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BY VICTOR LI
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Your Vote Is Your Voice

Americans need to participate in elections that are fair, trusted and accessible

BY JUDY PERRY MARTINEZ

Voting is the cornerstone of our democracy and the civic responsibility of all eligible citizens.

As we approach the 2020 presidential election, many Americans are calling it the most consequential of their lifetime. But all elections are important, whether for school boards, local judges, town councils or the U.S. Senate. Elections provide the opportunity for citizens to express their voices and help decide the direction that our leaders should take our country. Each vote is a building block in our democracy.

The more people who participate, the stronger our country becomes. Yet, over the past 50 years, less than 60% of eligible voters have cast a ballot in our national elections, putting us behind most other developed countries. As Thomas Jefferson said, “We do not have government by the majority. We have government by the majority who participate.”

In 2020, we celebrate the 150th anniversary of the 15th Amendment’s ratification, which granted Black men the right to vote. This year we also commemorate the 100th anniversary of the ratification of the 19th Amendment, which guaranteed women the right to vote and produced the largest expansion of democracy in our country’s history. Now is an appropriate time to examine voting rights in America and to cast aside unconstitutional obstacles to voting.

Cyberattacks by foreign nations have made our election process less trusted. Long wait times due to broken voting machines and the closings of polling places have resulted in elections that are less accessible. After the 2013 Supreme Court decision in Shelby County v. Holder removed the preclearance requirements necessary for any changes in laws of jurisdictions with a history of voting discrimination, restrictive election laws were enacted that further limited access.

All people eligible to vote should be able to do so easily, safely and securely. The ABA supports allowing all registered voters to vote absentee, regardless of cause, and urges Congress to develop preclearance criteria removed by the Shelby decision to protect voting rights. And the ABA urges all states to remove barriers to voting for convicted felons and opposes the imposition of fees for the reinstatement of the right to vote. Through our Vote Your Voice and Election Center webpages, the ABA provides valuable state-by-state information on elections and voter registration rules.

Our country needs lawyers to be stalwart advocates for honest, open and fair elections. We can serve as poll workers, volunteer as election advisers, and staff Election Day voter hotlines for those who have questions regarding their right to vote. In these times when we must each demonstrate our commitment to anti-racism and equity, one of the simplest ways to do so is to help people exercise their right to vote.

And as Minnesota Supreme Court Chief Justice Lorie Gildea noted at a recent state bar conference, lawyers’ voices are needed more than ever this election season. Many lawyers will have the chance to speak to those seeking local office. “There is no better time to talk to elected officials and candidates about the importance of our justice system than when they are asking for your vote,” Gildea said, adding that state policymakers must “know that the bench and bar are united behind a high-functioning, accessible, independent and adequately funded justice system.”

Voting is a right that must never be taken for granted. It should be accorded the passion it deserves from us all. One of the most comforting parts of my journey as ABA president is knowing that the very things that stir passion and advocacy in me also inspire those who will follow in service. I know incoming ABA President Trish Refo, my friend and sister in the law, will take up the passions that drive us as lawyers. Not only do I wish her the best, but I also know she will do more and better than those who came before her.
Give the Gift of ABA Membership

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Cover practice, not activism
I agree with Matthew Kremer from San Diego that there are far too many social justice articles in the ABA Journal (Letters from Our Readers, April-May, page 8), and I’m not some Trump-supporting, right-wing conservative. I’m fine with a couple of articles that have some profound relevance to most attorneys, but these articles are not beneficial or relevant to my practice. My clients are diverse: white, people of color, LGBTQ, disabled, very elderly—or any combination of these. However, their economic backgrounds are not so diverse.

They are typically of modest income—working folks, most without a college degree, or senior citizens who rely on their Social Security and a modest pension to get by and don’t have time to be an “activist.”

The working people punch a clock from 8 to 5, go home and take care of their families. These are people who have no voice because they simply don’t have time or the wherewithal to get involved in organizations representing their interests. They often need a lawyer because they don’t know how to deal with a person who plays the race card (even if my client is also of color) or the disability card and knows how to be vocal to get sympathy, etc., in order to gain financial advantage. But I don’t think you come in contact much with mainstream middle- to lower-middle-income people. I’m much more interested in articles that will help me become a more proficient lawyer.

Doubtful that I’ll be renewing with the ABA next year.

Bonnie Bates
Santa Rosa, California

Regulating advertising
The article “Cure or Con?” February-March, page 42, calls for more regulatory scrutiny of individuals or companies making questionable or even fraudulent health-related claims for a wide range of products. Health-related advertising that misleads consumers can cause significant harm and erode consumers’ trust in advertising. The article, however, overlooks the important role of the advertising industry’s self-regulation process in protecting consumers. For almost 50 years, the Better Business Bureau’s National Programs’ National Advertising Division has published thousands of decisions requiring prompt discontinuance of misleading or unsupported claims, ensuring that advertising is truthful and accurate, including many pertaining to health-related claims. The consumer advocacy groups referenced in the article, such as the Center for Science in the Public Interest or Truth in Advertising, provide important information to consumers when they expose deceptive advertisements to regulators, such as the Federal Trade Commission. Protecting consumers is the goal of NAD review; it guides businesses to support their advertising claims with reliable evidence or discontinue any unsubstantiated claims.

Providing a transparent forum for review of misleading advertising claims, either challenged by competitors or opened on NAD’s initiative, NAD holds advertising claims to standards set not only by NAD’s own precedent but by regulatory authorities such as the FTC and the Food and Drug Administration. NAD decisions are precedent-based and publicly reported. The process has the support of the FTC and is respected by industry.

Compliance with NAD’s decisions is north of 90%. NAD has reviewed hundreds of health claims. Much guidance on the substantiation required to support health-related advertising claims arose from NAD’s collaboration with the Council for Responsible Nutrition, which funded monitoring of advertising in the dietary supplement industry.

As long as there are health issues that consumers struggle with, there will be others trying to sell them simple, too-good-to-be-true solutions. A multifaceted approach consisting of regulatory enforcement, self-regulatory review and attention from industry watchdogs provides the best protection for consumers to assist them in parsing fact from fiction.

Laura Brett
BBB National Programs Inc.

Correction
In “Rough Seas,” June-July, page 34, Robert L. Gardana should have been identified as a past chair of the Admiralty and Maritime Law Committee of the ABA’s Tort and Trial Lawyer Insurance Practice Section.

The Journal regrets the error.

Letters to the Editor
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America’s Tipping Point

BY LIANE JACKSON

Intersection is a column that explores issues of race, gender and law across America’s criminal and social justice landscape.

America is struggling to emerge from dark and uncertain times. COVID-19, record unemployment, civil unrest. There is a never-ending loop of protests and police brutality; of disease and dire predictions. But even as the turmoil unfolds, there has been a seismic shift in the national discourse, and 2020 may be one of those defining years of resurgence that bends the arc, ever so slightly, toward justice.

Cradle to the grave

A confluence of traumatic events—a series of graphic killings, a shattered economy, sheltering in place and a long, hot summer—sparked agitation for change. And all of a sudden, there is a spotlight on the crippling discrimination that permeates our country’s history and on the “law and order” Faustian bargain that has repressed and terrorized America’s Black citizens for decades.

Instead of persistent denials and victim-blaming, there are now admissions that there is a real problem—and not only is there a real problem, but there is a really, really bad problem. And that a solution is required, perhaps a penance is due.

There is new acknowledgment that this country has a serious systemic racism problem—from the cradle to the grave—from police brutality to education to health disparities to employment. This collective, contemplative moment is stunning and whiplash-inducing but long overdue.

Black people’s participation in the American experiment has felt a bit like The Hunger Games. A small fraction gain token, conditional admission to the world of the havens. Meanwhile, the have-nots remain trapped in blight and poverty, prisons and violence; targeted by the police; fighting for survival; dying from lack of adequate health care; searching for hope that’s hard to find—all amid blame-shifting accusations of being pathological.

For decades, America has dodged accountability for its original sin through false equivalencies, false narratives and gaslighting, constructing smoke-and-
mirror justifications for the legacy of slavery, Jim Crow, police brutality and discriminatory laws that railroaded a population. Insisting that a historically oppressed people should be the ones to shove the knees off their necks (rather than just removing the knee) is not only a red herring, it’s a ticking time bomb. And apparently it took watching a man die for 8 minutes and 46 seconds to put that fact into full focus.

To serve and protect?
Stop to imagine a system of law enforcement where the police are rarely there to help you but instead are actively at war with you. What this means is living a life fraught with anxiety, if not terror, because of having dark skin in America. Perhaps this particular police encounter isn’t your day to die, but it’s likely your moment to be disrespected, disbelieved, manhandled, arrested or otherwise abused. For Black Americans, having to live under the perennial threat of violence is abuse in itself.

These are not idle indictments. I’ve worked for a sheriff’s office and considered police officers friends and colleagues. I’ve also worked as a pro bono lawyer defending the criminally accused. I’ve been a member of on-the-ground news media in cities across the country. I am a Black woman in America. Yes, there are a lot of good police officers serving honorably. But no one needs to solve the problem of good police officers. What’s needed now is the elimination of the contagion of bad police officers: the rogue officers, the bad apples who have inexorably tainted the rank and file of America’s police. Minneapolis police officers turning a blind eye to their colleague’s killing of George Floyd was just a small window into the widespread collusion and cover-ups that occur daily in police departments. The impunity, the code of silence, the inhumane treatment and disrespect have decimated community trust. The secrecy, qualified immunity, unbalanced union contracts and judges ruling for abusive officers has to end. De minimis, policing needs a radical reset.

The most dangerous game
According to Gary Potter, associate dean at Eastern Kentucky University’s School of Justice Studies, the evolutionary underpinnings of today’s racist policing can be traced to the South, where there was economic motivation to preserve chattel slavery.

In his article “The History of Policing in the United States,” Potter describes how slave patrols were tasked with tracking down runaways and preventing revolts by any means necessary during Reconstruction, and how local sheriffs violently enforced segregation and the disenfranchisement of freed people. There is an unbroken link between slavery and modern racially biased policing.

The “war on drugs” and tough “law and order” talk ratcheted up support for a militarized police force. But effective public safety and nonlethal law enforcement can coexist. Militarized police are not necessary, and in fact, multiple studies show that heavily weaponized officers use higher levels of force against citizens. It is possible for police to investigate crimes, respond to emergencies and serve the community without resorting to beatings and murder.

Masks on, muzzles off
But this moment is about more than reimagining policing and what it means to serve and protect. It’s about acknowledging the devastation, writ large, of racism in America.

Although it all began with the slave trade, it doesn’t matter if your family got off the boat 10 years ago or 400. White people in this country are born beneficiaries of a legacy system premised on oppression and brutality. They are institutional admits to the land of opportunity. This truth is uncomfortable, but it is a fact that must be understood and admitted to move forward with reform.

What this means is, if you are in a position of authority or a gatekeeper, then silence is complicity and inaction is collusion. Many have spoken up. Others have wanted to but did not—until this unique window in history. There are allies who have been waiting for this moment to show their solidarity and have taken to the streets or actively lobbied for change. But you don’t have to march in protest—it’s as important for voices to be heard in hiring decisions, in mentoring and sponsoring, in team building, and in speaking up and championing the historically disadvantaged.

Lawyers have a special obligation to promote justice and serve the community, but our profession is one of the whitest, most male-dominated in existence. According to recent ABA statistics, 85% of lawyers are white; 80% of federal judges are white; 5% of lawyers are African American. Whether it’s women in the ranks or people of color, it’s been perpetually easier to shut the gate than crack the door open to diversity. Lip service and platitudes don’t make you an ally. It takes honest introspection and self-assessment to determine whether you are actively part of the problem or part of the solution.

No one has an obligation to pursue justice—it’s an ethical and moral choice. But at least now, everyone is on notice that a choice must be made. And that hiding behind the rose-colored pretense of a post-racial society is an abrogation of duty to do the hard work.

Whether all of this becomes another cycle of symbolic acts or ends with systemic change is within our individual and collective control.
Support and Sacrifice

BY JASMIN GRANT

#MyPathToLaw is a guest column that celebrates the diversity of the legal profession through attorneys’ first-person stories detailing their unique and inspiring trajectories.

Telling my mother that I was pregnant was one of the hardest things I have ever had to do. I felt as if I could see her heart break at that very moment. But how else could I have expected her to react to her 16-year-old high school junior announcing that she was going to have a baby? This certainly couldn’t have been what my mother had in mind for my future when she left Mexico at the age of 27 to marry my father. She thought her future children would have a better life in the U.S.

As a family, we had already known years of struggle and poverty, and now here I was telling my mom that I was going to be a teen mother. We were living in a public housing development on the west side of San Antonio at the time. While living there, I had seen drive-by shootings, drug paraphernalia lying on the ground and drug sales happening out in the open. This was the environment I was bringing my child into.

My son Marc was born the same month I started my senior year of high school. Every school day, I got up in time to get myself ready for school and my son ready for day care. I took public transportation to school, rain or shine, while toting an infant, diaper bag, stroller and backpack. On weekends, my mom refused to watch my son or take over my responsibilities for him so that I could continue the life of a carefree teenager. I had to grow up really fast—and I did.

My love and interest in the law started in high school, where I took constitutional law and legal research classes, participated in mock trials, and discussed case law each day in the magnet program at Fox Tech High School. However, because of my circumstances, law school seemed like a far-fetched dream. In June 2001, I graduated from high school with my 10-month-old son in the audience. I entered community college right afterward and was determined to break the cycle of poverty. I didn’t want to have to carry groceries home on the bus anymore; I didn’t want to live in public housing with cinderblock walls anymore; and I knew our ticket out was my education. After obtaining my associate degree, I went on to attend the University of Texas at San Antonio in 2006, the same year my second son James was born. I went on to graduate summa cum laude with my bachelor’s in management in 2009.

“Being pregnant in law school was quite an experience.”
—Jasmine Grant

The University of Texas at Austin School of Law had always been my dream law school, so when I got the call that I had been accepted, I was ecstatic! Not only had I gotten in, I had also received two scholarships that would cover a substantial part of my tuition. Everything seemed to be going great. Little did I know that a tiny surprise was already on his way.

In early 2013, I learned my third child would be born at the end of my first semester of law school. As if that wasn’t daunting enough, it became clear my relationship with his father was not going to survive a move to Austin for me to attend law school. However, after talking with my mom about my situation, she told me she had my back. That’s all I needed to hear to know I’d make it through law school as a single mother. My mother, my sons and I moved to Austin a few months later.

Toughing it out

Being pregnant in law school was quite an experience. Some people asked intrusive questions about my situation and marital status. More than one person looked at my belly and asked me how I expected to make it through law school, not knowing I had two other children at home. As a 1L, you deal with enough stress and self-doubt, so those kinds of comments made it even more difficult for me. Nevertheless, I survived my first semester, and my son Adam came into this world two weeks after my last final exam. Any stress or doubts I felt about law school disappeared as soon as he was in my arms. Instantly, I felt a renewed sense of determination.

I returned to school for my second semester of my 1L year when Adam was only about 2 weeks old, and my grades actually improved. I even found time to participate in extracurricular activities.

During my third year, I became the president of the Chicano/Hispanic Law Students Association and the managing editor for the Texas Environmental Law Journal. Thanks to my mother’s help with my kids during this time, I had some of the best years of my life.
during law school and made such amazing friends while there.

The University of Texas allows law students to walk the stage with their children. All the students who saw me walking around with my baby bump to Con Law and torts classes that first semester got to see my son Adam walk himself across the stage with me and his big brothers at graduation.

Marc was 15, James was 9, and Adam was 2 at that time. My heart burst with pride for my sons, who had roughed it out with my mom and me during those years.

With everything happening in the world right now with the COVID-19 pandemic, I could not be more grateful that I put in the hard work and made the investment in myself and my education all those years ago. I am extremely fortunate to have a great job with a law firm practicing education and employment law where, during the COVID-19 shutdown, I have been able to work from home and provide for my family.

The label “teen mom” can carry such a negative connotation. No one would expect someone who came from a poor background and had a child before she even became an adult to beat the odds and accomplish her dream of becoming an attorney. By sharing my story, I want others to know that they are capable of so much more than what society may believe. You are absolutely worth the investment in yourself. You’ve got this!

Jasmine Grant currently resides in San Antonio with her three sons, Marc, 19; James, 13; and Adam, 6. She is currently an associate at Schulman, Lopez, Hoffer & Adelstein where she practices, among other things, state and local government law, education law and employment law.

**10 QUESTIONS**

**Survival Skills**

David Lat on conquering the coronavirus, pursuing dreams

BY JENNY DAVIS

Lawyer, journalist and publishing entrepreneur David Lat has spent nearly two decades covering the ins and outs of the legal world. From high court chambers to BigLaw boardrooms, Lat has shared gossip, news and opinion, first through the judiciary-focused Underneath Their Robes blog he founded while working as a federal prosecutor and later through the popular legal news-and-views site he co-founded, Above the Law.

Rarely, however, has Lat stood at the center of a news cycle. That changed with COVID-19.

In mid-March, Lat became one of the first 500 confirmed cases in New York City. The physically fit 44-year-old spent 17 days in the hospital, including six days on a ventilator, before beginning the long, arduous recovery process that continues today. His ordeal was documented not only by national legal news outlets—ABAJournal.com included—but also by mainstream media, including CNN, the New York Post, the New York Times and the Daily Mail. Lat appeared on the Today show, was interviewed by Rachel Maddow and had his own piece published by the Washington Post about his experience on a ventilator.

Lat left Above the Law last year to become a managing director in the New York City office of Lateral Link, a nationwide Los Angeles-based legal recruiting firm. Which means he now occupies the unique position of being able to offer hope to people fighting this deadly disease and help to lawyers whose careers, clients and cases have been upended by it.

COVID-19 is a new illness, with no clear timeline for recovery. In those first days and weeks following your discharge from the hospital, how did you approach your recovery? How did you keep your mind and body focused?

I took things a bit slowly at first, trying to notch little victories here and there. When I first came home, I could hardly walk; I had to use a wheelchair. Eventually, I graduated from the wheelchair to walking, and then from walking short distances to walking a few miles. I’m very into metrics, and so I would try to measure things to keep my recovery on track—for example, increasing my walking distance or increasing the numbers I would hit on the incentive spirometer, a device I was given to help rehabilitate my lungs.

You have nearly 100,000 followers on social media, and you’ve been engaging with them since you first posted that you’d tested positive. Did you always intend to share your illness with the public?

I kind of came at it by accident. After I got my positive test result, I wanted an easy way to let my contacts know that, if they came down with symptoms, they should get tested, so I went to Facebook and Twitter and announced it. I got a lot of support from those messages, so I thought, “It’s fairly early, and we don’t know a lot about this, so let me chronicle this in real time.” I discovered there were a couple things I wanted to get across. One: It’s not exclusively a disease of the elderly or infirm. Two: I wanted to underscore public health
Your April 1 Twitter post, where you announced you were finally being discharged from the hospital, has been liked by nearly 162,000 people and has been retweeted more than 9,000 times. How does it feel to have so many people invested in your recovery?

I was surprised just at the extent of it. I've always been grateful to have a large network of family and friends, but I've also heard from a lot of strangers through Twitter, including patients struggling with the disease themselves or people with family members who have it. But the amount of support has been touching and overwhelming—in a good way.

I want to pivot and ask, what's it like right now in the legal recruiting world?

Certainly in recruiting, things have been a little slow—and different. One thing that's different is that recruiting has had to take place virtually through interviews on Zoom, Skype and similar tools. I have one candidate who was interviewed, hired and onboarded, all virtually. He's been at his firm since late March, and he has never set foot in their physical offices.

What do you say to lawyers whose job searches are on hold? What should they be doing?

I always say, focus on developing your skills. It could be legal skills—this is certainly a good time for doing your online CLE—or it could be learning a new skill like coding. At Lateral Link, we had a workshop on how to sharpen your Microsoft Excel skills. There are things you can do when you have less billable work to make you more efficient when you do have billable hours. Lawyers often say, “I am going to write articles,” but they don’t get around to it. Anecdotally, lawyers I am talking to are not working at 100%, they’re working more like 60% to 70%, so that means they have time to work on that article. Of course, when I tell people, “This is a great time to do X,” there’s one big qualification: You may have different responsibilities now, like child care or elder care. It’s complicated, and we’re really all just trying to do the best we can under the circumstances.

I wonder if there’s a lesson in this pandemic about career resiliency and how maybe you don’t need to have a concrete career plan.

I mean, you’ve been a judicial clerk, a BigLaw associate, an assistant U.S. attorney, a journalist and now a legal recruiter. I can’t imagine you had a plan for all of that.

I certainly had no grand plan! My career unfolded organically, and I think that’s a good message for lawyers. As long as you’re enjoying what you’re doing and you’re still learning, don’t feel like you have to stress about the next five or 10 years. If you feel stagnant, then that’s the time to think about what to do next.

Although sometimes I think lawyers can be hesitant to make major career changes because they’re beholden to status and money.

Absolutely. Right out of law school, my succession of jobs was an exercise in downward mobility, but I feel that as my salary went down, my satisfaction went up. It would be great if everyone could follow their interests instead of their personal finances. But I realize that’s a luxury; careers are in many ways a matter of compromise.

Several years ago, you wrote a novel called Supreme Ambitions, loosely based on your experience as a judicial clerk. Has your experience fighting COVID-19 provided inspiration for another writing project, maybe a second novel?

I definitely feel that what I have been through would play some role in a new writing project—maybe some type of nonfiction project—but I haven’t figured out what that would be yet.

How about a children’s book!

I think a children’s book would be fun, especially now that I am reading stories to our son. I have sometimes thought, “How hard could it be? It’s not 75,000 words, and there are lots of pictures.” But there’s actually a lot of creativity and ingenuity that goes into some of these books.

At some point in the future, the worst of the pandemic will pass. Do you think any silver linings for lawyers will emerge from this ordeal?

I do think so. We are working less, and we seem to be OK with it—a lot of people are discovering that they like to have meals with their families. There also will be more flexibility when it comes to remote appearances. I don’t think this will replace in-person hearings—there’s still a benefit to being in court with litigants and advocates—but in cases where it would be difficult or expensive, it’s now an option that’s not alien or a huge imposition. A lot of status conferences, routine appearances and uncontested proceedings could be done remotely. My husband is a lawyer, and he just handled a sentencing remotely. I also think it has increased civility and compassion in our profession. I heard a story where a bunch of New York City lawyers working on a document production got a call from opposing counsel in Atlanta who said, “Hey, we know you’ve been hard hit up there. We’re happy to agree to an extension.” That just struck me as very nice. This kindness may just be temporary—once things are back to “normal,” we may go back to our old ways. But this has been so hard and so long-lasting that it might be difficult for people to go exactly back to business as usual. For better or for worse, for those of us who had COVID and those who did not, this time will go down as one of the most consequential periods in our lives.
CRIMINAL JUSTICE

Deadly Force

High-profile killings of unarmed Black people spark calls for reform

BY ROSS BARKAN

The seeds that inflamed America’s intense national debate over race and criminal justice were planted months before George Floyd was killed by police on a Minneapolis street in late May.

The buildup to the country’s summer of civil unrest began in a quiet subdivision just outside of Brunswick, Georgia, where an unarmed Black man out jogging was shot and killed on Feb. 23 by two armed white men.

When Glynn County Police arrived at the scene, a father and son claimed 25-year-old Ahmaud Arbery had been involved in a burglary of a home under construction. Gregory McMichael told police his son Travis fatally shot Arbery after he “began to violently attack Travis.” The McMichaels and a third man who recorded the shooting, William “Roddie” Bryan Jr., were allowed to go home without an arrest.

Arbery’s mother and local activists refused to accept the police and prosecutor’s narrative and insisted on an independent investigation. But the coronavirus and general apathy over another Black man’s death meant little to no attention was paid to the case. No charges were brought until graphic video of the killing surfaced months later.

The cellphone video showed Arbery jogging through the southeast Georgia neighborhood with the McMichaels and Bryan in pursuit. Moments later, after a struggle over the shotgun with Travis McMichael, Arbery was shot and killed.

More than two months after Arbery’s death, the Georgia Bureau of Investigation took over the case, and within days they had arrested the McMichaels on charges of murder and aggravated assault. Bryan was later charged with felony murder.

In May, the U.S. Department of Justice has since confirmed that it is investigating Arbery’s death as a possible hate crime.

And in June, a Georgia grand jury indicted the three men on murder charges, including malice and felony murder. Travis McMichael’s lawyer said his client intended to plead not guilty. None of the three men had entered a plea at press time.

“I believe from day one, once police saw that video, that there was enough probable cause to arrest them,” says civil rights attorney Ben Crump, who represents Arbery’s mother. “They did not have to let [the McMichaels] go home and sleep in their own beds every night for 10 weeks. We know people in the minority communities are arrested for far less probable cause.” Crump believes the intention of local law enforcement was to “kick the can down the road” and “sweep [the case] under the rug.” Ultimately, that didn’t happen.

A wave of protests

George Floyd’s death catalyzed mass protests against police brutality across the country and the world, leading to fresh calls for sweeping reform.
Renewed attention has been given to the case of Breonna Taylor, an unarmed Black woman in Kentucky who was shot and killed by police in her own home.

In each instance, deadly force was used against a person of color who wasn’t able to fight back.

In Taylor’s case, police broke into her apartment on a no-knock search warrant as part of an investigation of two men they believed were selling drugs, even though those men were already in custody.

Taylor’s boyfriend, Kenneth Walker, believing there was a break-in, fired once. Police returned fire wildly, killing Taylor in a hail of bullets. Her family has filed a wrongful death lawsuit, but no charges have been filed in the case at press time.

In June, one officer involved in the shooting was fired, and the Louisville city council voted unanimously to outlaw no-knock warrants and require officers to wear body cameras. In the same month, Sen. Rand Paul (R-Ky.) introduced federal legislation to ban no-knock warrants.

The killings of Taylor, Arbery and Floyd have remained at the forefront of civil rights protests and have also brought additional scrutiny on laws that go beyond traditional self-defense, ranging from qualified immunity of police officers to “stand your ground” and citizen’s arrest laws.

“Some might ask, ‘Why didn’t the man with the shotgun back up and retreat?’ Under the ‘stand your ground’ law, a person who is under attack is entitled to stand his ground and respond to a threat of grievous bodily harm with lethal force,” says Ronald Carlson, a law professor at the University of Georgia who has closely followed the Arbery case.

“That is going to be contested by the prosecution by saying, ‘Well, the defendants in this case, the McMichaels, set up this scenario, and a person who is the aggressor—we say the McMichaels are the aggressor—cannot invoke self-defense as a defense because they started this whole thing.’”

American self-defense law dates back centuries to English common law and the so-called castle doctrine.

The idea behind the castle doctrine was rather simple: A threatened individual may be able to use lethal force to defend himself or herself within the confines of his or her home.

Race was interwoven into the castle doctrine in the early days of the United States, when only white men could own property and created the legal means to protect it. Native Americans who wanted to defend their homes from colonization and African Americans under attack from lynch mobs did not have the same legal right. This narrative played out in Taylor’s case when Walker was arrested and charged with attempted murder and assault on a police officer for grabbing his gun to defend his home. Those charges have since been dropped.

During and long after the Civil War, castle doctrine and self-defense laws were used to violently safeguard the homes and possessions of white men, argues Caroline Light, the author of *Stand Your Ground: A History of America’s Love Affair with Lethal Self-Defense*.

“The laws take for granted this appeal to reasonableness, and that’s the problem here,” says Light, senior lecturer on studies of women, gender and sexuality at Harvard University. “What counts as reasonable in legal practice is historically embedded in racial inequality and violence.”

In 2005, Florida became the first state to enact a “stand your ground” law, making a crucial change to self-defense as it had been understood for most of American history: Citizens who feel threatened were no longer required to try to defuse a situation first or retreat before having the right to use deadly force.

Versions of “stand your ground” had existed through case law in some states, but no single statute had been written to enshrine it.

An intense lobbying campaign by the National Rifle Association and the American Legislative Exchange Council, coupled with support from Republican legislators and the Republican governor at the time, Jeb Bush, brought “stand your ground” to Florida. That law would quickly become a model for similar measures across America, particularly in the South.

Florida’s “stand your ground” law states that a person who is in a dwelling or residence has no duty to retreat and can use deadly force if he or she “reasonably” believes that using such force is necessary to prevent death or bodily harm.

What makes the Florida law so far-reaching is the automatic presumption of reasonable fear, overriding previous self-defense laws that required proof that a person felt a reasonable enough level of fear to use deadly force.

“If you start a fight, you shouldn’t be able to rely on ‘stand your ground,’” says Walter Signorelli, a professor at the John Jay College of Criminal Justice and a retired New York City Police Department inspector.

Georgia’s “stand your ground law” came shortly after Florida’s, in 2006. Eventually, more than 30 states would have “stand your ground” laws in a variety of forms.

Carlson says a version of “stand your ground” had been embedded in Georgia case law for a century. But conservative Georgia legislators wanted to codify “stand your ground” in the event of a U.S. Supreme Court challenge.
Infamous laws
“Stand your ground” would attract national notoriety in 2012 when George Zimmerman fatally shot Trayvon Martin, a Black 17-year-old high school student in Florida who was unarmed. Charged with second-degree murder, Zimmerman was eventually acquitted on grounds of self-defense.

“Stand your ground’ takes common sense out of the equation,” says Melba Pearson, the former deputy director of the American Civil Liberties Union of Florida and a current candidate for Miami-Dade State Attorney. “OK, a person looked at me funny, therefore I’m in fear—I’m gonna pull out my weapon and shoot them.”

Studies show “stand your ground” laws have escalated violence across the country, without evidence of crime deterrence. Compounding the problems is racial disparity data showing the odds a white-on-black homicide is found justifiable is 281% greater than with white-on-white homicide. Also, a defendant is twice as likely to be convicted in cases with white victims compared to cases with nonwhite victims.

What has also been lost in the discussion of the Arbery case is whether Arbery himself had a right to stand his ground. Police assumed he did not, which critics have used as evidence of the local police department’s racial bias.

“Imagine if we don’t know the races of the individuals. Imagine we only know they’re men and one man is unarmed running through the neighborhood. The other two are armed men in a pickup truck with another man in a pickup truck,” Light says. “If you really look at ‘stand your ground’ law and apply it sincerely, the person with the strongest, most persuasive right to stand his ground was Ahmaud Arbery. He was being accosted, he was being pursued, he was being threatened.”

Co-opting the law
What legal defense the McMichaels and Bryan take in the Arbery case remains to be seen. They may say they were implementing a citizen’s arrest under Georgia law. The current version of the law, however, allows a citizen’s arrest if a crime is committed in the presence of or is within the citizen’s “immediate knowledge.” If the crime is a felony and the offender is escaping, the citizen can stop someone with “reasonable and probable grounds of suspicion.” Georgia’s citizen’s rights law can be used only to prevent a violent felony. If that scenario occurs, a person who is attacked could then claim self-defense.

But the law also requires the “immediate knowledge” of the commission of a crime. In the Arbery case, no evidence has been presented of a crime being committed at all.

Waycross Judicial Circuit District Attorney George Barnhill, the second district attorney to recuse himself from the case after Arbery’s mother objected to his personal relationship with the McMichaels, claimed the evidence reviewed exonerated the McMichaels. In a highly criticized move, Barnhill wrote an extensive memo to his successor prosecutor insisting the three men were trying to stop and hold a criminal suspect and the shooting was self-defense.

Citizen’s arrest laws exist, in some form, in almost every state, and Georgia’s dates back to 1863. Supporters say there are instances where these laws have allowed individuals to detain people who are committing crimes, such as shoplifters and muggers, and hold them until the police arrive.

But in the wake of Arbery’s death, critics are now moving to try to get these laws repealed. Opponents say citizen’s arrest laws are a relic of the Wild West and premodern police departments, when residents were left to their own devices to enforce law and order.

Ira Robbins, a law professor at American University, argued in a recent paper that citizen’s arrest laws had run their course. “Placing such power in the hands of ordinary, untrained individuals creates the possibility that citizens will misuse or abuse the privilege,” Robbins wrote. “This risk is compounded by the disparate treatment of the citizen’s arrest doctrine in different jurisdictions and the ambiguities inherent in many of the doctrine’s key features.”

Democrats in Georgia are hoping to repeal the state’s version of the citizen’s arrest law. Both citizen’s arrest and “stand your ground” laws have endured for decades, especially in states once under Jim Crow. But activists say dismantling these laws is a priority to ensure justice for generations to come.

“No matter how daunting it gets, no matter how charged with punishment the scroll, we cannot give up the fight because if we give up the fight, it’s like we’re giving up on their future,” Crump says.
INTERNATIONAL LAW

Suing China for COVID-19

Can plaintiffs from other countries hold China legally accountable in their respective courts?

BY DARLENE RICKER

 Barely 24 hours after the World Health Organization officially designated COVID-19 as a pandemic on March 11, the international legal blame game began. The first firm to file a lawsuit against the government of China and the Chinese Communist Party was Florida-based Berman Law Group, a Boca Raton firm with a heavy emphasis on mass torts and class actions.

Matthew Moore, the firm’s litigation attorney, stayed up all night drafting the complaint, which he filed in the Southern District of Florida the day after the declaration by the WHO. The case, a class action suit, was brought on behalf of individuals and small businesses alleging a variety of financial and health damages, on grounds citing China’s negligence in failing to contain the virus and in actively concealing the outbreak and its extent from the world.

In April, Moore expanded the effort with a second complaint designating another class: health care workers. Hundreds of nurses and doctors have joined the suit claiming China harmed them by hoarding essential personal protective equipment they needed for work safety. In short order, federal lawsuits were filed in California, Texas and Nevada, and even the attorneys general of Missouri and Mississippi brought coronavirus cases against China.

Moore says his firm has been inundated with inquiries from potential plaintiffs. “Some days it’s 100, other days 2,000,” he says. Total inquiries have exceeded 15,000.

The firm is building a global coalition of international citizens and law firms to hold China accountable. Berman Law Group also has received offers to join its Florida lawsuits, or help prosecute them, from attorneys in more than 47 countries. Attorneys in Italy, Nigeria, Turkey and India also have independently filed complaints against China.

The litigation has spurred a double-edged question: Do international coronavirus cases have any chance of success, and even if they do, are the courts the proper forum to resolve issues that impact United States foreign policy?

Sovereign immunity

The consensus among international law scholars and attorneys to both questions has been a resounding no. A gargantuan obstacle is the bedrock doctrine of sovereign immunity, which protects a nation from being sued in another nation. Most countries, including China, extend it as a reciprocal courtesy.

On May 26, however, according to the Chinese state-run press agency Xinhua and communist party publication Global Times, China’s National People’s Congress proposed drafting a foreign states immunity law to allow Chinese citizens to sue the U.S. government in Chinese courts.

Litigation against foreign nations in U.S. courts is expressly prohibited unless it fits within one of the narrowly drawn exceptions in the Foreign Sovereign Immunities Act. The statute was enacted in 1976 to clarify conflicting thoughts on proper use of the statute. The most commonly raised exceptions, which are alleged in several pending COVID-19 complaints against China, are misconduct in the United States by foreign nations involving commercial activity and noncommercial torts.

The pandemic suit filed in Texas by attorney Larry Klayman and his conservative nonprofit Freedom Watch also alleges China created the virus in a lab as a biological weapon, amounting to an act of international terrorism, another exception. FSIA was amended in 2016 to extend continuation of a long-standing suit, which is still pending, against the government of Saudi Arabia by families of victims of the 9/11 attacks.

Lea Brilmayer, a professor of international law at Yale Law School, says, “Courts want to be careful about weighing in on foreign policy. It’s a diplomatic issue. If you make a mistake in foreign policy, it’s very hard to correct. It’s not like making a mistake when you interpret a statute or an executive order.
If courts interpret [sovereign immunity] the wrong way, Congress can step in and correct the problem. But if they make a mistake about foreign policy, it can cause a war.”

The Florida complaint also seeks redress for untested grounds on which to sue a foreign country—the odds of which rival the chance of winning the lottery. To prevail, Congress would need to amend the FSIA to add yet another exception: engaging in an “ultrahazardous activity” that caused damage in the United States.

Berman claims with regard to China’s conduct that strict liability may be imposed for China’s operation of bioweapons labs, including one near Wuhan’s Huanan Seafood Wholesale Market, which is widely suspected to be the origin of the outbreak.

“The idea that China is responsible for the original outbreak ignores all the subsequent missteps that have allowed the pandemic to ravage the United States,” says former State Department lawyer Chimène Keitner, a professor of international law at the University of California’s Hastings College of the Law in San Francisco. “So unless the U.S. government is willing to abrogate its own sovereign immunity, I think it really misses the point to not allow full investigation and accounting of what various governments could and should have done differently.”

Tom Ginsburg, an international law professor at the University of Chicago Law School, considers the cases against China a misuse of tort law. “You’re having the foreign policy of the United States being dictated by a bunch of tort lawyers in Florida,” he says. “We have a State Department for a reason.”

**New bills**

In April, coronavirus-related legislation was proposed in both houses of Congress.

- Sen. Josh Hawley (R-Mo.) announced the Justice for Victims of Coronavirus Act. It would make the Chinese government liable for civil claims in U.S. courts. In addition, the act would allow U.S. courts to freeze Chinese government assets and launch a task force to examine the role of the Chinese government in the pandemic.
- Rep. Dan Crenshaw (R-Texas) and Sen. Tom Cotton (R-Ark.) introduced the Holding the Chinese Communist Party Accountable for Inflicting Americans Act. It would amend the FSIA to allow litigation against a foreign state that deliberately conceals or distorts information about an international public health emergency.
- Republican Sens. Marsha Blackburn from Tennessee and Martha McSally from Arizona introduced the Stop China-Originated Viral Infectious Diseases Act of 2020 or the Stop COVID Act of 2020. It would create an exception to sovereign immunity if a foreign state is alleged—intentionally or not—to have discharged a biological weapon.

Keitner says even if the pending cases succeed or the FSIA amendments pass, making China fair game for litigation in the U.S. would be “a total nightmare.” She warns against making the “knee-jerk reaction of stripping foreign states of their sovereign immunity every time they do something we don’t like.”

The United States is already a target in pending litigation in China. Two attorneys from that nation each filed coronavirus-related cases against the U.S. government.

A suit by Wuhan attorney Xuguang names the Centers for Disease Control and Prevention, the Department of Defense, and other entities, and it alleges they caused harm to Chinese individuals and businesses by covering up the pandemic and allowing it to spread. It seeks damages of approximately $28,000—which pales in comparison to the $20 trillion Klayman asserts is due to plaintiffs in the class action he filed in the Northern District of Texas. The second suit from China, brought by Beijing attorney Chen Yueqin, seeks compensation for the reputational damage done by President Donald Trump’s description of COVID-19 as “the Chinese virus.”

George Sorial, an attorney and former top-level executive at the Trump Organization, maintains that civil litigation is the only means of making the class members whole. A government relations and communications consultant to Berman Law Group, he shared a media brief that was provided to senior government officials who are advising Trump. He says that because of the “atrocity against mankind” allegedly committed by China, that nation should not be allowed to “hide behind” the concept of sovereign immunity. “That would set very dangerous precedent.”

Still, Sorial remains optimistic. “I think some good things will grow out of this. We have a rare opportunity now for the world to unite and address this issue and implement consequences to ensure something like this never happens again.”

According to former State Department lawyer Chimène Keitner, who is now a professor of international law at University of California’s Hastings College of the Law in San Francisco, holding China accountable for the original outbreak of COVID-19 “ignores all the subsequent missteps that have allowed the pandemic to ravage the United States.”
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Not So Predictable

Analytics products offer different results depending on data sources, quality and the types of analytics and reports they provide.

BY SEAN LA ROQUE-DOHERTY

Litigation analytics products provide lawyers with critical insights into courts, judges, lawyers and litigants. It is valuable information to know that opposing counsel successfully motioned to dismiss 10 personal injury cases from a federal district court, four of which were decided by the presiding judge. But what if your research missed two motions to dismiss before the same judge that opposing counsel lost? Have you deprived a client of adequate representation?

When lawyers use litigation analytics, they expect software to deliver accurate and comprehensive results on a variety of litigation-related matters. A recent study conducted by law librarians, however, dashed those expectations.

At Law.com’s Legalweek Legaltech conference in New York City in February, Diana Koppang, director of research and competitive intelligence at Neal, Gerber & Eisenberg; and Jeremy Sullivan, manager of competitive intelligence and analytics at DLA Piper, presented findings from a 2019 study (updated in 2020) by 27 academic and law firm librarians comparing the answers of federal litigation analytics products to a set of real-world questions. The study defined litigation
analytics as the marriage of docket analytics and semantic analytics.

Docket analytics allows researchers and attorneys to monitor and assess judicial profiles of prior decisions, motion times to resolution, win-loss rates, and other data that can help predict future outcomes to advise clients and determine case strategies. Semantic analytics derives from the words and phrases in judicial decisions. The analysis matches language with data point analytics, such as grant and dismissal rates.

The study focused on data from federal district courts reported by analytics platforms, not dockets platforms per se. The platforms evaluated were from Bloomberg Law, Fastcase (Docket Alarm’s Analytics Workbench), Docket Navigator, LexisNexis Legal & Professional (Lexis Context, Lex Machina) and Thomson Reuters (Monitor Suite and Westlaw Edge).

Real-world questions

“There were no pie-in-the-sky questions to try and break the platforms,” Koppang said at the conference. The testers brought real-world problems to the study from lawyers with clients in or contemplating litigation. For example: “How many motions to dismiss for failure to state a claim have been filed?” When presented with the question “In how many [patent] cases has Irell & Manella appeared in front of Judge Richard Andrews in the District of Delaware?” and a date range beginning Jan. 1, 2007 (see results in chart above), no two vendors had the same answer.

Bloomberg Law found none, while Monitor Suite and Docket Alarm found five and six cases, respectively. Docket Navigator found 14 cases, Lex Machina found 13.

Westlaw Edge ultimately found 11, but testers had to start their search with the court, then filter on the firm and judge. When the research began with the firm and judge, Westlaw Edge found nothing. It found three cases when the search started with a patent and filtered on the firm name.

To verify the answers, the study presented the same queries in a docket search and performed a manual review.

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plaintiffs and defendants, attorney names, the basis of jurisdiction and the nature of the suit—a single code.

The filer must identify one NOS code that best describes the case from more than 90 issue areas grouped in 13 categories. The selection of a NOS code is critical for court statistics, the allocation of resources to federal courts and the retrieval of case data, as Christina Boyd, an associate professor of political science at the University of Georgia, and David A. Hoffman, professor at the University of Pennsylvania Carey School of Law, found in their 2017 paper, “The Use and Reliability of Federal Nature of Suit Codes.” Although some NOS selections, such as employment discrimination and intellectual property, do an excellent job of summarizing the legal content of a complaint, other codes do not, such as those for contract, real property and tort cases.

Bloomberg Law, Docket Alarm, Lexis Context, Monitor Suite and Westlaw Edge claim coverage for all civil NOS codes. Coverage for Docket Navigator and Lex Machina, however, is limited by case types or NOS codes. If a civil case includes a claim that fits a vendor’s coverage area but the NOS code does not reflect it, the vendor might not export the case from PACER.

In addition to the NOS limitation, the study identified other PACER problems, including spelling errors or typos in attorney and firm names and incorrect attribution of attorneys to firms after lateral moves or acquisitions. New firms or attorneys may replace or substitute for original counsel or appear pro hac vice. Depending on the product, “law firms may not get counted for pro hac vice,” Sander says.

Platforms beg to differ
Platforms differ in many ways, including federal court coverage, update frequency, data normalization, quality control, search options and analytical features. All the products cover federal district courts; and most products, except for Lex Machina, include data on federal courts of appeal. Only Docket Alarm, Lexis Context and Monitor Suite cover federal bankruptcy courts.

How frequently vendors update PACER data can matter. “The time case data is pulled can change the accuracy of it,” Sullivan said during the Legaltech session. Most vendors update PACER daily, but Bloomberg Law and Docket Alarm can refresh case data on user demand or specification.

Vendors have various methods to implement authority control for things such as spelling and normalizing data on attorney, company, firm and judge names, among other things. All the vendors engage in some aspect of human review or quality control, whether they monitor the system for error correction or perform random audits to check for accuracy. But Docket Navigator uses legal editors to curate litigation data for patent, antitrust, copyright and trademark cases by hand, and it does not use algorithms to populate data fields.

Vendors apply different tagging and grouping schemes to PACER data, leading to differences in search options and other platform functions. All the platforms can search by attorney, firm and district court judge. But searching by bankruptcy, magistrate and other judges is spotty, as is searching by party name, be it a company or an individual.

Docket Alarm and Lex Machina have the most comparison tools, including judges, jurisdictions, law firms and parties. All the products analyze motion outcomes for motions to dismiss and summary judgment, but only Bloomberg Law, Docket Alarm and Westlaw Edge analyze appeal outcomes. Note that analytics products are continually updating their software and analytics. Depending on the coverage, product innovation begets competition among the various platforms.

Takeaways
The study was not conceived as a contest and did not aim to find a winner.

From a high-level view, the law librarians’ study found that analytics research is different from case law research, and that vendors must provide transparency, training and guidance to use these systems properly. When combined with research from other platforms, such as company databases and docketing systems, analytics platforms generate the best results.
Anticipating a post-COVID-19 boom, law firms are staffing up on bankruptcy lawyers

BY JOHN ROEMER

A lot remains unknown about our post-coronavirus future, but an onslaught of commercial bankruptcies seems inescapable—and law firms are taking a hard look at their bankruptcy and restructuring practice groups in anticipation of increased demand.

John D. Penn is firmwide chair of Perkins Coie’s bankruptcy and restructuring practice. With nearly four decades of experience, he’s seen it before, and he knows there’s trouble ahead. “I’m sitting on the beach watching the water recede to the horizon,” he says. “I don’t know how fast it will come or how far inland it will go, but the tsunami is on its way.”

Lawyers interviewed for this story report that legal headhunters are busy looking to place or to poach bankruptcy lawyers. In April, Baker McKenzie added three lawyers from Greenberg Traurig to its global restructuring and insolvency practice, including Mark Bloom, who had been Greenberg’s bankruptcy practice group co-chair. Gibson, Dunn & Crutcher got an early start last October by bringing on three business restructuring lawyers from Jones Day. Meanwhile, a spokesperson for Latham & Watkins says the firm has been expanding its global restructuring and special situations practice over the last several years.

“The legal recruiters are out there hot and heavy in a very competitive environment,” says Christopher Ward,
“We never cut our bankruptcy practice after the last recession.”
—John D. Penn

chair of the bankruptcy and financial restructuring practice at Polsinelli and managing shareholder of the firm’s Delaware office. “We’re fairly busy today, and we are staffing up.”

At Perkins Coie, Penn’s team currently comprises 14 partners, three senior counsel and an associate—plus a newly hired junior associate based in Chicago. “We never cut our bankruptcy practice after the last recession. We have always understood there are economic swings, so we’ve maintained our expertise levels to be ready. This is not our first rodeo,” says Penn, who is based in Dallas. He also says his firm is strongly positioned to aid clients in the commercial mortgage-backed securities arena along with hospitals and retailers.

At Stinson, bankruptcy and creditors’ rights partner Thomas J. Salerno says he’s planning to hire at least two additional associates. “We’re actively interviewing candidates right now,” Salerno told the ABA Journal in late May. He’s also recruiting and retooling existing firm partners and associates from related fields. “Bankruptcy is a generalist practice, and we are beefing up. You need litigation folks, corporate M&A people for restructuring, and tax, labor and environmental skill sets,” he says. “The restructuring partner is the quarterback of the team.”

Fallout forecast
Salerno, who is based in Phoenix, drafted an article with a series of coronavirus impact predictions for the American Bankruptcy Institute, where he plays drums for the ABI house band and leaves his lawyerly insights with an occasional pop music reference. As an epigram to his ABI piece, he quoted a line from the 1972 Johnny Rivers hit: “I got the rockin’ pneumonia and the boogie woogie flu.”

Credit will tighten, straining downstream vendors and manufacturers, he forecasts in the article, written with G. Neil Elsey of Avion Holdings, and distressed companies will argue they are not really in default as they invoke force majeure clauses to defend collection actions. Bankruptcy courts will be lenient with debtors and will allow more telephonic appearances, which will cut some client costs but will negatively impact the airline, hotel and restaurant sectors. There will be opportunistic acquisitions by vulture investors. Cash flow and liquidity restrictions will impact asset sales and cram-down dynamics.

“The deluge hasn’t started. You see scattered showers right now,” Salerno says in a phone interview. “Banks aren’t yet overly aggressive. They don’t want their building back. Despite a few nasty letters, they are in wait-and-see mode. I expect the real storm in mid-to-late August.”

At Day Pitney, bankruptcy and restructuring practice group chair Joshua W. Cohen deals with a firmwide 15% pay cut for all attorneys during the remote working period and other efforts to maintain financial stability by bolstering his group from within. “When times are good, our tax, corporate, securities, real estate and energy partners are all busy in their disciplines. But when the bottom drops out, we want to keep everyone fully engaged,” he says. “So we take a multidisciplinary approach to our bankruptcy practice. To the extent we find we still need to fill holes, we’ll do that.”

Cohen expects the bankruptcy leaders will be in the hospitality, main street retail and oil and gas sectors. “Not the big-box stores. Real estate will be an issue as tenants can’t pay their rents, and there will be another wave of airline bankruptcies. It still depends in part on who gets bailed out.”

Scott A. Underwood, formerly the chair of the bankruptcy and creditors’ rights practice group at Buchanan Ingersoll & Rooney, left that post to open his own firm in Tampa, Florida, in June. “This is a now-or-never time for anyone in the industry who ever wanted to strike out on his own,” he says. “There’s more bankruptcy business coming in than in the last decade, even as it’s become plain that large firms will be struggling in their nonbankruptcy practice areas. And large firms doing bankruptcies have conflict issues, such as when they represent financial institutions, that I can avoid in a small shop.”

He adds that he listened to the intel he was getting from his creditor clients as far back as 18 months ago and understood the upcoming need for more staffing. “A lot of borrowers were on very thin margins, and interest rates were so low that we foresaw [bankruptcy] filings would rise, and they have.”

“There’s more bankruptcy business coming in than in the last decade,” Scott A. Underwood says.
PRIVACY LAW

What’s Your Score?

Some U.S. businesses already require consumers to maintain a certain social credit score, but a government-sponsored system is unlikely.

BY RICH ACELLO

Among the casualties of COVID-19 was the planned 2020 rollout of the Chinese social credit system.

In development for years and already in use in several Chinese cities, the social credit system is a way for the government to use the capabilities of cellphones to monitor, track, observe and ultimately judge Chinese citizens as they go about their daily lives. The system uses both carrots and sticks to reward and punish behavior. Donating blood or other community activities might rate a carrot, but bad behavior could prevent the offender from taking trips on high-speed trains or airplanes or engaging in e-commerce.

Thanks to China’s restrictive internet policies, most functions of Chinese society can be conducted on a few apps, including the ubiquitous WeChat, and all of this is discoverable by the government.

However, COVID-19 forced the government to push the pause button. According to reports, the government had to assure individuals and businesses that tax defaults or other things that would ordinarily dent one’s credit would not be held against them while the pandemic raged on.

Nevertheless, observers of the rapid rise of China are intrigued by
the system and wonder if it would fly in the U.S.

There are arguably pieces of it in place already—notably the credit rating system, which uses computer-stored data to assign consumers a credit score regardless of whether they’ve requested it.

Additionally, selling platforms such as eBay require a net positive or neutral score; social media platforms can shut down posters for abusive behavior; and ride-share services can exclude riders with low ratings.

In a society where users already routinely use social media to shame others for behaviors that offend them, what could go wrong?

Plenty, according to Jay Stanley, senior policy analyst for the Speech, Privacy and Technology Project of the American Civil Liberties Union. “The concept of taking credit scores and applying it to other areas of life is ominous,” he says.

Experts who spoke to the ABA Journal agree there would be massive constitutional obstacles for any centralized credit scoring system.

Stanley points to constitutional protections in the Fifth Amendment for due process, and Fourth Amendment protections against unreasonable searches and seizures.

However, Dean Cheng, an Asian Studies Center senior research fellow within the Davis Institute for National Security and Foreign Policy at the Heritage Foundation, argues such a system would run afoul of the First, Fourth and Fifth Amendments.

Ben Winters, an attorney for the Washington, D.C.-based Electronic Privacy information Center, calls a potential U.S. social credit system a “solution to a problem that doesn’t exist” and agrees with Cheng and Stanley that the Constitution would rule out such a centralized system.

Constitutional conflict
Additionally, there are cultural reasons why such a system might fly in China but not here.

“Because the Chinese have been under a dictatorship for 70 years, they have very little expectations of privacy,” Cheng points out.

Meanwhile, Winters adds: “In China, cameras show if you’re jaywalking, and with 100% enforcement, you could say efficiencies will be achieved in law enforcement. But in America, with constitutional rights and civil rights laws, there are protections against that type of thing.”

But what about a system that is driven by private businesses and industries?

Cheng doubts it is in any business’s commercial interests to undertake the project. And if such a system arose, participation in the platforms that support it are optional.

“I don’t have a Facebook or Twitter account because I choose not to,” he says. “I never bought or sold anything on eBay, either. You can choose to participate or not.”

However, Stanley disagrees, arguing that opting out in order to maintain privacy becomes less meaningful over time. “Try living a normal life without a credit card,” he says. ■
Adapting Your Law Firm to a Changing Legal Market
By Jack Newton

In recent months, the legal market has experienced a sharp upheaval, the likes of which legal professionals have never seen.

The first of Clio’s COVID-19 Impact Research Briefings, published in May, stated that the number of new legal matters being opened each week fell by over 30% by early April. And, 49% of consumers surveyed said they’d likely delay reaching out for help until after the coronavirus pandemic had subsided. Client demand for legal services has dropped, at least in the short term.

But even then, it was clear there was another key trend at play: 60% of consumers said they’d still seek legal services from a lawyer rather than deal with an issue in some other way—but 52% said that if they had to deal with a legal issue in the next few months, they would not be able to afford the associated legal costs and fees. We’re seeing national and state bars trying to bridge the gap by increasing access to pro-bono legal services.

In other words, there is a product-market fit issue in the legal market. Product-market fit, the degree to which your product or service satisfies market demand, has always been important. But today, understanding product-market fit is crucial for guiding law firms in how to adapt. The impact on the way people engage with legal services, and what they now expect from a business because of COVID-19, will last long after the pandemic is over.

Clients still have legal needs—in fact, they have more legal needs than ever. But they are in search of law firms that are designing new ways of addressing those needs in a client-centered way, designing a totally new experience calibrated to the new realities and needs. That experience is an integral part of the whole package your law firm offers, right alongside actual legal services. Firms who can successfully match their offering to what clients are looking for will not only survive, but thrive in today’s legal market.

What sort of experience are your potential clients looking for? Every law firm is different, so the answer will depend on carefully listening to your clients. Reach out to past and existing clients. Ask them how they are. Ask them what they need, and if there’s anything you can do for them. Ask them how COVID-19 has impacted their legal needs. Ask what would make working with your firm easier.

For example, maybe now that your clients have seen how convenient video meetings can be as a result of working from home during coronavirus, they’d prefer to meet via video. Or, if you typically work with older clientele, maybe they’d prefer to discuss matters over the phone.

Are your potential clients part of the 52% of consumers who wouldn’t be able to afford a lawyer? Talk to them about their needs, and consider offering options like payment plans, flat-fee legal services, or subscription legal services to better meet their needs while ensuring consistent cash flow for your firm.

By asking questions, listening, and developing deep empathy for your clients’ needs, you’ll position yourself to create a legal product and client experience that better matches what clients are looking for. And, in many cases, with the power of cloud technology, you can deliver better experiences in a way that makes day-to-day work more efficient and effective for your law firm as well.

The impact of COVID-19 on the legal industry has been extensive and trying for many law firms. But there remains an opportunity for firms to adapt and thrive by strengthening the product-market fit between lawyers and consumers of legal services. Whether you have five minutes or five hours, reach out to your clients, and find out what they seek. You’ll take the guesswork out of knowing what your clients want, build trust, and in the end, deliver the results your clients are looking for in a way that’s efficient for your law firm.
In the seventh week of the pandemic lockdown, I went on a solo walk in the rain. A soggy pile of books on a Brooklyn sidewalk caught my eye. One lay open to a page with the title “Object Lesson.” When I got home, I looked up the meaning of the phrase:

• “A striking practical example of a principle or an ideal.”
• “A concrete illustration of a moral.”
• An action, situation or event that demonstrates a truth.

It got me thinking: What are some lessons of this COVID-19 experience for the legal profession? What are some truths that are coming to light? Four initial lessons come to mind.

Lesson No. 1: Our definition of talent needs to expand
Legal employers and legal educators who hope to wait this out and then go back to business as usual are fooling themselves. Things are never going to be the same as they were. The institutions that will survive—and thrive—will reject outdated hierarchies and systems that continually attract and promote the same people. Sustainable entities will seek out and champion nontraditional talents and skills.

Past interviews for law jobs focused on GPAs, traditional law school accolades and applicants’ gift of gab. Once hired, those employees who excelled at office face time and racked up maximum billable hours won plaudits from performance evaluators. It’s time to let go of systems, hierarchies and performance metrics that do not serve the profession or society. Instead, we must consider and invest in previously undervalued and overlooked individual and collective strengths.

In both the immediate and distant future, the successful legal employers will be those who appreciate how different individuals flourish in traditional...
and nontraditional working environments. Lockdown has pulled back the curtain, revealing that many members of our legal communities, with the right support, can excel in work-from-home scenarios—even if they are working at odd hours while sharing space with and caring for others. Instead of hankering to pull everyone back to the brick-and-mortar office, let’s reconsider what it means for an employee to be “productive” or “contributing.”

A first step is to restructure the way we interview and draw out strengths such as:

• An ability to focus and produce high-quality and timely work, independently and unsupervised.
• Excellent oral and written communication skills in virtual spaces.
• Openness to and facility with adjusting to new technology.
• Creativity in designing solutions to complex problems—in law and other disciplines and industries.
• Collaborative problem-solving capability—also across other disciplines and industries.

We also must more highly appraise job applicants and employees with emotional intelligence, such as those who can exhibit empathy toward and authentically reassure clients (and co-workers) navigating unparalleled emotional, financial or other trauma.

Lesson No. 2: Our communication skills are overdue for an upgrade

Our profession hinges upon effective communication, but often we fail to model productive dialogue. Let’s seize this opportunity to improve how we converse in person and in virtual spaces.

In New York’s daily pandemic press briefings, the clamor of reporters seeking to ask Gov. Andrew Cuomo a question prompted him to suggest, that instead of yelling at each other, how about the journalists go one at a time to make sure everyone gets a chance to ask a question? I have wondered—for 26 years—why we don’t conduct lawyering activities such as depositions, negotiations and oral arguments in a less disruptive fashion, rather than the usual riot of interruptions in which the loudest voices often reign. The governor’s commonsense suggestion could apply to lawyering scenarios as well.

The U.S. Supreme Court already presented a prime example of such a communications upgrade. In October, the court started allowing advocates to have two minutes to present initial statements without interruption; and mid-pandemic, it announced a new protocol for its first-ever telephonic arguments: The justices would ask questions in order of seniority rather than the usual free-for-all. Some folks on Twitter and cable news seemed surprised that Justice Clarence Thomas—traditionally quiet in oral arguments—unmuted his microphone, actively questioning advocates in the court’s new format of telephonic hearings. When I started hearing the buzz about Thomas’ invigoration in this new platform, I immediately thought, “He must be an introvert.” Introverts resist interruption. Thomas made an appearance at the University of Kentucky in 2012 at which he discussed his views on the traditional format of justices interrupting advocates with questions. He remarked, “Maybe it’s the introvert in me, I don’t know. I think that when somebody’s talking, somebody ought to listen.” It makes sense why he would speak up more readily now, without the expectation to speak over an advocate or a colleague to be heard.

Lesson No. 3: To amplify unheard voices, we must change how we engage

Making the quick switch to “emergency remote law teaching” in March, some educators indicated they planned to merely shift their in-person teaching style onto the online platform and continue cold-calling students, but now on video. As a researcher of how traditional models of legal education already underserve introverted, naturally quiet and shy students, I yearn for this crisis to inspire an evolution in legal education. As an introvert who resists being put on the spot and interrupting others to be heard, I rejoiced at discovering Zoom features such as “chat” and virtual hand-raising. I was excited to see how quieter law students might amplify their voices in online spaces.

In the past few months, experts at multiple levels of education have reported anecdotally that many quiet students are engaging more readily in remote learning. In a CNN interview, Sundai Riggins, an elementary school principal in Washington, D.C., relayed how students who were not talkative in regular in-person classes were expressing themselves much more frequently in distance learning. In an Edutopia article, a high school psychology teacher in Alabama, Blake Harvard, said “the online environment may allow for voices to be heard without the added bit of social anxiety.” Barbara Gartner, an English-as-a-second-language specialist at Brooklyn Law School, told me one international student felt more empowered in the Zoom classroom than in “the big lecture hall.” The student shared that she could hear and understand the professor better, and she “felt freer to ask questions.”
Instead of trying to cling to “business as usual” in these unusual times, let’s experiment with a broader range of techniques, activating more platforms to engage all voices.

Lesson No. 4: Serious well-being initiatives are as essential as oxygen

Before the pandemic, our profession made strides to address our well-being crisis. Now, it’s even more clear that a conversation about and a strategic plan to address the mental, physical and emotional health of all members of our legal communities, including our administrative support teams, is essential.

Continuing to shelter at home, striving to be productive and keep businesses going, many employees and colleagues also wrestled with trauma, fear, anxiety, loss, pain, depression and grief.

The events of 2020 are converging into one of the biggest traumas we—as individuals, a country and a global community—will face in our lives. Some of us who thought we had worked through past injuries such as divorce, loss of a loved one or 9/11 are discovering that solo isolation is triggering unresolved grief. Saying this out loud does not make us weak; processing it together builds collective fortitude.

The legal institutions that give serious thought to this reality and go all in on building infrastructures to support the mental, physical and emotional health of every member of their communities will rise up, impenetrable. Those who don’t will collapse. They will lose their beating heart. We need heart now more than ever.

Overall, let’s pause and assess the lessons we can learn from 2020. Let’s be and do better.

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WORDS

The Perennial Question

How to make the most of your time during the pandemic

BY BRYAN A. GARNER

“There is nothing new under the sun,” according to an important Jacobean text—namely, the King James Version of the Bible (Ecclesiastes 1:9).

To illustrate the point, people were true to form when a few started Tweeting and commenting that William Shakespeare wrote King Lear while quarantined during the plague in 1603. That assertion was retweeted and repeated endlessly. Few checked the facts, but many felt inspired to try doing something meaningful during the stay-at-home orders resulting from COVID-19.

Actually, though, Shakespeare is thought to have written King Lear in 1605, not 1603. There may or may not be any truth to his having done it when playhouses were closed because of the plague. We just don’t know: That part of his biography is a mystery.

That’s not to say you shouldn’t try to do something meaningful while staying at home. You should. Maybe you’ll even change the course of English literature. But I doubt even Shakespeare thought he was doing that.

After Shakespeare joined a London acting troupe in 1588, the playhouses were closed from time to time—as they were for much of 1594. It was a continual problem. During his last decade as a playwright, from 1603 to 1613, the playhouses were closed a total of 78 months. That’s when “plague orders” were put into place: Whenever the deaths passed a certain number, infected houses were put under a 21-day quarantined; every householder had to wash his part of the street twice a day; graves had to be 6 feet deep; two women from each parish were designated to shop for and nurse the quarantined; and only certain physicians were allowed to care for infected patients. Sounds vaguely familiar, doesn’t it?

Nobody in those days knew what caused the plague. The scientifically minded thought it resulted from an airborne contagion. So one of the first measures when the plague struck was to close the playhouses. The mystically minded also liked this measure because they thought sinful stage performances were themselves the cause. As one London preacher put it, “The cause of plagues is sin, if you look to it well; and the cause of sin are plays; therefore, the cause of plagues are plays.” His grammar was no better than his logic.

Scientists now say that the disease was transmitted by the bite of an infected rat flea—a flea that bites humans only when all the local rats have been infected and killed. And unlike human fleas, rat fleas can’t jump far, so people must be in close confinement for the disease to spread. (Unfortunately, they hadn’t invented the phrase or even quite the concept of social distancing, which didn’t emerge in public health vocabulary until the 1970s.) The most dangerous things for the spread of the
disease were the clothing and bedding of plague victims, along with wooden buildings, earthen floors, trash heaps and dunghills.

Of those infected, some 60% to 90% died.

Odd, isn’t it, to think that the absence of rats made things less safe?

And it’s a little odd to think the public authorities knew more than four centuries ago that when an outbreak occurs, people need to stay home and not congregate—which to watch sinless plays, attend bear-baiting spectacles or even shop in crowded marketplaces.

Seek to be worthy

Regardless of whether Shakespeare used playhouse closings to write great drama, it’s worth asking yourself: What should I do during periods of isolation?

Perhaps during stay-at-home orders you were schooling the kids, cleaning the house, preparing more meals than ever, doing jigsaw puzzles, undertaking home improvements, learning how to use Zoom or just going stir-crazy. But what were you doing professionally?

Perhaps you were tending to clients’ needs, marketing your services or just hoping more business would come.

I have a suggestion—one inspired by the story about Shakespeare and Lear.

One thing you must do as a lawyer, at all times, is cultivate your mind. You can do it mostly through reading and reflection. Serious reading.

I take as my text The Analects of Confucius. The great ethicist referred to “the unpretentious hiving of wisdom and patient self-cultivation.” Confucius was constantly urging people to prepare themselves properly for opportunities that might come their way. He warned about getting carried away with the miniscule shows of accomplishment: “Be not distressed by lack of recognition but rather by lack of ability.”

If you’re constantly worried about being up to snuff professionally—and ensuring you might be—you’ll do better than if you’re worried about the number of awards on your wall.

In another place, Confucius said: “Instead of being concerned that you have no clients, be concerned to think how you may fit yourself for clients. Instead of being concerned that you are not known, seek to be worthy of being known.”

OK, I changed that quote for my legal audience: He said office instead of clients. It’s just that I translate the Chinese original a little differently. That is to say, I would if I knew how to read it.

Hey, presto! A challenging project in self-cultivation presents itself: Learn to read and speak Mandarin.

Well, no. It’s not that easy—neither learning Mandarin nor deciding what type of self-cultivation constitutes the best and highest use of your time.

That’s the perennial question: What’s the best and highest use of your time?

What about you?

For me, it wouldn’t be learning a tone language. For some lawyers, it certainly might be, especially perhaps those on the younger side. Statistically, they can most easily acquire a language with phonemes that are alien to their native tongue. But when you’re past 50, it’s a much bigger struggle. And I have other missions to accomplish in the finite time I have left here.

I’m writing a screenplay, it’s true, and (as always) I’m preparing new definitions for legal terms. But I’d be doing those things even if there weren’t a pandemic. I’m also completing some new law-related books and revisions of books. I didn’t leave the house for more than three months.

Three months at home. Without setting foot off the property. That’s the first of a lifetime. And for someone who, in the pre-2020 world, had a run of more than 30 years spending 180 nights a year on the road teaching lawyers around the country, that’s quite a change.

Our world has been and will continue to be transformed by a virus.

I’m not writing Lear. I don’t have the ability. But I’m trying, to the best of my ability, to make the most of my abilities.

What about you? What’s the best and highest use of your time? Surely, you’ve been thinking about it.

My wife, a member of the patent bar, has been making high-grade masks for friends and family with sewn-in filters and pockets for additional replaceable filters to be added; learning crochet; learning simplified Chinese as well as Korean (OK, I feel inadequate); rediscovering her love of cooking; becoming a gardener; and, on the professional side, reading various Harvard Business Review guides (they’re excellent). She has also written two appellate briefs.

But once again, what about you? If you’re a member of the ABA, I have no doubt you’ve thought about the best and highest use of your time.

The only thing I can usefully add, from this bully pulpit, is to suggest that you think of your future clients—the ones who will be depending on you five or 10 years from now. Someday before long, they’ll be counting on you to have prepared yourself to perform to your utmost. They’ll need you to be diligent, smart and wise.

Whatever you can do now to prepare for that time will be a good and high use of your time—and perhaps even the best and highest.

To put it negatively, I might quote King Lear: “Nothing will come of nothing.” ■

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Penalizing Poverty

Judges must ensure defendants can afford court costs before imposing fines and fees

BY DAVID L. HUDSON JR.

Judges must take steps to ensure individuals have the ability to pay criminal justice debt before threatening incarceration, revoking probation, exercising contempt powers or considering similar consequences. Such steps are essential “not just to the constitutional rights of litigants but to the integrity of the judicial process and public confidence in it,” according to Formal Opinion 490 from the ABA’s Standing Committee on Ethics and Professional Responsibility.

“Unfortunately, the problem of judges not conducting meaningful ability-to-pay hearings before incarcerating individuals for failure to pay criminal justice debt is widespread,” says Neil Sobol, a law professor at Texas A&M who has written extensively on these issues.

Opinion 490 refers to the obligation as an “important area of procedural justice” and notes that in some jurisdictions, judges are failing to meet their ethical responsibilities. The opinion cites examples in which judges have ordered individuals to pay financial obligations with their disability benefits; made payment of legal financial obligations a condition of probation and then revoked probation for failure to pay; and used the contempt power to collect unpaid civil debt by jailing or threatening to jail individuals without inquiry into their ability to pay.

“The imposition of court costs and fees on people charged with crimes, including juveniles, is a pervasive problem,” says Hamden, Connecticut-based attorney Tamar R. Birckhead, who has written several law review articles on related subjects. “It is in essence a hidden regressive tax that turns courthouse staff into collection agents, burdening the system and interfering with the administration of justice. Further compounding the issue, many courts divert these fees to projects that have little connection to the judicial system.”

Right to be heard

The opinion notes evidence that judges in some jurisdictions repeatedly fail to inquire into litigants’ ability to pay financial obligations prior to incarceration for nonpayment. According to Andrew Hammond, a law professor at the University of Florida, the standing committee decided to address the problem of fees and fines because of the proliferation of pretrial detention. “The criminal context certainly dominates the academic discussion of this issue, and maybe rightly so, given the liberty interest at stake.”

Individuals have a fundamental right to be asked about—and heard—regarding their ability to pay, according to the opinion. Due process principles under federal and state constitutions, laws and judges’ ethical responsibilities form the bedrock of this fundamental right.

The ABA ethics committee notes that “courts across the country have faced severe budget crises over the last few decades as a result of recessions and cuts in traditional sources of state and local funding.” This has led to courts increasing fines and other fees to help offset that loss of funds.

However, this has created serious ethics issues, according to the committee.

When judges ignore individuals’ ability to pay, they commit “a serious breach” of Rule 1.1 of the Model Code of Judicial Conduct, which requires judges to “comply with the law.”

When judges don’t inquire meaningfully into whether a litigant has the capability to pay, they cause a decline in public confidence in the judiciary—a key principle under Rule 1.2, which states that “a judge shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary.”

Furthermore, the comment on Rule 2.2 (“A judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially”) requires judges to show care to those who can’t afford counsel to ensure their matters are fairly heard.

“Incarcerating pro se litigants for failure to pay legal financial obligations without inquiring into their ability to
pay directly undermines their opportunity to be heard on issues as to which they may most need accommodation,” the opinion states.

Two other provisions of the Model Code of Judicial Conduct are directly triggered, according to the opinion. These include Rule 2.5, which requires judges to “perform judicial and administrative duties, competently and diligently,” and Rule 2.6, which provides that “a judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law.” Judges also must avoid conflicts of interest that arise from imposing fees that fund courts.

**Guiding principles**

“ABA Ethics Opinion 490 returns us to first principles,” says Indiana University-Bloomington law professor and judicial ethics expert Charles Gardner Geyh. “As early as the 14th century, English judges took an oath to ‘do equal law and execution of right to ... rich and poor.’ That principle remains embedded in the oath federal judges take to this day, in which they swear to ‘do equal right to the poor and to the rich.’ Imposing a duty on judges to inquire into a defendant’s ability to pay, so as not to indiscriminately imprison people who fail to pay fines on account of their poverty is in keeping with this ancient ethics principle.”

Birckhead calls the ABA’s ethics opinion requiring judges to consider an individual’s ability to pay “an important step in the right direction.”

Opinion 490 encourages judges to consider “innovative options and comprehensive guidance” from the Conference of State Court Administrators, the National Center for State Courts and other organizations.

It lists four examples of methods to help ensure procedural justice: (1) using “a bench card” that gives judges and judicial staff instructions on “ability-to-pay inquiries”; (2) giving advance notice to litigants of their ability-to-pay hearings and that the ability to pay will be a critical issue at the hearing; (3) distributing a form to obtain relevant financial information; and (4) providing a meaningful opportunity to address questions about the litigant’s ‘financial status’ at the hearing.”

Hammond appreciates the effort made by the committee in the opinion, but he says more is needed. “A bench card gives the judge a tool to make a determination about a party’s finances,” he says. “It’s certainly helpful, but I don’t think it’s sufficient. Better to have a bright-line rule ... that also allows for some discretion if a litigant doesn’t automatically qualify based on an income test, public benefit receipt or representation by a legal aid attorney.”

Sobol praises the guidance the opinion offers. “In March of 2016, the U.S. Department of Justice prepared a guidance letter addressing the constitutional violations that arise from the illegal enforcement of criminal justice debt, including concerns about bail practices and incarceration based on inability to pay,” he says. “The letter was to be distributed by state chief justices to all justices in their jurisdictions; however, in 2017, Attorney General Jeff Sessions withdrew the guidance letter as part of the administration’s regulatory reforms. The ethics opinion helps restore guidance to the judges about the need for meaningful inquiry of an individual’s ability to pay legal financial obligations.”

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WILL THE COVID-19 PANDEMIC FUNDAMENTALLY REMAKE THE LEGAL INDUSTRY?

BY LYLE MORAN
n late February, the University of Pennsylvania Carey Law School held a Law 2030 conference focused on the myriad challenges the legal profession was likely to face in the next decade and how it could adapt to combat them.

Soon after, the spread of deadly COVID-19 forced law firms and the justice system to rapidly evolve in ways that conferencegoers had predicted would take years to come to fruition.

Shelter-in-place orders and social distancing guidelines necessitated that an industry known for being slow to embrace technology quickly shift to remote working and use the tools needed to do so effectively. Courts also furiously worked to implement videoconferencing and other electronic solutions to keep providing forums for litigants to resolve disputes amid courthouse closures and the suspension of jury trials.

The legal profession endeavored to comply with the various pandemic-related requirements while encountering the beginning of what is likely to be a prolonged economic downturn due to much of global commerce screeching to a halt.

This confluence of events sparked some legal industry observers to predict that the many technological changes being adopted will persist beyond COVID-19, as will the utilization of remote working. Meanwhile, others have suggested the widespread upheaval will provide fuel for state reviews of whether to open up the legal marketplace to alternative business structures and nonlawyer practitioners.

**Big promises, mixed results**

Of course, many people made similar prognostications a decade ago, when it seemed the Great Recession would fundamentally and radically transform the legal industry. Ultimately, experts say such large-scale changes were only partially achieved.

Predictions that the U.S. would join Australia and the United Kingdom in permitting alternative business structures in the law did not come true. The American Bar Association’s Commission on Ethics 20/20 carefully studied whether to recommend revisions to the ABA policy prohibiting nonlawyer ownership of law firms, but eventually
decided against doing so in light of opposition from many in the industry.

However, law firms’ approach to client billing was one area of major reform sparked by the last significant economic downturn, says Susan Hackett, the former longtime general counsel of the Association of Corporate Counsel. Rather than just billing clients by the hour, firms started to shift toward billing clients based on the value of the services they were providing—a trend driven in part by clients seeking to cut back their legal expenses and exert more control over their matters.

The legal industry also began to embrace technologies that made some attorney work more efficient, allowing lawyers to spend more time on higher-level tasks. “It brought people to the table to look at doing things differently who had never thought they would sit at that table before,” says Hackett, now CEO of Legal Executive Leadership.

Kent Zimmermann, a consultant at Zeughauser Group who advises law firm leaders, agrees some firms responded to the trying financial times by permanently altering their approach to billing and technology utilization. But others only revised their business model to weather the recession and felt the reforms would not serve them well economically in the long run. That’s why he says the Great Recession’s impact on legal was ultimately mixed.

“I do think many firms kind of snapped back to doing things the way they did before the financial crisis, but I think some others found religion and the benefits to be worth continuing,” Zimmermann says.

‘Forced experimentation’

Zimmermann and Jennifer Leonard, who heads Penn Law’s Future of the Profession Initiative, are among the legal professionals who think the COVID-19 pandemic will produce greater transformative effects.

They both note that while the Great Recession was a substantial shock to the economic system, COVID-19 has resulted in the sudden upheaval of society at large. This includes changing how members of the public can access the court system or connect with a lawyer.

“It is really fundamentally disrupting overnight every single component of the legal system, and that is very different than 2008-2009,” says Leonard, who is also Penn Law’s chief innovation officer. “I think it creates enormous opportunities for changing many of the ways we work as lawyers, the ways we provide legal services to our clients and also the ways the justice system as a whole works.”

In the short term, Leonard says the pandemic has resulted in massive “forced experimentation.”

For instance, COVID-19 prompted law firms to very quickly adopt technology more common in some other business sectors in order to allow attorneys and staff to work remotely. Video and audioconferencing tools, particularly Zoom, are being used widely for a variety of purposes. These include firm and client meetings as well as webinars.

Firms have also been utilizing videoconferencing technology to conduct litigation in a remote fashion. Littler Mendelson, a global law firm representing employers, produced training videos to help its attorneys who have needed to conduct depositions, mediations and witness preparation via video.

Scott A. Forman, a Miami-based Littler shareholder, says he expects remote litigation will continue beyond COVID-19. “I anticipate that folks who were resistant to remote meetings and feeling that everything needed to be in person, including depositions, that that resistance will dissipate as time goes on and people get used to this new normal,” Forman says.

Tools that make it easy for lawyers at a firm to collaborate while working from home also have gained traction. Dave Kinsey, whose Phoenix-based Total Networks assists law firms and other businesses with their technology needs, points to the rise in popularity of Microsoft Teams. It permits attorneys to send instant messages to one another, share files and edit documents at the same time as colleagues. Microsoft Teams also permits lawyers to conduct
video and voice calls. “I think law firms have come a long way in wanting to be very tech-savvy,” says Kinsey, president and owner of Total Networks.

**Shift to the cloud**

Perhaps unsurprisingly, the pandemic also prompted more law firms to move their operations to the cloud, something forward-thinking legal outfits such as international firm Rimon Law did long ago.

Michael Moradzadeh, founding partner and CEO of Rimon Law, says “it’s reckless in some ways” for a law firm not to be cloud-based in a climate where remote working is essential. He and others expect more firms will move to the cloud in the months to come.

“I think this painful experience will push a lot of people to ask, ‘Why aren’t we in the cloud?’” says Moradzadeh, who is based in Silicon Valley. “The argument that it is not secure is just outdated at this point.”

“I have a feeling we are going to see the removal of a lot of servers that are still in some small-to-midsize firms because of this,” adds Adriana Linares, a New Orleans-based legal technology consultant.

She says there are also a number of legal technology service providers who have yet to move to the cloud, making it more difficult for lawyers utilizing their software to effectively work remotely. Examples of such tools she highlights are estate planning, real estate closing and litigation support software.

“I hope those companies start to develop cloud-based services based on feedback from their clients, or I hope their clients develop alternatives in case this ever happens again,” says Linares, owner of LawTech Partners and the San Diego County Bar Association’s technology and practice management adviser.

**Remote working won’t go away**

Experts also think widespread remote working itself will remain common in the legal industry beyond COVID-19. One reason they predict this development is because firms’ quick transition to having almost all lawyers and staff work off-site was smoother than anticipated.

A Loeb Leadership survey of law firm leaders in the spring found that 98% of the 136 respondents reported at least a moderate amount of success in rapidly moving their employees to home offices, with 77% of respondents saying they have been highly successful.

“It is hard to put the genie back in the bottle if you have been running a business successfully for two to three months with every staff member out of the office,” said Ben Allgrove, a London-based Baker McKenzie partner, during an interview in the spring.

The initial economic impact of the coronavirus, which prompted firms to begin layoffs and furloughs, also has given legal services providers seeking to cut costs an incentive to have more employees work remotely so they can reduce their physical footprints.

Zimmermann notes that real estate is normally a law firm’s second-largest expense behind lawyer compensation, and he says he has spoken to several law firm managing partners and chairs who say they think their firms will occupy less real estate moving forward, perhaps materially less. “There was already some movement in that direction, but I think this will accelerate momentum toward less big corner offices [and] more flexible arrangements in more firms for more people,” Zimmermann says.

Additionally, Bill Karns, co-founder of Karns & Karns in Los Angeles, believes firms that remain supportive of remote working after the pandemic will have an advantage in recruiting. “Employees are going to want to go to law firms that allow them to work from home a day a week or two days a week,” he says.

**Regulatory reform efforts**

Meanwhile, the rapid spread of COVID-19 came amid several states’ efforts to overhaul regulation of the legal industry with the primary goal of strengthening access to justice. Task forces launched by supreme courts or state bars in several U.S. jurisdictions have examined how to make it easier for technology-driven legal services providers to operate and whether to
eliminate prohibitions regarding nonlawyer ownership of law firms. Regulatory reform supporters say they believe the coronavirus and its aftermath will create additional momentum for such efforts because the many legal issues associated with COVID-19 will further exacerbate the justice gap.

“I think the demand for legal services will rise, and at the same time I think the ability of lawyers to sustain their practices under the current models are going to be crippling in some cases,” says Jayne Reardon, executive director of the Illinois Supreme Court Commission on Professionalism.

She and Scott Bales, the former chief justice of the Arizona Supreme Court, say the pandemic has also highlighted the essential role technology plays in broadening access to justice.

For example, legal innovators have worked in recent months to develop mobile applications that allow members of the public to remotely submit court forms. Legal technologists also have created tools to help consumers and businesses determine if they are eligible for benefits included in the coronavirus-related federal stimulus legislation signed into law.

Bales, now the executive director of the Institute for the Advancement of the American Legal System, says restrictions on who can own law firms have historically inhibited technological advances by limiting the investment needed for testing out innovative approaches to delivering legal services.

“I think, over time, opening up the provision of services by entities where lawyers can combine in ownership with nonlawyers has the greatest potential for technological changes and bringing capital into the legal services industry in a more direct way than is now occurring,” Bales says.

A similar argument was made in a white paper the Stanford Center on the Legal Profession released in late April highlighting what it says would be the many benefits of reforming ABA Model Rule of Professional Conduct 5.4, which prohibits nonlawyers from owning or investing in law firms.

Utah is the state that appears closest to broadly opening up its legal marketplace. In late April, the Utah Supreme Court proposed a series of wide-ranging regulatory reforms that included permitting nonlawyers to own or invest in law firms. The court planned to decide how to proceed on its proposals after receiving public comments through July 23. “This pandemic has highlighted the need for regulatory reform,” Utah Supreme Court Justice Constandinos “Deno” Himonas says.

Meanwhile, sandbox proposals from applicants who believe they could provide low-cost or no-cost legal services addressing issues stemming from COVID-19 were to be considered for expedited approval.

Himonas says this provision was included in light of the pandemic creating significant demand for legal services in a variety of practice areas, including those where litigants are often self-represented.

Courts streaming video
Judicial leaders throughout the U.S. also have helped courts join the broader legal industry in quickly expanding their use of technology in response to COVID-19.

In early April, the Texas Supreme Court for the first time livestreamed an oral argument session in which the lawyers and some of the justices appeared remotely. Meanwhile, the state’s trial courts held video-powered hearings in more than 160,000 civil
and criminal cases from late March to mid-June, according to David Slayton, administrative director of Texas’ Office of Court Administration. Texas Supreme Court Chief Justice Nathan L. Hecht says this speedy adoption of technology would have been unimaginable prior to the COVID-19 outbreak.

“I know if we had tried to get trial courts in Texas to videoconference more, we would be working at it for years before we made any discernible progress,” Hecht says.

By mid-June, more than 40 state supreme courts had responded to in-person arguments being canceled by holding remote hearings, according to court transparency group Fix the Court. Although the report said federal courts were not as quick to adapt, it noted several U.S. appeals courts had permitted livestreaming by mid-April.

Additionally, the U.S. Supreme Court livestreamed oral arguments for the first time in May using teleconference technology. Fix the Court reported that more than 880,000 people clicked on the audio feed of the arguments in President Donald Trump’s tax records case, and the organization conducted a poll that found 70% of respondents would like the live audio to continue post-pandemic. In a June letter addressed to Chief Justice John Roberts, ABA President Judy Perry Martinez encouraged the Supreme Court to continue livestreaming oral arguments during the upcoming October term.

Hecht, who is also president of the Conference of Chief Justices, expresses confidence video streaming technology will be used in Texas courts even after the current pandemic. He predicts other states will likely do the same because of the benefits the technology provides lawyers and court personnel who live in geographically large states or rural areas.

For example, an April videoconference of his court’s oral arguments saved lawyers in one case from having to make a roughly 1,200-mile round-trip trek from El Paso to Austin for a brief appearance. Additionally, Hecht says tech platforms have a greater incentive now to make their tools easier for courts to use. “With the whole American justice system running downhill toward these changes, the pressure on the industry to improve the platforms to meet the needs of the justice system is going to be enormous,” he says.

COVID-19 also has prompted courts to expand their use of e-filing, e-service and online dispute software, among other tools.

The pandemic sparked Michigan to work to more quickly expand statewide an online dispute resolution service for some civil disputes and small claims matters, Michigan Supreme Court Chief Justice Bridget Mary McCormack says. She envisions courts across the country will pursue such technological innovations beyond the near term.

“You need to get to the tipping point before something sticks,” McCormack says. “That tipping point is coming very quickly.”

In June, Michigan Supreme Court Chief Justice Bridget Mary McCormack swore in a cohort of law students via a Zoom teleconference.
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Documentaries are shaping public opinion and influencing cases

BY VICTOR LI

Americans love a good comeback story, and until recently, R&B superstar R. Kelly was in the midst of one of the most unlikely yet successful second acts in recent memory.
Accused of filming himself having sex with an underage girl, the hitmaker was acquitted on charges relating to child pornography in 2008. Kelly largely emerged unscathed. The self-proclaimed “King of R&B” subsequently reclaimed his throne, working with A-list singers, touring and receiving multiple Grammy nominations. Although a 2017 investigation published in Buzzfeed accusing the singer, songwriter and producer of holding underage girls captive in a sex cult resulted in some backlash, including streaming services refusing to promote his songs, Kelly kept his record deal, and more important, his freedom. Kelly may not have been able to fly, like he believed in his famous song, but it sure seemed as if he could do almost anything else, including dodge bullets.

But then the documentary Surviving R. Kelly premiered on Lifetime in January 2019. The six-part miniseries investigated the sex cult allegations while revisiting some older accusations against the singer, including those that led to the 2008 trial and his 1994 marriage to protégée Aaliyah, who was then 15 years old. Containing interviews with several former girlfriends, his ex-wife, family members and associates, the documentary succeeded in clipping Kelly’s wings. Days after the premiere, Georgia and Illinois opened criminal investigations and encouraged more victims to come forward. By the next month, Kelly had lost his record deal and been charged by the Cook County state’s attorney in Chicago with sex abuse. In July 2019, he got hit with federal sex abuse charges as well. At press time, he sits in a Chicago jail awaiting trial.

“I was so shocked that law enforcement got involved,” Surviving R. Kelly executive producer Tamra Simmons says. “We thought, ‘Maybe the families [of his accusers] could pursue legal action if and when they were reunited with their daughters.’ We knew there were certain laws that he had broken. What we didn’t know was if anyone would do anything about it.”

Gloria Allred of Allred, Maroko & Goldberg, who represents several of Kelly’s accusers, called the documentary “inspiring,” adding: “Courage is contagious, and the courage of those that spoke out inspired others. It made them realize, ‘I’m not alone. I didn’t realize he was doing this others. Maybe I can speak out, too.’ When women break out of those chains of fear, many things are possible.”

Surviving R. Kelly is the latest in a string of documentaries that have made an impact—not just in terms of TV ratings, streaming figures or downloads. Popular documentaries such as Making a Murderer (2015), The Central Park Five (2012), Paradise Lost: The Child Murders at Robin Hood Hills (1996), The Staircase (2004) and podsuct such as Serial (2014) and In the Dark (2016) have helped shine a light on inadequacies in our criminal justice system, and in some cases have cast doubt on guilty verdicts,
set wrongfully convicted individuals free, galvanized public opinion, and brought about structural and systemic reforms.

“Legal documentaries reflect the best of what media can do,” says Dan Abrams, chief legal affairs anchor at ABC News. “The influence these documentaries can have is enormous. They can sway public opinion. They can expose injustices, highlight things that have been buried and force action from people in power.”

On the flip side, Abrams cautions that some documentaries can blur the line between journalism and advocacy, giving them a veneer or presumption of legitimacy. “I think the danger can occur when documentarians become advocates and they don’t admit it,” he says. “They just pretend they review the evidence objectively.”

“Courage is contagious, and the courage of those that spoke out inspired others.”

—Gloria Allred

“Legal documentaries reflect the best of what media can do.”

—Dan Abrams

SUNLIGHT

“Welcome to where time stands still. No one leaves, and no one will,” are the ominous opening lines to Metallica’s 1986 song “Welcome Home (Sanitarium).” Those words plus the eerie combination of minor and major chords in the song set the tone for 1996’s Paradise Lost: The Child Murders at Robin Hood Hills and its two sequels, released in 2000 and 2011, respectively.

In the opening scene of the landmark 1996 film, it’s May 6, 1993, and the naked, mangled and disfigured corpses of three 8-year-old boys—Steve Branch, Michael Moore and Christopher Byers—are being fished from a drainage ditch in West Memphis, Arkansas. The sleepy, conservative town is rocked to its core, and residents—to say nothing of the devastated families of the victims—
are determined to make the perpetrators of this heinous act pay.

When police arrest Jason Baldwin, Damien Echols and Jessie Misskelley Jr. and accuse them of being Satan worshipers who committed the murders as part of some dark ritual, the so-called West Memphis Three become the next Manson family.

Seeing the potential of another *Helter Skelter*-type of film, HBO sent filmmakers Joe Berlinger and Bruce Sinofsky to West Memphis to shoot what they all assumed would be a dark tale of youth gone bad.

“We spent the first couple of months with the victims’ families, and that made us continue to believe that this documentary would be about these horrible teenagers who did these horrible things,” Berlinger says.

It wasn’t until the filmmakers got access to the defendants that they realized something wasn’t quite right. For Berlinger, whose credits also include *Brother’s Keeper*, a 1992 documentary he made with Sinofsky about a man wrongfully charged with his brother’s murder; and *Wrong Man*, a documentary series on the Starz network examining claims of wrongful incarceration, his doubts crystallized when he interviewed Baldwin, whom he described as a sweet, shy kid. “I kept staring at his little wrists,” Berlinger recalls. “They were so tiny, and if you believe the prosecution’s story, he’s the one that castrated Christopher Byers with a 10-inch serrated knife. I kept looking at his wrist and thinking there was no way he could have done that.”

After that, Berlinger and Sinofsky called HBO and told them they were having doubts about the defendants’ guilt. “They weren’t necessarily signing up for a wrong-

ful conviction case. That genre didn’t exist the way it does now,” says Berlinger, mentioning 1988’s *The Thin Blue Line*, about the wrongful conviction of Randall Dale Adams for the murder of a police officer, as one of the few legal documentaries from that time period.

“I thought they might tell us to come home, but [HBO executive Sheila Nevins] saw the potential and let us keep filming. The more we dug into it, the less it seemed like they did it.”

Unfortunately for the West Memphis Three, plenty of people believed in their guilt—including the jurors who decided their fates. The three were convicted despite a lack of physical evidence. For Misskelley, a 17-year-old with an IQ in the low 70s, his own words did him in: He confessed while being interrogated for approximately 12 hours without parental supervision or counsel. Misskelley later recanted, with his lawyer arguing that he had been coerced into a false confession due to his mental impairment, fear of the police and fatigue. Nonetheless, the judge sentenced Misskelley to life plus 40 years.

As for the other two, the prosecution focused on the occult, accusing the heavy metal-loving Baldwin and Echols of being Satanists. Despite their denials, Echols got the death penalty, and Baldwin was sentenced to life in prison.

“I believed in the criminal justice system and assumed everything would work itself out either before or at trial,” Berlinger recalls. “I had no real knowledge about the extent of wrongful convictions.”

To handle the West Memphis Three’s appeals, Echols’ wife, Lorri Davis, hired Stephen Braga, then a partner at Ropes & Gray. Braga had just spent 13 years working pro bono on behalf of Martin Tankleff, a New York man convicted of murdering his parents largely on the basis of a false confession. After uncovering evidence pointing to another suspect, Braga got the conviction overturned, and the state chose not to retry Tankleff. Laura Nirider, co-director of the Center on Wrongful Convictions at Northwestern University Pritzker School of Law, served as co-counsel for Echols.

Braga’s research, which included watching *Paradise Lost*, left him feeling that the three had been railroaded. He also felt drawn to the case because of Echols, the charismatic leading star of the film. “When you see the scenes of him in the documentary, you can’t help but want to help this kid,” Braga says.

In fact, as a result of the documentary, many grassroots activists, including celebrities such as Johnny Depp, Eddie Vedder, Peter Jackson and his wife, Fran Walsh, worked with Davis’ Take Action Arkansas group to try to free the West Memphis Three. According to Braga, having celebrities on board helped raise both awareness as well as much-needed funds to pay for DNA tests and other
investigations. Meanwhile, thanks to the internet, Arkansas Take Action began working with people across the globe, crowdsourcing evidence and theories. “By sharing information on the web, it leads to a better understanding of the failings of the case forensically, which then helps the lawyers out as well,” Braga says.

Their work paid off in 2010, when the Arkansas Supreme Court ordered the trial court to grant the three an evidentiary hearing to consider newly analyzed DNA evidence taken from hair samples that matched the stepfather of one of the victims. The following year, the state allowed the three to take Alford pleas, where they pled guilty while maintaining their innocence, and they were released after serving over 18 years in prison.

“The greatest thing to happen to the wrongful conviction movement is sunlight,” Braga says. “This documentary kept the case in the public spotlight. It ensured people would keep watching and led to the fairest result possible. Damien Echols has said that without this documentary, he would have been executed.”

**SERIAL**

**DOUBLE-EDGED SWORD**

Of course, not every documentary yields those kinds of results. Oftentimes, they underscore how difficult it can be to overturn guilty verdicts and expose the public to the challenges and complexities of the legal system.

For example, at press time, Adnan Syed remains in prison, serving life plus 30 years for the 1999 murder of his ex-girlfriend, Hae Min Lee. The acclaimed 2014 *Serial* podcast, as well as the 2019 HBO film *The Case Against Adnan Syed*, cast doubts on his conviction and generated a tremendous amount of publicity. “I think that I could say, unequivocally, that *Serial* helped,” Syed’s attorney C. Justin Brown says. “For instance, we had an alibi witness that was the key to our argument, and we were unable to bring her into the fold. But after she heard how she important she was after listening to *Serial*, she came forward.”

The witness testified at a post-conviction hearing in 2016 that led Baltimore City Circuit Judge Martin Welch to grant Syed a new trial. However, the Maryland Court of Appeals overturned Welch’s order. “What was interesting was that the court of appeals had been sitting on their opinion for many months,” Brown says. “Then they issued their ruling denying us relief the Friday before the HBO documentary was to debut. I don’t believe in coincidence, and it’s impossible to know for sure, but I’ve always been and will be concerned that their opinion was adversely affected by the HBO documentary.”

A film about another high-profile case, *Making a Murderer*, debuted on Netflix in 2015 with 10 episodes spotlighting the 2007 murder convictions of Wisconsin residents Steven Avery and his nephew, Brendan Dassey. The binge-worthy documentary became a cultural phenomenon and was widely covered in the media.

“I think it’s helped and hurt—I’m not sure where it nets out,” Avery’s co-lead trial attorney Dean Strang says of *Making a Murderer*. On the one hand, Strang...
points out that the documentary has raised awareness of the case and—like *Paradise Lost* did for the West Memphis Three—helped Avery’s post-conviction counsel by inspiring many people to crowdfund evidence and sift through transcripts, among other things. “It’s also inflamed those who think Avery is guilty and has caused the state to take an ever-more defensive crouch as to Steven’s efforts to vacate the conviction,” Strang says. “And I think it probably has some of that effect on the judiciary. When operating under spotlight, judges tend to work ever harder to preserve the status quo.”

Perhaps the most memorable scenes in the first season involve Dassey, a quiet, shy 16-year-old with an IQ in the low 70s. Using video from his March 1, 2006, police interrogation, the fourth episode showed Dassey, alone and without counsel or parental supervision, lounging slightly in a loveseat inside a police interrogation room and looking half asleep while being subjected to hours of questioning from two experienced detectives. Eventually, Dassey confesses to helping his uncle rape, murder and then mutilate the corpse of 25-year-old photographer Teresa Halbach—a confession he’d later recant. After he’s finished, essentially giving the police the statement prosecutors would use to send him and his uncle to prison, he puts his hands on his head as if he can’t believe what he’s just done. “They got to my head,” he later explained to his mother.

“I have represented people who have falsely confessed for years,” says Nirider, Dassey’s post-conviction attorney. “I have found it difficult to convince people that it happens. But when people saw that video of Brendan and heard the techniques used on him and saw how he reacted, then it becomes intuitive and changes the narrative into something everyone understands.”

Nirider was planning to become a corporate lawyer before taking Northwestern law professor Steve Drizin’s class on wrongful convictions (the two are currently co-directors of the Center on Wrongful Convictions) and working on Dassey’s appeal as a third-year law student. She credits both *Making a Murderer* and *Paradise Lost* for helping raise awareness of false
confessions and how they can send the wrong people to prison. The outcry over her client’s treatment resulted in a massive clemency campaign for Dassey in late 2019, including an online petition signed by tens of thousands of people worldwide, as well an open letter to Wisconsin Gov. Tony Evers signed by 250 lawyers, politicians and people who have given false confessions.

However, all of their efforts were for naught because Evers declined to grant Dassey clemency. “That was a difficult moment because of the global groundswell of support that there was,” says Nirider, who notes Evers followed the advice of his pardon advisory board. She hopes a direct appeal to the governor, a former educator, will be more successful.

Avery, a prime suspect due to the fact that he was the last person to see the victim alive, her remains and car were found on his property, and her car key was recovered in his home, among other things. Additionally, he takes issue with the documentary’s theory that the police set up Avery at the same time they ignored or mishandled key evidence, comparing it to O.J. Simpson’s defense.

When it comes to Dassey, however, Abrams agrees that he is probably innocent. Like many others, he watched the tapes of Dassey’s interrogation and believes his lack of sophistication and understanding of his situation allowed him to be tricked, manipulated and coerced into giving a false confession.

“I think the most important thing is transparency—accuracy,” Abrams says. “Unfortunately, it’s not that I think these major documentaries are getting facts wrong on a regular basis. Most of them get them right. It’s just a question of what facts do they highlight, and what do they omit?”

The 2018 podcast In the Dark by APM Reports—the investigative arm of American Public Media—examined the case of Curtis Flowers, a man tried six times for a 1996 quadruple murder in Mississippi. Flowers has been convicted four times, but each conviction was reversed on appeal due to prosecutorial misconduct.

Lead reporter Madeleine Baran tried to maintain accuracy and transparency throughout the entire process, pointing out: “We did not go into the reporting for this piece to try to exonerate him. There wasn’t something

**ADVOCACY OR ACCURACY?**

Obviously, documentaries only present a fraction of the complete overall narrative. As Berlinger points out, he and Sinofsky shot over 200 hours of footage for the first Paradise Lost film, which clocked in at around 2½ hours. Even multiepisode documentaries such as Making a Murderer capture only a small fraction of the entire story.

“No documentary film can ever be the complete, objective truth of any situation,” Berlinger says. “It’s a heightened reality because of the process of filmmaking. You have to trust the filmmaker to give you the emotional truth, not the literal truth, of the situation.”

In fact, Abrams has been critical of Making a Murderer, arguing the documentary left out or overlooked facts in order in order to advocate for Dassey and Avery.

For instance, Abrams says any rational police officer would have considered
we had to prove or needed to be true. If I was a lawyer or something like that, it would be different.”

Flowers was convicted for a fourth time in 2010 and sentenced to death. The U.S. Supreme Court in 2019 overturned his sentence after finding that the prosecutor systematically excluded black jurors in violation of *Batson v. Kentucky* (1986) and ordered a new trial. In the *Dark’s* reporting was cited in the briefs.

In 2019, Flowers was granted bail with his defense lawyers citing *In the Dark* numerous times—particularly when it came to uncovering evidence incriminating another possible suspect. Baran recalls being stunned that the judge seemed so sympathetic to Flowers, even going so far as to call him a “person with a significant chance of acquittal.”

“That seemed astonishing considering he’d always been so receptive to the state and their arguments,” Baran says. “Instead, he seemed aggravated with the state because he didn’t have the whole story.” Flowers is currently free on bail while the state (with the prosecutor recused) decides whether to try him for a seventh time.

On the other hand, when French filmmakers decided to make a documentary examining the murder trial of accused wife-killer Michael Peterson of Durham, North Carolina, there was no pretense of impartiality. The crew agreed to work for the defense to get access to the defendant, a condition Peterson’s lawyer David Rudolf insisted on as a means to protect attorney-client privilege. As part of the deal, the crew was required to send their dailies to France every night so they couldn’t be subpoenaed by the prosecution. The resulting documentary was 2004’s *The Staircase*, which originally aired on television networks and was so popular that it spawned two sequels. It was rereleased on Netflix in 2018.

Rudolf always had subscribed to the belief that defendants should keep their mouths shut until trial, but his client saw the potential of the documentary immediately. “Michael believed the powers that be that existed in Durham would be out to get him,” Rudolf says. “He thought having a documentary film crew in town for the trial would perhaps temper the zealousness of those out to get him.”

Peterson was convicted, but he was granted a new trial in 2011 after a judge found that a forensic expert who testified for the prosecution had given false and misleading testimony while exaggerating his credentials. Peterson took an Alford plea in 2017 and was released. While the original documentary left the question of Peterson’s guilt open because it centered entirely on his case and his lawyers, it resulted in a wave of sympathy and support. In one of the later documentaries, Peterson even gets emotional and hugs members of the film crew for helping him secure a new trial.

**REMEMBERING THE FORGOTTEN**

When *The Central Park Five*—directed by Ken Burns, his daughter Sarah and her husband, David McMahon—was released in 2012, the five men who were convicted as teenagers for the brutal rape and attempted murder of a jogger in Central Park already had been exonerated. However, they had largely been forgotten about and had

Michael Peterson (left) gets a congratulatory embrace from attorney David Rudolf (right).

From left to right: David McMahon, Sarah Burns and Ken Burns
only been able to tell their side of the story in court pleadings and proceedings. When they filed a lawsuit against the city of New York in 2003 for malicious prosecution and discrimination, among other things, it seemed as if the city already had moved on.

“We tried to get some sort of public awareness of this case,” says David Kreizer, a New York attorney who represented Korey Wise, one of the Central Park Five. “We tried calling every news outlet, and they told us it was old news.”

The documentary, however, put the issue back squarely in the public eye, and Burns himself told the New York Times in 2012 that his goal was to get the city to settle. Two years later, the city finally settled with the Central Park Five for $41 million.

Time will tell what happens to both R. Kelly and his accusers. For his part, Kelly has denied all of the allegations against him. In one of his only public appearances before being imprisoned, Kelly condemned Surviving R. Kelly and told CBS News’ Gayle King that he was being railroaded. “They are lying on me,” he said, breaking down in tears while categorically denying he’s ever had sex with underage girls and maintaining that he would have to be pretty stupid to start a sex cult considering his past. His attorney, Steven Greenberg, did not respond to a request for comment.

For Surviving R. Kelly executive producer Simmons, the documentary already has helped some of his accusers start the healing process while hopefully providing a beacon of hope for future generations. “There were so many who were scared to speak out against this man because they weren’t sure they’d be heard,” says Simmons, who, along with her team, released Surviving R. Kelly Part II: The Reckoning, which dealt with the fallout from the first part—both for Kelly and his accusers—in January 2020. “As an African American woman, I wanted to make sure my daughter and all our daughters knew our voices did matter.”

R. Kelly turns to leave after appearing at a hearing at the Leighton Criminal Courthouse in Chicago on Sept. 17, 2019. He is facing multiple sexual assault charges and is being held without bail.
Flashbacks to Russian interference in the 2016 election loom large over November’s presidential contest. But a threat more insidious than foreign meddling has long been operating within U.S. borders: voter suppression. A study on the 2018 midterm elections by the Center for American Progress, a nonpartisan policy institute, reported “severe voter suppression” in states with highly competitive races, including Florida, Georgia, Texas and North Dakota.
This year marks two major milestones in United States voting history—the 150th anniversary of the passage of the 15th Amendment, which gave African Americans the right to vote, and the 50th anniversary of the Voting Rights Act Amendments of 1970, which abolished literacy tests and other methods of disenfranchising voters.

But despite these legislative achievements, it wasn’t long until end runs were made around voter protection laws, and those efforts are alive and well, election law attorneys and voting rights advocates say.

Today there are a variety of methods of suppression: onerous voter registration rules, voter purges, photo ID requirements, misinformation, harassment, poll closures, shortened voting hours and days, long lines and a perennial favorite—gerrymandering. Many modern practices, voting rights advocates say, are just creative ways of accomplishing the same goal.

“Tactics are the same as they were in 1865,” says the historian Carol Anderson, chair of African American studies at Emory University and author of the 2018 book One Person, No Vote: How Voter Suppression Is Destroying Our Democracy.

Taking away the vote

Poll taxes have long been illegal, but their specter cropped up in 2019, shortly after Florida passed Amendment 4 to its state constitution. The measure extended the vote to ex-felons, but the state soon tacked on a debilitating condition: Returning citizens would first have to pay any outstanding fines and fees, regardless of their financial ability to do so. Voting rights advocates branded the requirement a modern-day poll tax, and in February the Atlanta-based 11th Circuit unanimously agreed, finding the law unconstitutional, a determination affirmed by the trial court on remand.

Florida’s governor appealed and in July was granted an en banc rehearing by the 11th Circuit, which has become one of the most conservative appellate courts in the nation after judicial appointments by President Donald Trump. The Aug. 11 hearing date and uncertainty about how quickly the court will rule jeopardizes voting rights restoration for Florida’s returning citizens.

Purging voter rolls is another tried-and-true method of suppression. The method is less overt, with discriminatory purges often cloaked in an alleged need to “update.” The Brennan Center for Justice at New York University School of Law found that between 2016 and 2018, 17 million people were stripped of their status as registered voters.

Purges operate under the guise of fraud prevention, a purpose few would oppose were it true. However, Anderson contends claims of endemic fraud are “a lie perpetrated to justify voter suppression.” In the last decade, 25 states used the fear of voting fraud to enact laws that make it harder for people to vote.

This year, an unforeseen pandemic injected a potentially lethal dose of fear into the voting process and opened the door for another wave of voter suppression. COVID-19 has heightened the demand for mail-in voting, which advocates hope will increase participation, and which Republicans claim will increase voter fraud.

Wisconsin became ground zero for post-COVID-19 voting rights when the state held its April primary, the final contested Democratic presidential primary of 2020. Mail-in voting offered protection from exposure, but thousands of Wisconsin voters did not receive absentee ballots before the deadline. Desperate legal and political maneuvers to extend the deadline, change
the election date and suspend in-person voting all failed. At the 11th hour, the U.S. Supreme Court ruled against an extension for absentee voting, and thousands of Wisconsin voters braved long lines and the coronavirus to cast their ballots.

“Wisconsin put voters in a coronavirus firing squad,” Anderson says. “Their choice was, ‘I can vote and die, or I can stay home and live.’”

Democratic National Committee chairman Tom Perez, in an April interview on MSNBC’s PoliticsNation, called the Wisconsin debacle “voter suppression on steroids.”

In light of the pandemic, voting rights activists have called for states to hold all elections by mail, as do Colorado, Hawaii, Oregon, Utah and Washington. In those states, a ballot is automatically mailed to every registered voter at least two weeks before the voting deadline. In about two-thirds of the states, voters can request a mail-in ballot without providing any justification.

Voter fraud is a favorite Twitter topic for President Trump, who opposes mail-in voting even though he cast an absentee ballot in the Florida primary. On April 8, Trump tweeted that “Democrats are clamoring” for mail-in voting and claimed the practice “doesn’t work out well for Republicans.”

He went further in a pair of May 20 tweets. After Michigan Secretary of State Jocelyn Benson announced all 7.7
million Michigan voters would receive absentee ballot applications for both the August primary and the November general election, Trump tweeted that she was doing so “illegally” and threatened to halt federal funding to the state. Hours later, Trump threatened to “hold up funds” to Nevada, which had sent out absentee ballots for its June 9 primary election.

Legal challenges
Some voter suppression methods cut a wide swath, while others are leveled at specific minority groups.

A 2016 opinion by the Richmond, Virginia-based 4th U.S. Circuit Court of Appeals, North Carolina State Conference of the NAACP v. Patrick L. McCrory, invalidated a North Carolina law that required voters to show photo ID at the polls.

The judge said the law had been adopted with “discriminatory intent” and that its provisions “target African Americans with almost surgical precision.”

But the appeals court ruling didn’t put the matter to rest. North Carolina passed a voter ID law put on the ballot in 2018, and more lawsuits followed. In 2019 and 2020, federal and state courts issued preliminary injunctions blocking implementation of the law, which activists expect will remain in place through the November elections.

The most profound legal blow to voting rights in the modern era came seven years ago in the U.S. Supreme Court case Shelby County v. Holder, which Anderson says “gutted” the Voting Rights Act. She notes that two hours after the ruling came out, Texas implemented a strict voter ID law, and Alabama followed within a few months. “These legislators wrote the laws based on the types of identification that minority voters typically do not have,” she adds.

The Shelby ruling allows voting districts with documented track records of racial discrimination to change voting requirements without first obtaining approval from the Civil Rights Division of the U.S. Department of Justice (a policy known as preclearance) or petitioning the U.S. District Court for the District of Columbia, as previously required under the act.

Voting rights advocates strongly condemn Shelby for eliminating oversight and disingenuously declaring racism a relic of the past. Since the court’s ruling, about half the states passed laws targeting minority voting rights.

“Where we are now has me seething and frustrated because none of this had to be,” says Anderson, who Rep. John Lewis, D-Ga., at a 2013 press conference outside the U.S. Supreme Court before the justices heard arguments in voting rights case Shelby County v. Holder.
considers Shelby as wrongly decided as Plessy v. Ferguson. She says the 2013 opinion written by Chief Justice John G. Roberts Jr. “reshaped the legal and political landscape of America” in detrimental ways.

Vanita Gupta, president and CEO of the Leadership Conference on Civil & Human Rights, says that during her tenure in the Obama administration, “We were dealing with the devastating blow of Shelby, but the tools we had were diminished significantly. The Civil Rights Division [of the DOJ] was trying to be on top of protecting voting rights around the country. The states enacted restrictive voter ID laws. We engaged in litigation to stop the tide of racially discriminatory policies enacted in the states. It was a very active docket.”

Today, she says, “The Justice Department has halted a lot of its voting rights enforcement and has been MIA in the area of elections and voter rights.” She points to a Supreme Court brief filed by the government in Husted v. A. Philip Randolph Institute. “The DOJ argued that it should be easier for states to purge registered voters from their rolls—reversing not only its long-standing legal interpretation, but also the position it had taken in the lower courts in that case.”

But even in the wake of Shelby, there are some glimmers of hope for voting equality. The Voting Rights Advancement Act of 2019 passed the House in December and is pending before the Senate Judiciary Committee. It is not expected to go for a floor vote this year, but it may pass if Democrats regain control of the Senate in November. The bill would establish new criteria to fill the preclearance gap Shelby left in the Voting Rights Act.

Myrna Pérez, director of the voting rights and elections program at the Brennan Center for Justice, testified before Congress in September 2019 on the Justice Department’s inaction.
restoring the Voting Rights Act, calling it “the engine of voting equality in our nation.”

Targeting the margins
Marginalized and vulnerable populations can be stealth targets for voter suppression. Residency requirements have been a perpetually vexing issue for Native Americans because reservations typically do not have streets with numbered homes.

At its midyear meeting in February, the ABA House of Delegates passed two resolutions urging states to remove voting barriers for Native Americans and Alaska Natives. One recommended changes in residency requirements that would make it easier for voters without street addresses to use alternative forms of ID to register. The same month, North Dakota agreed to a binding consent decree ensuring Native Americans can vote without an ID that shows a residential address.

Jacqueline De León, who is a member of the Isleta Pueblo and the ABA Standing Committee on Election Law, says voting rights violations for Native Americans are underreported. A staff attorney for the Native American Rights Fund in Boulder, Colorado, she testified in February before the Committee on House Administration’s Subcommittee on Elections in a hearing on barriers facing Native American voters.

De León notes that Washington state has its own Native American voting rights act. It permits a tribe to designate one building per precinct that voters can use as a residential address. At that location, voters can register to vote and can pick up or drop off a ballot. The bill received bipartisan support, even from high-ranking Republican officials such as Washington’s secretary of state.

“It’s a good solution to break the logistical challenges” for those who do not have a post office in their community, she says. “The Native American vote can influence elections on the margin, especially when they’re close. So the [voter suppression] tactics are stronger there.”

Even the physical conditions of a polling place can be enough to give Native Americans the clear message that even if their vote is legally protected, it isn’t particularly welcome. De León recalls that a few years ago in South Dakota, a polling location in a largely Native American precinct was made from a “repurposed chicken coop.” Chicken feathers were scattered all over the floor, and there was no bathroom.

“The voters felt disrespected,” she says. Other situations can only be perceived as threatening, says De León, who has witnessed “poll workers staring at Native American voters while the sheriff is outside, visibly fingering his gun.”

Protecting the vote
Phoenix criminal defense attorney Adrian Fontes was similarly alarmed when he drove past a polling location in a largely Latino precinct on the day of Arizona’s March 2016 primary. Fontes saw what struck him as a thinly veiled attempt at voter suppression: a legion of steely-eyed police officers positioned at intervals throughout a line of voters that stretched block after block. Nearly five hours later, some of the same people were still in line.

“Not in my town,” he vowed to himself. “This is not America.” Fontes, who resides in what he calls “the Trumpiest county in this country”
had a busy law practice when he threw his hat in the ring for county recorder, the office that oversees elections in Maricopa County. To his shock—and just about everyone else’s—he won.

Fontes enacted election policy reforms that vastly impacted Maricopa County, which, with nearly 4.5 million residents, is the fourth most populous county in the United States. In its 2018 elections, 40 “vote anywhere” centers—locations where any registered voter can cast a ballot, no matter where they live in the county—opened, and tens of thousands of previously denied voters were added to the rolls.

A study by political science professors at Dartmouth College and the University of Florida found that African Americans and Latinos in Florida who voted by mail were twice as likely to have their ballots rejected as white voters. Despite this fact, mail-in voting is gaining momentum.

But it’s not a panacea—absentee ballot measures have boosted voter participation in some states but not in others.

Court challenges are pending in Florida and other states where voters have to pay their own postage—including some mail-in ballots that require more than one 55-cent stamp. That may not seem unreasonable for the electorate at large, but it can be a bar for low-income voters or those who live in remote locations where stamps are not easily obtainable.

In California, Oregon and Washington, however, state election officials are legally required to include prepaid postage on ballots, and in April the American Civil Liberties Union filed a complaint on behalf of Black Voters Matter challenging Georgia’s refusal to provide prepaid postage for ballots.

Georgia already faced allegations of voter suppression and mail-in irregularities after the 2018 gubernatorial election.

Attorney Stacey Abrams, a Democrat, narrowly lost her bid for the governor’s seat to Republican Brian Kemp, who by virtue of his then-position as Georgia’s secretary of state was in charge of overseeing the election. Calling Kemp an “architect of voter suppression,” Abrams lost the election by less than 55,000 votes (1.4 percentage points) and attributed it to the closure of polling locations in minority neighborhoods, rejection of absentee ballots and purging of voter rolls.

Stakes ramping up
Anderson foresees heightened attacks on voting rights in the November election. She expects some of it will be aimed at voting blocs that have not until recently been considered a threat. “College students are on today’s voter hit list, too,” she says.

Students tend to be liberal and favor the Democratic Party, according to a 2019 survey by the Institute of Politics at Harvard University’s Kennedy School of Government.

Results showed that 45% of college students ages 18-24 identified as Democrats, 29% as independents and 24% as Republicans.

Texas, New Hampshire, Wisconsin and North Carolina have been trailblazers in efforts to quash the student vote. Tactics have included requiring out-of-state students to have in-state drivers licenses to register, inconveniencing students by removing ballot locations from college campuses and gerrymandering.

Some states throw up significant obstacles to inhibit out-of-state college students from voting where they live for school, including arduous proof of residency requirements, a move activists call de facto gerrymandering.

A particularly egregious case of gerrymandering came to light in a 2019 redistricting that split the historically Black North Carolina A&T State University between two congressional districts, diluting the students’ voting power.

A September 2019 study by Tufts University showed a sharp spike in voter participation among students. The number of eligible students who cast ballots doubled in the last midterm elections (from 19% in 2014 to 40% in 2018).

So if campus engagement remains high, the student voting bloc may have a significant impact on the November elections. Its potential effect, and that of other voting groups on the radar, however, hangs in the balance with the success or failure of voter suppression efforts.

“Not in my town. This is not America.”
— Adrian Fontes

Darlene Ricker, a legal affairs writer and book editor based in Lexington, Kentucky, is a former staff writer and editor for the Boston Globe and the Los Angeles Times.
Telling Untold Stories

Two young Native American lawyers call for action on missing and murdered indigenous women

BY AMANDA ROBERT

Lauren van Schilfgaarde and Heather Torres introduced the ABA to the missing and murdered indigenous women crisis in February by first sharing the stories of those who suffered.

One involved Savanna LaFontaine-Greywind, a 22-year-old Spirit Lake tribal member who was eight months pregnant when she disappeared from her Fargo, North Dakota, apartment building in 2017. Eight days later, her body was discovered in the nearby Red River. Her baby, who had been cut from her womb, was found alive at the home of a neighbor, Brooke Crews. Crews pled guilty to conspiracy to commit murder and kidnapping, and she was sentenced to life without parole.

“It’s really important to humanize this crisis because the data itself is daunting,” says van Schilfgaarde, the director of the San Manuel Band of Mission Indians Tribal Legal Development Clinic at the UCLA School of Law. “So much so that it’s not even fathomable, and so for me especially, it was important to include stories that were happening in real time as we were drafting this resolution.”

Those stories resonated with the ABA House of Delegates. At the midyear meeting in February, the body overwhelmingly approved Resolution 10A, which urges federal, state, local, territorial and tribal governments to “acknowledge and prioritize responding to the Missing and Murdered Indigenous Women (MMIW) crisis.”

It also calls on Congress to make accurate national data collection on the MMIW crisis a priority and give tribal access to those databases; develop inter-jurisdictional protocols for tracking and responding to the crisis; and provide training for law enforcement and funding for tribal justice systems.

Both van Schilfgaarde and Torres, the program director at the Tribal Law...
and Policy Institute in West Hollywood, California, have drafted resolutions for the ABA Section of Civil Rights and Social Justice’s Native American Concerns Committee, but they consider this one the most difficult. Not only did the women’s stories weigh on them, but the data—which has mostly been collected by tribes themselves—demonstrated a dire emergency.

American Indian and Alaska Native women are nearly twice as likely as non-Hispanic white women to have experienced rape in their lifetime, according to a study cited by the report that accompanies Resolution 10A. And in some U.S. counties, per a 2008 National Criminal Justice Reference Service report, indigenous women were murdered at a rate that was more than 10 times the national average.

“There can no longer be inaction,” Torres says. “We are seeing even with preliminary data that has been done by indigenous folks that it is an issue, and it needs to be moved on now, even while we are trying to collect more data and get the mechanisms in place to share that data.”

Crossing paths

Torres and van Schilfgaarde were connected long before they began researching the MMIW crisis.

Torres is a member of the San Ildefonso Pueblo, which is outside of Santa Fe, New Mexico, and she is also a descendant of the Navajo Nation. She grew up in Southern California, where her great-grandparents were sent to boarding school for assimilation in the 1920s.

She earned her bachelor’s degree in English and American Indian Studies from UCLA. She is also a 2017 graduate of the UCLA School of Law, where she focused her studies on federal Indian law.

Torres was the director of Native Student Programs at the University of Redlands before moving in 2019 to the Tribal Law and Policy Institute, where she worked as a fellow after law school. She now helps provide training and technical assistance to tribal nations as they develop their governance structures.

Van Schilfgaarde is a member of the Cochiti Pueblo, near the San Ildefonso Pueblo. She was born in Santa Fe, raised in Albuquerque and graduated from Colorado College in Colorado Springs with a bachelor’s degree in religion.

She also graduated from the UCLA School of Law and joined the Tribal Law and Policy Institute after graduating in 2012. She served as the director of its Tribal Healing to Wellness Court Training and Technical Assistance Project before leaving last year to supervise clinic projects at her alma mater that provide legal assistance to native nations.

Torres and van Schilfgaarde first met at the Tribal Law and Policy Institute, where they focused on preventing violence against native women. They continue to work together as members of both the ABA and the National Native American Bar Association.

“There are only a handful of places that are open and value and prioritize these types of issues, and so it’s funny we’re connected; but in another way, it’s not a coincidence,” van Schilfgaarde says. “Of course we end up in the same school and in the same organization, because those are the spaces that are having these conversations.”

Fast action

The story behind Resolution 10A begins with ABA President Judy Perry Martinez and Secretary Mary Smith’s trip to the Coushatta Tribe in southern Louisiana in December.

While there, Martinez heard about the MMIW crisis. She realized that although the ABA has a long history of supporting Native American interests, it did not have policy related to the crisis. “When I looked around the room and met with members of the Coushatta Tribe and realized that they were expressing not only concerns but a passion for having the issues involved in these untold stories addressed, I realized that the American Bar Association could assist them in that struggle,” she says.

Smith, an enrolled member of the Cherokee Nation, returned to the Native American Concerns Committee and asked van Schilfgaarde and Torres if they could quickly write a draft. She also asked the Massachusetts Bar Association to sponsor the late resolution.

They agreed, and by the ABA Midyear Meeting, they had received support from numerous entities and other affiliate bar associations.

“The comments I heard from the Massachusetts bar is that it was one of the most well-written resolutions they had ever seen, especially given that it was drafted only in a couple weeks, and some people work for months or even years on their resolutions. It shows the incredible job that Heather and Lauren did,” Smith says.

Torres and van Schilfgaarde hope the ABA can soon advocate for specific legislation, including Savanna’s Act, named for LaFontaine-Greywind. Among other things, it directs the attorney general to develop protocols that address MMIW cases.

Van Schilfgaarde adds that action is especially needed now, as the pandemic has likely increased domestic violence.

“We need to transition to, ‘What does life look like moving forward?’” she says. “There are still murder cases and missing cases that are not solved. What are we going to do about it?”

Torres also helped draft Resolution 116 for the midyear meeting. It urges Congress to reauthorize the Violence Against Women Act or similar legislation that provides funding for tribal governments and recognizes “the inherent authority of American Indian and Alaska Native governments to prosecute non-Indian perpetrators of crimes arising from gender-based violence.”

The House of Delegates overwhelmingly supported this measure.

“I am a brand-new baby lawyer, just out of getting barred, and I’m already seeing so much of the work that the ABA is undertaking have an impact,” Torres says. “I really see the ABA as an advocate for tribal nations, and that is an immense reason why I am already so committed.”
Family Ties

Father-daughter duo serves together in ABA leadership

BY AMANDA ROBERT

Michaela Posner wasn’t even 6 months old when she attended her first ABA meeting.

Her father, Michael Posner, was active in the Section of Labor and Employment Law. He told his wife, Cassandra, that its 1997 midwinter meeting would be in Puerto Vallarta, Mexico. They decided to go as a family to see how their daughter traveled.

“She handled it beautifully,” he says. “And after that, every meeting, we took Michaela with us. She has been an ABA baby for a long time.”

“It was a family vacation with a name badge,” Michaela Posner adds.

More than 20 years later, the father-daughter duo from Southern California has taken their ABA participation to a new level. Michael Posner was serving as a section delegate to the House of Delegates in April 2019 when Michaela Posner was elected as the law student at-large on the Board of Governors.

“It has taken me a lifetime to get to the House of Delegates, and now I have to answer to my daughter, who is on the Board of Governors,” says Michael Posner (right) of Michaela Posner. “It’s pretty unique.”

Like minds

Michael Posner started his career as a junior high school teacher, but he decided to pursue law after a mentor suggested he consider his future.

“He said, ‘Look around, look at all of the guys who teach and are 20 years into it, and ask yourself if that’s where you want to be,’” he says. “That was a shock, because I had no ambition to go into administration.”

He graduated from Loyola Law School in Los Angeles in 1968 and got a job at the Los Angeles City Attorney’s Office. He handled criminal cases for about a year until a judge asked if he’d ever thought about being a labor lawyer. He hadn’t, but he realized he felt strongly about protecting workers and unions.

Michael Posner says he is “still widely enthused” with his practice. Although he retired from Posner & Rosen, the firm he co-founded in Los Angeles in 1985, he continues to represent long-time clients such as Pasadena’s firefighters union.

Michaela Posner remembers always meeting her father at the door when he came home from work. Even as a kid, she knew she wanted to be just like him.

“My mom was cleaning out the cupboards in the house last year and found a paper from 2002 that said, "It has taken me a lifetime to get to the House of Delegates, and now I have to answer to my daughter, who is on the Board of Governors," says Michael Posner (right) of Michaela Posner. “It’s pretty unique.”

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ABAJOURNAL
with horrible spelling, ‘I want to be a lawyer so I can help people who have been fired,’” she says. “I think that’s so funny because at that point, it was, ‘I just want to do what my dad does.’”

“But now I genuinely care about it, and I still want to do the exact same work for the exact same reason.”

She went with her father to his office beginning in middle school and attended Cornell University to study industrial and labor relations. After graduating in 2018, she started at the University of California at Irvine School of Law.

Michaela Posner has often helped her dad prepare clients for Skelly hearings, which are provided to public employees in California before they receive discipline. During her first semester of law school, she also assisted in filing an unfair practice charge to the Public Employment Relations Board.

Last summer, as she clerked for an administrative law judge at the Equal Employment Opportunity Commission in Los Angeles, her dad again asked for her help with that case. Since she had already done the research, he convinced her to draft the brief.

“The experience she had as a law clerk was so profound because the draft she produced was unbelievably good,” he says. “We had just a few conversations and modifications, submitted the brief, and we won.”

Michaela Posner was only 90 miles away from her parents until COVID-19 forced students off campus in March. She returned home to finish her 2L year.

“I’m the kind of person who definitely prefers a physical learning environment, so finishing up the semester online was far from ideal. Although frankly, I’m just happy I was able to finish and stay on track to graduate next year,” she says.

Taking the lead

After growing up around the ABA, Michaela Posner knew she would join as soon as possible. When she saw the open Law Student Division position that would allow her to sit in the House of Delegates, she couldn’t resist that opportunity.

“I thought it would be fun to be in the House with my dad because you sit by state, and I would finally be back in California after four years in New York,” she says. “I said, ‘Well, I’m going to go for it.’”

She attended her first Board of Governors meeting in Missoula, Montana, in June 2019. In a role reversal, she invited her parents.

“After all of the years of my wife and I attending ABA meetings and taking Michaela, she came to us and said, ‘Would you guys like to come with me to Montana?’” Michael Posner says. “So we did.”

As they plan to attend the ABA’s first virtual annual meeting in August, the Posners say they will most miss seeing their friends and colleagues in person. Although Michael Posner expects that remotely convening the 600-member House will be an interesting experience, Michaela Posner hopes more law students will participate if they don’t have to pay to travel to the meeting.

When considering why they became so active in the ABA, both contend it was to help direct the future of their profession.

“If you sit on the sidelines, you have no voice in it,” Michael Posner says. “I’ve always been the type of person where I can’t just sit and listen. I like to be a participant.”

“The country looks to the ABA to speak on behalf of the profession,” Michaela Posner continues. “In order for that voice to be powerful and accurate, we need people to get involved. And it’s not like there is a lack of opportunity to step up.”

After her one-year term ends in August, she will become the Law Student Division liaison to the Section of Labor and Employment Law—and continue to serve alongside her dad.

“We can sit on the labor and employment council together,” Michaela says, looking at him. “You just can’t get rid of me, sorry.”
How the ABA has adjusted to the COVID-19 pandemic

BY AMANDA ROBERT

In mid-March, as COVID-19 showed no signs of slowing down, the American Bar Association put its plan for pushing through the pandemic into action.

“First, we needed to make sure we did our best to ensure the safety and health of employees and volunteers,” ABA President Judy Perry Martinez says. “That was the primary focus.”

By March 12, the ABA had rescheduled or canceled the in-person portions of nearly a dozen major events, including ABA Day, the annual lobbying effort that draws hundreds of members to Capitol Hill. By the following week, 98% of staff was working remotely, a measure that ABA Executive Director Jack Rives says was anticipated and planned for by the association.

“We had practiced various scenarios, including a pandemic,” he says. “We had good plans, and we were able to implement them. Our staff was prepared, and we found that we could transition to a remote working environment en masse.”

In addition to changes in ABA operations, Martinez says association leaders realized they had an opportunity to be “out front with regard to looking at the legal needs and responding to them.”

For Martinez, who is of counsel with Simon, Peragine, Smith & Redfearn in New Orleans, it paralleled her experience after Hurricane Katrina hit the Gulf Coast in August 2005.

“It brought forth new emerging challenges and needs that people were experiencing, but also when the waters receded, it exposed societal problems and challenges—many of which have legal solutions—that had not been addressed,” she says. “And so it is incumbent upon us as the American Bar Association to make sure we immedi-ately focus our attention on that as well as on the needs of our members.”

**Being of service**

The ABA launched its Task Force on Legal Needs Arising Out of the 2020 Pandemic on March 13 to address legal challenges facing Americans during the public health crisis and make recommendations on how to overcome those challenges.

The task force is chaired by James Sandman, the former president of the Legal Services Corp., the largest funder of civil legal aid to low-income Americans. It includes representatives from ABA entities and leaders from other organizations, including the Conference of Chief Justices and the National Center for State Courts.

It also seeks to mobilize a larger network of pro bono attorneys. “We need a call to action like we have never needed before in order to address what we know will be a surge in legal needs in the months and years ahead,” Martinez says. “We are calling upon lawyers across the country in what we know are challenging times for them in their practices, as well as in their obligations to their families and their communities, to step up and serve.”

The task force’s website includes more information about pro bono efforts and resources related to remote service delivery, court closings and rule changes in addition to current legal issues related to COVID-19.

The ABA’s ongoing pro bono initiatives include ABA Free Legal Answers, a virtual clinic that connects volunteer attorneys to income-eligible users with specific civil legal questions, and the new Disaster Relief Pro Bono Portal. The Young Lawyers Division’s Disaster Legal Services Program and Paladin, a justice technology company, introduced the portal in April to provide more opportunities to attorneys who want to help people impacted by COVID-19 and other disasters.

On May 13, the ABA announced the complementary Coordinating Group on Practice Forward, which aims to help members identify both challenges
and opportunities now facing the legal profession and justice system.

Bill Bay is the chair of the House of Delegates until the close of the 2020 ABA Annual Meeting, and he is a partner with Thompson Coburn in St. Louis. Bay and Laura Farber, a partner with Hahn & Hahn in Pasadena, California, co-chair the group. Through August 2021, it will distribute existing ABA resources, including seminars and publications, as well as work with ABA entities and state, local and affinity bar associations to provide additional information on how to best practice law.

The group also plans to work with experts in social psychology, health, economics and technology.

“We want to bring in expertise, whether it’s someone in the ABA or outside of the ABA, to help understand what we don’t know yet about how the legal profession is being transformed at this moment as a result of the pandemic—and how we make sure we come out of this stronger,” Martinez says.

Several other ABA entities, including the Section of Civil Rights and Social Justice, have responded to COVID-19 by offering webinars that explore how the pandemic underscores critical legal issues. The Business Law Section, Health Law Section and Solo, Small Firm and General Practice Division are also among those that have collected COVID-19 resources and provided them to members.

In addition to other efforts, the Commission on Law and Aging published a “special coronavirus edition” of its journal Bifocal in May, and the Commission on Lawyer Assistance Programs created a list of mental health resources to help judges, attorneys and law students prioritize their well-being during the pandemic.

Meeting needs
By mid-June, the ABA had either canceled or rescheduled nearly 100 in-person meetings.

The ABA’s executive director explains that this significantly impacted the association, and as a result of lower revenue projections, the ABA now needs to cut $9 million from the general operations budget for fiscal year 2021. The Board of Governors is expected to approve the budget at the ABA Annual Meeting, but Rives adds that member services should not be affected.

“We know it is critical to provide good value to our members, and across the board, I do not believe that members will see much, if any, impact in the aspects of membership they value,” he says. “That is something we have been very carefully analyzing as we considered reductions in our expenses.”

Rather than canceling, several of the ABA’s spring and summer events went entirely virtual for the first time. This included ABA Day in April and Law Day in May. The 2020 ABA Annual Meeting, scheduled to take place from July 29 to Aug. 4, will also be held virtually (ambar.org/annual).

Brian Henry, chair of the Antitrust Law Section, says plans for its spring meeting were altered “when it became clear that even if we had the meeting, no one would be there.”

From April 17 through May 1, the section hosted more than 30 free events, including a livestreamed keynote presentation and virtual receptions. It used the website that hosts the section’s Our Curious Amalgam podcast and released new podcast episodes and videos each day.

“There are very high standards for our in-person spring meeting, and the trick was taking those high standards and applying them online,” says Henry, vice president and senior managing counsel at the Coca-Cola Co. in Atlanta. “We agreed that if we’re going to do this, we have to make it as professional as in-person, as springlike as possible.”

Henry says the virtual spring meeting exceeded expectations, drawing more than 12,000 visits. Plus, he adds, those numbers will increase as people continue to access content still available online.

The Real Property, Trust and Estate Law Section also offered its National CLE Conference virtually. Chair Jo-Ann Marzullo says the section reduced the registration fee; offered 35 live programs on May 14 and 15; and then made those programs available on demand for two years.

“We thought, ‘Let’s use this to promote why people should care about the ABA, and get to those who have never been exposed to RPTE,’” says Marzullo, an attorney in the Boston office of Ligris + Associates. “Maybe we could draw in people who have never come to the physical meeting. That’s where we were trying to see the rainbow in this.”

Like Henry, Marzullo considers the virtual conference a success. Not only did she receive positive feedback, but it attracted 428 paid registrants—the highest number in recent years.

“This, everyone was excited about; and I believe staff is already working on how we could make it better in the future,” she says. “Someone had to go out first and make it happen, and I am delighted and overjoyed by how well it really went.”

For more coverage of COVID-19 as well as links to the resources mentioned, go to ABAJournal.com/covid-19.
Developing Immunity

Congress battles over liability shields for businesses during the COVID-19 pandemic

Just as the number of COVID-19-related deaths, job losses and small business closures has continued to climb in the United States, so has the number of coronavirus-related lawsuits. By early May, the ABA Journal reported that nearly 800 lawsuits had been filed related to COVID-19; by July 1, that number had grown to more than 3,100, according to an online tracker developed by Hunton Andrews Kurth. These lawsuits have led some states to grant varying degrees of liability immunity to certain businesses, and Senate Majority Leader Mitch McConnell (R-Ky.) has pushed to provide federal liability protections as well.

Legislators are debating whether or not Congress should enact legislation that will protect businesses and other organizations from COVID-19-related tort liability. While some policymakers assert liability protections are necessary to help reopen the economy without fear of litigation, others claim such provisions would remove incentives for businesses to protect their employees and the public and eliminate accountability.

Tort law is largely a state responsibility, but Congress has enacted legislation that shields certain entities from tort liability. For example, Section 3215 of the Coronavirus Aid, Relief and Economic Security Act protects health care professionals from liability for acts or omissions they commit while performing volunteer health care services during the COVID-19 emergency.

On May 12, the Senate Judiciary Committee held a hearing titled “Examining Liability During the COVID-19 Pandemic.” The witnesses were a diverse cross section of stakeholders representing small business, organized labor, employee rights advocates, colleges and universities, and a local tourism bureau as well as a law professor.

During the hearing, committee Chairman Lindsey Graham (R-S.C.), ranking member Dianne Feinstein (D-Calif.), and all the witnesses agreed that more guidance was needed from the Occupational Safety and Health Administration to safely reopen the nation.

“The sooner we can come up with a regulatory, OSHA-driven process to allow big, small and intermediate businesses [guidance], the better off we’ll be,” Graham said. Feinstein concurred, adding that it’s critical for the federal government to issue coronavirus-related standards for workplaces.

Divided opinion

Although there was broad agreement on the need for OSHA guidelines, the witnesses disagreed on the need for a liability shield. In a reflection of the ideological divide in Congress on the issue, the witnesses representing small business, colleges and a local tourism bureau called for strong temporary liability protections to shield their constituencies from unfair lawsuits. In contrast, the law professor and the union and employee rights witnesses warned that such protections were not needed and would harm workers and the public.

McConnell on the day of the hearing announced he was developing a bill with Sen. John Cornyn (R-Texas) to prevent “a second epidemic of frivolous lawsuits” by creating “a legal safe harbor for businesses, nonprofits, governments, workers and schools who are following public health guidelines to the best of their ability.” However, the bill would not provide immunity for “actual gross negligence and intentional misconduct.”

During the hearing, Sen. Dick Durbin (D-Ill.) disagreed with McConnell’s assertion that a tidal wave of coronavirus-related lawsuits would inundate the legal system if liability shields were not enacted. Durbin also claimed that of the suits filed to that point, only 27 were for personal injury and nine were for medical malpractice. The bulk of the lawsuits, he added, centered around prison conditions and insurance coverage disputes.

Other congressional Democrats also have pushed back hard against Republican proposals to include business immunity in any stimulus package.

“We believe that the requirements that are in place to protect consumers and patients and others are there for a reason,” House Majority Leader Steny Hoyer (D-Md.) said on May 12. “Undermining those protections is not somewhere we would want to go.”

The ABA has not taken a position on federal proposals to limit COVID-19 liability but previously has urged Congress to be specific when enacting legislation to preempt state tort laws. The ABA will continue to monitor these developments and comment as appropriate.

This report is written by the ABA’s Governmental Affairs Office and discusses advocacy efforts by the ABA relating to issues being addressed by Congress and the executive branch of the U.S. government.
SAVE THE DATE

**Summer 2020**

For the latest info, go to americanbar.org and click “Events & CLE.”

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**ANNUAL MEETING OF THE MEMBERS**

The Annual Meeting of the Members of the American Bar Endowment will be held virtually on Monday, Aug. 3, at 1 p.m. at the conclusion of the first session of the House of Delegates meeting. The agenda includes the election of two Board members. Go to abendowment.org for the full text of this notice.

**2021 REGULAR STATE DELEGATE ELECTION**

Pursuant to Section 6.3(a) of the ABA’s Constitution, 17 states will elect State Delegates for three-year terms beginning at the adjournment of the 2021 ABA Annual Meeting. The states conducting elections and election rules and procedures can be found at ambar.org/2021-statedel.

**ABA Notices**

For more official ABA notices, visit ABAJournal.com in September.
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**Murder Charges in My Lai Massacre**

**BY ALLEN PUSEY**

On the morning of March 16, 1968, Warrant Officer Hugh Thompson was guiding his helicopter over My Lai 4, a small village in Vietnam’s Quang Ngai province known to American soldiers as “Pinkville.”

Until the Tet Offensive just six weeks before, the village long had been a stronghold for the Viet Cong, and Thompson’s job was to locate enemy concentrations for a battalion-size unit known as Task Force Barker. His gunner had fired at an armed man seen running from the village, but it was the last “enemy person” Thompson saw that day.

Crisscrossing above the village, Thompson and his crew were suddenly seeing bodies: old women, old men, young women, infants and toddlers. “Everywhere we’d look, we’d see bodies,” Thompson said years later. Spotting a young woman clutching a wound, he radioed for help and marked her position with smoke. “A few minutes later, up walks a captain, steps up to her, nudges her with a foot, steps back and blows her away.”

Thompson saw a ditch with more bodies, some still moving. He landed and asked a sergeant nearby for help. When the sergeant promised to put them “out of their misery,” he shrugged off the answer as dark humor. But as Thompson walked away, gunfire erupted in the direction of the ditch where he later estimated he had seen as many as 100 bodies, not one of them a draft-age male.

The situation as later determined was even worse. The three companies of Task Force Barker had landed “cold” that morning—without resistance. Two circled and contained the village while a third, C/1-20 INF, followed orders to sweep and destroy. Commanded by Capt. Edwin Medina and Lt. William P. Calley, they entered the village firing; they burned houses, tossed grenades, killed livestock and shot fleeing civilians. There were rapes, including the gang rape of a young girl. An old man was bayoneted to death; another was tossed into a well followed by a grenade. Women, children and babies were killed as they sat in their burning houses.

Other killings were more organized. One group of 30 to 50 noncombatants was rounded up. Seeing the prisoners, Calley asked a soldier, “How come they’re not dead?” then stepped back and emptied four or five clips from his M-16 into the unarmed villagers. Later, at a nearby ravine, the scene was repeated, this time with 75 to 100 unarmed men, women and children. A news release about the incident described a “running battle” that left 128 Viet Cong dead.

The fog of war—the uncertainty and confusion of battle—makes prosecution of war crimes difficult, at best. Dead civilians become collateral damage—the lamentable result of bad aim, poor training and faulty intelligence. But when the chain of command is complicit, it becomes all but impossible.

**The reckoning**

In March 1969, a mimeographed letter from a former soldier named Ronald Ridenhour broke the official silence. It described the slaughter in detail, including the geographic coordinates of Pinkville. The House Armed Services Committee inquired, and the Army promised to investigate. The problem was they already had.

On his return to base, Thompson reported what he saw to his commander, who in turn reported it to the commander of the Pinkville operations, Lt. Col. Frank Barker. When Barker shrugged it off, a second investigation was ordered. The resulting Henderson Report was a two-page memo concluding that 20 civilians likely had been killed at My Lai by artillery and gunships.

When the Army returned to Congress on Sept. 5, 1969, it was to report charges against Calley for the deaths of 109 Vietnamese civilians. Calley later was convicted and sentenced to life in prison, but he was released after 3½ years.

The only other soldier tried was Medina, who was acquitted of killing more than 100 innocents. He admitted shooting the woman Thompson described, but he claimed he thought she was carrying a grenade.

The Peers Report, an exhaustive independent military investigation, identified 28 officers and commanders who had suppressed, omitted or outright lied about their knowledge of the potential war crime.
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