As the justice system undergoes a radical transformation prompted by COVID-19, these innovators were quick to bring about change.
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Since COVID-19, courts have toggled between in-person and virtual trials.

BY MEGHANN CUNIFF AND MATT REYNOLDS

How Jim Crow-era laws let speculators exploit fraught family dynamics and tear people from their homes.

BY MATT REYNOLDS
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The American Bar Association has a long-held and deep commitment to the principle of “equal justice under law.” One of the association’s core goals is to advance the rule of law, which includes ensuring meaningful access to justice for all persons.

A century ago, in 1920, the ABA established the Standing Committee on Legal Aid and Indigent Defense to work with state and local bar associations to provide legal assistance to the poor. Decades later, while serving as ABA president in 1965, Lewis F. Powell understood the need for equal justice and led the ABA to become an early supporter of federally funded legal aid. Later, as a U.S. Supreme Court justice, Powell explained in his famous address at the ABA Annual Meeting in 1976, “Equal justice under law is not merely a caption on the facade of the Supreme Court building, it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists.”

The belief that justice should be the same, in substance and availability, regardless of an individual’s economic status was fundamental to Powell and is ingrained in the American Bar Association’s DNA.

The ABA played a key role in the founding of the Legal Services Corp., which funds legal aid offices nationwide. Today, LSC-funded agencies provide civil legal services that help more than 1.8 million low-income people every year.

In 1964, when President Lyndon B. Johnson created the Office of Economic Opportunity as part of the War on Poverty, it quickly became apparent that neighborhood lawyers should be a key part of the effort. The next year, the ABA and Powell supported the creation of the office’s Legal Services Program, giving it the national credibility and acceptance it would need to succeed. These efforts resulted in the creation of LSC when President Richard M. Nixon signed the Legal Services Corporation Act into law in 1974.

At ABA Day, our association’s annual spring grassroots lobbying event, lawyers from across the country ask their congressional representatives to continue funding for LSC.

These funds are never enough to serve the civil legal needs of low-income Americans. The COVID-19 pandemic has increased the need as people grapple with evictions and unpaid bills. Add to that the already existing issues involving family law, consumer protection, employment disputes, the opioid crisis, natural disasters and homelessness.

We all need to do better if equal justice is to become a reality.

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Doing our part
Because the need is so great, the ABA also has extensive pro bono initiatives to complement the extraordinary efforts of LSC. For example, the ABA formed a COVID-19 Pro Bono Network in partnership with state, local and other bar associations that began with a call for help with eviction cases but will continue to address other issues.

Through the South Texas Pro Bono Asylum Representation Project, the ABA assists immigrants, especially adults and unaccompanied children in federal custody, through legal education, representation and connections to services. The Disaster Legal Services Program, run by the ABA Young Lawyers Division and the Federal Emergency Management Agency, provides immediate temporary legal assistance to disaster survivors at no charge. The program has responded to 222 disasters in 45 states and five U.S. territories in the last 13 years. ABA Free Legal Answers provides a virtual legal advice clinic where qualifying users post civil legal questions to their state’s website and pro bono lawyers provide information and basic legal advice.

The ABA has helped millions of people with civic legal access. ABA lawyers have performed millions of hours of pro bono. But the need is great, and our nation is not providing access to justice to all who need it. We all need to help; we all need to do better if equal justice is to become a reality. To see what you can do, visit abaprobono.org today.
Introducing ATEM Mini
The compact television studio that lets you create presentation videos and live streams!

Blackmagic Design is a leader in video for the television industry, and now you can create your own streaming videos with ATEM Mini. Simply connect HDMI cameras, computers or even microphones. Then push the buttons on the panel to switch video sources just like a professional broadcaster! You can even add titles, picture in picture overlays and mix audio! Then live stream to Zoom, Skype or YouTube!

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Court reporters vs. AI

With regard to “Dictating Change,” October-November, page 26, and on behalf of the more than 13,000 members of the National Court Reporters Association, I would like to share why using a human court reporter versus any artificial intelligence systems is vital to not only ensuring an accurate record is made, but also ensuring participants in any legal proceeding have access to that accurate record.

Stenographic court reporters remain the gold standard for capturing the spoken word. It’s not just that they produce the most accurate legal records, including capturing certain interpersonal nuances that digital recordings might miss. Nor is it simply because they are trained to handle complex procedures associated with trials and depositions. Court reporters are indispensable to the legal system because they offer 21st century solutions to unyielding situations that demand speed without sacrificing accuracy. They provide high-tech solutions to our increasingly virtual society.

Today’s court reporters process their shorthand through computers to provide judges, attorneys and clients with instantaneous, understandable transcripts. No AI technology can come close.

Your article suggests that the use of remote video platforms and AI technology in the courtroom have emerged as two solutions to address both the shortage of court reporters and the need for social distancing. I agree that remote video platforms address the solution for social distancing, and in most instances during the pandemic, the stenographic court reporter working remotely through the use of these video platforms has been the only solution for the administration of justice.

In the courtroom, peoples’ lives are on the line, and every single word matters. That is the ethical responsibility that guides stenographers. Only a human being, charged with care of the record, is capable of instantly determining unintelligible speech and pausing the proceedings for clarification. Only court reporters can provide a real-time display of the transcript that has the added value of being able to resolve potential misunderstandings in real time.

Even in courts that have been forced to implement other methods of record-keeping, court reporters nearly always remain in place for complex civil litigation and felony criminal proceedings because they are the most reliable in high-stakes situations.

As a further note, the stenographic writer depicted in the photo is more than 50 years old. Stenographic machines, like cars and technology in general, are far more computerized and advanced than their 50-year-old ancestors.

Christine Phipps
NCRA President

When we talk about our court reporters shortage in “Dictating Change,” one thing that is left out is that we have known about the shortage for at least seven years. Many initiatives have popped up in that time, including the National Court Reporters A to Z program, Open Steno, Project Steno and school programs initiated by Allison Hall to close the gap and fulfill demand for stenographic reporters.

Also, this push to say companies like Verbit are “AI-driven” is likely inaccurate. When studied by Stanford University, automated transcription was only 80% accurate with “white” speech, 65% accurate with “Black” speech and worse with specific dialects such as African American English. If all the big companies haven’t cracked the code, it’s unlikely a relative newcomer has. In Verbit’s series A funding, it was stated it provided 99% accuracy. In its series B funding, it revealed that it would not remove the human from the equation. While it is nice to think about a world of automation, in reality, we’re talking about a world where it’s transcribed by people and you’re told it’s automation.

Christopher Day
Staten Island, New York

Correction

“Humanitarian Exception,” December-January 2020-21, page 42, incorrectly stated that ABA Model Rule 1.8(e) was revised to allow lawyers to give gifts to clients they represent on a contingency-fee basis.

The Journal regrets the error.

Letters to the Editor

You may submit a letter by email to abajournal@americanbar.org or via mail: Attn: Letters, ABA Journal, 321 N. Clark St. Chicago, IL 60654. Letters must concern articles published in the Journal. They may be edited for clarity or space. Be sure to include your name, city and state, and email address.
A new administration means a new approach to justice issues in America, but it remains to be seen what actions will be taken amid clamors for reform. There have been months of protests over police brutality and continued killings of Black people at the hands of law enforcement. And while President Joe Biden conducts triage, activists are seeking substantive change.

Policing in America is in crisis. This is not a controversial observation, a revelation or an alternative fact. Communities of color are overpoliced and brutalized. Law enforcement officers feel increasingly unappreciated and under attack. America has an unregulated and broken police system that must be overhauled. U.S. law enforcement needs a radical reset—the question becomes how that will occur and in what shape or form.

Changing the paradigm
In the fall, the ABA announced the formation of its Legal Education Police Practices Consortium, which will help address law-related issues in policing and public safety, including “conduct, oversight and the evolving nature of police work.” Dozens of law schools have signed on to collaborate in the effort.

Over the next five years, the ABA will work with its law school partners to implement widespread standardized practices to “promote racial equity in the criminal justice system” and eliminate the disparate policing of Black and brown people that has resulted in an epidemic of shootings and racially motivated tactics like stop-and-frisk.

The ABA joins a reform movement that has been working behind the scenes to train bias out of police departments and find policy solutions to systemic problems. Among others, Georgetown University Law Center’s Innovative Policing Program engages with stakeholders to rethink the role police should play in public safety, conducts trainings and offers certificate programs. The Center for Policing Equity at the John Jay College of Criminal Justice also trains officers nationwide with the goal of making law enforcement “less deadly and less racist,” according to professor Phillip Atiba Goff. In 2018, the New York Police Department instituted implicit bias training for its 36,000 officers.

But training bias out of law enforcement, eliminating the code of silence and stripping the sense of impunity and power is an uphill climb in a profession in which systemic racism has driven and informed practices for more than a century. And although these efforts
have had mixed results, proponents are focusing on the upsides.

**Nationalize, professionalize**

On the other hand, there are activists calling for stronger interventions. The rallying cry “defund the police” gained traction after George Floyd died under the knee of Minnesota Police Department Officer Derek Chauvin. It’s a refrain that’s been weaponized by some “law and order” hawks to stoke fear, and it’s a slogan in need of rebranding. The idea behind “defund the police” isn’t to eviscerate public safety and leave neighborhoods in chaos. Instead, the goal is to reimagine policing in America, partnering public safety with human services responsive to community needs. There will always be a need for police, but what shape that should take and how law enforcement should be resourced is a topic of hot debate. Will the old guard be open to and allow radical changes? Or should America’s Jim Crow-era policing model be scrapped and rebuilt?

Often when a police officer has killed, the defense is that it was a split-second decision based on a subjective danger assessment in that moment.

But what’s confounding is the rate at which police manage to not kill white people during their split-second decision-making compared with the rate at which they kill Black citizens under similar circumstances, usually with no imminent threat justifying deadly force. For decades, racial disparities and violence in policing has been a given, a footnote, forgiven. Policies and procedures within departments must be changed, along with the culture of “us against them.” It is a battle to change hearts and minds, bias and accountability.

There are approximately 18,000 police departments across the country but no federally mandated minimum requirements for employment or training and no continuing education standards. Most police officers are given a gun, a badge and carte blanche. They are rarely taught how to de-escalate situations or how to deal with mental health crises or implicit bias on the job. Instead, most training focuses on threat elimination.

State-mandated minimums for police academy training are often less intensive than the requirements to enter a trade. A CNN analysis found that in some states, training hours for barbers, manicurists and refrigeration technicians surpassed the academy time needed to earn a badge.

In some countries, becoming a police officer requires a three-year degree, with ethics and human rights classes and even a thesis paper. In Scandinavia and many other Western nations, police officers in training are taught to use their guns as a last resort and are given a combination of personal interviews and psychological tests to determine whether they can be entrusted with a firearm and the power of the position.

By comparison, in Minneapolis, where Chauvin knelt on Floyd’s neck for 8 minutes and 46 seconds, incoming officers train for 16 weeks before they’re sent into the streets, where they are paired for six months with training officers. The lessons end there.

Reimagining police training is a crucial component of building trust with communities and ending the epidemic of police brutality. Nationalizing qualifications and training standards, more oversight of use of force, tracking problem officers and evaluating fitness to serve are just a few baselines that should be in effect when a lethal weapon and a license to kill are placed in an officer’s hands.

Police training is just one of a number of criminal justice issues the **ABA Journal** will be exploring in-depth as part of a new ongoing print and web series, Redefining Justice. We’ll be covering the evolution of criminal justice reform after Floyd and under the new administration—mass incarceration, bail and sentencing reform, qualified immunity and more—tracking this next-gen civil rights movement as it unfolds. ■
Like my grandmother used to say: “Women hold up half of the sky, men hold up the other half.”

**All hands on deck**

Forging a strong, supportive relationship with the other “parental unit” is not easy. It requires ongoing efforts. As a divorce lawyer, I often see family breakdowns due to the parents’ inability to cooperate and to compromise. A rigid division of family responsibilities does not work. In a family, not everything is a quid pro quo. My husband and I do not have a clear division of labor. The flexibility has worked well. When he has more work than I do, I will take more parenting and domestic responsibilities. He will do the same for me. When we both are swamped, the kids will take more responsibilities and help us to get through the tough time.

Children also play an indispensable role in family success. One big challenge in balancing parenthood and law practice is to manage the expectations surrounding parenthood. “Tiger moms” prescribe to us an upper middle-class fantasy of “intensive motherhood” that demands exorbitant amounts of time, labor and money. The headlines in the *New York Times’* parenting section alone can make one’s head spin:

- “How to Teach Children About Healthy Eating, without Food Shaming”
- “How to Forge a Solid Parent-Teacher Relationship”
- “Updating the ‘You Go Girl’ Book Collection”
- “A Lot of Bad News Out There: Parenting in a Pandemic”
- “‘Just a Small Play Date’? You Still Need to Be Careful”
- “The Freedom and Fulfillment of Home-Schooling”

All this parenting advice focuses on how parents can meet the children’s needs and demands, not vice versa. The combination of unrealistic expectations from intensive parenting and the demanding legal profession can knock anyone off balance. I propose rejecting the hysteria of intensive parenting and making the children part of the team.

In our family, the kids are integrated into our professional lives. We feel that our children respect our professional identities and appreciate our efforts to provide them with a good family life, in large measure because they are active participants in our endeavor. Our kids are “office trained” to do their part in the family. They learned to recognize their parents’ workspaces and respect their parents’ individuality as professionals. They learned to be patient, resilient, independent and responsible. They learned to be kind and considerate about others while being assertive about their own needs and feelings. Most important, they learned from us a strong work ethic and skills needed to balance career and personal life, and they are getting better at it than we are.

We live in a society where the workplace and the family sphere are largely separated. Corporate workplaces demand that male workers forgo family responsibilities, and that their partners, mainly women, bear household labor without compensation. Social norms and workplace structures still encourage men to be breadwinners and women to be caretakers. To make it work in this family-unfriendly environment requires the entire family’s group efforts. Perhaps we will eventually be able to remodel the workplace and legal practice to a family-friendly model, one family at a time.

Rong Tao Kohtz is an international family lawyer based in New York City and Mount Pleasant, Michigan. She specializes in multijurisdictional matrimonial litigation and international child custody disputes. Kohtz is a fellow of the International Academy of Family Lawyers.
ON WELL-BEING

Cultivating Optimism

How to release self-destructive thoughts

BY JEENA CHO

During this period of COVID-19, when so many of our norms have been disrupted and the future is uncertain, it is an understatement to say there is a lot to feel anxious about.

One of the benefits of having a regular mindfulness and meditation practice is becoming more skillful at getting to know and understand your own thinking, a process known as metacognition. I started to notice that my mind was constantly filled with negative thoughts, and that I was always imagining worst-case scenarios and holding myself to impossible standards and self-criticisms. Cultivating a mind that leans toward optimism, creativity and constructive thinking takes practice, and it’s a skill well worth building.

Starting to gain a deeper knowledge of my own mind, the thoughts that run through it and its impact on me has truly liberated me from habitual negativity. Here are just a few such thoughts: I can’t ever make a mistake. I have to work around the clock to be a good lawyer. I always have to be available to my clients. I am a bad mother if I ever snap at my daughter. There is something wrong with me. I am not likable. I can’t ask for help.

Perhaps you see some of your own unproductive thought patterns in this list.

Other lawyers I interviewed for this story also held beliefs that led them down the path of self-criticism. One common struggle was perfectionism. As a lawyer, the pressure to win when the stakes are high can be intense, and this perfectionism can easily bleed over into other areas of one’s life. Claire E. Parsons, a member at Adams, Stepner, Woltermann & Dusing in Covington, Kentucky, realized she had to adjust her expectations and how she approached her life after the quarantine.

“My experience with meditation retreats was invaluable when quarantine started. Just like nobody ‘wins’ a meditation retreat, I knew I couldn’t ‘win’ quarantine,” Parsons says.

Rather than trying to balance work and family perfectly, she instead focused on keeping her spirit up and practicing self-care. “It helped me not only stay afloat in a dark time but also make progress professionally.”

Redefine progress

Megan Peterson, a partner at Simon Peragine Smith & Redfearn, realized after the pandemic that she had to redefine productivity and what a successful day looked like. “This requires a mindfulness approach, because I would designate one big and two to four smaller items to get done in a day, and while tackling the individual tasks would try to keep myself from getting distracted, pulled away by emails or social media, and really focus on doing that one task well.” After she accomplished her one big task of the day, she would check it off her list, catch up on emails and give herself a quick break. She found that by better structuring her day and setting realistic goals, she felt more productive.

Metacognition—starting to unearth the inner narrative we hold about how we must be as lawyers—doesn’t happen overnight. It’s a process. For me, mindfulness, meditation and therapy were critical for gently starting to shift the narrative and stop the cycle of constantly berating myself.

One helpful technique is known as RAIN—coined by Tara Brach, a psychotherapist, meditation teacher and author of several books on self-compassion. RAIN stands for recognize, allow, investigate, nurture. The next time you’re caught in the cycle of negative thoughts, feelings of insecurity or self-doubt, try this practice.

First, recognize what is happening. Often we’re reacting to our thoughts or the inner dialogue but aren’t even aware of it. Simply acknowledge and label the actual experience of the moment. For example, you may constantly check your phone without even realizing it. This behavior may be negatively impacting you, disrupting your sleep or pulling you away from spending quality time with your family. The process of recognizing the experience creates a brief pause in the automatic thoughts or behavior. You might label what is happening by saying to yourself: I am checking my work email again when I do not need to.

The second step is to allow. This is the process of permitting whatever may come up—including feelings, emotions, physical sensations or thoughts. In this step, you are practicing being with the discomfort of the moment rather than turning to distractions, avoidant behaviors or other coping strategies. Going back to our example, you might notice feelings of irritation, shame, frustration or other emotions that come up about
how attached you are to your smartphone, your lack of balance, or how often you check your work email.

Third, investigate what is happening with gentle attention and kindness without continuing the negative thought patterns or self-judgment. There may be an inner dialogue about how you are always attached to your phone, how you’re not present for your family, lack of self-control and so on. Approach yourself with curiosity and compassion. Perhaps you hold the belief that your boss, colleague or client will think you are a bad lawyer if you don’t instantly respond to their emails. Perhaps you are compulsively checking social media as a way to avoid having difficult conversations or unpleasant feelings.

Fourth, nurture. Self-compassion isn’t about spoiling yourself, letting yourself off the hook or being selfish. It’s about recognizing your suffering and practicing self-care. Perhaps through this line of inquiry, you recognize that there’s a deeply held belief that you’re not good enough, that you’re inadequate or some other painful thought. What does that pained part of you need? How can you meet yourself with kindness?

Finally, after the RAIN comes the practice of recognizing that these thoughts, beliefs or feelings don’t define you. As Brach writes: “The fruit of RAIN is realizing that you are no longer imprisoned in the trance of unworthiness or in any limiting sense of self.”

The practice of overcoming self-criticism or negative beliefs is a gradual process and takes practice. Chances are you have many decades of thinking these thoughts, and it’s going to take time to change the narrative. Fortunately, what we practice gets easier over time. So remember to be gentle with yourself, especially during these challenging times, and try lifting yourself out of darkness with RAIN.

Jeena Cho consults with law firms on stress management and mindfulness. She co-wrote The Anxious Lawyer and practices bankruptcy law with the JC Law Group in San Francisco.

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10 QUESTIONS

Acting on Inaction
Law professor exposes the harms of enabler complicity

BY JENNY B. DAVIS

In high school, three things held Amos N. Guiora’s attention: politics, books and sports. Following this trio of interests for nearly 50 years has given Guiora a rich and meaningful career path—several of them, in fact.

Today Guiora is a law professor at the University of Utah’s S.J. Quinney College of Law. The prolific writer has authored books on subjects ranging from counterterrorism and cybersecurity to the impact of the Miranda decision.

Academics is a second career for Guiora. Before joining Utah’s faculty in 2007, he spent nearly 20 years in the Israel Defense Forces, retiring in 2004 as a lieutenant colonel. Because of his service as legal adviser to the GazaStrip Military Commander, among many high-level postings, he became an in-demand expert on Middle East policy, terrorism and human rights. He has testified before the United Nations, the U.S. House of Representatives and the U.S. Senate.

But it was Guiora’s book Armies of Enablers: Survivor Stories of Complicity and Betrayal in Sexual Assaults that set him on his most recent path. The book, released in September, explores institutional complicity in relation to the victimization of young people by college sports coaches, trainers, doctors and Catholic priests. As a result of this work, Guiora has become not just an academic but also an advocate for sexual assault victims.

In March, he will testify about the book at a hearing before the Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence Against Children.

Armed Forces is actually your second book to explore legal issues arising from complicity. The first was The Crime of Complicity: The Bystander in the Holocaust, published in 2017. How did you get the idea for this book and for its unconventional line of legal inquiry?

I was training for the Salt Lake City marathon with my running partner, who is not Jewish, and she said to me, “How did this happen?” This being the Holocaust. She knew both of my parents were Holocaust survivors. I told her a brilliant academic answer, which shows you how smart I am. I said, “I have no idea.” After my friend asked me the question, I started reading about it a lot, and I came to the conclusion that there was an area that had not been explored through the lens of the law, and that was the role of the bystander.

Did growing up with survivors—with their stories and memories—give you any special insight into this topic?

No. My parents decided never to discuss the Holocaust with their children. When I was 12 years old, my father took me canoeing. He said, “I will tell you my story and your mother’s story, and this is the first and last time we will have this conversation.”

And was it?

Yes. I came home and there was no one to talk to. My mother had been in hiding at the age of 12 in Budapest with her mother, and my father survived two death marches at 19 in the former Yugoslavia after having been in a labor mining camp. They had not talked about their experiences with each other, and they never talked about them with me.
How did your bystander complicity scholarship lead you to enabler complicity and the sexual assault of college athletes?

The Crime of Complicity came out almost four years ago, and it took on a life of its own. I’ve given so many talks. I’ve taught courses on it. Two-and-a-half years ago, I was having dinner with my publisher in Chicago, and he said, “What’s next?” I said, “I am done with this bystander stuff.” Then he said, “You are a huge sports fan, you know about Larry Nassar and Michigan State and the Catholic Church? There’s your next book.” On the spot, I said, “I am in!” and we shook hands. I went back to my hotel and said, “What have I gotten myself into?” Fast forward to half-a-year later, and I could write a book about writing this book.

Did you have any idea how profoundly it would change your life?

No. I spent 15 months interviewing survivors—20 to 25 men and women alike. They humbled me. They honored me by trusting me with their stories. In return, I promised them two things: One, that I would speak to people worldwide to tell their stories so that people would understand the consequences and ramifications of enabling; and two, that I would talk to opinion leaders, the media, politicians—anyone who could work to make significant changes to try to put an end to all of this. The book came out on Sept. 25, and I am 100% focused and dedicated to this. I know it sounds dramatic. I don’t care if people agree with me or not, I just want people to think about this.

How has that affected you personally? It’s important, necessary work, but on some level, is it emotionally difficult?

I am a tough guy—I am not into this whole emotion/compassion thing. I am not warm and fuzzy. But I have been blown away. Overwhelmed. I was on a Skype call, and a woman introduced herself and told me her daughter was raped and murdered, and she had found the body. She wanted to talk to me about it.

Did you anticipate that the general public would embrace your book like this?

No. It did not occur to me that the book would have this kind of impact. But I welcome it. I want people to reach out to me.

You’ve done enabler and bystander complicity. What’s next for you in the area of victim advocacy?

I am now in interactions with other states to criminalize bystander complicity. Also, the University of Utah recently established an Independent Review Committee that involves mandatory review of all security matters, regulations and procedures on campus. I was appointed by the university president to be the committee chairman. It’s a great honor and also an opportunity, and it’s all a consequence of the book.

Speaking of books, are you working on a new one yet?

Yes. I am writing a book with Jon Vaughn. He played at the University of Michigan and in the NFL and is the first big-time African American player to go public with being sexually assaulted. He was raped by the University of Michigan team doctor, and he spoke out not as John Doe but as Jon Vaughn. It’s an incredible story.

I have to ask, because you are always juggling so many things: How do you get it all done?

I go to bed at 10 p.m., and I wake up at 2:30-3 in the morning. I work out, I don’t drink, I eat healthy. But I am also pissed. I am serious! I want to go to work on behalf of survivors. I want to kick ass. That fuels me. Truly. When I die, I want two things on my tombstone: “Luckiest Guy”—because I believe I am the luckiest guy—and “Angry on Behalf of the Survivors.”
A Green Wave

Successful ballot measures for marijuana and other substances create opportunities for lawyers

BY STEPHANIE ZIMMERMANN

The 2020 electorate was one of the most polarized in recent memory, with red state and blue state voters hunkering down on each side. But despite the partisan rancor, there was one topic that solid majorities of voters in both camps were able to agree on: drugs.

Voters from politically blue New Jersey to deep red Mississippi and South Dakota were among those passing ballot measures that will loosen state laws around marijuana. With this recent green wave of approvals, an estimated one in three Americans now lives in a state with legalized recreational marijuana. Others are in states with medical marijuana. And in some places, citizens went even further, voting to relax laws around psilocybin—or psychedelic mushrooms—and even decriminalize the possession of small amounts of harder drugs such as cocaine.

The widespread embrace of substances that just a few years ago could get a person tossed in jail or ruin a career—and in some states, they still can—is encouraging a whole new crop of lawyers to support the legal drug industry. And on the criminal side, the growing acceptance of marijuana and other drugs is adding momentum to the expungement movement.

Whether it’s advising a cannabis business on how to comply with state and local regulations or helping a person clear an old drug-crime record, lawyers say practicing in this space can be both exhilarating and frustrating.

“This is going to create a whole new slew of problems, and how do I help fix that?” asks Whitney Hodges, a San Diego-based real estate and land use attorney in Sheppard Mullin’s cannabis practice. These businesses have a wide range of legal needs, from tax and regulatory issues to land use and intellectual property protection, she says.

Even before the November election, the trend was moving toward legalizing marijuana. The election kept that momentum going, resulting in a total of 15 states where voters have either enacted or voted in favor of enacting adult recreational use and 36 states that have done the same with medical marijuana, according to the National Organization for the Reform of Marijuana Laws. Here’s what passed:

- In Mississippi and South Dakota, voters approved the legalization of medical marijuana.
- In Arizona, Montana and South Dakota, voters legalized possession and cultivation of marijuana by adults for personal use and backed the establishment of a regulated retail market.
- In New Jersey, voters approved a public ballot question legalizing cannabis; the state assembly then passed two bills that Gov. Phil Murphy had not signed at press time.
- Voters in Oregon approved the legalization of psilocybin for supervised mental health treatment, and District of Columbia voters approved decriminalizing mushrooms and other psychedelic substances such as ayahuasca and peyote.
- Also in Oregon, voters backed decriminalizing the possession of small amounts of hard drugs like cocaine, heroin, oxycodone and methamphetamines, and supported using sales tax from previously legalized marijuana to help pay for addiction treatment instead of sending users to jail.

Lawyers’ role

Like any nascent industry, legal marijuana needs lawyers. But what’s tricky—and exciting for lawyers who are up for a challenge—is it’s highly regulated at the state level but still illegal at the federal level. Marijuana is a Schedule I drug under the federal Controlled Substances Act, a category that includes heroin.
and ecstasy. In 2019, the ABA passed a resolution calling for marijuana exemptions from the act as well as legislation to support cannabis research.

The tension between federal and state law “is a big part of why I have a job and why I am so busy,” says Alison Malsbury, the San Francisco-based co-chair of Harris Bricken’s corporate practice group, who applies her intellectual property law knowledge to the booming cannabis industry. “We really have very little caselaw to rely on in many areas of cannabis law.”

Colorado was one of the first two states to legalize recreational marijuana in 2012. And Denver-based attorney Bob Hoban was there at the beginning, using his background as a commercial litigator to help usher in the legal cannabis industry. He helped formulate the state’s regulations and now runs a global law firm that assists hemp and marijuana companies.

Hoban Law Group provides regulatory assistance, tax and banking advice, intellectual property protection, litigation services and more. Firms such as his offer legal services to an industry that just a few years ago was more likely to need a criminal defense attorney than a business lawyer. Hoban says every day brings a new legal challenge.

Hoban was drawn to the industry after his mom fell ill with pancreatic cancer in early 2005. Initially, she was given just six months to live, and between rounds of chemotherapy, her doctors prescribed opiates, which brought their own problems.

Looking for a better way, Hoban tried a piece of a cannabis-infused candy to test its effects, then he gave his mom a small bite to see if it would help.

It worked wonders, he says. Her appetite returned, and eventually she was able to get off the addictive pills. She lived another 3½ years with an improved quality of life, and Hoban says he became convinced of cannabis’ medicinal value.

A federal-state divide
But despite broad national support and the legal cannabis industry representing an estimated $13.6 billion in the United States in 2019, the unresolved tension between federal and state law has a host of implications, from banking to taxes to land use for the businesses that grow and sell marijuana.

Lawyers practicing in this area can find themselves in ethical minefields. All attorneys are duty-bound to not assist a client in violating the law, but growing and selling marijuana is illegal under federal law.

Bar associations typically say that if lawyers disclose this, they are operating ethically, Malsbury says. The ABA’s House last year adopted resolutions calling on Congress to clarify that it’s not a federal crime for lawyers to take on cannabis clients or for banks to provide services to cannabis lawyers if they are acting in accordance with state law.

“The cannabis industry is just like any other industry, except for so many years it was completely illegal,” says Sarah Blitz, a Los Angeles-based business and commercial litigator with Sheppard Mullin’s cannabis team.

Blitz and her colleagues say the very first conversation they have with new clients is to remind them marijuana is still illegal under federal law, and then they devise a strategy to navigate the legal divide.

For example, in the area of intellectual property law, companies are able to get federal patents for their plant clones or product recipes. But they can’t federally trademark their cannabis products. So they may decide to trademark something related, such as a clothing line.

Interstate and international movement of goods is another troublesome spot. It’s why Dean Heizer, executive vice president and chief legal strategist at Denver-based LivWell Enlightened Health, is hoping marijuana eventually will be legalized nationwide so the U.S. can catch up with its neighbors. Mexico’s Senate approved a cannabis legalization bill in November; Canada approved adult use in 2018.

“Can I speak frankly? This is all stupid,” Heizer says. “The drug is in every country on the planet, and it’s used with minimal ill effect across the world.”

One hope for resolving some of the federal vs. state legal conundrum is a bipartisan proposal in Congress called the Strengthening the Tenth Amendment Through Entrusting States Act, which would prevent federal interference in states, territories or Native American jurisdictions that already have legalized cannabis and have a robust regulatory system. Proponents say this hands-off approach would correct problems with federal banking and tax laws and help draw investor capital without having to legalize marijuana nationally.

Expungment efforts
Meanwhile, in December the House passed the Marijuana Opportunity Reinvestment and Expungement Act, which would remove pot from Schedule I and facilitate the expungement of past minor drug convictions as well as tax cannabis products to fund criminal and social reform projects.

Supporters of expungement say old criminal records can keep people from getting jobs, student loans and housing, arguing people deserve a fresh start, especially in states where pot is now legal anyway.

Maritza Perez, national affairs director for the Drug Policy Alliance, hopes the continuing acceptance of cannabis—and now in some places, mushrooms—will result in more vigorous efforts to right what she says are past wrongs.

Once drugs are legalized in a state, “you can’t just pretend that the past harms don’t exist and don’t affect people’s lives today,” Perez says.

Some of that work is done by nonprofit legal aid clinics. And some corporate cannabis attorneys want to help: Hoban’s firm is already doing pro bono work on expungements, and Hodges says the team at Sheppard Mullin is exploring volunteer possibilities.

Law schools also are offering classes specifically in cannabis law, touching on the broad implications for the new field. Hoban says it’s a lot of pressure and responsibility working on this legal frontier. But he adds, “I’m proud of it. And I know my mother would be really proud of it.”
New laws aim to quash racial profiling in 911 calls

Rep. Janelle Bynum, a Black member of the Oregon House of Representatives, was inspired to sponsor a bill against racial profiling in 911 calls after someone called the police on her as she went door-to-door in a Portland suburb to speak to constituents in an effort to keep her seat in the state house.

It was the July Fourth weekend in 2018. Bynum was dressed in a white shirt, camo pants and a pair of Eileen Fisher sandals while she canvassed. Since she had 30 people on her list, she traveled light: red lipstick, cellphone, ID and keys.

The Democratic politician said hello to a 3-year-old boy on the street. Out of the corner of her eye, she thought she saw the boy’s mother. Bynum moved on.

The woman, Jasmine Piazzisi, made a nonemergency call and reported her.

“The weird thing is ... she just stops at the end of the driveway whether or not she talks to somebody,” Piazzisi told the dispatcher. “So she just knocks on the door, and then if somebody is there or not, she’ll stop at the end of the driveway and enters something into her phone.”

Bynum was using her phone to take notes about her constituents when a Clackamas County sheriff’s deputy pulled up.

“I laughed. Not because it was funny, but because my number had been called,” Bynum says. “It was something I’d prepared for since the first day I’d started canvassing.”

After Bynum explained to the deputy that she was canvassing, she asked the officer if she could talk to Piazzisi.

“You could have gotten me killed,” Bynum says she told her. “All you had to do was stop me and ask me what I was doing.”

The incident prompted her to co-sponsor a bill to deter biased 911 calls, allowing civil claims for up to $250 in damages.

Gov. Kate Brown signed the bill into law in 2019, almost a year before Amy Cooper, a white woman, called 911 on birdwatcher Christian Cooper after he asked her to put a leash on her dog in Central Park. She falsely claimed Cooper, a Black man, was threatening her. Since then, a flurry of new laws allow civil or criminal remedies for discriminatory calls, casting light on the gatekeeper role of the 911 system and false reports that could turn deadly.

Racial profiling and 911

In 2018, an employee called 911 on two Black men meeting in a downtown Philadelphia Starbucks.

In June, a white woman reported a Filipino man stenciling “Black Lives Matter” on the exterior of his own San Francisco home. Police have been called on Black people for operating a lemonade stand, napping in a dorm common room, barbecuing in a park, shopping while pregnant and mowing the wrong lawn.

For many, 911 bias laws are overdue. Gloria Browne-Marshall, a professor of constitutional law at the John Jay College of Criminal Justice in New York City, says false reporting of Black
people committing crimes is as old as Jim Crow laws.

“It takes George Floyd’s death and an Amy Cooper in Central Park being videotaped before it rises to the consciousness of many people in this country,” Browne-Marshall says.

Other states and cities have followed Bynum’s lead. Grand Rapids, Michigan, passed a similar ordinance in 2019, and there are pending bills in Wisconsin. In October, San Francisco lawmakers passed the CAREN Act, which stands for Caution Against Racially Exploitative Non-Emergencies. California and New Jersey also passed laws criminalizing biased calls last year.

About 240 million 911 calls are placed each year. But there is no national database of 911 calls, according to Pew Stateline, a news source on trends in state policy.

Brian Fontes, CEO of the National Emergency Number Association, says state and local officials keep false report data, and several states have laws criminalizing false reports.

Paul Butler, a law professor at Georgetown University Law Center, hopes the new legislation will make people think twice before placing calls.

“It sends the message that the police are not there to help you act out your white supremacist fantasy and take revenge against some Black person who has violated your white space,” Butler says.

Bynum’s bill faced opposition from Republican Sen. Alan Olsen. He cast the only vote against the bill in the Oregon Senate, arguing the law would deter people from reporting crime and would make “our communities less safe.”

Mitchell Davis, executive board member of the Chicago chapter of the National Organization of Black Law Enforcement Executives and chief of the Hazel Crest Police Department in Illinois, isn’t opposed to the new laws but says existing false reporting laws might make them unnecessary.

“If we’re going to spend the time and effort on legislation, let’s look at legislation that’s going to bring about meaningful change,” Davis says.

Civil rights attorney Thomas Seabaugh represented the mother of Kendrec McDade, a 19-year-old Black man who Pasadena, California, police shot and killed after a man falsely reported he had been robbed at gunpoint. California’s new 911 law is “cosmetic,” Seabaugh says.

“One of the defenses the police had was to attempt to shift blame on to the person who had called 911,” Seabaugh says. “We argued that regardless of the information they had, the police had killed a young man who was running away unarmed.”

When a call leads to tragedy

In 2014, John Crawford III, a 22-year-old Black man, took an unpackaged air rifle off a shelf in a Walmart in Beavercreek, Ohio. Ronald Ritchie, a white man, saw Crawford in the pet section and dialed 911. He told the dispatcher Crawford was loading the rifle and was pointing it at two children.

Two police officers entered the Walmart, and one of them shot and killed Crawford. Surveillance video synced to a recording of Ritchie’s call seemed to reveal Crawford did not brandish the toy gun or point it at anyone.

An Ohio judge found probable cause to charge Ritchie with making a false alarm. A special prosecutor decided not to press charges, arguing Ritchie did not knowingly give false information.

Bomani Moyenda and other activists filed affidavits supporting criminal charges against Ritchie. While he welcomes the recent legislation, Moyenda says the laws could go further. Someone making a racially biased 911 call should face charges ranging “up to attempted murder,” he says.

“I think it’s intentional. They’re using the police as a weapon to kill Black people, to bring Black people harm,” Moyenda says.

Proving bias in 911 cases can be difficult. Piazzisi said she called the police on Bynum because her behavior seemed strange, and race was never a factor.

Establishing intent is not unique to false reports. New Jersey Attorney General Gurbir Grewal says the challenge for prosecutors will be getting “into the head of the defendant” and making clear the calls are racially motivated.

The focus of criminal justice reform is often on police, prosecutors and judges. But 911 dispatchers are gatekeepers of the justice system. If a dispatcher relays false or missing information, the result can be deadly.

Bynum says the “default question” the dispatcher asked Piazzisi was if the person was a white female. There is “so much bias wrapped up in that [question], because that’s the safest thing to ask,” Bynum says, adding that the dispatcher was “trying to get at” her race.

“Policies and procedures can help save the lives of a lot of people, and if police departments and 911 call centers would do that internal work, legislation wouldn’t be necessary,” Bynum says.

Grewal agrees that dispatchers, prosecutors and police officers do their work against a backdrop of implicit bias.

“Training 911 dispatchers and others on these issues is important because that’s part of the danger with these race-based false alarm calls,” Grewal says.

Jessica Gillooly, a research fellow at the Policing Project at New York University School of Law, has studied the impact of 911 dispatchers on policing and worked as a 911 call-taker. Typically, police officers go through implicit bias training, but it’s less common in 911 centers, Gillooly says.

“There’s not a lot of focus in the training on the social harms that could come from sending the police,” Gillooly adds. “I think training call-takers to push back and challenge callers a bit more when they have concern over the callers’ rationale is important, and then passing that information on if the police are going to respond so they show up with the best information they have.”

Bynum’s recollections of the day Piazzisi called the police on her are still vivid.

“On the surface, nothing really bad happened, but it was humiliating. It has taken me quite some time to get over the fact I could do everything right and still be suspicious,” Bynum says.
Remote Possibilities

Thanks to the COVID-19 pandemic, law firms are starting to embrace virtual offices—but will it last?

BY DANIELLE BRAFF

Blame it on the pandemic. Law offices throughout the country are finally tiptoeing into the virtual world. For most professions, this is nothing new: More than half of professionals worked remotely at least half the week before the COVID-19 pandemic was declared in March, according to International Workplace Group research. But law firms always do things at their own pace. According to the 2019 ABA TechReport, roughly 70% to 90% of law firms across all sizes—other than solo firms—primarily utilized traditional office spaces. For solo firms, approximately one-third were home-based.

By early April, 48% of law firms started working totally remotely, and only 12% remained in their offices (the remainder did a mix), according to a survey by the practice manage-
the pandemic, it has homed in on ways to do it more efficiently now, such as having the phone systems rerouted to individual cellphones and switching the focus from just being in the office for a certain number of hours a day to tracking deliverables and progress.

Still, the pressure is on to maintain monthly monetary collections, says Amy Howard, a partner with Ascension Law, a midsize firm in Charlotte, North Carolina. “We just know that in order for the firm to keep running in the manner that it does, each have a role in billing and collecting legal fees from our clients.”

Her firm made the decision to work remotely, and Howard says there’s pressure on the partners and associates to maintain monthly collections while homeschooling, helping with e-learning and working remotely. The firm has semi-weekly meetings through Zoom to keep in touch, and Howard says although the firm is trying to be flexible, it’s a tricky situation.

The attorneys and staff have come up with creative solutions to balance the responsibilities of making their monthly collections while working remotely and handling online learning, she says. Some of the administrative staff have a hybrid schedule, working in the office a few days a week and working remotely the other days so they can assist their children with online learning. Others have self-motivated teenagers who don’t need as much help, Howard says. Many of the attorneys have been able to return to the office since some private schools are in-person, and day care centers have reopened.

“The business is still there, it is just finding a way to maintain monthly collections and the challenges COVID has created,” Howard says. “Sometimes, that means working after normal business hours and on weekends.”

**Whither the physical office?**

Meanwhile, for some firms that had already gone completely virtual even before the pandemic hit, COVID-19 has strengthened their resolve not to have physical offices.

Victoria Clark, founder and managing attorney of Clark Law in Washington, D.C., is one of them. Her firm, which consists of three employees, is completely virtual. Clark says she loves being virtual because it saves time and it’s convenient. “As far as I’ve seen, most clients are happy with virtual law firms,” she says. “With lower overhead,
clients enjoy lower fees.” The clients also don’t have to leave home and search for parking—and they’ve done well with adapting to technology and paperless transactions, Clark says.

There are some downsides to being totally virtual, though. Clark says it’s hard to establish a team culture and face-to-face relationships, and it’s difficult to judge the efficiency of workers who are at home with potential distractions.

Robert Elwood, the Philadelphia-based co-founder and partner of the virtual law firm Practus, echoed similar issues. Since his partners are spread across the country, the firm has to work harder to create the sense of team and community that comes naturally from having people in an office. They have regular team meetings on substantive topics as well as having virtual happy hours and other events.

Plus, not all clients may be as pleased with the virtual setup as the firms may be. Andrew Shaw, managing attorney of Shaw Divorce & Family Law in New Jersey, says that after the pandemic subsides, he anticipates some small and midsize firms in consumer-focused areas of the law will not return to physical offices—and that may be OK. But larger firms courting wealthy corporate clients who expect and demand a certain level of service will quickly return to their downtown high-rises. The same will be true of firms with leaders who are uncomfortable with new technologies, Shaw says.

That’s why some offices are doing a hybrid model. Tracey Ingle of Ingle Law in Southborough, Massachusetts, has been doing in-person and virtual law for a few years. One of the downsides is that it’s still new by industry standards, and depending on the area of law and the clientele, it can be hard to get clients or partners on board, Ingle says.

Going virtual also means really trusting the team. “Productivity is now measured by software metrics and regular team meetings less than visually seeing how busy someone is,” Ingle says.

On the plus side, there are fewer interruptions if the virtual offices are set up well. And since most people understand Zoom and are comfortable with it these days, clients have become more accustomed to virtual professionals. “Pre-virus, we had a number of clients who were turned off by video meetings and wouldn’t do business that way,” Ingle says.

Ingle is hoping that the relative ease of using the technology will allow her firm to do 100% of the business virtually after the pandemic, though she admits that some of her clients may not want to embrace the technology permanently. The big question, she says, is whether industries will adopt this technology as a new business as usual. “If the industries do, the customers will follow,” Ingle says.
Driving the Legal Industry to a New Equilibrium

By Jack Newton

I’ve written at length about adaptability, and about my belief in the resilience of lawyers to do what’s best for their businesses and their clients to build a thriving legal industry. Over the past 12 months, the need for the legal industry to embrace change and innovation became more urgent than ever. External factors can come as a shock to the system and demand immediate action, as the pandemic and other events of 2020 did throughout the past year, and many in the legal industry are still iterating and pushing forward to define what our future will be.

Change is not predictable and progressive—it is punctuated by moments in time where dramatic geologic events drive rapid change. Paleontologist and evolutionary biologist Stephen Jay Gould postulated that such a model of “punctuated equilibria” was a strong representation of the history of life.

According to Dr. Gould’s studies, species are in stasis for a long time, then they experience an event or period of disruption that drives a rapid evolutionary change—a “punctuation”—and then they emerge to a new state of stasis. For legal, as was the case for many other industries, COVID-19 has been this “punctuated equilibrium” event. Without an event of this magnitude taking place previously, the legal industry has been in a period of relative stasis for decades. But the macro-level impacts of the pandemic have driven more change in the legal industry in the past year than in the past several decades.

The punctuation that is COVID-19 continues to drive the speciation of law firms into two groups: those that have rapidly adapted to the new realities of the COVID-19 landscape, and those that are unwilling or unable to change. Some law firms will continue to struggle significantly in this new reality, and some will fail outright. But the law firms that rapidly adapt will be the law firms that not only survive, but thrive in our new legal environment. This is where the true opportunity lies for a better future for the legal industry—for lawyers, law firms, and their clients.

The benefits of adaptation are clear and undeniable for the legal industry. Findings of our 2020 Legal Trends Report suggest that those who embraced the use of technology saw much better year-over-year business performance throughout the pandemic.

For example, firms that used electronic payments saw negative impacts mitigated by up to 5% during the initial months of the pandemic, when law firms saw a dramatic decrease in new casework. Through the summer months of COVID-19, those gains continued to accelerate, and by August of 2020 firms using electronic payments were collecting 15% more revenue than firms who were not using technology. Similarly, firms using client intake software in 2020 saw over 20% more cases every month from February onward, and were projected to collect $27,304 more revenue per lawyer.

Overall, the research found that firms using online credit card payments, client portals, and client intake solutions together consistently earned over 20% more revenue per lawyer each month—and as much as 39% more in August—compared to firms who hadn’t adopted these technologies. Adaptability wins—and technology provides a platform for adaptability. You can learn more about how adaptive law firms are succeeding in our current world at clio.com/ltr.

Urgent change is necessary for the long-term survival of the legal industry, but there is also a massive opportunity to drive business growth. Law firms who continue to respond to the punctuated events of 2020 and 2021 by adapting to bring us to a new equilibrium will bring in more revenue, secure more clients, and position themselves to provide legal services to those who need it. And that will bring us all to a better normal for the legal industry.

Jack Newton is the founder of Clio and a pioneer of cloud-based practice management. Jack has spearheaded efforts to educate the legal community on the security, ethics, and privacy issues surrounding cloud computing, and is a nationally recognized writer and speaker on the state of the legal industry. Jack is the author of “The Client-Centered Law Firm,” the essential book for law firms looking to succeed in the experience-driven age, available at cliocenteredlawfirm.com.
Locked down at home during the coronavirus pandemic, I watched Orson Welles’ 1941 film, Citizen Kane.

The inciting incident of Welles’ masterpiece is the title character’s death. On his deathbed, Kane utters “Rosebud” with his final breath. Is that word somehow a key that unlocks his past? Is it a clue revealing Kane’s identity and the meaning of his complex and contradictory life?

For me, a law professor, Welles’ enigmatic scene provides a cinematic analogue evoking the U.S. Supreme Court’s endless quest for the meaning behind crucial words from the Constitution and the Bill of Rights, locked away in foundational moments from long ago.

All lawyers are storytellers. And Supreme Court justices are not exceptions. Outcomes in constitutional law are typically predicated upon the stories the justices tell—interpretations of foundational “origin stories”—that shape understandings of the law and who we are as a people. Origin stories—similarly referred to as “backstories” in pop culture—build upon myth and history, providing crucial narrative framing for constitutional interpretation, often predetermining constitutional meanings.

Hundreds of years later, the question remains whether to interpret America’s original texts as “living documents” or as “sacred texts” handed down as if from a higher authority.

The late visionary Yale law professor Robert Cover observed, “No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic; for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed but a world in which we live.”

For Cover, words lose their meanings when they are not located within a narrative tradition of interpretation.

Perhaps origin stories are even more important than Cover suggests. Constitutional cases are built upon shared historical creation myths. Without some origin story, the Constitution and Bill of Rights are merely broken shards of language spinning in the ether—akin to Kane calling out “Rosebud” with his dying breath.
Originalist’s interpretation

Our purportedly narrative-free jurisprudence was the late Justice Antonin Scalia. His “originalism,” or “textualism,” in its most dumbed-down form appeared to strip narrative context from constitutional interpretation.

For Scalia, constitutional meanings resided in the words themselves and in “reasonable” acontextual interpretations of those words, without the reader’s subjective storytelling inviting an ever-changing interpretive lens of politics and contemporary values. He didn’t support the idea of a living Constitution; its meanings were fixed and did not morph across time.

As Scalia said, “The originalist at least knows what he is looking for: the original meaning of the text. Often—indeed, I dare say usually—that is easy to discern and simple to apply.” He added, “What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”

Scalia further observed, “The Constitution that I interpret and apply is not living but dead—or, as I prefer to put it—enduring.”

Landmark case revisited

Does theory insulate Scalia from the imaginative grip of origin stories? Of course not.

For example, in District of Columbia v. Heller, Scalia famously struck down provisions of the Firearms Control Regulations Act of 1975 as unconstitutional, ruling that District of Columbia residents possessed a Second Amendment right to own and keep handguns for self-protection.

Scalia begins with a grammarian’s counterintuitive analysis of the words of the Second Amendment, breaking the text into two discrete and detachable provisions: a prefatory clause (he called it a “prologue”), separate from a second operative clause and not limited by the purposes clearly announced in the initial provision.

But then Justice Scalia time travels over the barriers of earlier and contradictory Supreme Court precedents, heading back into the world of our constitutional forefathers at the moment of the birth of our nation.

Scalia arranges select narrative fragments to fit his core narrative theme—the founders sought to preserve individuals’ common-law right of self-defense in an ever-dangerous land—concluding that current District of Columbia residents preserve their Second Amendment right to possess handguns in their homes for personal protection.

So what is Scalia’s underlying “default” origin story? Perhaps, as Cover suggests, it is a biblical story where textual meanings are revealed prophetically by an omniscient narrator imbued with force of law.

Counterstory

In his 2015 book, The Quartet: Orchestrating the Second American Revolution 1783-1789, Pulitzer Prize-winning historian Joseph J. Ellis argues that the Constitution and Bill of Rights were never intended as sacred texts with fixed meanings designed to withstand time.

According to the author’s interpretation, the founders made the Constitution purposefully vague, considering it a living document with malleable words to be perfected over time and fitting the unfolding experiences of the people of our new nation.

In Ellis’ version of our origin story, the Constitution and the Bill of Rights that followed were a second Revolution of sorts, a veritable coup. Political elites “conspired” to replace a state-based confederation with a federal government “that claimed to speak for the American people as a collective whole.”

The plot is instigated by four remarkable and heroic protagonists: George Washington, Alexander Hamilton, John Jay and James Madison, with the help of several important co-conspirators.

After enlisting Washington’s crucial support, these brothers in arms struggle to preserve the victory of the Revolution and push the country—against its backsliding impulses and away from weak Articles of Confederation—toward a strong and centralized federal authority guaranteed by a Constitution, further insured by the Bill of Rights.

As Ellis puts it, these Founding Fathers were politically motivated strategists and actors-in-consort who “diagnosed the systematic dysfunctions under the Articles, manipulated the political process to force the calling of the Constitutional Convention, collaborated to set the agenda in Philadelphia, attempted somewhat successfully to orchestrate the debates in the state ratifying conventions, then drafted the Bill of Rights as an insurance policy” that transformed “the people” into an “us” rather than a “them.”

Drawing upon a trove of recent historical materials, he crafts a marvelous origin story that, like Ron Chernow’s Alexander Hamilton, also fits our times.

Minor subplot

According to Ellis, Madison was the primary architect and original draftsman of the Bill of Rights, even though he “did not really think the Constitution needed a bill of rights.”

Madison’s Bill of Rights was never intended to “become enshrined as the semi-sacred creedal statement of America’s core political values,” Ellis writes. Indeed, its purposes “were neither constitutional nor philosophical but political.”

Ellis says we tend to regard the Bill of Rights as a “secular version of the Ten Commandments,” but this wasn’t the drafters’ intent—especially Madison’s. The Bill of Rights was added to secure ratification after opponents were “pushing” for a second convention with hopes of passing a revised, weaker version of the Constitution closely based upon the Articles of Confederation. Opponents of ratification wanted clearer protections from government intrusion into their private lives. Madison “took the lead” in addressing these concerns with a Bill of Rights.

As to the Second Amendment, Madison’s intention was simply to “assure those skeptical souls that the defense of the United States would depend on state
militias rather than a professional federal army.” This would uphold states’ and individuals’ rights against any potential tyranny borne of federal authority.

**Our ‘living Constitution’**

At the end of the book, Ellis quotes Jefferson: “Some men look at constitutions with sanctimonious reverence and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the preceding age a wisdom more than human. ... But I know also that laws and institutions must go hand in hand with the progress of the human mind.”

To this Ellis adds: “One of the few original intentions they all shared was opposition to any judicial doctrine of ‘original intent.’ To be sure, they all wished to be remembered, but they did not want to be embalmed.”

Constitutional storytelling is irresistible for Supreme Court justices and for historians, too. Of course, Scalia’s and Ellis’ origin stories are inapposite and fundamentally irreconcilable. Which one is true? Alas, we will never know.

Ellis’ story certainly has verisimilitude. But Scalia’s forceful textualist vision has legal authority and prevails—at least with the five avowed originalists currently sitting on the Supreme Court.

We employ origin stories and creation myths about constitutional law to reveal who we were then, to tell us who we are today and who we will become tomorrow.

**Philip N. Meyer, a professor at Vermont Law School, is the author of Storytelling for Lawyers.**

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**WORDS**

**The Art of Giving Directions**

One who can draw a good map can probably write a good brief

BY BRYAN A. GARNER

W e’ve all had the experience of being told how to get from one place to another. You’ve doubtless noticed that some of your friends are exceedingly inept at it: They leave out important landmarks but include trivial ones. They don’t see things from your point of view. Other friends are picture-perfect: They draw maps with just the right amount of detail to get you from point A to point D with assurance. Never a worry: Each time you have a question on the journey, you’re reassured by the map.

If we take the extremes on the two ends of the bell curve, those on the left side fail to understand how we come to the map and maybe even why we need it. Those on the right side have troubled themselves enough to think about our perspective, our likely experience of the locale and what might be useful for us to know: major thoroughfares, approximate distances, landmarks, etc.

Someone who can draw a good map can probably write a good brief; someone who can’t draw a good map will undoubtedly write a bad brief.

Or think of a different, more passive analogy: Picture yourself as a passenger in a car, going somewhere but not knowing where because the driver won’t tell you. If you’re like most people, you’d probably feel uneasy—even if you know the driver but more so if you don’t. You’d probably like to know something about where you’re going and maybe a rough idea of how you’re going to get there.

**Leaving markers**

Legal arguments amount to elaborate sets of directions. They require some artful orientation for busy (perhaps even rushed) readers. Hence it’s surprising how often advocates say a court should do something or refrain from doing something and then fail to give any real orientation or guidance to their readers.

This failure happens even at the level of a single paragraph. Consider this example:

Because a court looks to the surrounding circumstances to determine “reasonable assurance,” it is important to examine the progress and state of NLR’s negotiations with Vasaly Central, Vasaly Central’s satisfaction with NLR and the previous contract, and whether Vasaly Central was seeking alternatives to NLR.

Nothing there stands out in your mind unless you concentrate really hard. It’s indistinct and frankly, boring. If you add two words (the phrase three things) and three numerals, see what a dramatic difference they make:

Because a court looks to the surrounding circumstances to determine “reasonable assurance,” the court should examine three things: (1) the progress and state of NLR’s negotiations with Vasaly Central; (2) Vasaly Central’s satisfaction with NLR and the previous contract; and (3) whether Vasaly Central was seeking alternatives to NLR.

Almost subliminally, the little markers ease the reader’s way through the passage.

By the way, note that my numerals have parentheses on both sides, not just the right side. Parentheses and brackets come in pairs. That’s my view. And even though I’ve put the words and numbers in boldface, please understand that you should never do that in a brief. Here, it’s a pedagogical device; in a brief,
boldfacing within a paragraph just looks like desperate hectoring.

As for large-scale signposting, good point headings are your best tool. We’re not talking about just any tag-style headings here, but “point headings”: full-sentence headings that, in a brief’s table of contents, appear between the topical headings “Argument” and “Conclusion.” In between are full sentences only, preferably typeset as sentences (not, please, with initial capitals or, worse, all caps). Use point headings the way the Office of the Solicitor General does.

Here’s an example supporting the idea that the federal courts of appeals have jurisdiction to review an agency rule:

I. The Clean Water Rule is subject to direct appellate review under the text of both § 1369(b)(1)(E) and § 1369(b)(1)(F).

II. Findlay’s reading of § 1369(b)(1) cannot be reconciled with the provision’s structure and purpose.

III. Legislative history supports the courts of appeals’ assertion of jurisdiction.

IV. When Congress authorizes direct review of agency action, an ambiguity about the scope of the authorization should be resolved in favor of greater breadth.

For more on this subject, see my September 2015 ABA Journal piece, “Pointed Advice on Point Headings.”

Avoid ‘talk, talk, talk’

Good point headings serve as both writing tools (for you as the brief-writer) and navigational tools (for your readers). But even within the sections divided by point headings, guideposts can be important. At this level, three pitfalls pervade modern advocacy.

The most serious failing is just abruptly launching into a discussion. “Jenkins erroneously relies on McCallister v. Blaine.” Talk, talk, talk. No signposts at all. Readers feel as if they’re drifting rudderless at sea.

A second deficiency—barely a notch up the ladder from the bottom rung of unskillfulness—is inadequate signposting. “The court should deny Jenkins’s motion,” followed by “First, Jenkins is wrong about the holding in McCallister v. Blaine.” The advocate then lists several other arguments, with paragraphs beginning “Second,” “Third,” “Fourth,” and sometimes “Finally.” We’re given no preview of how many reasons there might be—perhaps because the advocate didn’t even know when embarking on the voyage.

An equally common but less incompetent failing is to say, “Jenkins is wrong in relying on McCallister v. Blaine for several reasons.” That’s a weak signpost. Many readers then start counting the reasons because the writer has failed to do it for them. There might be three or four. But sometimes, by the time you reach “For the foregoing reasons,” you realize there was really only one reason. Perhaps the writer suspected there might be several reasons but lost sight of the need to quantify.

What is missing is some smart guidance that keeps readers constantly aware of how the argument is progressing, even if that awareness isn’t quite conscious. “In ruling on this motion, this court is presented with three issues—any one of which is dispositive in Burton’s favor.” Then “First, ...” It’s a simple but powerful format. Use it.

This idea of quantifying your points often escapes legal writers. If you’re trying to overcome a motion for summary judgment and you’re saying there are genuine issues of material fact, why not list them? How many issues are there? Five? That’s great. But list them, perhaps even in a bulleted list. Most lawyers don’t do it; they just talk about the various fact issues. Talk, talk, talk.

That’s mostly what judges see. And it’s exhausting.

Essentially, you’re trying to put your arguments in high relief. Don’t make the judge dig for them. A brief shouldn’t be an archeological dig. It should be the resulting museum exhibit.

Consider one more example. This time, though, I won’t give a “before” version. It’s just too tortuous—and torturous as well. The original passage, before editing, lacked the words in
How Close Are You to Opposing Counsel?

Ethics opinion examines personal relationships and conflict

BY DAVID L. HUDSON JR.

Under the ABA Model Rules of Professional Conduct, attorneys can’t represent clients if they have a marital or familial relationship with opposing counsel unless they get informed consent in writing. Comment 11 to Model Rule 1.7 specifically identifies such a personal interest as when a lawyer is “closely related by blood or marriage” to opposing counsel. In such a case, the attorney cannot handle the client’s case unless each client has given informed consent confirmed in writing.

The opinion also notes that sometimes a lawyer may need to disclose a close relationship under another ethics rule—Rule 1.4, the lawyer’s duty of communication. Ethics expert Susan Saab Fortney, who directs the Program for the Advancement of Legal Ethics at Texas A&M University School of Law, says including the duty of communication under Rule 1.4 as a reason for possible disclosure of relationships to clients makes sense. “This points to the value of a lawyer considering the client’s perception of the significance of the lawyer’s relationship with opposing counsel,” she explains.

Intimate relationships

The opinion notes that “changing living patterns” suggest more people may be living in the same household with “arrangements that do not correspond to traditional categories.”

“Lawyers who cohabit in an intimate relationship should be treated similarly to married couples for conflicts purposes,” the opinion reads. This includes those who are married, engaged to be married or in “exclusive intimate relationships.” In those cases, lawyers must disclose the relationship to their respec-
tive clients and may not represent such clients unless each client gives informed consent confirmed in writing.

The opinion explains that a number of states “agree that intimate and cohabitating relationships should be treated like spousal ones,” citing ethics rulings from Arizona, Michigan and North Carolina. It adds that failure to disclose the relationship may result in “discipline, disqualification or other significant consequences.” For example, in the 1985 California case People v. Jackson, an appellate court reversed a conviction where defense counsel failed to inform the defendant that he dated the prosecutor.

A more difficult question arises for those lawyers who are in a type of intimate relationship “but are not exclusive, engaged to be married or cohabiting.” Lawyers in these types of nonexclusive intimate relationships “must carefully consider whether the relationship creates a significant risk that the representation of either client will be materially limited by the lawyers’ personal relationships.” The opinion adds that the “prudent course” is to disclose such relationships and obtain clients’ informed consent.

The opinion points out a possible difference between exclusive intimate relationships where the opposing lawyers are living together and a situation where the opposing lawyers are dating but do not reside together. However, it does not address personal relationships involving previous marriages or “cohabitations, engagements and exclusive dating relationships that have ended.”

“I appreciate the committee’s recognition ... of modern intimate relationships,” says Ellen Murphy, who teaches professional responsibility at Wake Forest Law School. “I also appreciate the committee’s admonition that a range of relationships, not just those in which the lawyer and opposing counsel are ‘closely related by blood or marriage,’ can give rise to conflicts of interest.”

Friendships
According to the opinion, friendships “may be the most difficult category to navigate.” Because there are many different types of friendships, those relationships should be examined carefully.

But the opinion notes that lawyers should affirmatively disclose close friendships with opposing counsel to their clients. These include friendships where the lawyers exchange holiday gifts, spend time at each other’s homes routinely or vacation together with their families. Ordinarily, such close friendships with opposing counsel should not only be disclosed to clients, but lawyers should also obtain clients’ informed consent. However, the rule says it’s a judgment call. The practitioners must decide whether Model Rule 1.7(a)(2) applies and if they can competently and diligently carry out the representation, notwithstanding a potential conflict.

“In sum, opposing lawyers who are friends are not for that reason alone prohibited from representing adverse clients,” the opinion reads. “The analysis turns on the closeness of the friendship.”

For example, opposing counsel who were law school classmates or once practiced together but don’t see each other regularly ordinarily do not have to obtain clients’ informed consent and may not have to even disclose the relationship to clients.

Murphy notes that “the opinion’s examples of friendships giving rise to conflicts is quite broad.” She says the opinion suggests that lawyers exchanging holiday gifts is “indicative of friendships that require disclosure and, most likely, consent,” but also says “it’s easy to imagine lawyers who could reasonably believe such exchange would not materially limit a representation.”

Acquaintances
The third category discussed is acquaintances, which the opinion defines as “relationships that do not carry the familiarity, affinity or attachment of friendships.” The opinion describes such relationships as those where individuals see each other at gatherings, such as for a professional organization or church, but don’t feel “a close personal bond.” Acquaintances may be lawyers who meet at bar association meetings, present continuing legal education programs together or serve on committees or boards together.

“Lawyers who are acquaintances of opposing counsel need not disclose the relationship to clients, although the lawyer may choose to do so,” the opinion reads.

The opinion concludes by explaining that lawyers should examine the nature of the relationship to see if it is one close enough to require disclosure and client consent, but it notes that “disclosure may even be advisable to maintain good client relations.”

Fortney agrees with the opinion’s conclusion that disclosure is often the best route. “Rather than using the conflicts analysis standard considering the conduct of a reasonably prudent and competent lawyer, for communication and risk management purposes, I urge lawyers to disclose information that a ‘reasonable client’ would consider to be significant in retaining counsel,” she explains. “Beyond ethics rules, such an approach would be consistent with the lawyer-fiduciary’s duty to loyalty and candor.”

David L. Hudson Jr. teaches at Belmont University College of Law. He is the author, co-author or co-editor of more than 40 books. For much of his career, he has focused on the First Amendment and professional responsibility.
As the justice system undergoes a radical transformation prompted by COVID-19, these innovators were quick to bring about change

BY VICTOR LI

When we started the Legal Rebels franchise in 2009, our original objective was to highlight individuals and groups thinking outside the box and transforming the practice of law, often through technology.

Turns out, nothing has been more transformative than the COVID-19 pandemic. In the year or so that we’ve been dealing with this disease, we’ve seen drastic changes within the legal industry—but perhaps nowhere has this been more apparent than in the courts. Some innovative judges have been pushing for greater tech adoption in courtrooms for years. The pandemic has provided courts with the opportunity to speed up the process and allow them to better serve the public without putting people at risk by forcing them to appear in person.

That’s not to say the legal industry wasn’t already undergoing massive changes before COVID-19 hit. Task forces in several states have been exploring ways to increase access to justice for low-income Americans. The past year saw two states grab what had long been the third rail of the legal profession and reform ethics regulations to remove prohibitions on alternative business structures, including nonlawyer ownership of law firms.

For this year’s class of Legal Rebels, the ABA Journal and the ABA Center for Innovation have chosen to highlight judges, lawyers and legal professionals who have helped bring about changes to the judicial system. Through their work, they’ve established the blueprint for courts to better serve the general public—with or without a pandemic.
“I was led to believe that being a lawyer required constant imagination and thinking.”

— JUDGE JOHN TRAN
Utah Supreme Court Justice Constandinos “Deno” Himonas is fond of saying that trying to tackle the growing justice gap with the same strategies is “Einstein’s definition of insanity.”

One key reason he says that is because of the size of the problem. The Legal Services Corp. reported in 2017 that low-income Americans receive inadequate or no professional legal help for 86% of the civil legal problems they face annually.

So when Himonas heard economist Gillian Hadfield speak at a May 2018 conference about how modernizing the way the legal industry is regulated could increase access to justice, he was immediately intrigued. So was litigator John Lund, the then-president of the Utah State Bar, who says he was struck by the idea that overhauling the traditional regulatory structure could open up the legal market to new providers and much-needed innovation.

Shortly thereafter, Himonas and Lund helped convince the state supreme court and state bar, respectively, that regulatory reforms were worth seriously considering. Their collective leadership, including as co-chairs of two different committees in the years since, paved the way for the Utah Supreme Court’s unanimous vote in August to adopt a package of sweeping regulatory changes. The reforms, which permit nontraditional legal services providers to test new ways of serving consumers, have propelled Utah to the front of the pack of the growing number of U.S. jurisdictions implementing or considering similar measures.
The groundwork for the changes was laid by a working group the Utah Supreme Court created in late 2018. As part of their work as co-chairs, Himonas and Lund say they endeavored to ensure the group included members with a wide array of perspectives and areas of knowledge. As a result, the panel featured a variety of outside experts as well as members with ties to the bar and the court system.

The centerpiece of the group’s recommendations was the proposed creation of a regulatory sandbox in which nontraditional legal services providers—including those with nonlawyer owners or investors—could provide legal assistance without the fear of being accused of the unauthorized practice of law.

Opponents of relaxing traditional prohibitions against nonlawyer ownership have argued that it could hurt the profession by putting profits before the quality of representation, ultimately harming the public. However, proponents of reform contend that relaxing UPL regulations is necessary to allow innovation to occur. In Utah, the working group argued that the sandbox approach would generate data to inform whether opening up the legal marketplace to nonlawyers and new services would serve the public well in the long term.

Lund, 61, credits Himonas with being a “force of nature” who not only helped the working group develop its proposals but also played a key role in writing the panel’s report.

Himonas praises Lund, a Parsons Behle & Latimer shareholder, for his consistent support for exploring comprehensive regulatory changes and for volunteering hundreds of hours of his time.

“It is one thing to be a visionary; it is another thing to be a working visionary,” says Himonas, 56.

Both he and Lund acknowledge receiving criticism for their support of regulatory reforms that are unpopular in segments of the broader legal community. But they say their confidence that the measures will eventually produce greater access to justice, as well as benefit the profession as a whole, has kept them plowing ahead.

“What I’m totally devoted to is improving access to justice and really giving the law back to the people and giving them the tools so they can access their law,” Himonas says.
Court is less intimidating on screen, says Bridget Mary McCormack, chief justice of the Michigan Supreme Court.

“When you are in the comfort of your own home, where you feel safe and secure, it’s easier to feel confident in letting the court know what’s on your mind. Also, everybody’s Zoom boxes are kind of the same size. There’s something equalizing about that,” says McCormack, 54. The state supreme court on March 15 issued an order requiring proceedings be conducted remotely when possible and followed that with another one April 7 expanding judges’ authority to conduct remote proceedings.

The state purchased Zoom licenses and videoconferencing hardware for courts prior to the pandemic, McCormack says, but few judges used the tools until April. By mid-October, Michigan courts were approaching 1.3 million hours of remote proceedings. “We had such a big assist from the pandemic because nobody had a choice but to try it,” says the chief justice, a former University of Michigan Law School professor who was elected to the state supreme court in 2012 and reelected in 2020.

McCormack long has been interested in using technology to increase access to justice. For instance, she helped pioneer the creation of an online dispute resolution system known as MI-Resolve, which was launched in August 2019. Most of the disputes involve small claims or landlord-tenant cases. “It allows people in small-money cases to log on, use the platform and see if they can resolve their dispute,” she says.

When it came to getting courts ready to conduct remote hearings, because of McCormack’s work helping judges and staff with courtroom technology before the pandemic, the system was able to quickly go online when it needed to, says Elizabeth Tripp Clement, a state supreme court justice. She adds that McCormack has always explained why technology improvements were necessary and asked judges and staff what they needed for change.

“Anytime we heard from any judges or courts saying, ‘I can’t do this’ or they identified a roadblock, her response was immediate,” Clement adds.

According to McCormack, there’s an increase in parties attending hearings.

“A lot of people just never showed up. But if you can show up just by logging onto your smartphone and seeing what you can do, people are much more likely to try that,” McCormack says.

McCormack, a 1991 New York University School of Law graduate, started her legal career with the New York Legal Aid Society and later worked at the office of the public defender.

In 1996, she became a faculty fellow at Yale Law School, and she joined the law school faculty at the University of Michigan in 1998.

McCormack’s godmother was also a New York legal aid lawyer, which is how the chief justice was drawn to the profession. She and her two siblings—actress Mary McCormack and actor/producer Will McCormack—are the children of a small-business owner and a social worker.

Her husband, Steven Croley, is a litigation partner with Latham & Watkins and a member of the University of Michigan law school faculty, which is where the couple met. They have four children in their blended family, each coming into the marriage with two children.
As COVID-19 spread through New York City and shuttered its courthouses in March 2020, Sateesh Nori realized JustFix.nyc could do even more to empower tenants to exercise their rights during the pandemic. Nori had been a longtime board member of the nonprofit organization, which offers a free online tool to help tenants send formal letters to their landlords requesting repairs in their apartments. It also provides tenants with the forms they need to sue their landlords if they refuse to make those repairs.

“He was the very first person to call me and say, ‘The courts are going to go virtual’ and, ‘This is an opportunity for JustFix to step up and step in to help with what is really a necessary digital transformation of New York City Housing Court,’” says Georges Clement, the co-founder and executive director of JustFix.nyc.

While the state implemented an eviction moratorium, Nori, 45, the attorney-in-charge of the Legal Aid Society Queens office, worked with the supervising judge of New York City Housing Court to permit tenants to start lawsuits through JustFix via their smartphones or computers. These matters can be brought over the loss of gas or heat or because of harassment or threats from a landlord. Once emergency cases are approved, they are heard virtually by a judge.

“This is something that has never happened in the history of New York courts,” Nori says. “Hundreds of these cases have been filed since April, and I think it is going to open the door for this type of thing to be the norm going forward.”

Nori, who was born in India and immigrated to New York with his parents as a child, developed an early interest in human rights. After graduating from New York University School of Law in 2001, he began his career as a housing attorney with the Legal Aid Society to “make immediate change in people’s lives.”

Each year, more than 200,000 cases are filed in housing court in New York City, and tens of thousands of residents are evicted. Despite the urgency of the situation, Nori realized little was being done to help tenants access the laws available to them.

That was one of the reasons he joined JustFix. It also guides his work with the Legal Aid Society, where he is the first Asian American attorney-in-charge and manages about 85 people, including nearly three dozen attorneys. Additionally, he helps tenants outside of the office, serving on the board of Chhaya, a community development corporation that addresses the housing and economic needs of the city’s Indo-Caribbean and South Asian communities, and as a member of the Mayor’s Committee on City Marshals, which screens and selects the individuals who conduct evictions.

He expects JustFix.nyc to expand to other cities, particularly as courts are becoming more open to virtual hearings because of COVID-19. He also hopes New York City residents can file other types of cases electronically in the future.

“It’s amazing to see that it took a pandemic to unlock the full potential of this idea that courts are a service and not a place,” says Nori, an avid runner who spent much of the spring shutdown raising his now-9-year-old twins and writing a memoir about being a housing attorney. “The next frontier is opening more avenues for people to assert their rights in various ways, and technology can help open a lot of those doors.”
At a National Conference of Bar Examiners event a couple years ago that touched on the growing number of self-represented litigants across the U.S., leaders of Arizona’s court system determined they needed to pursue bolder efforts to increase access to justice.

The actions the state’s judicial branch has taken since then to tackle the justice gap, including embracing nonlawyer ownership of law firms, have placed Arizona at the forefront of a burgeoning national movement to reform how the legal industry is regulated.

Members of the state’s legal community and regulatory reform proponents credit Arizona Supreme Court Vice Chief Justice Ann A. Scott Timmer and Administrative Office of the Courts Director Dave Byers with playing leading roles in Arizona’s progress.

Timmer, 60, says she asked Bales to name her to the post because of her passion for working to combat the access-to-justice problem. “We have done things over the years that have helped a little, but you still have this huge block of ice there,” she says.

For example, the state’s 2017 civil legal needs report highlighted that more than half of the Arizonans surveyed were not able to access the legal help they needed.

Under Timmer’s leadership and with Byers, 71, serving as a member, the legal services task force began meeting in early 2019 to consider potential changes to Arizona’s ethical rules...
and codes governing the practice of law. The panel’s work included hearing presentations from both national and international speakers on innovative approaches to delivering legal services.

In October 2019, the task force released its report and recommendations. Most notably, the panel called for the elimination of Arizona Rule of Professional Conduct 5.4, which bars nonlawyers from having an economic interest in a law firm or participating in attorney fee-sharing. The task force also recommended the development of a tier of nonlawyer legal services providers who could offer some legal assistance to clients, including court representation.

“The legal profession cannot continue to pretend that lawyers operate in a vacuum, surrounded and aided only by other lawyers, or that lawyers practice law in a hierarchy in which only lawyers should be owners,” the task force wrote.

“Nonlawyers are instrumental in helping lawyers deliver legal services, and they bring valuable skills to the table.”

Byers, a nonlawyer who has spent decades working for the Arizona court system, researched how alternative business structures in the law had played out in other parts of the world, a fact-finding effort he says demonstrated the sky had not fallen in the legal industry in those locales.

Byers also credits Timmer with working closely with her colleagues on the court to ensure they felt prepared to decide whether to move ahead with the regulatory reform proposals. These educational efforts paid off, as the court voted unanimously in August to eliminate the state’s prohibition on nonlawyer ownership or investment in law firms and thereby allow alternative business structures. A second court-approved rule change that was effective Jan. 1 established a new category of nonlawyer licensee called Legal Paraprofessionals who will be able to represent clients in court.

Timmer says the Arizona Supreme Court’s votes continued its history of supporting innovation. “If there is a problem out there, the court has never been reluctant to tackle it and try new things,” she says.

“We have done things over the years that have helped a little, but you still have this huge block of ice there.”

—ARIZONA SUPREME COURT VICE CHIEF JUSTICE ANN A. SCOTT TIMMER
Jayne Reardon is changing the practice of law by promoting civility, professionalism and looking toward the future

BY STEPHANIE FRANCIS WARD

Going into fight mode with opposing counsel is exhausting, Jayne Reardon says. “You’re just spinning your wheels, not solving problems for the client and costing the client more money when you do that,” says the 63-year-old lawyer, who serves as the Illinois Supreme Court Commission on Professionalism’s executive director.

It’s one of the reasons why the commission refers to itself as “2 Civility” on social media. Besides promoting civility, the commission also educates and trains lawyers—all with a view toward changing the profession.

That stems from Reardon. In recent years, she’s served on an Illinois task force that supports bringing innovation and the delivery of legal services to the profession, and she’s worked on an Association of Professional Responsibility Lawyers committee centered on technology and attorney ethics rules. She has frequently written on those topics as well, including for the ABA Journal. She’s also spearheaded the creation of a yearly event for the commission centered on how the profession can evolve and thrive, titled “The Future Is Now.”

“She educates members of the bar through really big events. Stuff like that had never been done on a big scale before,” says William Henderson, a professor at the Indiana University Maurer School of Law. He wrote an oft-cited 2018 report about online legal service delivery models that was commissioned by the State Bar of California.

Henderson, a 2009 Legal Rebel, adds that Reardon is a great listener who gets people’s support by understanding their agendas and emotions. “She plays the long game, not the short game. She never comes in and jams something down people’s throats,” Henderson says. “She has this uncanny sense of timing to bring people along. When you need to close, she can close.”

The Commission on Professionalism was established under a 2005 state supreme court rule. Besides the “Future Is Now” event, it offers continuing legal education focused on professional responsibility and works with law schools, courts and other legal groups to provide professionalism training.

The commission also has a mentoring program for lawyers focused on professionalism, civility, ethics, diversity and mental health. Some lawyers say younger attorneys don’t understand civility, but Reardon disputes that with the assertion that generations sometimes think less of those who come after them. “Part of what I think is really helpful is when generations engage in mentoring relationships so there’s an understanding of civility and professionalism. And frankly, when it’s properly used, you can be more effective for your clients,” she explains.

Reardon is based in Chicago and started her legal career in as a civil litigator defending products liability, medical malpractice and civil rights lawsuits. When the mother of four had her third child, she left private practice and started working for the Illinois Attorney Registration and Disciplinary Commission as counsel to its review board. With that work, which she did as an independent contractor, Reardon learned that although lawyer incivility may not directly violate any specific ethics rules, it’s often a sign of greater problems. “It’s kind of the gateway drug. If someone is uncivil, it could lead to much more serious bad behavior, and unfortunately, there’s often co-problematic behaviors going on,” she adds.
Soon after his 2013 election to the bench in Louisiana’s 24th Judicial District, Judge Scott Schlegel started looking for ways to repurpose technology common in the private sector for deployment in the court system.

Noticing that judges were limited in their use of electronic signatures, he and the local clerk of court successfully pushed for state legislation that allowed bench officers to greatly expand their use of that digital tool. Additionally, the Jefferson Parish judge transitioned from having his department use a big red book for scheduling civil matters to an online calendaring approach. Aided by the new calendaring system’s integration with videoconferencing, Schlegel, 43, began offering attorneys the opportunity to conduct their pretrial hearings via video.

Schlegel’s history of embracing technology in hopes of making the justice system more efficient has served him—and those who interact with his court—particularly well during the COVID-19 pandemic. Amid fears that the novel coronavirus would spread rapidly in jails, Schlegel worked to create a process whereby the increasing number of motions to reduce bond could be heard via video and within a short time frame. “We would handle it in a very expeditious manner because everybody was on the same collaboration platform,” says Schlegel, referring to Slack, an online instant messaging system.

Schlegel has also collaborated with legal technology companies to help keep the justice system operational during the ongoing public health crisis. For example, the judge teamed with LawDroid CEO Tom Martin to develop a text-based chatbot to check in with the specialty court probationers under the judge’s jurisdiction given COVID-19 restrictions on in-person gatherings. Schlegel also partnered with Documate CEO Dorna Moini, a 2019 Legal Rebel, to develop an online guilty plea form that was launched amid COVID-19. A defendant’s completion of the form paves the way for Schlegel to host a video hearing in which the plea is formally accepted. During these hearings, the judge gives defendants the chance to speak with their attorneys in a virtual breakout room.

Paul C. Fleming Jr., the deputy district defender for the Jefferson Parish public defender’s office, says he has been able to more effectively assist clients than public defenders in other parts of the state where courts have not implemented technology to the same degree. “I was very reluctant to do all of this,” Fleming says. In the end, however, “Judge Schlegel made a believer of me.”

Meanwhile, the guilty plea form Documate created was among the items Schlegel included on a website he launched, courtonline.us, within a week of the court buildings being shut down during COVID-19. The site also provides access to videoconferences with other 24th Judicial District Court judges and various resources for self-represented litigants. As the pandemic raged on, Schlegel launched onlinejudge.us to provide resources to those with civil matters in his courtroom.

Schlegel, who was named the chair of the new Louisiana Supreme Court Technology Commission in September, says the increased adoption of technology in Louisiana’s courts will serve the state well both in the near and long term. “The ability to continue with some level of services even if we are hit with another pandemic or hit with another hurricane or natural disaster, enables our citizenry to continue to bring their needs to the court steps if necessary,” Schlegel says.
When COVID-19 hit, Judge John Tran spearheaded adoption of tech to facilitate remote hearings in his county and helped train lawyers who wanted to learn

BY STEPHANIE FRANCIS WARD

If you need a judge who can be counted on to research all courtroom technology offerings that can help proceedings continue during the COVID-19 pandemic, look no further than John Tran of the Fairfax County Circuit Court in Virginia.

After the Virginia Supreme Court issued an order June 22 stating that remote proceedings should be used to conduct as much business as possible, Tran offered webinars to help lawyers with the Fairfax Bar Association get up to speed with Webex, the platform the court uses for remote proceedings.

“When Webex has a news release, he’s all over that. He’s already had a private demo. He is one of a small number of exceptionally tech-savvy judges,” says Sharon Nelson, a Fairfax attorney and co-founder and president of the digital forensics firm Sensei Enterprises.

Courts can devote a significant amount of time to finding technology for remote hearings during the COVID-19 pandemic, but the action is useless if lawyers can’t or won’t use it, Tran says.

“At first, I didn’t think too many people would be wanting to do it; time is money for lawyers,” adds Tran, 61. However, the webinars got a big turnout. “The people who wanted to participate, I could look at their names and see they are regular courthouse lawyers who were there every day.”

Some Fairfax County litigators may prefer in-person hearings to remote appearances, but they appreciate the technology because it allows them to keep billing rather than have all work postponed due to COVID-19, Nelson says.

She describes Tran, whom she’s known for some time, as someone who is patient with lawyers and litigants and offers help without sounding condescending. “He loves things that make the courtroom work better. Some of the judges are not as familiar with technology. Some pick it up really well, but they don’t love it. He loves it,” Nelson says.

Tran, who was born in Vietnam, is a former assistant commonwealth’s attorney for the city of Alexandria and a former special assistant U.S. attorney for the Eastern District of Virginia. His father was a South Vietnamese diplomat, and the family went back and forth between Vietnam and the United States until 1975, when Saigon fell.

In 2013, the Virginia General Assembly elected him as a judge, and he is the state’s first Vietnamese American judge. As the son of a diplomat, Tran says he was always interested in the rule of law. Also, he was inspired by one of his undergraduate professors at George Washington University who had a JD and a psychology degree. Tran also attended law school at George Washington, graduating in 1984. “I was led to believe that being a lawyer required constant imagination and thinking,” he says.

That seems particularly true during the pandemic. Tran generally opens court meetings early so people can test their equipment. Sometimes, parties might need an Ethernet cable to plug a laptop into a router because Webex may not work on a Wi-Fi connection. If litigants have trouble using the platform, “we do work-arounds,” Tran says.

He also finds remote hearings less distracting than in-person court calls. “I can focus on them. And so far, the lawyers who have appeared remotely have been more concise in presenting their arguments. They don’t seem to be distracted,” he says.
Quinten Steenhuis made his first foray into programming on an Apple II as a kid in Ithaca, New York. He carried that childhood interest in computers to Carnegie Mellon University, where he studied logic and computation and used his technical skills to advocate for social justice before the start of the Iraq War in 2003. “We were pioneering this use of a concept we called ‘open publishing.’ At that point, social media didn’t really exist, but we let people who were attending anti-Iraq War protests or globalization movements upload photos and videos and stories,” says Steenhuis, 38, who later attended and graduated from Cornell Law School in 2008.

Steenhuis has pursued his dual passions for programming and access to justice throughout his entire career. For nearly 12 years, he worked as a senior housing attorney, systems administrator and developer at Greater Boston Legal Services, where he also built Massachusetts Defense for Eviction, which helps pro se tenants defend themselves in eviction cases. Since Steenhuis launched the free online tool in 2018, it has assisted tenants across Massachusetts in preparing the seven forms they need for their hearings. MADE was created using Docassemble, task automation software designed by 2019 Legal Rebel Jonathan Pyle, and it can be accessed on a computer or smartphone.

Steenhuis quickly expanded this work after he became a clinical fellow in Suffolk University Law School’s Legal Innovation and Technology Lab in March 2020. He started the same day campus shut down because of COVID-19 and was inspired by a letter from Massachusetts Supreme Judicial Court Chief Justice Ralph Gants, who died in September 2020, asking the bar to “figure out how we can find new ways to protect the most vulnerable, preserve individual rights, resolve disputes and somehow keep the wheels of justice turning in the midst of this frightening pandemic.”

In cooperation with the Massachusetts Access to Justice Commission’s COVID-19 Task Force and several other partners, Steenhuis helped develop MassAccess, an emergency response project that has engaged more than 100 volunteers from five continents to create smartphone-friendly versions of online court forms and self-help materials in several languages. They started in April 2020 with a form that helps tenants address emergency housing conditions with their landlords and have since automated forms in additional areas of urgent legal need, including the petition for a restraining order in domestic violence cases. These forms are filed electronically with the trial court once completed.

Steenhuis also has assisted with related projects outside of Massachusetts. He is a consultant and mentor to the New Hampshire Legal Advice & Referral Center and Illinois Legal Aid Online, which received a Legal Services Corp. grant in 2019 to develop standards for automating documents using Docassemble. In addition, he helped the Northwest Justice Project and Capstone Practice Systems automate a parenting plan and a domestic violence protective order using HotDocs for Washington Forms Online.

“Unlike many of us, he had a career in programming before he became a lawyer,” Capstone founder and president Marc Lauritsen says. “We are lawyers who have picked up aspects of technology later in life. But Quinten combines the expertise of a coder with the passion of a social justice warrior.”

In his free time, Steenhuis enjoys biking, advocating for recycling and serving his local community in other ways. “I try to stay involved in committees that touch on the work I’m doing,” he says.
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Courts struggle to manage in-person and virtual trials amid pandemic safety concerns

BY MATT REYNOLDS AND MEGHANN CUNIFF

Keeping Up Appearances

For nearly a year, legal professionals have been grappling with the implications of delayed justice while trying to balance the safety of court employees, jurists, lawyers and clients as the COVID-19 pandemic continues to ravage the United States. With thousands of trials delayed since the pandemic began last March, judges are tasked with prioritizing which cases to handle first and deciding whether to try cases in person. Courts nationwide are embracing remote technology, using video and audio platforms to conduct hearings and trials. These adaptations expand access to court proceedings; they also deepen the divide for those who lack proper internet access. Meanwhile, states are actively debating whether courts can open safely and summon citizens to sit on juries. The ABA Journal explores these challenges in the following stories.

Going Virtual

Courts attempt to balance innovation with access in remote proceedings

BY MATT REYNOLDS

As a lawyer sparred with Justice Elena Kagan during livestreamed arguments at the U.S. Supreme Court in May, something burbled and slurped in the background.

The response on social media was immediate. “Did a toilet just flush during #SCOTUS oral arguments?!?” Bloomberg Law reporter Kimberly Robinson tweeted.

It’s unlikely the public will ever know for sure. What’s more likely is that virtual hearings, and all of their anomalies and awkward moments, are here to stay.

Before the coronavirus pandemic, the judiciary was slow to innovate and resistant to virtual proceedings. Now courts are using every tool at their disposal, balancing safety with the need to keep the wheels of justice spinning. In New York state,
as of Nov. 1, there were 1,157,918 pending local civil actions; and as of Oct. 4, there were 101,140 pending local criminal actions, according to data shared by court system spokesman Lucian Chalfen. In the San Diego court system, the second-largest in California, there was a backlog of 54,000 civil cases and 20,000 criminal cases, the San Diego Union-Tribune reported in September. Courts across the country are dealing with their own bottlenecks.

Although a newfound reliance on technology could ease courts’ caseloads and logjams, it also has the potential to usher in a new era of digital justice that widens access to more Americans.

“This pandemic was not the disruption any of us wanted,” Michigan Supreme Court Chief Justice Bridget Mary McCormack told Congress in June. (Read more about McCormack, an ABA Journal Legal Rebel, in “Chief Influencers,” page 34.) “But it might be the disruption we needed to transform the judiciary into a more accessible, transparent, efficient and customer-friendly branch of government.”

Douglas Keith of the Brennan Center for Justice at the New York University School of Law welcomes innovation. He cautions, however, that because the country has grappled with racial injustice and inequality, the courts will need to weigh efficiency against the constitutional right to open court proceedings, especially since judges play as big a role in the justice system as police and prosecutors.

“It is crucial now more than ever that the public continues to have access to observe these proceedings and to know what’s happening in their courtrooms,” Keith says.

Transparency and accountability
Before the Supreme Court began livestreaming, people lined up for hours to watch oral arguments. Now, anyone with a cellphone, laptop, tablet or computer can listen in.

Gabe Roth is executive director of the New York City-based group Fix the Court, which advocates for transparency at the Supreme Court and livestreaming and virtual hearings in state and federal courts.

“There’s value to having an in-person trial,” Roth says. “But at the same time, you can’t just shut down the criminal justice system or the federal court system or state court system because of a pandemic. You want [to be able] to avail yourself of modern technology.”
Fix the Court asked the federal courts to livestream court hearings through their YouTube channels because the platform can more reliably handle traffic than call-in lines. In November, the group joined media organizations in writing to the courts asking for greater access after callers were bumped off a court hearing in Texas regarding whether 127,000 drive-in ballots should be thrown out. In December, the federal judiciary announced a two-year pilot program to livestream audio of hearings in 13 district courts.

The U.S. Supreme Court has previously ruled the public has a constitutional right to access court hearings. In 1980, the court established the public’s First Amendment right to attend a murder trial in *Richmond Newspapers Inc. v. Virginia*. The court also enshrined the right to watch lawyers question jurors in 1984 in *Press-Enterprise Co. v. Superior Court of California*.

In the years since, the fight for transparency in the court system has raged on. More recently, David Snyder of the First Amendment Coalition in San Rafael, California, confronted restrictions at a courthouse in Kern County Superior Court curtailing public access because of the COVID-19 pandemic. After the group filed the complaint, the California court announced in September it would livestream audio of its hearings.

Snyder believes video or audio livestreaming should never wholly replace in-person proceedings because body language, facial expressions and other nonverbal cues are lost or absent altogether if a hearing is in audio.

Court watchers, meanwhile, want to make sure the public and media can see and hear what’s happening during proceedings. Simone Levine, executive director of the group Court Watch NOLA in New Orleans, says funding and public education are vital so that people will know how to access virtual hearings in the Orleans Parish criminal courts.

“Court watchers have had a problem logging on to some of the Zoom proceedings,” Levine says. “Sometimes the wrong Zoom link is given. Sometimes we are thrown off the Zoom link, either intentionally or unintentionally.”

Other courts have fully embraced live hearings. In Texas, hundreds of judges livestream on Zoom through YouTube channels. The Texas Judicial Branch has a channel directory for each court on its website, and links are also on court websites.

**Innovating for accessibility**

The pandemic presents an opportunity that few could have foreseen before the coronavirus brought the justice system to its knees: a chance to modernize courts at breakneck speed.

Last year, a majority of states allowed virtual hearings. New Jersey, Connecticut, Delaware, New Mexico and Alaska mandated their use. Others, including New York, California and Texas, have urged their use while suspending conflicting rules, according to the National Center for State Courts. The technology’s rise comes after over 30 states and the District of Columbia suspended in-person proceedings for weeks or months after the March lockdown.

Scott Schlegel, a judge in Jefferson Parish, Louisiana, says it doesn’t make sense for lawyers to bill their clients for two or three hours of their time if they are coming into court for a five-minute pretrial conference. (Read more about Schlegel, an *ABA Journal* Legal Rebel, in “Going Digital,” page 39.) He predicts more courts will move pretrial conferences online post-pandemic.

Hearings that do not require witnesses all could work virtually, Schlegel argues, making the system “more efficient.” Jury trials are another story.

“If you’re dealing with a 12-person jury, with all those complications and the inability to see and make eye contact, and see and touch and feel the tangible objects that you need in a trial, I think that’s a problem,” Schlegel says.

In August, Pittsburgh attorney Daniel McLane of the firm Eckert Seamans participated in a two-day virtual civil bench trial in the U.S. Court for the Western District of Pennsylvania.

McLane says planning is crucial. He would like to see pretrial orders in virtual trials stipulating how exhibits should be shared among witnesses and attorneys, and protocols ensuring witnesses are seen clearly on camera.

Despite serious due process concerns in criminal cases, some courts have proceeded with online jury trials. In one of those virtual trials, jurors in a Travis County, Texas, court reached a guilty verdict in a traffic case in August.

Judge Nicholas Chu presided over the trial using Zoom on a desktop computer in his courtroom to communicate with

Simone Levine of Court Watch NOLA says it is vital to educate the public about how to access remote hearings.
attorneys, jurors and staff. The court did several dry runs with stand-ins and attorneys. Some jurors used cellphones to access Zoom.

Chu says next time jurors will use laptops or iPads because it is difficult to use Zoom’s gallery mode on a cellphone with multiple participants. He said hybrid remote and in-person hearings could become the norm.

“The biggest thing will probably be making sure that courts communicate clearly to people their expectations on how to participate, and making sure that if somebody says that they cannot participate because they don’t have these technological devices or high-speed internet, that the courts provide those resources,” Chu says.

The digital divide
In April, the federal judiciary sent a letter to Congress asking for $36.6 million in supplemental funding, in part to pay for “information technology hardware and infrastructure costs associated with expanded telework and videoconferencing.”

The U.S. House of Representatives passed an updated version of the Heroes Act in October covering $25 million of the funding. The Administrative Office of the U.S. Courts says it hopes Congress will cover the full amount in another iteration of the bill.

Still, virtual hearings risk widening the gap between technological haves and have-nots.

In a May 2019 study, the Pew Research Center found that 29% of adults with household incomes of less than $30,000 did not have a smartphone, 44% did not have home broadband services and 46% did not own a personal computer.

An April 2020 Pew study found that 53% of Americans view the internet as a must-have during the pandemic.

The need for at-home schooling further exposed the digital divide, and the justice system has to address the same gap.

“Communities that are more likely to be harmed by our justice system are less likely to have access to the high-quality technology that’s needed to use some of these tools,” Keith says.

If courts adopt a hybrid model that allows some in-person participation, judges and lawyers will have to adapt to the demands of technology.

Darrin Browder of Court Watch NOLA says months into the pandemic, he was still seeing judges struggling to turn on cameras or unmute microphones during hearings. Similarly, Judge Denise Langford Morris of the Oakland County Circuit Court in Michigan says in some civil and criminal cases, there are lawyers and clients who can’t afford broadband.

Roth of Fix the Court argues the pandemic has created an opportunity for the judiciary and courts to work with local governments and school districts to lobby for funding to close the gap. “We’re all trying to figure out how to make the best of the situation,” he says. “Now is a critical time for our court system, and hopefully we learn some important lessons from it.”
Go-Live Debate

Judges differ on when it’s safe to hold in-person jury trials

BY MEGHANN CUNIFF

Despite reports from federal courts of in-person jury trials being held safely, many judges across the country are still deliberating whether to hold in-person jury trials at all.

In September, the Administrative Office of the U.S. Courts posted an article sharing judges’ accounts of in-person pandemic-era jury trial success stories in which precautions taken ensured participants’ safety. But as COVID-19 rages on, not every judge practicing on the front lines agrees moving forward with in-person trials is safe.

State and federal courts resumed jury trials at different paces, some doing so as early as June. But across the country, including in the huge Los Angeles federal system, battles are ensuing over safety and due process, representative juries and the overall fairness of altering a system never designed to withstand video appearances, mandatory masks, 6-feet social distancing and regular temperature checks.

Two days before the U.S. Courts posted the article about in-person trials, Chief Judge Sidney R. Thomas of the San Francisco-based 9th U.S. Circuit Court of Appeals, which includes the Central District of California, praised Central District Chief Judge Philip S. Gutierrez’s decision to keep jury trials off-limits, writing in a Sept. 8 letter to all Central District judges that resuming jury trials “prematurely” in other districts was “causing coronavirus spread.”

Thomas’ letter came amid litigation in which Gutierrez’s Central District colleague Judge Cormac J. Carney asked Gutierrez to summon a jury for an Oct. 13 trial of a physician accused of illegally supplying patients with drugs including oxycodone. Carney denied prosecutors’ pandemic-related request for a continuance, then dismissed the case with prejudice after Gutierrez declined his order to summon a jury. At press time, jury trials in the Central District remained suspended.

A judge in Sacramento shared Carney’s belief that such a delay violates the U.S. Speedy Trial Act. U.S. District Judge William B. Shubb in October dismissed without prejudice a criminal indictment against a neurologist accused of harboring noncitizens on her property and forcing them to work. But unlike Carney, Shubb said in his dismissal he believed jury trials were not safe.

The debates over public safety versus timely justice have experts questioning the best way to manage an unprecedented disruption in the U.S. judicial system. Some are warning of a dire health threat, and others are advocating for in-person proceedings with safety measures to ensure the already increasingly rare jury trial doesn’t disappear during the indefinite length of the pandemic. As judges weigh constitutional claims, lawyers are navigating the safety and strategic aspects of agreeing to or fighting delays, with wide-ranging opinions on the value of in-person witness examination, the need to see facial expressions in a time of masks and the danger of excessive no-shows leading to slanted jury pools.

And the changing nature of the pandemic is adding an extra layer of uncertainty. At press time, rising infection rates were again altering policies at courthouses across the country, with many jurisdictions postponing and canceling in-person trials amid new local restrictions and surges.

Anna Offit says defendants have to consider their rights while going virtual.
Anna Offit, a professor at Southern Methodist University’s Dedman School of Law, says some defendants “may be forced to make significant decisions with implications for their constitutional rights.

“This can come at the expense of having an in-person trial,” Offit says. “And if a trial is going to be virtual, this could very well entail compromising other rights.”

No national uniformity
Many courts, whether federal or state, are simply unprepared, says Melanie D. Wilson, a professor and dean emeritus at the University of Tennessee College of Law.

“It’s really been a struggle and patchwork for courts that have been requiring masks sometimes but not other times; doing health inspections sometimes but not other times,” Wilson says.

No national policies exist regarding in-person proceedings, resulting in vastly different approaches to jury trials during the pandemic. While statewide guidelines and policies exist, many state courts differ by county and sometimes by courthouse. And despite the uniformity of the federal system, the chief judges of the 94 districts are tasked with determining how their courthouses should approach hearings, sentencings and trials amid differing infection rates and safety approaches, locally and by state.

A few chiefs have allowed individual judges to decide whether to halt trials. Some prohibited trials for several weeks but have since resumed them with restrictions. Others have stopped them indefinitely and are rejecting requests to resume activity, leading to outcries among some jurists wary of the Speedy Trial Act and adamant that the Constitution trumps any local restrictions.

By early September, 30 federal district courts issued orders allowing jury trials to resume, according to the Brennan Center for Justice. But as COVID-19 infections surged in the fall, some courts halted them for a second time. Some state courts found themselves in the same situation. The Idaho Supreme Court in November halted jury trials after resuming them in September. Colorado’s 1st Judicial District resumed jury trials in August but suspended them in November after court staff became infected, and in January it continued that suspension through Feb. 15. Maryland also stopped trials in November through Jan. 15 after reopening in October, though trials with already-seated juries continued. The suspension had not been extended past Jan. 15 at press time.

Judge insists live trial OK
In Orange County, California, the state-run superior court resumed in-person trials in June and had held 100 by the end of October with no major problems reported. The main courthouse in Santa Ana is a block from the U.S. District courthouse where Carney’s Central District chambers are located, and Carney cited the nearby trials when he dismissed the physician’s criminal indictment.

In his ruling, Carney said the successful trials prove trials in his geographic area are possible, and caselaw indicates the Speedy Trial Act’s “ends of justice” exception applies only in situations where conducting trials is impossible, citing delay examples after Sept. 11, 2001, and the Mount Saint Helens explosion in 1982.

Prosecutors argued against Carney’s dismissal of the charges against the physician during an Oct. 13 in-person hearing, saying it was the Central District’s pandemic policy, not them, preventing the trial. But Carney said at the hearing that the judges who don’t want to hold trials fear people getting sick, which is “blinding them to the Constitution,” and he invited prosecutors to appeal his decision to the 9th Circuit. They did so in November, but no decision was expected for several months.

The majority of Carney’s district colleagues disagree with him, as do many of his colleagues across the country.

But Kate Corrigan, a criminal defense attorney in Orange County, says she understands the public health concerns but can’t understand why the Central District won’t hold trials when the nearby superior court has conducted more than 100.

“I think the public should be very concerned over the idea that due process has come to a screeching halt,” Corrigan says. “People are being detained for lengthy periods of time.”

Balancing safety and speedy trial rights
The dismissal issued by Carney in California came nearly four months after U.S. District Judge Robert Lasnik in the Western District of Washington rejected a similar argument from a public defender representing a man awaiting trial on child pornography charges.

Lasnik cited unfeasible social distancing requirements, a lack of personal protective equipment and his belief that risks to certain demographics, including the elderly and people with underlying health conditions, make it “difficult, if not impossible, to obtain a jury pool that would represent a fair cross section of the community.”

Some judges may give leeway to people who say they’re at high risk, but the larger concern is that many simply won’t show up for initial selection. U.S. District Judge Barbara M.G. Lynn, chief judge of the Northern District of Texas, conducted the state’s first in-person federal trial in early June.

She discussed her pandemic trial experiences at a July panel sponsored by the ABA Judicial Division, saying she was skeptical that she could seat a cross-section jury. “I was very concerned about whether minority members of our community would feel themselves at great risk and therefore do their best to drop out,” Lynn said. “That did not turn out to be the case.”
Still, due to rising infection numbers, in a June 19 order and a subsequent July order, Lynn postponed in-person jury trials in the district’s Dallas Division scheduled to start through July 31. And on Nov. 18, she postponed all in-person trials in the district—except one in the Fort Worth Division—until after Jan. 1.

U.S. District Judge Stefan R. Underhill, chief of the District of Connecticut, said last fall his judges were deciding themselves whether to resume trials after the court-imposed moratorium on civil trials expired in September and the one for criminal trials ended in November.

“The processes are safe,” Underhill said, adding that the jury pools have shown the diversity needed to properly represent the public. Judges are prioritizing trials for in-custody defendants.

“Obviously, everybody has speedy trial rights, but I think it’s a different issue when you have defendants who have been detained versus defendants who haven’t been detained,” Underhill said.

But he cautioned, “Certainly not all of our judges are interested in getting going yet.”

The reluctant judges got a reprieve through the fall and winter surges: Underhill on Dec. 3 suspended jury trials until Feb. 1 “in the hope that circumstances may permit them to proceed safely.”

Once trials resume, Underhill’s order says priority “will be given to short criminal trials involving defendants who have been detained the longest.”

Like most aspects of pandemic-era trials, however, priority for in-custody defendants isn’t universal: Lynn said out-of-custody defendants were more likely to be tried sooner because of the infection risks associated with jails and transporting defendants.

**COVID-19 precautions in the courtroom**

Brandon Draper, a prosecutor with the Harris County District Attorney’s Office in Texas, says socially distanced in-person trials may be problematic, but videoconferencing could be worse because of the limitations on the accused’s ability to privately confer with counsel and confront witnesses.

In an August article for the *Boston College Law Review*, Draper urged in-person trials to proceed with caution because “if we do nothing, we will ensure that justice delayed is justice denied.”

U.S. District Judge Anthony J. Battaglia in San Diego presided over four jury trials between Sept. 1 and mid-October after the Southern District of California worked with health experts to implement safety precautions such as digital presentations of evidence, reconfigured courtrooms, jury selection in large waiting rooms and sequestering requirements that keep jurors at the courthouse for breaks, including lunch.

Each juror receives hand sanitizer, clean notebooks and pens, and clear masks that allow their facial expressions to be seen during voir dire. Witnesses also wear clear masks during testimony, Battaglia says.

The Southern District of California suspended jury trials in December and in January extended that suspension through Jan. 22; it had not been extended past that date at press time.

But even with precautions in place, courts aren’t immune to spreading COVID-19. U.S. District Judge Amos L. Mazzant in the Eastern District of Texas paused a jury trial in November after learning at least one juror and one attorney had become infected, according to court clerk David O’Toole.

The District of Idaho hired an epidemiologist to recommend safety measures, such as a new air filtration system, for the resumption of trials in its three courthouses, which began Sept. 1, U.S. District Judge B. Lynn Winmill says. Jury trials in the district were suspended from mid-November through Jan. 31; at press time, that suspension had not been extended.

Winmill says a woman who appeared for jury selection but wasn’t seated reported the next day she was sick with COVID-19. However, no one in the courthouse appeared to become infected, which he credits to new safety measures.

Winmill says courts need to weigh local circumstances but should try hard to do something.

“I don’t think we can just decide we’re not going to do it at all,” Winmill says. “It’s not easy, but I think we really have to make a concerted effort to try. We’ve got to keep justice moving.”

Meghann Cuniff is a journalist based in California who’s reported for the Washington Post, the Orange County Register, the Los Angeles Daily Journal, the Idaho Statesman and the Spokesman-Review.
HOW JIM CROW-ERA LAWS STILL TEAR FAMILIES FROM THEIR HOMES

BY MATT REYNOLDS
Back in the late 1990s, Thomas Mitchell was an LLM student at the University of Wisconsin Law School researching land law policy when almost by accident, he stumbled across a little-known legal loophole that had stripped generations of Americans of their land.

Mitchell was volunteering for a legal organization and observing a meeting of Black farmers in a hotel conference room in Durham, North Carolina. They were engaged in a heated discussion about the class action settlement in Pigford v. Glickman, a case filed in 1997 against the U.S. Department of Agriculture alleging discriminatory lending that resulted in a consent decree awarding more than $1 billion to thousands of Black farmers. It was the largest civil rights settlement in U.S. history.

At the meeting, someone identified Mitchell as a lawyer. Before long, several people had regaled him with tales of how they had been stripped of the land they had inherited.

Two members of the same family explained how they had lost about 200 acres after another relative with a small stake had sold their share to a speculator who forced a partition sale. The land had been in the family since the late 1800s.

At first, Mitchell dismissed what he was hearing as a lack of sophistication about how the legal system works.

“What they had just described to me, I had never heard it before when I was in law school. No property textbook guide talked about the process working out that way,” Mitchell remembers.

His interest, however, was piqued. He politely promised to look into the matter, but when his research came up short, Mitchell contacted the family and asked to see the court records in their case.

He was stunned to discover the documents mirrored exactly what they had told him.

“It was like a fire sale,” says Mitchell, now a Texas A&M University School of Law professor who received a John D. and Catherine T. MacArthur Foundation “genius grant” in 2020 for his work in property law.

At first, Mitchell thought the family’s case might be the exception rather than the rule. Then he started looking at laws in all 50 states and realized he had just scratched the surface. The case was the catalyst for his effort to spotlight an inequity in property law that strips landowners, often the poor and
people of color, of their equity and wealth. Heirs’ property ownership, a subset of tenancy-in-common ownership, affects owners who share an interest in land, a home or a farm that is often transferred without an effective deed or will.

Heirs’ property is considered a vestige of the Jim Crow South, where unsophisticated property owners without the means or ability to hire a lawyer—or with a justifiable distrust of the courts—divvied up their assets informally, creating “interests” for descendants.

Regressive laws allow speculators to swoop in, exploit fraught family dynamics and fractionalize shared ownership through forced partition sales, divesting generations from lawfully owned property.

“The original sin is many of these families, when they first got the property in the late 1800s, tried to get a lawyer, but no lawyer would represent them,” explains Mitchell, who has been the driving force for heirs’ property reform as principal drafter of the Uniform Partition of Heirs Property Act, which offers greater protections to land and property owners entangled in court-ordered sales. “As a result, they fell into this heirs’ property, which I almost think of as a Jim Crow form of ownership, and now they’re trapped in it because they couldn’t get 99% of their family to agree. I just think that’s fundamentally unfair.”

**Struggling to stay in their homes**

There has been a landslide of property loss in the Black community since Reconstruction through violence, threats and intimidation, discriminatory lending, foreclosures, tax sales and legally sanctioned takings.

From farmland in the Mississippi Delta to beaches on the Southeast coast, researchers estimate the value of wealth lost by Black property owners is in the billions of dollars, with millions of acres dispossessed.

Heirs’ property auctions have contributed to the racial wealth gap, particularly for Black landowners in rural communities. But people of color living in cities are just as vulnerable to forced partition sales if they hold a fractional interest

"**RIGHT NOW, THIS IS WHAT THEY CALL A ‘HOT’ AREA. ALL THE DEVELOPERS WANT TO BUY IN THIS AREA, AND THEY’RE LIKE VULTURES.**"

—RONALD HENRY
through a tenancy-in-common ownership structure, which Mitchell says is inherently unstable.

Ronald Henry can attest to that. The 69-year-old African American homeowner says he was blindsided when a letter came in the mail detailing how a trust had purchased half an interest in his single-family home in San Antonio, where he has lived since 1978.

Henry soon discovered his brother, Jesse Henry, whom he hadn’t seen in close to 10 years, had sold his 50% share in the house to an investor, identified in court records as the San Antonio Arts and Entertainment Revocable Trust. Soon the trust claimed the right to charge him $375 a month for living in his own home, and then it filed a partition action asking for the house to be sold.

“Evidently, they had got a sweet deal. Maybe they got it for a little bit of nothing from him,” Henry says of his brother. “They probably figured they could bully me into selling the other half.”

Henry doesn’t want to sell and hopes to hand down the home to his son Kirk and 12-year-old granddaughter. He has witnessed his neighborhood transform over the years from a majority Black neighborhood that he estimates is now 50% white and 40% Hispanic. As the demographics shifted, he says, investors moved in. Henry lives off $1,000 per month in retirement benefits and felt he didn’t have the means to hire a lawyer to fight back.

“Right now, this is what they call a ‘hot’ area. All the developers want to buy in this area, and they’re like vultures,” Henry says. “In other words, they’re running over each other trying to get property, lots, houses.”

Scott Kohanowski, director of the Homeowner Stability Project with the City Bar Justice Center in New York City, has
seen predatory investors and developers look for properties in gentrifying parts of the city to force partition sales. Investors often prey on homes in Black or Latino neighborhoods that have been historically undervalued because of redlining and discriminatory lending. “Fast forward 30 or 40 years, and those neighborhoods have gentrified, and those properties are now worth $1 million or $2 million,” Kohanowski says.

In August, Kohanowski met with a 60-year-old woman who was close to being forced out of her multiunit apartment building in Brooklyn’s Clinton Hill neighborhood that had been in her family for 40 years.

Kohanowski says a “vulture investor” swooped in to take a majority 70% interest in the property by buying out two sisters who no longer lived there.

Kohanowski says New York’s original partition law is harsh, allowing the investor to charge the woman and her family rent without crediting them for their mortgage payments and repairs.

“The end result is the vulture investor stands to gain a significant advantage in his small investment, stripping the equity from the home and displacing about a dozen heirs,” Kohanowski says.
refusal and the opportunity to buy out co-tenants who force a court-ordered sale. If a sale must go ahead, then an open-market sale is preferred over a sale at auction.

Even with the protections of the Uniform Partition of Heirs Property Act, the cases are complicated because it’s not always possible to divide parts of an inherited home in the same way multiple owners could divvy up land.

Texas Gov. Greg Abbott signed the same legislation into law in 2018. But Henry still risks losing the family home. His house on South Olive Street is in an area close to downtown San Antonio and was passed down from his grandparents to his mother, Felma, who then deeded the property to Henry, his brother Jesse and sisters Barbara and Janelle. The sisters later transferred their interest in the home to Ronald and his brother, according to Henry.

Eventually, Henry went to Texas RioGrande Legal Aid for help. Staff attorney Lizbeth Parra-Davila took on his case. She says Henry’s home is his greatest asset and his only source of wealth. Parra-Davila says when she first talked to Henry, he thought he was being scammed. His confusion turned to anger when he learned that the trust had bought half an interest in his house.

“It’s just egregious that Mr. Henry, who is at risk of being homeless, was preyed upon by this investor-developer, who was really only trying to make a profit out of this home located in a very desirable area of the city,” Parra-Davila says.

Daniel Burke, an attorney for the San Antonio Arts and Entertainment Revocable Trust, declined to comment on specific claims in Henry’s case but says more will be revealed in court.

“I understand that Mr. Henry is probably saying, ‘This bad person bought my brother’s interest in the house, and they’re going to want to kick me out on the street forever and ever,’” Burke says. “There’s always two sides to the story.”

In its partition action, the trust says “despite plaintiff’s multiple and best efforts, the parties have been unable to reach an amicable resolution,” and it was forced to take legal action because Henry has allowed the house to fall into a state of disrepair.

Henry’s grandmother bought the home for $2,000, and he has lived there more than 40 years. He admits the house, a tumbledown single-story with a buckling front porch, is in “bad shape.” He suspects the trust is more interested in tearing it down and making use of the land, perhaps to build condominiums. He has not had his home appraised but says that a lot across the street sold for $75,000.

In court filings, Henry says he has paid almost $13,000 in property taxes in the past two decades, and $35,000 on upkeep, including repairs to the roof and main sewage lines. Henry also accused the trust of common-law fraud for claiming it has the right to collect rent from him.

“All I want to do is just live the rest of my days in peace,” Henry says. “I’m not interested in selling. You could...
probably talk to most of the senior citizens in this area. They’re not interested.”

**A fight on many fronts**

Attorney Tina Nelson works on probate cases for the AARP’s Legal Counsel for the Elderly in Washington, D.C. She says clients who live in gentrifying areas of the district are vulnerable to losing homes that may have been in their families for generations.

Nelson testified before the Council of the District of Columbia as it considered adopting a version of the Uniform Partition of Heirs Property Act in 2017. The bill failed that time around, but Nelson hopes the district will eventually adopt the law.

“To keep what you own in the family and preserve that wealth for the next generation is of utmost importance, especially for communities of color,” Nelson says.

She adds that elderly homeowners in the district are often unable to take advantage of homestead exemption deductions because that relief is only available to those with a deed. Without the exemption, property taxes can overwhelm homeowners in gentrifying neighborhoods, Nelson explains.

Attorney Kelley Austin helps her indigent clients in rural Texas avoid land loss and keep wealth in their families through a project at the Earl Carl Institute for Legal & Social Policy at Texas Southern University’s Thurgood Marshall School of Law.

The project’s efforts are not always successful and reveal the uphill battle many face in securing land they inherited.

Austin says that in 2009, the project had a client in her late 70s who wanted to buy out her relatives because she was paying all the property taxes and expenses associated with more than 33 acres of land in Montgomery County, about 40 miles north of Houston.

According to Austin, the woman wanted to hand down the land to her daughter when she died and knew it was valuable because someone had offered $400,000 for 5.57 acres.

The woman was one of 14 siblings with a claim to the land after her father died. The elderly client was forced to file a partition action after unsuccessfully trying to negotiate with her siblings. During the course of the litigation, the project uncovered almost 900 heirs.

Austin says the case was a huge undertaking and dragged on for 10 years. Just when it looked like the woman was about to settle the case, she died, leaving the matter unresolved. The case illustrates how fractionalized ownership of land can deprive a family of generational wealth, Austin says.

**A national push for reform**

Heirs’ property ownership in urban areas of the country dates back to the mid-1900s and to the late 1800s in rural America, according to Mitchell.

Austin says the case was a huge undertaking and dragged on for 10 years. Just when it looked like the woman was about to settle the case, she died, leaving the matter unresolved. The case illustrates how fractionalized ownership of land can deprive a family of generational wealth, Austin says.

A national push for reform

Generations of African Americans lost their homes through forced partition sales, but there was no meaningful reform until 2010, when the Uniform Law Commission adopted the Uniform Partition of Heirs Property Act.
Mitchell proposed the law to curtail partition law abuses that robbed the disadvantaged of millions of acres of land and property. Mitchell worked together with the ABA Real Property, Trust and Estate Law Section to urge the Uniform Law Commission to adopt it.

Mitchell says it took a long time for people to take his work seriously since previous efforts at reform had failed. But his work got a major boost in 2001 when the Associated Press published a series called “Torn From the Land” that detailed how white Americans had stolen property and land from Black people through intimidation and violence. The investigative reporters behind the series needed an expert to talk to about partition actions in the rural South and called Mitchell.

“That changed my status within the world of law schools because all of a sudden, I was getting this outside validation,” Mitchell says.

The AP series prompted the ABA to create a task force that would go on to submit the proposal on partition law reform to the Uniform Law Commission. The first state to adopt the Uniform Partition of Heirs Property Act was Nevada. Sixteen states and the U.S. Virgin Islands have enacted it since.

Next, Mitchell wants to unravel the convoluted form of ownership that thrust Henry and other homeowners into court battles to save their homes.

Mitchell has asked the Uniform Law Commission to consider a new reform that would allow heirs to shift to a more stable form of ownership without the consent of all the owners who hold a fractional interest. At present, if someone wants to stabilize ownership through a limited liability company, for example, he or she may have to get dozens of people to agree, according to Mitchell.

“The unanimity requirement is locking these families into this dysfunctional ownership structure,” Mitchell says.

His proposal would require a lower percentage of owners to reach a consensus to change a property’s ownership structure. Mitchell has not established what the threshold percentage would be, but it would require the creation of a new law rather than amendments to the Uniform Partition of Heirs Property Act.

Heirs’ property disputes between families can still arise because of tenancy-in-common ownership, Mitchell says, even when the families have a deed or will but have estate plans that do not establish rights and responsibilities for heirs, such as who will be responsible for property taxes and upkeep.

Heather Way, a professor at the University of Texas at Austin School of Law, says there is a desperate need for legal services to help struggling homeowners engage in estate planning to establish clear titles and deeds.

“We need to address this issue head-on and need to make sure that everyone who is fortunate to have access to land and a home is able to maintain that access. Access to legal services is a big part of that,” Way says.

Kohanowski says it remains to be seen how effective the Uniform Partition of Heirs Property Act is in curtailing predatory developers and investors. He says homeowners are still vulnerable but that the law at least “levels the playing field” by giving heirs the right of first refusal and the chance to secure financing to buy out a competing interest. Kohanowski says the law in New York state also has an alternative dispute resolution component to help heirs settle disputes.

“My feeling is it’s going to discourage this sort of investment activity and give us more tools to preserve intergenerational wealth, especially in communities of color,” Kohanowski says.
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MEMBERS WHO INSPIRE

‘Fighting for them’

Mona Kaveh gives a voice to foster children in Las Vegas

BY AMANDA ROBERT

In 2018, Mona Kaveh received an email from the Legal Aid Center of Southern Nevada informing her she was on the short list for one of its pro bono awards and should prepare a speech.

She was surprised but thought it could be related to her work with the Children’s Attorneys Project, which provides legal counsel and representation to abused and neglected children who are placed in foster care in Clark County.

In thinking over what she might say, Kaveh decided a simple thank-you wouldn’t suffice.

“I remember talking to my family and saying, ‘I want to do something to inspire, because that’s the reason why I’m doing this,’” she explains. “I want people to understand what this program is and how they can help.”

Kaveh, a partner at Kemp Jones who practices complex commercial litigation, also talked with a founding partner of her firm, which agreed to support her if she posed a challenge to the Las Vegas legal community.

At the Legal Aid Center’s Pro Bono Awards Luncheon—where she won the Pro Bono Attorney of the Year Award—Kaveh got her chance. During her speech, she told the audience the Children’s Attorneys Project had 45 foster children on its pro bono wait list. For each case taken by an attorney, her firm would donate $1,000.

Within two weeks, all 45 children had attorneys.

“I was so touched,” says Kaveh, who has represented nearly 30 foster children since she began volunteering with the Children’s Attorneys Project in 2010. “It made me so happy that these kids had someone fighting for them. I always say, as much as I try to advo-

Members Who Inspire is an ABA Journal series profiling exceptional ABA members. If you know members who do unique and important work, you can nominate them for this series by emailing inspire@abajournal.com.
cate for these kids, I feel like they have changed my life so much and inspired me so much in return. What they have been through and what they are still able to achieve is so inspiring.”

**Becoming an advocate**

Kaveh was in her second year at the UNLV William S. Boyd School of Law when she met with a career adviser to talk about externship opportunities.

The Las Vegas native already had helped educate underrepresented high school students about legal rights through Street Law Inc. and child victims and witnesses about judicial processes through Kids’ Court School.

She was thrilled when the adviser told her about the Children’s Attorneys Project.

In summer 2008, she became its legal extern, assisting the attorneys who represented abused and neglected children and meeting with their young clients across the city.

“I went to mental institutions, I went to drug rehab centers, I went to foster homes, I went to group homes, I went to detention centers,” Kaveh says. “Wherever you can imagine these poor kids are, we went to talk to them to make sure they were OK and to explain what was going on.

“They tell you what they want, and you’re their voice.”

It was life-changing for Kaveh, who promised herself she would work with the Children’s Attorneys Project after she graduated from law school in 2009. She kept that promise and began taking pro bono cases the following year.

Kaveh has helped newborns, children and youth up to age 21 through adoption, reunification and guardianship.

If newborns have been exposed to drugs, she starts by visiting them in the hospital to ensure they receive adequate care.

Since they can’t tell her what they need, she tries to see everything from their perspective. She advocates for them during court hearings and meetings to find them good homes and get their lives on track.

“There’s a famous quote: ‘It’s easier to build strong children than to repair broken men,’” Kaveh says. “That’s always in my mind. What can we do when we get them young to build them up?”

One of the newborns Kaveh represented is now 2 and recently was adopted by her foster family. Because of COVID-19, it was the first adoption proceeding she participated in via videoconference, but she still cried as she watched.

When representing older children, Kaveh understands that it’s hard for them to trust adults since many have been in and out of their lives. She tries to be consistent and show she’s working for them.

One of Kaveh’s most memorable cases involved a 17-year-old girl who at first wouldn’t even look at her. She kept encouraging the teenager, and during a difficult meeting about her goals after foster care, the girl finally said she trusted her.

Kaveh represented her until she was 21 and stayed in touch afterward.

“She wrote me the sweetest message about how she didn’t know where she would be in life, but that I always believed in her,” Kaveh says. “That to me shows that you really can make a difference in these lives as a CAP attorney. That’s why I’m so passionate about this work.”

Judge Cynthia Giuliani of the Eighth Judicial District Court’s Family Division has heard several of Kaveh’s cases and agrees her passion for helping foster children is obvious.

“It’s so special because she does work in a litigation firm, but she’s soft

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and she’s calm with the kids,” Giuliani says. “She knows her case back and forth, and her kids that she represents, she knows them so well. We don’t always see that.

“You have to have someone the kids can call anytime there is a crisis or they need to talk,” the judge adds. “She’s that type. She’s always there.”

Building community
Kaveh credits her parents, who came to the United States from Iran, for encouraging her to be kind and help those around her.

“I think watching my parents working hard and achieving their dreams really inspired me and lit that fire in me,” she says. “I had these opportunities, and I also wanted to work hard and make a difference.”

Kaveh’s drive to give back isn’t limited to the Children’s Attorneys Project. Before the pandemic, she and her mom volunteered at least once a month at Child Haven, a temporary shelter where they helped feed and nurture children ages 6 and younger who had been removed from their homes.

She also volunteered monthly at the Shannon West Homeless Youth Center. She hosted an independent living course on various skills, including how to find an apartment and pay rent, but Kaveh realized many youth just wanted to talk to someone.

“It’s been very eye-opening getting to talk to kids who have been through a lot and who share their life stories,” she says. “I can learn from the older ones about what happened and what would’ve helped them to then try to help the younger kids head down the right path.”

Kaveh, who joined the ABA when she began practicing, was recognized for her commitment to her community with the Standing Committee on Pro Bono and Public Service’s Pro Bono Publico Award in 2019.

Despite her busy practice, she says she will continue to make time for children because she knows the difference it makes in their lives.

“Helping a child in need, helping somebody who doesn’t always have their voice heard or just needs someone to fight for them, I think is so important,” Kaveh says. “I’m always going to do it.”

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posing a resolution urging Congress to create and fund a guardianship court improvement program to support states’ efforts to reform or strengthen their adult guardianship systems.

Resolution 105, which was adopted by the House of Delegates, says a federal court improvement program would also “improve outcomes for adults subject to or potentially subject to guardianship, increase the use of less restrictive options than guardianship, and enhance collaboration among courts, the legal system and the aging and disability networks.”

Root of the issue
When Louraine Arkfeld, the chair of the ABA Commission on Law and Aging, introduced the resolution to the House of Delegates, she said there is a precedent for this concept.

In 1993, at the urging of the ABA Center on Children and the Law, Congress for the first time provided federal funds to state child welfare agencies and tribes through a state court improvement program. In recent years, Congress has allocated $30 million to the program.

“A guardianship court improvement program has similar potential for doing this—having a wide-reaching impact and providing your state courts with necessary resources to protect the safety, well-being and individual rights of millions of individuals in the United States,” Arkfeld, the former presiding judge of the Tempe Municipal Court in Arizona, told delegates at the annual meeting.

Dari Pogach, a senior attorney with the Commission on Law and Aging who drafted Resolution 105, says the lack of federal funding and support for state courts has led to several issues, including scarce data on the number of adults under guardianship.

According to the report that accompanied the resolution, a 2011 study estimated that there were anywhere from fewer than 1 million to more than 3 million active guardianship cases in the United States in 2008. This number has likely grown, particularly because the population of older adults has increased substantially since then.

Pogach adds that state courts without resources to protect individuals under guardianship could potentially violate their due process rights or fail to investigate family members or others put in charge of their finances. Many courts also are unable to monitor guardians to uncover potential elder abuse.

“Courts are only going to see an increase in guardianship proceedings,” Pogach says. “I really feel strongly that we can see from [the coronavirus], and before, that there is a real lack of attention to ensuring people have the support they need in an appropriate way without risk of abuse and exploitation or being limited without needing to be as they age.”

In addition to providing funding and expertise to state courts for data sharing, collection and analysis, a guardianship court improvement program would allow them to determine their priorities for reforms, support their efforts to create strategic plans and provide them with technical assistance and training.

Judge Lauren Holland of the Lane County Circuit Court in Eugene, Oregon, hears probate cases and stresses the significance of the irreversible decisions often made for individuals by guardians, such as removing them involuntarily from their homes or forcing them to stop medical treatment.

She contends more training on the guardianship system as well as how these cases affect individuals’ lives is vital.

“The court improvement program would be invaluable,” says Holland, a member of the Commission on Law and Aging. “It allows us to start being not merely reactive to the tragic events that occurred and develop a system with all of us understanding the importance and impact on the lives of people and their assets as well so that we avoid further abuse.”

Solving the problem
The Commission on Law and Aging has a long history of calling for changes in guardianship.

Erica Wood, its former assistant director, helped convene three national conferences to inspire reforms, including the Third National Guardianship Summit in 2011. It was there that delegates adopted the recommendation that each state’s highest court create Working Interdisciplinary Networks of Guardianship Stakeholders.

WINGS supports state court-led partnerships to improve guardianship policies and practices. The commission received a grant from the Administration for Community Living in 2016 to establish or expand state WINGS, which resulted in four-year pilot projects in seven states, including Alabama and Utah.

The commission also began studying the Center on Children and the Law, and in 2019, it brought together WINGS coordinators from more than 20 states to explore how its court improvement program model could benefit their groups.
In a WINGS briefing paper published in November, Wood encourages the Administration for Community Living and other federal agencies to support WINGS through five-year systems change grants and plan for a guardianship court improvement program based on the commission’s work under the project.

“We need to make a real difference because these populations that are potentially subject to guardianship are vulnerable,” says Wood, who retired in January 2020 after 40 years with the commission. “They do need eyes upon them, and because of the potential for loss of rights, they need something more sturdy and consistent than we have now.”

Since Resolution 105 was adopted, Pogach has been working on a law review article about the guardianship court improvement program that will be presented at the Fourth National Guardianship Summit in May at Syracuse University College of Law. She is also exploring the potential for pilot programs with state courts.

Subasinghe, who describes Maryland’s Guardianship and Vulnerable Adults Work Group as similar to WINGS groups, appreciates the Commission on Law and Aging’s work to help states take their reform efforts to the next level.

“Guardianship is so much a creature of state law, and it is in many ways a creature of local practice,” she says. “There really can’t be a one-size-fits-all for the country.

“There needs to be an assessment of what each state needs, and we need support to do that. The ability to assess those needs and then apply for federal funds to help implement whatever recommendations the state itself comes up with would be really helpful.”

REPORT FROM GOVERNMENTAL AFFAIRS

Recommitting to Reform

117th Congress has opportunities for bipartisan criminal justice reforms

In the final days of the 115th Congress, lawmakers promised to continue to build on their successful passage of the landmark bipartisan First Step Act of 2018 —long-overdue improvements to the federal criminal justice system. Two years later, however, the 116th Congress adjourned without fulfilling that pledge. It was not for a lack of trying; in fact, hundreds of criminal justice bills were introduced but ultimately died at the end of the last Congress.

The good news for those seeking change is that most of the problems were specific to the 116th Congress, and the 117th presents new opportunities for progress. Cautious optimism comes with understanding some of the reasons that reforms did not happen and how the new Congress and 2021 are expected to be different.

While there was no singular obstacle for criminal justice legislation in the 116th Congress, delays—both planned and unforeseen—were a primary culprit. For starters, it convened during a record-setting 35-day partial shutdown of the federal government, which was quickly followed by major efforts to raise the debt ceiling and repeal the automatic spending cuts known as sequestration. Congress also attempted in vain to complete all fiscal year 2020 funding bills on time—a feat accomplished only four times in the past 43 years.

Meanwhile, the House and Senate judiciary committees placed all new criminal justice legislation on hold for most of 2019 until they had carried out planned oversight of the FSA’s implementation. By year’s end, the House and Senate were dominated by impeachment proceedings that ended with the president’s acquittal in February 2020. Then a global pandemic reached American shores. And by the August recess, most major legislative activity had stopped until after the election.

Delays were not the only obstacle, however. National events such as the pandemic also grabbed the spotlight, forcing a shift in priorities. For example, the focus on immediate problems caused by the pandemic postponed consideration of larger, more systemic reforms. And although George Floyd’s tragic death while in police custody in May forced the country and both chambers of Congress to reexamine issues of racism and bias in law enforcement, partisan differences on specific reform proposals prevented their passage before the 116th Congress finally adjourned.

There were isolated bright spots for criminal justice reform advocates, however. Congress passed the Fair Chance to Compete for Jobs Act of 2019, a new law that reduces emphasis on federal job seekers’ criminal backgrounds, as well as other legislation improving regulation of the Department of Defense program through which state and local law enforcement obtain military equipment. The House also passed additional legislation focused on the criminal justice system during the pandemic. And while the Senate would not entertain those proposals, it did concur with the House on the need for increased funding to support implementation of the FSA and Second Chance Act reentry programs to help people make successful transitions from prison to their communities at the end of their sentences.

Prospects for additional significant criminal justice reform have improved this Congress. The distraction of national elections is behind us; COVID-19 vaccines and a return to a new normal are helping lawmakers refocus on
broader permanent criminal justice system reforms; and widely supported bipartisan bills introduced in the 116th Congress provide a road map for “next step” legislation. It is also encouraging that House and Senate champions of bipartisan reform have returned this Congress, including Sen. Chuck Grassley, R-Iowa, whose previous efforts were a cornerstone of the FSA’s success.

The American Bar Association remains committed to the fight for comprehensive criminal justice system improvements.

Among other issues, the ABA supports a range of decarceration proposals; improvements to conditions of confinement, including protecting the confidentiality of prisoners’ emails with their attorneys; and strengthening reentry programs.

The ABA also seeks to reduce draconian sentencing for nonviolent offenses and to end mandatory minimum sentences.

In addition, the ABA works to prevent racism or bias in the criminal justice system and opposes collateral consequences for convictions that bear no rational relation to the underlying offense. And the ABA opposes incarceration or the loss of substantive rights for people who pose no danger or flight risk but lack the means to satisfy money bail, fees or fines. ■

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.

ABA Notices
For more official ABA notices, visit ABAJournal.com in March.

2021 MIDYEAR NOMINATING COMMITTEE BUSINESS SESSION, CANDIDATES FORUM AND VOTING SESSION

The Nominating Committee will meet in conjunction with the 2021 Virtual Midyear Meeting on Saturday, Feb. 20, from 1 p.m. to 3 p.m. CT. The meeting will begin with the business session and immediately followed by the Candidates Forum, at which the Nominating Committee and members will hear from candidates seeking nomination at the 2022 midyear meeting for an association office. This portion of the meeting is open to association members. In addition, immediately following the Candidates Forum, the Nominating Committee will hold its voting session from 3 p.m. to 4 p.m. CT to announce nominations for district and at-large positions on the ABA Board of Governors (2021-2024). Go to ambar.org/2021-BOGdel for a list of the district and at-large positions that apply.

2021 DELEGATE-AT-LARGE ELECTION

Pursuant to Section 6.5 of the ABA Constitution, six Delegates-at-Large to the House of Delegates will be elected at the 2021 ABA Annual Meeting for three-year terms beginning with the adjournment of that meeting and ending with the adjournment of the 2024 annual meeting. Candidates for election as Delegate-at-Large are to be nominated by written petition. The deadline for filing nominating petitions for the 2021 election is Wednesday, May 19. Go to ambar.org/delegate-at-large for rules and procedures.

BOARD OF ELECTION RESULTS OF THE UNCONTESTED 2021 STATE DELEGATE ELECTIONS

In December, the Board of Elections certified the results of the 2021 State Delegate Elections. For a complete list of the state delegates elected for the 2021-2024 term, go to ambar.org/stdelegateresults.

GOAL III MEMBERS-AT-LARGE ON THE NOMINATING COMMITTEE

The ABA president will appoint one Goal III LGBT Member-at-Large, one Goal III Minority Member-at-Large and one Goal III Woman Member-at-Large to the Nominating Committee for the 2021-2024 term. These appointments will be made from broadly solicited nominations from the diversity commissions, sections, divisions and forums; state and local bar associations; and the membership at large. If you are interested in submitting a nomination or have questions, contact Leticia Spencer at 312-988-5160 or leticia.spencer@americanbar.org by Monday, May 10.

AMENDMENTS TO THE CONSTITUTION AND BYLAWS

The constitution and bylaws of the ABA may be amended only at the ABA Annual Meeting upon action of the House of Delegates. The next annual meeting of the House will be held Aug. 9-10 in Toronto. Proposals to amend either the constitution or bylaws may be submitted by any ABA member. It is preferable that proposals be submitted in the form of a memorandum that details the purpose and effect of the proposal. In order to be considered at the 2021 annual meeting, a policy amendment must be received by the Policy and Planning Division at the American Bar Association on or before Friday, March 5. Go to ambar.org/amendments for the full text of this notice.
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Colfax Massacre Convictions Tossed

BY ALLEN PUSEY

On Easter Sunday in 1873, a heavily armed group of white men led by Christopher Columbus Nash laid siege to the Grant Parish courthouse in the Louisiana town of Colfax. The aim of the assault by 300 white Democrats, many of them former Confederate soldiers, was to dislodge an armed cadre of 150 freedmen and white Republicans who had barricaded themselves inside to protect what they believed was the integrity of their local election.

At the time, Louisiana was one of three formerly Confederate states where Black citizens outnumbered white citizens. But eight years after the murder of Abraham Lincoln and the end of the Civil War, Southern whites, and more than a few of their Northern supporters, were bristling—often with violence—against freed slaves, their Republican supporters and the so-called Reconstruction amendments to the U.S. Constitution designed to create a more universal American citizenship.

For local whites, changes wrought by Reconstruction were plentiful. Grant Parish, for instance, had been formed from two surrounding parishes and renamed for the nation’s 18th president. Calhoun’s Landing, once named for plantation owner Meredith Calhoun, was renamed for Grant’s vice president, Schuyler Colfax.

Nearly everywhere in the South, elections were particularly caustic. And in Louisiana, the election of 1872 was especially painful. With the election plagued by factionalism, racism, voter suppression and charges of fraud from both sides, Republicans and Democrats formed parallel administrations: Republicans sought protection from the federal government; the Democrats relied on racist paramilitary groups. And when the Republican governor certified the Republican candidates as judge and sheriff in Grant Parish, Black former soldiers flocked to Colfax to protect them.

Nash, who had been the Democrats’ candidate for sheriff, responded in kind with a paramilitary force that spent 13 days assaulting the courthouse with horse soldiers and light artillery. When they finally set the building ablaze, the Republicans abandoned their positions. Once outside, many were slaughtered by men on horseback. According to witnesses, at least 37 were taken prisoner and killed that night by gun-shots to the back of the head.

News of the Colfax massacre reached James Beckwith, a federal prosecutor in New Orleans. Backed by the Enforcement Act of 1870 and federal soldiers who had arrived at the scene, Beckwith headed to Colfax to investigate; soon after, 97 marauders had been identified and indicted under the federal law.

Convictions under the Enforcement Act weren’t as rare as might be imagined—there had been at least 800 in three formerly Confederate states alone. But Bradley’s reasoning had been embraced by terrorist organizations such as the Ku Klux Klan and the Knights of the White Camelia as a license to use violence to regain white rule in the South, “thanks to Justice Bradley.”
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