of advice whispered in the ear of Dustin Hoffman playing the protagonist in film *The Graduate*. It was advice his morose, alienated character disdainfully ignored.

67. Dr. Emmanuelle Charpentier of France and the Max Planck Unit for the Science of Pathogens in Berlin and Dr. Jennifer A Doudna of the United States and the University of California, Berkeley. *See Isaacson supra* note 63. *See also*, Walter Isaacson, *A Nobel That Honors, and Poses Questions*, WASH. POST at A27 (Oct. 8, 2020); Katherine J. Wu, Carl Zimmer and Elion Peltier, *Rewriting the Code of Life and Reshaping the World of Science*, N. Y. TIMES at A13 (Oct. 8, 2020).

68. Dr. He Juankui experiment were decried by many scientists as irresponsible and dangerous. Katherine Wu, Carl Zimmer, and Elion Peltier, N. Y. TIMES at A13 (Oct. 8, 2020); Dr. Doudna herself recognized the promise and risks of this powerful technology in her book *A CRACK IN CREATION* (2017). *See Isaacson, supra*, note 64, and Wu et al. *supra*, note 64.

shaped politics, political theory and values. For example the understanding of life as being inexorably nasty, brutish and short led to the theoretical need for an all-powerful Leviathan.<sup>69</sup> Later concepts that people were sentient rational beings who could understand and agree to law and order for the greater good or that people were all born equal with certain inalienable rights led to much different constructs for societal rules and governance.<sup>70</sup> Now, for the first time in the history of civilization, humankind has the ability to determine and engineer the nature of people rather than simply accept human nature as an inalterable given. The applications of new science are likely to strain the existing fabric of social consensus in many ways. Law and legal process will prove critical to reexamining applicable rules and norms and as necessary reweave them to fit the brave new world that, without fully realizing, we have already entered.

There also are many critical unresolved issues about new digital technology. The question of the applicability and relevance of antitrust law to the digital age is raised, for example, by the recent cases filed against Facebook and Google.<sup>71</sup> The list of other unresolved digital technology driven issues could stretch, shape, and fill any law school's upper class curricular course offerings many times over. This will influence how and what is taught in classes studying the First Amendment, privacy, security, search and seizure, intelligence gathering, responsibility for false and misleading information, jurisdiction, conflicts, choice of law, how to practice in a digital world and what to do about the so-called digital divide between the haves and have nots; that is, those who do and do not have access to affordable advanced networked digital communications and the know-how to use it. In addition, given breathtaking strides in artificial intelligence, virtual reality, and a vast variety of microchip driven components or replacement parts already available or soon to be implantable in human beings, science fiction increasingly meets reality. As our real-life version of a Hollywood Terminator meets Bladerunner world approaches true life we have fundamental questions to face:

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69. Thomas Hobbes, *The Leviathan* (1651) (Arguing for the necessity of a strong central government to avoid the natural state of humans where life was "solitary, poor, nasty, brutish, and short.").

70. Among others consider: John Locke, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* (1689); *TWO TREATISES OF GOVERNMENT* (1689); and David Hume *A TREATISE OF HUMAN NATURE* (1739) (both empiricists who believed that human knowledge was derived from experience); Bishop George Berkeley, *A TREATISE TOWARD CONCERNING THE PRINCIPLES OF HUMAN KNOWLEDGE* (1710) (the relation between perception and existence); Jean-Jacques Rousseau, *DISCOURSE ON THE ORIGIN AND BASIS OF INEQUALITY AMONG MEN* (1754) and *THE SOCIAL CONTRACT* (1762)(only people are sovereign arguing against the divine right of monarchs to govern); John Stuart Mill, *ON LIBERTY* (1859) (applying his theory of utilitarianism to society and examining why individuality and liberty are essential for the highest form of human gratification).

71. In 2020, the FTC and 48 State Attorneys General filed dual antitrust lawsuits against Facebook in the United States District Court for the District of Columbia. On October 20, the U.S. Department of Justice filed an antitrust suit against Google over its alleged monopoly of online searches. Texas and eight other states filed a separate lawsuit focusing on Google's monopoly power over the advertising technology market on December 16. A day later, on December 17, a coalition of 35 states plus Washington D.C., Guam, and Puerto Rico filed an additional complaint similar to the Justice Department case against Google, also in the D.C. federal court, accusing google of favoring its own products in search results, and alleging that the company took steps to prevent competition from rivals.

what is a human being and what is life? Do robots deserve civil rights?<sup>72</sup> Such questions no doubt will become increasingly relevant in practice and much more than intriguing hypotheticals for law school exams.<sup>73</sup>

--B. *The Unfinished, In Fact, Never Ending Work of Continuously Developing Better Legal Teaching, Training, and Communications*<sup>74</sup>

Many of we Baby Boomers and younger Generation Xers often tease and criticize Millennials and members of Generation Z – who comprise the current cohort of law students in this country – as overprotected or entitled. Yet most of today’s law students are digital natives who, in many cases, are more comfortable with technology and adaptable to change than many of their teachers, mentors, and critics. They are also individually and collectively impatient (in a good way) to make a positive impact on the world in which we live as soon as possible. Forcing a new generation of law students to learn law the way we did along the same path and timeline we did – decades ago – is shortsighted. Renowned choreographer, dancer, and author Twyla Tharp said, “If you only do what you know and do it very, very, well chances are that you won’t fail. You’ll just stagnate, and your work will get less and less interesting, and that’s failure by erosion.”<sup>75</sup> Medical school teaching has obviously evolved with scientific advances; business education has adapted to the needs of emerging online markets and the growth of the tech industry. Architecture and engineering schools are using remarkable new tools – from 3D printing to virtual reality powered by artificial intelligence to gamification – to reimagine effective ways to teach skills increasingly in demand in forward-progressing markets. Similarly, so should law schools commit to vigorously pursue and be open to applications of technology that are true to the nature of law and the

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72. In some sense that time already is upon us. With increasing numbers of us to various degrees having artificial mechanical components and increasing biological engineered parts in our bodies, along with other developments such of the advances of AI and the prospect of machines gaining self-awareness, the line between human and robot becomes harder to draw. I have addressed as have others elsewhere the future of the legal profession in an age of robots. See Richard Susskind, *Tomorrow’s Lawyers: An Introduction to Your Future* (2013); Richard and Daniel Susskind, *The Future of the Professions: How Technology With Transform the Work of Human Experts* (2017); ACLU President and BLS Professor Susan N. Herman on Robots and Rights, TIME, (Sept. 11, 2015) (also complete text of Professor Herman’s statement, on file with author); Allard, *The Future of Legal Education and the Profession*, Keynote, Opening Plenary of the VIII St. Petersburg International Legal Forum (SPILF) (May 18, 2018); *The Art of Law: The Persistent Artful Humanity of Law in a World of Continuous, Rapid, Disruptive Technological Change*, Keynote, Opening Plenary, IX SPILF (May 17, 2019).

73. Note there is considerable and growing literature discussing whether and when robots will have enforceable civil rights. See Herman, *supra* note 66; David J. Gunkel, *Robot Rights* (2018) and 2020: *The Year of Robot Rights*, Dr. David Hanson, MIT PRESS (2020); *Robots Will Have Civil Right by 2045, Claims Creator of ‘I Will Destroy Humans’ Android*, INDEPENDENT (May 25, 2018); Lauren Sigfusson, *Do Robots Deserve Human Rights?*, DISCOVER (Dec. 5, 2017).

74. I am particularly grateful for the insights and work of my colleague Professor Heidi K. Brown whose contributions are especially reflected and incorporated in this section.

75. Interview with Dance Icon Twyla Tharp, “Keep It Moving: Lessons for the Rest of Your Life” Allison Hagan, Broadcast by WBUR and NPR, *Here and Now* (2018).

unique requirements of the profession, but enable us to be better, faster, and cheaper at what we do.

For a learned profession like ours to refrain from adapting to new technology and classroom dynamics is analogous to only teaching 21<sup>st</sup> Century photography students how to develop film negatives in a darkroom. Legal education must move beyond “the way we’ve always done things.” Instead, we should meet our next generation of lawyers where they are, strive to speak a common language, and help our students outgrow us.

As recently as twenty years ago, lawyers contacted each other and clients after looking up phone numbers on gigantic “rolodexes” and calling on telephones contacted to a wall by a wire. Or they relied on some poor soul sitting outside their office to do it for them. Lawyers communicated through lengthy client opinion letters or settlement demand letters transmitted via fax or FedEx, briefs filed with the court (often hand-delivered by couriers), and perhaps the occasional press release carefully crafted for high profile cases. Today, in our fast-paced, media-saturated, and tech-driven world, we see lawyers advocating for clients through Twitter soundbites, blogs, and marketing through all sorts of new media. Pleadings and briefs – once buried in dusty court filing cabinets – are electronically accessible for the world’s review and “Monday-morning quarterback” scrutiny.

You know the myriad other ways that we work differently including performing so many more tasks for ourselves. Attorneys conduct negotiations, conferences, and depositions with their national or even international counterparts over Skype, GoToMeeting, or Zoom. Lawyers establish their personal permanent digital footprints through LinkedIn, Facebook, and Instagram. Legal communication is rapidly changing because of the same megatrends affecting all of society: technological advances, disruptive business models, and globalism. Although there are outliers and pockets of stubborn resistance,<sup>76</sup> generally the legal profession and legal educators – famously slow and often resistant to adaptation for understandable reasons – are now evolving with the times.<sup>77</sup> This is what clients, students, and the rise of competition compel. Standing still, clinging to the “business as usual” status quo is a luxury no one can afford.<sup>78</sup>

In 1816, late in his life, America’s third president and renowned lawyer, Thomas Jefferson, wrote:

[L]aws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.<sup>79</sup>

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76. See *Improving Law for the Future*, SPILF SPHERE, *supra* note 50; Allard and Brown, *supra* note 1.

77. *Id.*

78. *Id.*

79. Part of the famous quote carved on the Southwest Portico of the Jefferson Memorial in Washington D.C., excerpted from a letter to Samuel Kercheval (July 12, 1816).

Over 200 years later, societal change happens faster and will continue to do so at accelerating speed. This is the “new normal” to which the legal profession must adjust. A widely held, if not universal, view of anyone actively engaged in legal practice – employers, judges, clients, recent graduates, and senior supervisors – is that effective communication, including written and oral expression, is among the most important skills that any lawyer must possess to succeed. The Institute for the Advancement of the American Legal System (IAALS) is a “national, independent research center at the University of Denver dedicated to facilitating continuous improvement and advancing excellence in the American legal system.” Educating Tomorrow’s Lawyers is an IAALS initiative focused on aligning legal education with the needs of the legal profession. In July 2016, IAALS and Educating Tomorrow’s Lawyers issued a report summarizing a national, multi-year project called Foundations for Practice. The report noted:

The current dichotomous debate that places “law school as trade school” up against “law school as intellectual endeavor” is missing the sweet spot and the vision of what legal education could be and what type of lawyers it should be producing. New lawyers need some legal skills and require intelligence, but they are successful when they come to the job with a much broader blend of legal skills, professional competencies, and characteristics that comprise the whole lawyer.<sup>80</sup>

The findings gathered from a survey of over 24,000 attorneys indicate that “[b]y and large, foundations in the Communications category were considered necessary in the short term by a majority of respondents.” Paradoxically, law schools historically place a lower priority on teaching fundamental communication competencies (like legal writing) than other core subjects. This trend is reflected in fewer credits traditionally allocated to writing courses in the 1L year of law school, in addition to less job security, lower salaries, and limited or no faculty voting rights for many legal writing professors. While many schools have made strides toward achieving professional equity for professors who teach these courses as well as others engaged in practical education of all kinds, the academy as a whole still has much work to do in that regard.<sup>81</sup> The tectonic shifts shaking the foundations of law offer an opportunity for law schools and post-graduate training programs to innovatively teach essential communication and other practical skills

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80. *Id.*

81. As someone who came to full time academic administration later in my career, and perhaps with fresh eyes, the prevalence and corrosive nature of the caste system within faculties came both as a surprise and concern. Fundamentally, its nature is contrary to anything I have been taught or believe, see e.g. *St. Paul, I Corinthians 12:21* (“As it is, there are many parts, but one body. The eye cannot say unto the hand, ‘I do not have need of thee’, nor again, the head cannot say unto the feet, ‘I have no need of you.’”). An academic caste system also is contrary to what in reality is necessary for building a cohesive team that makes the most of its collective talent. It is promising that this subject is receiving the attention it deserves. See Darby Dickerson, “President’s Message: Abolish the Academic Caste System” Association of American Law Schools (aals.org). This principle also applies to the importance of recognizing, celebrating, and supporting the contributions and career advancement of staff. It is not a matter of altruism. It is both right to do in terms of equities and is smart to do in terms of effective management of any organization.

in ways that can transform the profession, and honor this critical component of legal education and practice.

### 1. *Innovative Curricula*

For example, legal writing programs around the country are already teaching legal communication methodologies in innovative and exciting ways. Professors invest time in crafting ripped-from-the-headlines research and writing assignments, and in teaching students how to engage with sources of law affecting our daily lives across an ever-changing societal landscape. Students learn how to draft memoranda and briefs, which, while reflective of traditional pedagogy, are still important vehicles through which students learn fundamental methods of disciplined, clear, organized, predictive, and persuasive legal analysis. Many professors also incorporate practical contemporary legal communication techniques such as professionally-presented emails to partners, clients, and opposing counsel, and how to appropriately compose quick, short reports of answers to discrete legal questions posed under a pressing timeline. Often these shorter assignments are designed to be read on a supervisor's smartphone instead of a lengthy, printed document. Students need to learn how to balance a lawyer's non-negotiable need to take the necessary time to think, research, reflect, and communicate carefully and thoroughly, against the 24/7 demands and expectations of clients for instantaneous answers to tough questions.

In addition, because so many students come to law school with a passion for activism they are eager to be involved immediately rather than waiting until after graduation to contribute to shaping the policy issues of our day. Law professors are using this commendable motivation to provide useful training by developing new genres of legal research and writing assignments, such as blogs and op-eds, to teach students how to communicate with the general public and explain complex laws and legal concepts in terms non-lawyers can understand. Through these assignments, we can blend the foundations of our legal rules (legislative history, development of case law, etc.) with events happening in real time, to bring the law to life. We can point students to the vibrant role of lawyers serving the public interest local, state, national, and global stages.

### 2. *Advancing the Role of Technology in Legal Education*

Increasingly, law schools are embracing technological innovations in legal education. Professors can use technology to identify students' individual areas of needed improvement in legal research, grammar, and legal citation.<sup>82</sup> Lest some

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82. According to Professor Brown, available tools include electronic legal research assessments, grammar diagnostics (such as Core Grammar for Lawyers, an "online, self-directed learning tool"), and online introductory legal citation primers (such as the LexisNexis® Interactive Citation Workstation). Legal publisher Wolters Kluwer just launched LawClassFeedback, providing electronic formative assessments for legal research and writing courses, and other subjects. Well-known legal writing expert, Ross Guberman, developed a legal writing app called BriefCatch that he proposes "will improve any legal document by generating instant feedback and suggestions."

educators suggest or worry that technology should or will supplant teachers, new technological platforms in the legal arena tend to increase rather than decrease the need for, and power of, excellent hands-on teaching by humans. Students always will need the requisite context for how to take the information gleaned from the diagnostics and incorporate and apply such learnings in the actual writing process.<sup>83</sup> It may well prove the case that some aspects of legal education such as lectures and learning fundamentals can be done efficiently and effectively remotely, while the need for tutoring, intensive, or small group learning experiences, and the availability of faculty to perform such teaching increases. Indeed, we may be experiencing a “Back to the Future” hybrid pedagogy if law schools move toward a model where students do large lectures and most reading and study on their own, combined with regular study sessions and supervised writing and lawyer skills training with individual tutors on the historically vaunted Oxford University tutorial model or the Princeton and other Universities’ precept or small group model. The efficiencies afforded by advanced technology may make such possible combined approaches feasible and economically viable.

Going forward, legal educators can use technology to afford law students much-needed opportunities to engage in lawyering scenarios that offer decision-making circumstances in which they likely will make mistakes, and that require problem-solving to handle and remedy mistakes. Professors and students can use technology-driven simulations to foster dialogue with teachers about professional judgment and mistake-making related to the complex doctrines, rules, and procedures that permeate our professional lives. For example, Brooklyn Law School and its Center for Urban Business Entrepreneurship (CUBE) convened a consortium of faculty, external technology partners, and public and private legal entities to launch the Brooklyn Law Smart LAB (trademark), a collection of virtual reality tools that will enhance legal education by allowing students to practice a diverse array of legal skills, and experience real-life circumstances in a virtual-reality setting. The consortium’s initial concept was an admittedly rudimentary virtual courtroom simulator, which places the student in the role of a defense attorney at trial, encountering scenarios requiring tactical judgment and affording decision-making and mistake-making opportunities in a low-stakes learning environment. This technology can easily be adapted to teach mediation, arbitration, negotiation, client intake, job interviewing, and a wide variety of other lawyering competencies.

### 3. *Honoring Diversity and Inclusion In Classrooms and the Language of Law*

Additionally, the legal academy and the profession must acknowledge that current events in our country are prompting aspiring lawyers from a wide variety of (and likely new) demographics, backgrounds, and constituencies to apply to law

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Lawyer and author Gary Kinder launched an editing tool called WordRake that helps writers “tighten, tone, and clarify.”

83. Allard and Brown, *supra* note 12, *Advancing the Role of Technology in Legal Education*.

school.<sup>84</sup> This positive, long sought-after development is another change that prompts us to adjust the way we teach and train new lawyers.

Acknowledging the global, interconnected, all-encompassing nature of law, the legal classroom offers a forum to foster inclusiveness in the way lawyers and the people they serve speak, write, and otherwise exchange ideas. It is important and useful to be sensitive to the obscurity of jargon and colloquial expressions and generally to avoid vernacular that is difficult to comprehend by others for whom English is not their primary language, or are from different communities. That is one of the gifts of those who are from or are able to live or study abroad, or are part of a community as diverse as Brooklyn.<sup>85</sup> A recent movement toward inclusive writing in various countries advocates for the adoption of gender-neutral pronouns and replacing outdated gender-biased language in statutes and contracts with inclusive language. This could entail, for example, using the word “spouse” instead of “husband” and “wife,” and adopting “their” as a gender-neutral singular pronoun (which remains the subject of grammar debates). While this inclusive writing movement has encountered resistance in some esteemed language circles such as the Académie Française, the American legal classroom presents a prime opportunity for educators to effect positive change, or at least spark dialogue with the new generation of lawyers about the importance of language in the law. Acknowledging the global cross-borders nature of the law at every jurisdictional level, we must be open to, and inclusive of, cultural, ethnic, gender, sexual identity, racial, socio-economic and all other types of diversity in its broadest sense, in our classrooms and our professional interactions. Accordingly, it is important and useful to cultivate classroom conversations in which all students can experiment with their lawyer voices and gain fluency in an inclusive legal language.

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84. It seems like yesterday that I observed and wrote about a so-called “Trump Bump” that was borne out by increased applications and enrollment to law school. *E.g.* Allard, *An Unexpected Trump effect: Lawyer As Hero*, THE HILL (Feb. 24, 2017). In the last four years the role of lawyers on major policy battles, government investigations, legislative hearings, lawsuits, election challenges constantly has put lawyers front and center on very visible public stages. The daily news is a veritable primer on the Constitution, statutes, and case law as well as legal procedure such as the meaning and significance of subpoena’s, probable cause, standing, jurisdiction, indictments, immunity, clemency, pardons, the difference between trial and appellate courts and not to mention what judges and lawyers do and how they do it. This could help attract many talented people to consider becoming lawyers and broaden the pool of aspiring lawyers; especially those who “want to be in the room where it happens.” Lin Manuel Miranda, “The Room Where It Happens,” *Hamilton*, Act 2 (2015).

85. English has become and increasingly is the common language in a globalized legal world. All over the world English is spoken to discuss legal matters even if none of the participants are native English speakers. One would think this creates advantages for anyone fluent in English, but it also presents challenges. I can attest to learning firsthand, experiencing some embarrassment about differences between even American and British English, such as trying to remember to say trousers instead of pants when in the polite company of English friends. Once when speaking to international law students about the “Borough” of Brooklyn I saw many furrowed brows. Eventually I realized that they mistook what I was saying about a municipal form of government thinking that I was referring to a common pack animal that they might have seen in a Clint Eastwood movie, i.e., the Burro of Brooklyn. Beyond definitional issues, understanding cultural and social communications norms is gained through exposure and experience. These are simply some of the advantageous of being part of and immersed in diverse communities.

We can inspire our law students to regard law and legal communication as a powerful tool that is immediately at their disposal: not when they graduate, not when they pass the bar, not when they land their first job, but immediately. Classrooms and training programs that focus on practical competencies and legal communication inevitably empower students to experiment with their authentic voices, develop confidence in the logos, ethos, and pathos of their messages, and address the legal issues facing the world outside our law school walls.<sup>86</sup>

--C. *The Need for Civic Legal Education and Engagement*

Universities and colleges across America are deemphasizing the founding history of our country.<sup>87</sup> At the same time there is ample evidence of widespread and profound ignorance about how our government and system of justice is supposed to work.<sup>88</sup> Law schools are uniquely equipped to step into the breach and supplement the civic legal education initiatives impressively underway and led by courts, bar authorities, and others. Law faculties can be an outstanding source of scholarship, teaching and learning about the origins, current state, and future of our system of limited government under law. Beyond their own law students, they can be a valuable resource for undergraduate and graduate students in their own

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86. There also are benefits for students' mental health and wellness. In 2016, the American Bar Association Commission on Lawyer Assistance Programs (CoLAP) – in conjunction with several other entities – established a National Task Force on Lawyer Well-Being. In August 2017, the Task Force issued a report reflecting a call to action for members of the profession to commit to “reducing the level of toxicity in our profession.” We can start this initiative in the first year of law school by offering courses devoted to enhancing legal communication skills – in an inclusive manner. We can teach all of our students how to communicate in the language of law and help them adjust to unfamiliar terminology and concepts. In doing so, we also will offer a healthy outlet for stressed-out law students, presenting opportunities to channel their mental energy and potential internal conflict over the issues facing our country in a productive and professional manner. They will learn to fully research facts, law, and policy, and use their writing skills to communicate concepts to colleagues and the public in a civil, clear, thoughtful, well-reasoned manner. Allard and Brown, *supra* note 13, *Conclusion*. Colorado State Attorney General Phil Weiser makes a powerful case that teaching how to communicate and lead empathetically are also critical for lawyers to help maintain and preserve the health of democracy based on the rule of law. See Weiser, *supra*, note 19.

87. The American Council of Trustees and Alumni (“ACTA”) is one source of data about the decline in teaching founding history nationwide. For example, the 12<sup>th</sup> edition of its annual Core Curricular Report (Nov. 2020) found that eighty-two percent of U.S. universities do not require students to take a foundational course in U.S. government or history.

88. For example, a survey conducted in 2018 by the Woodrow Wilson Fellowship Foundation found that only 36% of Americans would pass the standard citizen test given to immigrants. This test only requires applicants to get 60% of the questions right. Fewer than one quarter knew why the colonists fought the British, and more than half do not know how many justices serve on the Supreme Court. Sixty percent do not know which countries the United States fought in World War II. Younger people performed the worst. Only 19% of those younger than 45 passed the test. In fact, there are many recent studies showing that ignorance of basic civic information about American history, government and law is a growing problem. See e.g. *America's Increasing Ignorance of American History & Government Can No Longer Be Ignored*, AM. HERITAGE FOUND., [www.americanheritage.org](http://www.americanheritage.org). Justice Sandra Day O'Connor described the situation as a national crisis on the basis that this knowledge is fundamental to maintaining a democratic society based on the informed consent of the people to the rule of law. See ACTA Core Curriculum Reports, *supra* note 87.

and other academic institutions, and for the general public for people of all ages. Any law school that makes a start will no doubt benefit itself, its home institution, and the public and pilot programs that others might emulate. Indeed, it is what many law schools are doing.<sup>89</sup>

Law schools also have an important opportunity, indeed a responsibility, to help clear new paths in the field of public policy.<sup>90</sup> This is because public policy in America and throughout the world is grappling both with historic crises and governmental dysfunction. The dominant and often siloed economic and political approaches of the late 20<sup>th</sup> century and our post-World War II institutional mechanisms have not adequately addressed inequality, social and racial injustice, threats to sustaining democracy and the survival of the very world in which we live, or the ethical values of a free and civil society. Extreme ideas and disputes over basic facts, not to mention the significance of complex data, thwart evaluating, communicating, and implementing public policy solutions. Studying and applying workable public policy in this climate will require the kind of fresh and innovative cross-disciplinary work that law faculty could contribute to exquisitely. Law Deans can help overcome institutional barriers and support critically needed public policy work that bridges several disciplines.

It is worth studying and gaining a better understanding about public policy advocacy and citizen activism in the American constitutional democracy throughout its history.<sup>91</sup> The starting point would be to demonstrate how public

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89. I would be grateful to those who send examples.

90. The traditional practice of law pursues the question: what is the law? So, typically, private corporate law practice involves determining how to draft the contract or structure a transaction and then “paper the deal” under the applicable existing law. Similarly, private litigation and dispute resolution usually involves determining who wins or loses given the facts under the existing law. In contrast, the public policy process involves pursuit of the question: What should the law or rule be? This process is at the intersection of law, politics, governance and the public interest, not to mention philosophy and ethics. It unfolds in a complex, dynamic, continuous, unpredictable environment, which is often impacted by external events, often unexpected, circumstances which the participants and interested constituencies cannot control. Policy change, if it happens, often occurs only over considerable time and outcomes are never completely secure from further change or even reversal. The experience leading up to and following enactment of the landmark Telecommunications Act of 1996 and the Affordable Care Act of 2010 are examples of this phenomenon. Efforts to change, limit, update or reverse these well-known measures continue unabated. Public policy develops in an ongoing organic process, which of course often involves contentious multiyear legislative and regulatory processes and litigation about major social issues. Over time this complex dynamic system determines when and how society progresses and can be moved toward justice, freedom, economic opportunity, equal rights, peace and the well-being of people and the planet.

91. There is a great divide between conventional wisdom and contemporary academic literature about the nature of the public policy process in the United States and how in the 21st century digital interconnected world it actually works. An impressive amount of academic work rebuts popular notions about our government and the policy system, such as: (1) that money buys results, that outcomes are readily determined and predictable depending on resources, power and influence (*e.g.*, Frank Baumgartner et al., *LOBBYING AND POLICY CHANGE* (2009); Lee Drutman, *THE BUSINESS OF AMERICA IS LOBBYING* (2015), Allan Ciglar, *INTEREST GROUP POLITICS* (2016), Mark Fagan, *LOBBYING, BUSINESS, LAW AND PUBLIC POLICY* (2015), John Scott, *LOBBYING AND SOCIETY: A POLITICAL SOCIOLOGY OF INTEREST GROUPS* (2018), William Luneburg et al editors, *THE ABA LOBBYING MANUAL: A Complete Guide to Federal Lobbying Law and Practice* (various editions and supplements), and many others); (2) the

advocacy and activism of an informed, concerned and engaged citizenry was assumed and expected by the founders as an integral part of the constitutional system of limited self-government in the United States.<sup>92</sup> This is reflected in the debates during the constitutional convention and the Federalist Papers. It is worth learning how these expectations have or have not been met, and how advocacy and activism evolved and made a difference in major movements through the 19<sup>th</sup> and 20<sup>th</sup> centuries, such as, for example, the antislavery/abolition, labor, antimonopoly-competition-consumer protection, woman's suffrage and civil rights movements.

Studying the role that lawyers and the public can and should play in sustaining democracy and justice can help determine how to successfully resolve difficult policy issues. It also can help evaluate reforms needed to repair what is broken in all three of America's federal branches of government at a time of government institutional disfunction (i.e., lack of function), dysfunction (i.e., abnormal function), and constitutional stress.

In the wake of the harrowing 2020 political slugfest, two immediate examples come to mind that both involve the field of election law. With the election now over it is now back to the difficult, demanding and distracting business of governance. It is imperative, however, that whether due to a false sense of relief,

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persistent erroneous belief that corruption and illegality are rampant and are the prevalent drivers of results, rather than being relatively rare and dealt with, albeit episodically and imperfectly. (e.g., Patrick Griffin and James A. Thurber, *TEACHING PUBLIC POLICY ADVOCACY BY COMBINING ACADEMIC KNOWLEDGE AND PROFESSIONAL WISDOM* (2015), Beth Leech, *LOBBYISTS AT WORK* (2013), Bertram Levine, *THE ART OF LOBBYING* (2009), *Lobbying Law in the spotlight: Challenges and Proposed Improvements*, Report of the Task Force on Federal Lobbying Laws, Section of Administrative Law and regulatory Practice, ABA (2011); and, (3) that the legislative gridlock and failure to govern is caused by partisan divides over ideology, as opposed to the new reality of constant partisan competition to maintain or gain institutional control (e.g., Princeton's Professor Frances Lee, *INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN* (2016); Thurber and Yoshinaka, *AMERICAN GRIDLOCK, THE SOURCES, CHARACTER, AND IMPACT OF POLITICAL POLARIZATION* (2015); James A. Thurber, *OBAMA IN OFFICE: THE FIRST TWO YEARS* (2011). It would be worth building on this scholarship to analyze not only why at present the federal government often fails to adequately deal with the pressing issues, but also how to go about making progress on such problems as climate change, equal justice, gun violence, immigration and refugee crises, enduring discrimination based on race, gender, identity and disability, privacy and data security. There also is a vast amount of recent literature that identifies major institutional breakdowns and attempts to evaluate the various proposals that have been made for institutional and structural reform (e.g., Thomas Mann and Norman Ornstein, *THE BROKEN BRANCH* (2006), and the first sequel: *ITS EVEN WORSE THAN IT LOOKS* (2012) and the third with E.J. Dionne, *ONE NATION AFTER TRUMP: A GUIDE FOR THE PERPLEXED, THE DISILLUSIONED, THE DESPERATE AND NOT YET DEPARTED* (2017); Robert Katzmann, *JUDGING STATUTES* (2014), Sabeel Rahman Kahn, *DEMOCRACY AGAINST DOMINATION* (2016); Larry Lessig, *REPUBLIC LOST; THE CORRUPTION OF EQUALITY AND THE STEPS TO END IT* (2016). And as usual, one column by George F. will speaks volumes: *To Check the President, Modernize Congress*, WASH. POST at A21 (Dec. 18, 2020).

92. The legitimacy and viability of government and the legal system depends on the informed consent and active participation of the public. There are impressive existing efforts to advance civic education about government and that have been initiated by Congress, by the ABA and by courts, such as the admirable work led by the Second Circuit's former Chief Judge Robert Katzmann, who is the only political scientist currently on the federal bench.

fatigue, or old-fashioned distraction we do not lose interest in fixing our outdated terribly clunky election machinery held together like one of those submarines in old movies forced to go to depths it never was built to survive.<sup>93</sup> Our election infrastructure withstood the pressure of a record-breaking turnout of voters without any major known rupture only because of the dedicated work of tens of thousands workers and state officials all across the country and because of the quiet determined exercise of the right to vote by tens of millions of voters for both candidates. Despite unprecedented obstacles and safety issues people cast their ballots and made sure they counted. There should be a major nonpartisan effort, perhaps led by a national commission to study and recommend what changes are needed to make by the 2024 presidential election. Law Schools and faculties can play an invaluable role in this effort.

First, we need to examine the undemocratic electoral college apparatus. This can be done without constitutional amendment by more states (who are empowered to do so by the Constitution in Article II) deciding how to apportion electors and abandoning the winner-takes-all approach which is the root of the problem. Individual states can and, in this writer's personal view, should adopt any number of variations as, for example, Maine and Nebraska have, for having electors chosen and assigned in their state more democratically than just giving all of the electors to the winner, even if the winning margin is by one single vote. The prevalent winner-takes-all system both undermines and threatens to disenfranchise even a large national popular vote majority, and the significant minorities in most states including rural and less populous states.

Second, we also must have an immediate autopsy on our election infrastructure. Any federal infrastructure initiative focusing on brick and mortar items and our health delivery system should include a postmortem studying how to make the election infrastructure that democracy depends on sustainable. We need to understand how to make our national voting apparatus better, faster, more secure, and more accessible to every eligible voter. We also need to provide states with resources, training, and support to fulfill their constitutional responsibility to collect and count votes.

This writer also believes it is essential to evaluate how in the 21<sup>st</sup> Century age of scientific innovation we can supplement our pony express era snail mail and in-person voting techniques with secure electronic digital voting. After all, we all file our taxes and bank that way. Let's figure it out. For years, astronauts from all countries have voted from the international space station. Other countries regularly rely on electronic voting with excellent results.<sup>94</sup>

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93. If a reminder is needed of potential election breakdowns that were averted, see e.g., *'It's 8 P.M. on election Day' Experts Share Nightmare Scenarios*, N. Y. TIMES (Sept. 13, 2020). Benjamin L. Ginsberg, *America May Not be So Lucky Next Time*, WASH. POST at A 29 (Dec. 6, 2020); *Trump Shows that we Need to Reform U.S. Democracy*, WASH. POST (Dec. 3, 2020); Allard, *We Need a Commission to Fix Our Voting System—Now*, USA TODAY (Dec. 5, 2020) (With James K. Glassman); *An Overhaul of U.S. Democracy*, WASH. POST at A24 (Jan. 3, 2021). See Stewart, *supra* note 20, Appendix 1 "The Elector System."

94. Allard, *We Need a Commission to Fix Our Voting System—Now*, USA TODAY (Dec. 5, 2020) (With James K. Glassman); I wrote about the need to explore e-voting here:

Meanwhile, our local terrestrial election workers are underwater and under fearsome pressure. Voters must often take risks and enormous time to vote and even then not be sure their ballots will count. When we all finally surface from this election and can breathe, we must not forget how dangerous it was for our democracy. Surely, we can and must do even better.

Once again, our 245-year-old democracy has survived a major stress test. If we have learned anything it is that it is not time to take this blessing for granted. Our constitutional democracy takes work, as well as understanding and love of our neighbors and country, to preserve and enhance equality, justice, and peace. So while it is fitting to be relieved and grateful, as my father-in-law would say: Give thanks, pray to the Lord but row away from the rocks.

*--D. It is Time to Make the Bar Exam History*

Now does my project gather to a head.<sup>95</sup> But before closing, I cannot resist asking forgiveness for one more (last?) ride on my hobby horse about dealing with the failings of the traditional bar exam.<sup>96</sup>

Law practice is a lifelong, open book learning experience. It is flirting with if not per se malpractice to rely just on what was learned to pass the bar exam. Good lawyers perform their duties for their clients and the public based on research to enhance and verify knowledge, reflection, consultation and advice from others, experience, judgment, empathy, and wisdom guided by an ethical compass. While everyone agrees about the need for competent lawyers, there is no agreed understanding or definition of what minimal competencies should be required much less how best to measure them in order to obtain a law license. There is no evidence whatsoever that cramming for and passing a singular, all or nothing, multiple choice and essay test relates to competent and ethical behavior by attorneys.

Anyone who cares about the future of legal education and the profession would be well served to be aware of and read an important recent study by Ohio State University's Moritz School of Law Professor Deborah Jones Merritt under the auspices of the Institute for the Advancement of the American Legal System

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<https://www.techzone360.com/topics/techzone/articles/2020/09/30/446729-e-voting-could-be-faster-cheaper-more-accurate.htm>.

95. *Prospero*, Act V, Scene I, Beginning the Conclusion of *The Tempest*, William Shakespeare (1610-1611). See Drew Lichtenberg, "A Brave New World", Asides, Issue 2, p.10, Washington Shakespeare Theatre Company (2014-15 season).

96. I have been among those outspoken about the need to develop better ways to measure minimum competency and license new lawyers than the traditional bar exam. Most recently: Allard, *Act Now, Avert More Bar Exam Chaos Later*, JURIST MAGAZINE (Aug. 26, 2020); *ABA Must Seize Opportunity to Respond to Bar Chaos*, Op Ed, LAW 360 (July 31, 2020); *Should We Raze the Bar? No-We Should Make It Better!*, Op Ed, N. Y. L. J. (July 27, 2020). The 2021 Bloomberg Law Report begins with a section is headed: "Is this Really Needed?" and continues: "Covid-19 concerns have made us think hard about what we need and whether we are meeting those needs in the best way....The bar exam is a perfect example." Similarly see Erwin Chermersky, PANDEMIC PROVIDES OPPORTUNITY, BNA AND BLOOMBERG LAW (Aug. 25, 2020). See also, Allard, *Can We Do Better?*, Testimony, Public Hearing before the New York State Advisory Committee on the Uniform Bar Exam (Jan. 20, 2015).

of the University of Denver with the involvement of several other leading lights.<sup>97</sup> The study concludes:

The rules we use to license new lawyers define us as a profession. Are we a profession that serves clients, listening to their stories, helping them identify goals, and guiding them to solutions? Are we one that relies upon research and critical thinking? Are we problem solvers and negotiators as well as advocates? Do we know how to handle stress? Do we act professionally and recognize our special responsibility for the quality of justice? If these characteristics define our work, then they should be assessed during licensing.

In this national study, we asked new lawyers and their supervisors to describe their work to us. Using their voices, we identified 12 building blocks that constitute minimum competence for practicing law. The words in this report are not those of legal educators or bar examiners; they are the words of new lawyers and their supervisors. By listening to their perspectives, we can create an evidence-based licensing system—one that reflects the work we do, protects the public, and avoids protectionism or bias. As professionals, we owe the public no less.<sup>98</sup>

Professor Merritt's impressive study lays bare the shortcomings of how we prepare and license lawyers for practice. It offers a clear blueprint for building a better bar taking into consideration different local priorities, preferences, and appetite for experimentation.

Unproven bromides about consumer protection and nostalgia for a cruel professional rite of passage are misguided. That is because preparing for and taking the traditional bar exam has become an unnecessary, astonishingly expensive, arbitrary entry barrier for every candidate that falls disproportionately on the less-advantaged whose underprivileged communities are underrepresented by attorneys.

The old-fashioned bar exam has outlived its "sell by" date. Understandably pressured by the pandemic the profession in many states and territories already has made major lawyer licensing changes on an emergency basis that even a year ago were not contemplated. Now by necessity having broken out of the comfortable routine of the status quo, there is an historic opportunity to continue overhauling the system on a more evidence-driven, comprehensive, effective and fair basis. Simply reverting to the unsatisfactory old-fashioned, standard, pre-pandemic bar exam would amount to a sad waste of a crisis.

Should we simply raze the bar and lower standards? Of course not. We should do better. And we can. Frequently it is proudly asserted that an American law degree and license has long been considered the international gold standard.<sup>99</sup> Even

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97. Deborah Jones Merritt and Logan Cornett, *Building a Better Bar: The Twelve Building Blocks of Minimum Competence*, Institute for the Advancement of the American Legal System (Oct. 2020). The acknowledgements listing those who contributed to this seminal attest to the credibility and influence it should be accorded.

98. *Id.* at 110.

99. Some contend that the New York license is *primus inter pares*: "The license to practice in New York has long been considered the international gold standard." Michael Miller, President, New York State Bar Association, quoted in the N. Y. L. J. (July 21, 2020).

so, in the new world of law that is dominated by accelerating innovation, competition and uncertainty the luster of this reputation cannot be maintained by clinging to the past, rigidly defending the old ways of doing things. Just like almost every other aspect of our lives, adjustments and improvements in the way new attorneys are admitted to the bar are feasible and warranted.

The debate over which novel approaches can be and should be explored are discussed are available elsewhere<sup>100</sup> and the recommendations of Professor Merritt's seminal study are detailed in her report.<sup>101</sup> Meanwhile, beyond the numerous questions about stopgap measures considered and adopted in different jurisdictions, presumably and hopefully work will continue to determine a sensible way to revamp the system for good rather than simply revert to what was done before the health crisis demonstrated that change is not unthinkable. New York State Chief Judge Janet DiFiore, for example, has appointed a Working Group under the leadership of former Judge Howard A. Levine to "study the future of the bar exam." What a legacy that would be for all those involved in New York and other jurisdictions who could be credited with helping to reinvigorate the rule of law and deal responsibly with one of the most stubbornly insidious and almost

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100. A great deal of this debate arose in 2020 over the pandemic driven necessity to forgo the traditional in person multi-day bar exam. This included for example when the ABA at its August 2020 annual meeting considered and on August 4 its House of Delegates overwhelmingly passed Resolution 10G urging authorities in each state and territorial jurisdiction to suspend in person bar exams for so long as the COVID-19 crisis made them unsafe and impractical. Resolution 10G went on to recommend that if an online remote test was administered in lieu of the in-person test, then steps should be taken to mitigate the serious technological problems relating to reliability, security, privacy, equitable hardships that fall disproportionately heavily on less advantaged and disabled test takers and other challenges arising from online testing. In the meantime several jurisdictions opted to create pathways to a license without taking an exam, and significant constituents called on their state authorities to do so as well. For example, in New York all 15 law deans signed a request that the State Court of Appeals and the Board of law examiners grant a license to practice to graduates of their ABA accredited schools who fulfilled all the requirements for a J.D. These requirements included the pro bono public service requirements imposed by the State. *See Allard, ABA Must Seize the Opportunity To respond To Bar Exam Chaos*, LAW360 (July 31, 2020); Karen Sloan, *ABA Resolution Calls on States to Pull the Plug on In-Person Bar Exams Amid Pandemic*, NAT'L L. J. (July 30, 2020).

101. The Merritt report offers ten specific recommendations that grow out of the study's findings about how to develop a better evidence-based licensing system based on twelve inter-related building blocks their research found were needed in the 21<sup>st</sup> century for minimum competence to practice law. The clear and highly specific recommendations demonstrate not only that significant changes are possible but that they are necessary. What is jaw dropping to this writer is how clearly the Merritt study shows that the traditional bar exam misses the mark and lacks justification for its costs and burdens. In my opinion, The National Council of Bar Examiners ("NCBE") is predictably, but short sightedly leading the charge opposing changes and urging for a return to "business as usual." In reality, one way or another, the way lawyers are licensed in the United States will be transformed irrevocably. The NCBE can resist change and perhaps delay the inevitability of the demise of its business model, or instead embrace change and adapt and assist the effort to improve. This is possible, as has been done under Kellye Testy's forward looking leadership guiding the Law School Admission Council to dramatically adapt to new market circumstances and improve its members services. Whether NCBE will be able to similarly adapt, reimagine and renew its case for relevance is unclear. If it does it will have an opportunity to renew and even grow its business. If not the new world of law will pass it by.

hidden barriers to affordable, diverse, and inclusive legal services and entry into the profession itself.

It simply cannot be the case that the collective talent and wisdom of our profession is incapable of developing a better way or even multiple new ways to license new attorneys to serve the public. We can hope that the present necessity will jumpstart the effort to modernize the final stage of becoming an attorney.

## V. EPILOGUE

Hope and opportunity are always in tandem with despair and resignation. People are not fated to repeat the worst of their shared history. We can always choose to strive to do better. We can use our given talents in the service of people and of purposes larger than ourselves. We can work to return multifold what we have been given and entrusted to care for and use to those who we serve. We can begin with the necessary, then turn to do the possible, and eventually we may help accomplish the impossible. If that seems like Prospero's magic, then so be it.

For me, what makes a legal career worthwhile over a lifetime is how law provides endless opportunities for service. Recently, when asked at what point in my life I decided to devote time and attention to public service, I answered:

I cannot remember a time when I did not want to be a lawyer. There were no lawyers in my family, but my parents and relatives respected the profession and encouraged me to pursue it from a very young age. It may sound hokey, but I vividly remember being at the drive-in movies, sitting between my parents in the front seat of our car with my siblings sleeping in the back, and seeing Gregory Peck playing Atticus Finch in *To Kill a Mockingbird*. It was a thrilling moment for me and it solidified my decision to be a lawyer.... I have always believed—and I have seen this to be true over the years—that the public and private roles of lawyers are [both] honorable and provide limitless opportunities to serve others.<sup>102</sup>

So, restless as I am myself, I will now—as law faculties have been doing so well for students in Brooklyn and elsewhere—seek new ways and platforms to encourage and support students to begin to contribute to society while engaged with their formal studies and to continue doing so early in their careers upon graduation. Law students should with the support of their schools and practitioners begin before graduation to prepare for lives of service fulfilling the dual private and public roles of our profession. Lawyering is a job which at its best, is noble. Enthusiastically, I am also joining the efforts of those many colleagues who seek to help students gain for use after graduation, the life-long learning skills needed to continuously adapt; the ability to pursue wisdom and to be wise; and, to equip them with the intellectual firepower, knowledge, and experience needed to be people of substance who make a positive difference throughout their lives.

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102. Quoted in Profile, Public Interest and Public Policy Update (Winter 2017-20 18), ABA Division for Public Services E=Newsletter.

Now my charms are all o'erthrown, and what strength I have's my own,  
which is most faint....<sup>103</sup> Let your indulgence set me free.<sup>104</sup>

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103. I am no longer a dean. In *As You Like It*, Duke Senior welcomes being relieved of his dukedom, being "free from public haunt," an attitude also expressed by Duke Vincentio in *Measure for Measure* and of course Prospero in *The Tempest*. But see: Never Say Never, Sean Connery's seventh and final film romp as Ian Fleming's James Bond Character (1983).

104. Prospero's farewell, *The Tempest*, Act V, Epilogue.