

# U.C.L.A. Law Review

## Post-COVID Courts

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### ABSTRACT

As with so much else in American life, the COVID-19 crisis delivered a gut punch to our justice system. And the worst is yet to come, as federal and state courts alike are soon to fill with cases reflecting the failing finances and fraying relationships of our sheltered-in-place lives. But in truth, our courts were already at a crossroads: chronically underfunded, increasingly politicized, behind the curve technologically, and shockingly out of touch with the justice needs of ordinary Americans. This Essay argues that it is time—with states, for better or worse, reopening—to begin thinking longer term. For the COVID-19 pandemic is quickening a pair of tectonic shifts, both well underway when the first diagnoses were made, with the power to reshape the legal system for good or for ill by fundamentally altering the role lawyers play within it. The first is the erosion of the professional monopoly that lawyers have long enjoyed over the delivery of legal services and the steady empowerment of new legally trained professionals to help satisfy justice needs. The second is the adoption of new technologies, many using artificial intelligence, to supplement or even supplant lawyers' work. Looking back, the coronavirus's greatest legacy for the legal system may well be its hastening of the arrival of an age of supersession—the decentering and displacement of lawyers by nonlawyers of both the human and nonhuman sort. The question judges, lawyers, rulemakers, and legislators should be asking is not merely how to safely reopen the courts. We should also ask how the post-pandemic justice system will look different—and how it might even emerge from the current crisis better than before.

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## INTRODUCTION

Looking back, the time of coronavirus will be a time of reckonings—about the perils of political polarization, a diminished public sector, and America’s unfinished project of civil rights. But there is a further reckoning that will soon play out, not in our hospitals, but in our courts: our legal system’s declining capacity to provide justice to ordinary Americans. That reckoning will begin in the coming months as shuttered courthouses reopen, the system unpauses, and dockets fill with cases reflecting the failing finances and fraying relationships of our sheltered-in-place lives.

But in truth, even before 2020, America’s justice system was already at a fork in the road. One path, the current one, is not pretty. Our courts are chronically underfunded, increasingly politicized, and behind the curve technologically. They are also shockingly out of touch with the justice needs of ordinary Americans, who get little help in most—perhaps 85 percent or more—of the legal problems they encounter.<sup>1</sup>

A second path—a more promising one—was coming into focus even before the pandemic hit. This path is lined with new thinking about which professionals can provide legal services, and it is studded with new technologies that will transform how legal work gets done. Both are powerful, tectonic forces with the capacity to reshape the system and the distribution of burdens and benefits within it. Both will accelerate amidst the pandemic and its fallout. Navigated carefully, this second path can open the doors of justice wide (or at least wider) for all people. Handled poorly, it can make things worse than before.

Standing at that crossroads, it is time to begin thinking longer-term. Even as we grieve the hundreds of thousands of lives lost from COVID-19 and contend with the dislocation the disease continues to cause, the question that judges, lawyers, rulemakers, and legislators should be asking is not merely how to safely reopen the courts. We should also ask how the post-pandemic justice system will look different—and how it might even emerge from the current crisis better than before.

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1. LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 6 (2017).

## I. THE CORE CHALLENGE

Courts are often useless in emergencies. The judiciary, Alexander Hamilton wrote in Federalist No. 78, is the “least dangerous” branch.<sup>2</sup> Without an army or power to tax, courts have “neither FORCE nor WILL, but merely judgment”—a statesperson’s ability to cajole and persuade, rather than an ability to quickly marshal resources or take aggressive action.<sup>3</sup>

Yet if courts can shrink in the crucible of a crisis, they are pivotal in its aftermath. The reason is simple: Though less powerful than the executive or legislature in a grand emergency, courts decide who gets what in the endless stream of more workaday disputes, between landlords and tenants, employers and employees, creditors and debtors, domestic abusers and survivors, that often follow. Particularly in an American system that, more than most nations, taps courts and litigation to implement social policies,<sup>4</sup> courts are the cleanup crew, their most critical work coming after a crisis recedes and attention turns elsewhere. And thrust into that role, courts can be a great leveler—one of the few places in society where the “have nots” can hold the “haves” to account—or, just as easily, well-oiled machines of inequity.<sup>5</sup>

Put these ideas together and you get the essence of the current challenge: The greatest coronavirus-related challenges for our courts lie ahead of us, not behind us. And how we meet those challenges will not just help determine the inclusiveness of the recovery and the return to prosperity we all hope can follow. We will also be charting the future of the legal system in ways that will test our basic commitments to equal justice and the rule of law.

None of this will happen fast. Change will play out over years, not weeks or months. And it will come as the imperatives of the current crisis, and the reformist

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2. THE FEDERALIST NO. 78 (Alexander Hamilton) (McLean’s ed., 1788).

3. *Id.* For contemporary analysis, see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986), and ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2011).

4. See ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2d ed. 2019) (explaining the American penchant for court- and litigation-centered regulatory approaches); SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010) (same); see also Colleen F. Shanahan, Alyx Mark, Jessica Steinberg & Anna E. Carpenter, COVID, Crisis and Courts, TEX. L. REV. ONLINE (forthcoming 2020) (manuscript at 5), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3664742](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3664742) [<https://perma.cc/4NP6-KGDD>] (“Before the pandemic, state civil courts were acting as the government branch of last resort for poor Americans. The pandemic, and the legislative and executive branches’ limited responses to it, have exacerbated this tension.” (footnote omitted)).

5. A classic account is Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974) (showing how repeat-play dynamics allow “haves” to systematically win out over “have nots”).

propulsion of sickness and death, fade from view. Yet even once the worst is behind us, the urgent challenge will remain: What good, if anything, can we make out of the coronavirus catastrophe?

## II. COVID-19 TRIAGE

To call for longer-term thinking is not to slight the immense challenges the nation's judges faced down as the COVID-19 crisis deepened. With normal court operations suspended, judges asked: Which cases *must* be dealt with immediately, and how?<sup>6</sup>

For many cases, the wheels of justice skidded to a halt: Nonessential cases were stayed, trials were postponed, and the filing deadlines that dot litigation were suspended. But in cases raising immediate safety concerns, judges, like their healthcare counterparts, conducted triage operations to keep the wheels turning. They entered restraining orders protecting domestic violence survivors, made critical child protection determinations, and held bail hearings to avoid unnecessary detentions in infected jails.

In many courts, that meant safety measures much like those at your grocery store: plexiglass shields, socially distanced queuing, and Purell galore. In a creative few, it meant holding court in open air on courthouse steps<sup>7</sup> or in repurposed school gyms.<sup>8</sup> Perhaps most important of all, triage meant digitization. Many courts, long resistant to it, mandated or expanded e-filing to eliminate the need for infection-risking, in-person filings. Others embraced remote proceedings and trials, whether by telephone or video connection. In Michigan, 900 judges,

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6. For overviews, see *How Every State's Legal System Is Responding to COVID-19*, NOLO (Aug. 7, 2020), <https://www.nolo.com/legal-encyclopedia/how-every-states-legal-system-is-responding-to-Covid-19.html> [<https://perma.cc/3GL8-BP97>]; *Coronavirus and the Courts*, NAT'L CTR. FOR STATE CTS., <https://www.ncsc.org/newsroom/public-health-emergency> [<https://perma.cc/69UH-D8FQ>] (last visited Aug. 30, 2020); and Robert Loeb, Katie Kopp & Melanie Hallums, *The Federal Courts Begin to Adapt to COVID-19*, LAWFARE (Mar. 18, 2020, 1:29 PM), <https://www.lawfareblog.com/federal-courts-begin-adapt-Covid-19> [<https://perma.cc/G5M8-E9R6>].
  7. See Jessica A. York, *Holding Court in Time of Coronavirus*, SANTA CRUZ SENTINEL (Mar. 24, 2020, 6:44 PM), <https://www.santacruzsentinel.com/2020/03/23/holding-court-in-time-of-coronavirus/> [<https://perma.cc/U57A-68H4>]; Laura Kusisto, *Coronavirus Forces Courts to Experiment*, WALL ST. J. (Mar. 28, 2020, 5:30 AM), <https://www.wsj.com/articles/coronavirus-forces-courts-to-experiment-11585387800> [<https://perma.cc/6LSN-Z8NQ>].
  8. Rebecca Davis O'Brien, *Is Anywhere Safe for a Jury Trial During the Covid-19 Pandemic? Try a School Gym.*, WALL ST. J. (May 19, 2020, 9:00 AM), <https://www.wsj.com/articles/is-anywhere-safe-for-a-jury-trial-during-the-covid-19-pandemic-try-a-school-gym-11589893201> [<https://perma.cc/F7JF-S6XG>].

magistrates, and referees had by July presided over a remarkable 500,000 hours of Zoom hearings since the lockdown began.<sup>9</sup>

As with other accounts from the pandemic's front lines, these triage stories paint an inspiring portrait of ingenuity and grit. Triage's technological turn has even yielded rare moments of levity: a juror who walked away from a trial on Zoom to answer a cellphone call;<sup>10</sup> a toilet flush during the U.S. Supreme Court's resort, for the first time in its history, to telephonic arguments (likely Justice Breyer, journalistic sleuthing established).<sup>11</sup>

But if there is a consistent theme from the reports of judges, lawyers, and access to justice advocates, it is this: The worst is yet to come. Indeed, a calamity for the court system, and those who depend on it, sits on the horizon.

### III. CALAMITY IN OUR COURTS

True calamities typically require a perfect storm, and the one heading toward the courts is no exception. Among many likely contributors, three are most salient.

First, as the nation emerges from its initial encounter with COVID-19, we can expect a surge of lawsuits. The Great Recession from a decade ago helps put some numbers on what to expect. Over the four-year span beginning with the 2007–2008 crash, civil filings in state trial courts leapt by 1.5 million cases, or a whopping 20 percent.<sup>12</sup> Half of this spike was contract cases, mostly landlord-tenant

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9. Email from Chief Justice Bridget McCormack, Mich. Sup. Ct., to author (July 14, 2020, 7:49 PM) (on file with author); see also Lyle Moran, *Will the COVID-19 Pandemic Fundamentally Remake the Legal Industry?*, ABA J. (Aug. 1, 2020, 12:00 AM), <https://www.abajournal.com/magazine/article/will-the-covid-19-pandemic-fundamentally-remake-the-legal-industry> [<https://perma.cc/4LHZ-TBGH>] (noting use of videoconferencing in over 160,000 civil and criminal cases in Texas state courts between March and June 2020).
  10. Elizabeth Rosner, *Texas Juror Walks Off Zoom Trial to Take Phone Call*, N.Y. POST (May 19, 2020, 8:51 PM), <https://nypost.com/2020/05/19/texas-juror-walks-off-zoom-trial-to-take-phone-call> [<https://perma.cc/P4BM-VCNL>].
  11. Ashley Feinberg, *Investigation: I Think I Know Which Justice Flushed*, SLATE (May 8, 2020, 4:42 PM), <https://slate.com/news-and-politics/2020/05/toilet-flush-supreme-court-livestream.html> [<https://perma.cc/NRP6-JNCS>].
  12. See ROBERT C. LAFOUNTAIN, RICHARD Y. SCHAUFFLER, SHAUNA M. STRICKLAND & KATHRYN A. HOLT, NAT'L CTR. FOR STATE CTS., EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 3, 8 (2012) [hereinafter EXAMINING 2010 CASELOADS], [http://www.courtstatistics.org/\\_data/assets/pdf\\_file/0024/23838/csp\\_dec.pdf](http://www.courtstatistics.org/_data/assets/pdf_file/0024/23838/csp_dec.pdf) [<https://perma.cc/JJ3S-SLSX>]; ROBERT C. LAFOUNTAIN ET AL., NAT'L CTR. FOR STATE CTS., EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2007 STATE COURT CASELOADS 2 (2009) [hereinafter EXAMINING 2007 CASELOADS]. This accounting excludes "limited jurisdiction" courts (such as small-claims courts) and instead isolates caseloads in: (i) "general" trial courts in states with separate "general" and "limited" jurisdiction courts; and (ii) trial courts in states with "single-tiered" systems that lack separate limited jurisdiction courts. Isolating these courts captures more resource-intensive and higher-stakes cases. If both general and limited

and creditor-debtor disputes and home foreclosures. Domestic relations cases, a statistical basket of misery that includes divorces, child support and custody disputes, and restraining orders in domestic abuse cases, added another 228,000.<sup>13</sup> Turning to the federal courts, job discrimination cases claiming unequal treatment on the basis of race, gender, and disability rose more than 10 percent.<sup>14</sup> Consumer credit cases more than doubled, from 3222 to 8453.<sup>15</sup> And personal bankruptcy filings shot from 775,000 to more than 1.5 million.<sup>16</sup>

That's already millions of new cases. But the docket spikes will be sharper this time round because COVID-19's ravages have been, by nearly any measure, more ferocious. With unemployment higher and consumer debt \$2 trillion deeper on the eve of the pandemic than in 2007,<sup>17</sup> some are predicting a "debt collection pandemic,"<sup>18</sup> others an "eviction apocalypse."<sup>19</sup> Add to this the end of the support programs put into place to blunt COVID-19's impacts—the "stimulus cliff," as

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courts are included, the 2007–2010 increase was greater in absolute terms (2.5 million cases) but smaller in percentage terms (13 percent).

13. EXAMINING 2010 CASELOADS, *supra* note 12, at 3, 14; EXAMINING 2007 CASELOADS, *supra* note 12, at 2.
14. *Table C-2A. U.S. District Courts—Civil Cases Commenced, By Nature of Suit, During the 12-Month Periods Ending September 30, 2006 Through 2010*, U.S. CTS., [https://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/C02ASep10.pdf](https://www.uscourts.gov/sites/default/files/statistics_import_dir/C02ASep10.pdf) [<https://perma.cc/76TD-AUHW>] (last visited Aug. 12, 2020) (noting an increase in Civil Rights/Employment filings from 13,375 in 2007 to 14,543 in 2010, and ADA—Employment filings from 1041 in 2007 to 1522 in 2010).
15. *Id.*
16. *Just the Facts: Consumer Bankruptcy Filings, 2006–2017*, U.S. CTS. (Mar. 7, 2018), <https://www.uscourts.gov/news/2018/03/07/just-facts-consumer-bankruptcy-filings-2006-2017> [<https://perma.cc/8G46-BLA2>].
17. FED. RESV. BANK OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT: 2020:Q1, at 3 (2020), [https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/hhdc\\_2020q1.pdf](https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/hhdc_2020q1.pdf) [<https://perma.cc/43QX-4KJD>].
18. Pamela Foohey, Dalié Jiménez & Christopher K. Odinet, *The Debt Collection Pandemic*, 11 CALIF. L. REV. ONLINE 222, 222, 224 (2020).
19. Courtenay Brown, *Fears Grow of an Eviction Apocalypse*, AXIOS (June 12, 2020), <https://www.axios.com/eviction-crisis-coronavirus-351bb693-a04f-4ea1-a27d-dceb5163af14.html> [<https://perma.cc/85VR-7J72>]. For empirical analyses, see Eviction Tracking System, EVICTION LAB, <https://evictionlab.org/eviction-tracking/> [<https://perma.cc/7HB2-ZNMB>] (last visited Sept. 18, 2020), and EMILY BENFER ET AL., NAT'L LOW INCOME HOUS. COAL., THE COVID-19 EVICTION CRISIS: AN ESTIMATED 30–40 MILLION PEOPLE IN AMERICA ARE AT RISK (2020), [https://nlihc.org/sites/default/files/The\\_Eviction\\_Crisis\\_080720.pdf](https://nlihc.org/sites/default/files/The_Eviction_Crisis_080720.pdf) [<https://perma.cc/99EQ-7DB8>] (consortium-authored report providing overview of eviction statistics and concerns). See also *Week 12 Household Pulse Survey: July 16 – July 21*, U.S. CENSUS BUREAU (July 29, 2020), <https://www.census.gov/data/tables/2020/demo/hhp/hhp12.html> [<https://perma.cc/58LM-8CH4>] (select "Table 2b. Confidence in Ability to Make Next Month's Payment for Renter Occupied Housing Units, by Select Characteristics" hyperlink under "Housing Tables" heading) (finding roughly one-third of renters have slight to no confidence they can make rent).

some call it—and you have the makings of a surge that could easily swamp anything seen in the past.<sup>20</sup>

Compounding that, the case surge will hit as the bill comes due on the large mass of stayed cases. Emergency orders suspending the Speedy Trial Act (and state-level equivalents) have created a backlog of thousands of criminal cases that, once the Act comes back into force, must be tried within its 70-day clock. A similar mass of backlogged cases awaits on the civil side of the system as judge-ordered stays and continuances expire and moratoria on foreclosures, evictions, and replevin—installed by U.S. Congress in the Coronavirus Aid, Relief, and Economic Security (CARES) Act and in many states—are lifted or expire.<sup>21</sup>

Worst of all, the crush of old and new cases will come at a time when the courts themselves, and the organizations that help Americans navigate them, are seriously diminished. Courts will have to do more with less because they suffer budget hits with the rest of government, and no constitutional or other provision offers them any special refuge.<sup>22</sup> Plummeting law firm revenues and the austerity measures that follow will mean fewer lawyers willing or able to represent the worst-off or perform pro bono work.<sup>23</sup> And the network of publicly funded legal

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20. See Mary Williams Walsh, *A Tidal Wave of Bankruptcies Is Coming*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/business/corporate-bankruptcy-coronavirus.html> [<https://perma.cc/X4SZ-ACKL>]; *Racing Toward the Cliff*, N.Y. TIMES: DEALBOOK (July 22, 2020), <https://www.nytimes.com/2020/07/22/business/dealbook/coronavirus-economy-cliff.html> [<https://perma.cc/5KCG-P3L7>]. For a statistical snapshot from the federal courts showing how the combination of rising filings and declining terminations has swelled the current number of pending cases by roughly 30 percent over prior years back to 2015, see *U.S. District Courts—Combined Civil and Criminal Federal Court Management Statistics*, U.S. CTS. (June 30, 2020), <https://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2020/06/30-1> [<https://perma.cc/N79M-Y49C>].
  21. Foohey, *supra* note 18, at 227–28 (cataloging moratoria). Landlords suffer, too, and are challenging moratoria on constitutional grounds. See, e.g., *Melendez v. City of New York*, No. 1:20-cv-5301 (S.D.N.Y. July 10, 2020).
  22. See G. Alan Tarr, *No Exit: The Financial Crisis Facing State Courts*, 100 KY. L.J. 785, 786–88 (2012). For a study of how the Great Recession affected state courts, see Nels Pearsall, Bo Shippen & Roy Weinstein, *Economic Impact of Reduced Judiciary Funding and Resulting Delays in State Civil Litigation*, MICRONOMICS, Mar. 2012, [http://www.micronomics.com/articles/Economic\\_Impact\\_of\\_Reduced\\_Judiciary\\_Funding\\_and\\_Resulting\\_Delays\\_in\\_State\\_Civil\\_Litigations.pdf](http://www.micronomics.com/articles/Economic_Impact_of_Reduced_Judiciary_Funding_and_Resulting_Delays_in_State_Civil_Litigations.pdf) [<https://perma.cc/8BJB-TSK9>]. For estimates of current state budget woes compared to the last downturn, see Elizabeth McNichol & Michael Leachman, *States Continue to Face Large Shortfalls Due to COVID-19 Effects*, CTR. ON BUDGET & POL'Y PRIORITIES (July 7, 2020), <https://www.cbpp.org/sites/default/files/atoms/files/6-15-20sfp.pdf> [<https://perma.cc/D3M4-PBZL>].
  23. See, e.g., Lyle Moran, *Law Firm Revenue Takes Nosedive During COVID-19, New Survey Data Shows*, ABA J. (May 18, 2020, 12:16 PM), <https://www.abajournal.com/news/article/law-firm-revenue-takes-nosedive-during-covid-19-data-shows> [<https://perma.cc/6RZV-L3FM>]; *Pay Cuts, Layoffs, and More: How Law Firms Are Managing the Pandemic*, AM. LAW. (July 31, 2020, 5:00 AM), <https://www.law.com/americanlawyer/2020/07/31/pay-cuts-layoffs-and-more->



aid organizations that assist the poor face a sharp funding loss with state tax revenues sure to nosedive.<sup>24</sup>

But there is a further calamity hiding in case statistics. Consider this fact: State court civil filings shot up during the Great Recession, peaking in 2009 and 2010, but then steadily declined thereafter, falling steadily over the next seven years to levels last seen around 2001, well *before* the Great Recession.<sup>25</sup> While the precise causes are unclear,<sup>26</sup> the bigger calamity may not be backlogged cases in overwhelmed courts, but a massive body of unmet justice problems that never make it into court at all. The challenge, and the opportunity, is how to dig out from the COVID-19 crisis in a way that does not just steer our courts through docket surges. We should also endeavor to make progress on this less visible part of the story—the iceberg of justice problems that sit invisibly below its more visible, docketed tip.

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how-law-firms-are-managing-the-pandemic/?slreturn=20200730164517 [https://perma.cc/5Q5L-CX4U]. For an array of illuminating statistics derived from billing software company Clio, see *COVID-19's Impact on the Legal Industry*, CLIO, <https://www.clio.com/resources/legal-trends/covid-impact> [https://perma.cc/9S29-AYGZ] (last visited Sept. 18, 2020).

24. See, e.g., Melissa Heelan Stanzione, *Domestic Violence, Eviction, Finances Drive Virus Legal Aid Rise*, BLOOMBERG L. (July 24, 2020, 1:51 AM), <https://news.bloomberglaw.com/us-law-week/domestic-violence-eviction-finances-drive-virus-legal-aid-rise> [https://perma.cc/SML2-DQVQ] (noting the combination of increased demands for services and declining funding among legal aid groups). Many legal aid organizations are funded by the interest earned on lawyer trust accounts—known to practicing lawyers as IOLTA accounts, meaning contractions in the for-profit law world rip through the nonprofit legal aid world as well.
25. BRIAN J. OSTROM ET AL., NAT'L CTR. FOR STATE CTS., *EXAMINING THE WORK OF STATE COURTS*, 2003, at 18 (2004); NAT'L CTR. FOR STATE CTS., *STATE COURT CASELOAD DIGEST: 2017 DATA 3* (2019), [http://www.courtstatistics.org/\\_\\_data/assets/pdf\\_file/0011/24014/csp-2017-data-spreads-for-viewing.pdf](http://www.courtstatistics.org/__data/assets/pdf_file/0011/24014/csp-2017-data-spreads-for-viewing.pdf) [https://perma.cc/M84W-TWBQ].
26. See RICHARD SCHAUFFLER, NAT'L CTR. FOR STATE CTS., *THE RISE AND FALL OF STATE COURT CASELOADS* (2017) (discussing possible causes). Other possibilities not discussed include yet another round of tort reforms. See Stephen Daniels & Joanne Martin, *Where Have All the Cases Gone? The Strange Success of Tort Reform Revisited*, 65 EMORY L.J. 1445, 1459 (2016). Additionally, there has been a shift to arbitration following U.S. Supreme Court decisions holding arbitration agreements fully enforceable. Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2932–33 (2015). Finally, stagnating wages and deepening poverty have surely impacted the ability of those suffering legal harms to pay lawyers to represent them. See Chad Stone, Danilo Trisi, Arloc Sherman & Jennifer Beltrán, *A Guide to Statistics on Historical Trends in Income Inequality*, CTR. ON BUDGET & POL'Y PRIORITIES (Jan. 13, 2020), <https://www.cbpp.org/research/poverty-and-inequality/a-guide-to-statistics-on-historical-trends-in-income-inequality> [https://perma.cc/R8GR-GU6Y].

#### IV. “OPEN COURTS” AND RULE REFORM

What to do? As dockets swell, a good start would be to make permanent the best of the recent triage measures. And the lowest-hanging fruit may well be remote proceedings via telephone and videoconferencing. Indeed, even as courthouses are reopening, federal and state rulemakers are racing to move more of the system online.<sup>27</sup>

Virtual hearings save money for courts and litigants alike, especially in the smaller-scale proceedings—arraignments, motions practice, and status conferences—that make up the unending process of judicial management of litigation. Fewer litigant comings and goings mean less court staff and security, saving millions.<sup>28</sup> And because attorneys bill for travel time to courthouses and depositions, remote proceedings can increase access to justice by lowering the cost of legal services.

Remote proceedings also sit at the center of other innovative reforms that our normally hidebound courts are piloting to meet the coming case surge.<sup>29</sup> Among these are “diversion” programs for evictions and other high-volume cases that couple remote proceedings with new prehearing dispute resolution options and connect litigants to payment-assistance programs.<sup>30</sup>

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27. See *Judiciary Seeks Funding, Legislative Changes to Aid COVID-19 Response*, U.S. CTS. (May 5, 2020), <https://www.uscourts.gov/news/2020/05/05/judiciary-seeks-funding-legislative-changes-aid-covid-19-response> [<https://perma.cc/2Y42-C845>]; *Invitation for Comment on Emergency Rulemaking*, U.S. CTS., <https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment/invitation-comment-emergency-rulemaking> [<https://perma.cc/8AFX-V3BK>] (last visited Aug. 12, 2020); see also NAT'L CTR. FOR STATE CTS., *POST-PANDEMIC PLANNING: TECHNOLOGY RESOURCE GUIDE* (2020), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0020/42482/Post-Pandemic-Planning.pdf](https://www.ncsc.org/_data/assets/pdf_file/0020/42482/Post-Pandemic-Planning.pdf) [<https://perma.cc/R7AC-6FFV>] (offering a curated overview of state-level efforts around, among others, digital divide kiosks, digital recording, electronic filing and signatures, legal assistance portals, live streaming, and remote proceedings).

28. There are no good estimates of civil-side savings. Existing claims about potential cost reductions instead center on criminal defendant transportation costs. See, e.g., Press Release, Admin. Off. of Pa. Cts., *PA Courts Expand Use of Video Conferencing, Saving \$21 Million Annually in Defendant Transportation Costs* (June 7, 2011), <http://www.pacourts.us/assets/files/newsrelease-1/file-1396.pdf> [<https://perma.cc/UHV2-CP9J>]; Press Release, Mich. Cts., *Savings From Videoconferencing and Virtual Prisoner Transports Expected to Reach \$4.8 Million in FY 2016* (June 22, 2016), [https://courts.michigan.gov/News-Events/press\\_releases/Documents/Videoconferencing%20Update%20Media%20Release%20with%20MAP.pdf](https://courts.michigan.gov/News-Events/press_releases/Documents/Videoconferencing%20Update%20Media%20Release%20with%20MAP.pdf) [<https://perma.cc/S4PU-DEXP>].

29. Cf. *Pandemic Resources for Courts*, NAT'L CTR. FOR STATE CTS., <https://www.ncsc.org/newsroom/public-health-emergency/pandemic-and-the-courts-resources> [<https://perma.cc/TR3D-ZDQM>] (last visited Aug. 12, 2020).

30. See, e.g., Mich. Admin. Order No. 2020-17 (June 9, 2020), [https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08\\_2020-06-09\\_FormattedOrder\\_AO2020-17.pdf](https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08_2020-06-09_FormattedOrder_AO2020-17.pdf) [<https://perma.cc/VK67-RLRG>].

But there are limits. The “open court” provisions that dot constitutions and court rules ensure rigorous testing of evidence, curtail perjury, and lend conscience to proceedings by keeping “triers keenly alive,” as the Supreme Court has put it, “to a sense of their responsibility and to the importance of their functions.”<sup>31</sup> Virtual proceedings may not deliver these benefits because they cloud communication, reduce checks on attorney-witness interaction, and impair crucial judgments about witness credibility. Pilots in the 2000s spurred debate on these issues, and the coming months and years will revisit them with new vigor.<sup>32</sup>

Such concerns mean that some proceedings can be migrated to digital but others cannot. For instance, the Sixth Amendment’s requirement of a “public trial” and the right to confront witnesses puts key parts of criminal adjudication, including suppression hearings and trial itself, off limits to digitization.<sup>33</sup>

Civil proceedings face fewer barriers, but there is still work to do. Rule wrinkles abound and will require amendments. Federal Rule of Civil Procedure 43’s requirement that testimony be taken in “open court” already permits “transmission from a different location” with “good cause,”<sup>34</sup> but many state rules do not. Litigators can spot weedier issues. Do rules requiring that depositions be taken “before” a court officer permit virtual oathgiving and recording?<sup>35</sup> Rule

31. *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (quoting *In re Oliver*, 333 U.S. 257, 270 n.25 (1948)).

32. See, e.g., Molly Treadway Johnson & Elizabeth C. Wiggins, *Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research*, 28 LAW & POL’Y 211, 213 (2006); Shari Seidman Diamond, Locke E. Bowman, Manyee Wong & Matthew M. Patton, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869 (2010).

33. See *Illinois v. Allen*, 397 U.S. 337, 338 (1970) (“One of the most basic of the rights guaranteed by the Confrontation Clause is the accused’s right to be present in the courtroom at every stage of his trial.”). The U.S. Supreme Court has been notably stingy with confrontation exceptions—for example, its begrudging allowance of remote testimony by child victims in sexual abuse cases. See *Maryland v. Craig*, 497 U.S. 836 (1990); see also *People v. Jemison*, No. 157812, 2020 WL 3421925 (Mich. June 22, 2020) (limiting *Craig* to its facts and holding video testimony of forensic expert at trial violated Confrontation Clause). Suppression hearings are problematic because they often substitute for trial; once incriminating evidence comes in, defendants have no choice but to cop a plea. See *Waller*, 467 U.S. at 47. For a useful overview of “open courts” doctrine, see Michael Pressman & Michael Shammas, *Memorandum: The Permissibility & Constitutionality of Jury Trial by Videoconference*, CIV. JURY PROJECT (May 4, 2020), <https://civiljuryproject.law.nyu.edu/memorandum-the-permissibility-constitutionality-of-jury-trial-by-videoconference> [<https://perma.cc/432T-W8ND>].

34. FED. R. CIV. P. 43.

35. See FED. R. CIV. P. 28; Order, *Sinceno v. Riverside Church in N.Y.*, No. 18-cv-2156 (S.D.N.Y. Mar. 18, 2020) (clarifying that depositions will be deemed conducted “before” a Rule 28 officer so long as the officer attends via the same remote means). California recently enacted an amendment to its civil procedure rules authorizing remote depositions by making the physical presence of a deposition officer and counsel optional. See S. 1146, 2019–2020 Leg., Reg. Sess. (Cal. 2020), [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200SB1146](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB1146) [<https://perma.cc/X4B6-T8TV>].

revisions must also grapple with the fact that not all litigants have webcams, stable WiFi, quiet workspaces, or reliable phone service. Some studies suggest virtual parties do worse than in-person ones.<sup>36</sup> Making virtual proceedings an option might thus open the courthouse doors wider only to relegate some to the basement. The amendment process to grapple with all of these issues is slow, even glacial.

Lasting change will also require something harder: a shift in legal culture. Rule changes, when they come, will be framed in permissive, not mandatory, terms. This is a problem because lawyers are trained to be handwringers, to see around corners, and to catalog the reasons *not* to do things. Technology for virtual depositions, and rules authorizing them, have existed for years, but adoption has been slow.<sup>37</sup> Viewed through this lens, COVID-19's greatest power to effect change may come via a softening of the forces of inertia that have stymied digitization in the past. Hundreds of thousands of judges, lawyers, and court staff will emerge from the pandemic more telework ready than ever before—and they will not unlearn their new digital skillsets.<sup>38</sup>

In sum, remote proceedings are here to stay, but they are also a near-perfect microcosm of the challenges that afflict any court reform effort: the slowness of rule reforms, the stickiness of legal culture, and the difficulty of balancing lower cost and greater access against the value of adversarial testing and the fact that innovation, particularly the technological sort, can exclude as well as include.<sup>39</sup>

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36. See Diamond et al., *supra* note 32; Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259, 263 (2008); Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933 (2015); Dane Thorley & Joshua Mitts, *Trial by Skype: A Causality-Oriented Replication Exploring the Use of Remote Video Adjudication in Immigration Removal Proceedings*, 59 INT'L REV. L. & ECON. 82 (2019).

37. See Stephanie Russell-Kraft, *Depositions Go Virtual During Pandemic, May Remain That Way*, BLOOMBERG L. (May 22, 2020, 7:01 AM), <https://news.bloomberglaw.com/us-law-week/depositions-go-virtual-during-pandemic-may-remain-that-way> [<https://perma.cc/A3XY-ZRR6>]. For a comprehensive list of remote deposition rules as of 2010, see NCSC *Video Conferencing Survey*, NAT'L CTR. FOR STATE CTS., <https://www.ncsc.org/services-and-experts/areas-of-expertise/technology/ncsc-video-conferencing-survey> [<https://perma.cc/7J3H-APMW>] (last visited Sept. 28, 2020). As a further data point, uptick of virtual trials in the civil context has been low, with one federal judge reporting that only one of the twenty-five sets of litigants offered a virtual trial agreed. See Madison Alder & Holly Barker, *Tents, Smoke Machine: Judges Get Creative on Jury Trial Restart*, BLOOMBERG L. (Aug. 27, 2020, 1:51 AM), <https://news.bloomberglaw.com/us-law-week/tents-smoke-machine-judges-get-creative-on-jury-trial-restart> [<https://perma.cc/HQ6K-XLX5>].

38. See Allie Reed & Madison Alder, *Zoom Courts Will Stick Around as Virus Forces Seismic Change*, BLOOMBERG L. (July 30, 2020, 1:50 AM), <https://news.bloomberglaw.com/us-law-week/zoom-courts-will-stick-around-as-virus-forces-seismic-change> [<https://perma.cc/69B5-HREH>].

39. For an overview covering many different technologies, see James E. Cabral et al., *Using Technology to Enhance Access to Justice*, 26 HARV. J.L. & TECH. 241 (2012).

These challenges are important, for the COVID-19 crisis is also quickening a pair of bigger changes, and a wider reckoning, with profound consequences for the future of the legal system.

## V. THE AGE OF SUPERSESSION—NEW PROFESSIONALS, NEW MACHINES

Among Alexis de Tocqueville's most enduring observations while touring the early United States is his account of the central role lawyers play in American society. "When one visits Americans and when one studies their laws," he wrote in *Democracy in America*, "one sees that the authority they have given to lawyers and the influence that they have allowed them to have in the government form the most powerful barrier today against the lapses of democracy."<sup>40</sup> Tocqueville thus launched a debate that still rages today: Are America's lawyers agents of democracy, guardians of individual liberty, or handmaidens of the rich and powerful?<sup>41</sup>

No matter where one comes out on that question, it is clear that two tectonic shifts are coming—and, indeed, were already in motion when the COVID-19 pandemic hit—with the power to reshape the American legal system by fundamentally altering the role that lawyers play within it. The first is the erosion of the professional monopoly that lawyers have long enjoyed over the delivery of legal services and the steady empowerment of new legally trained paraprofessionals to help satisfy justice needs. The second is the steady adoption of new technologies, many using artificial intelligence, to supplement or even supplant lawyers' work. Looking back, COVID-19's greatest legal legacy may be its hastening of the arrival of an age of supersession—the gradual decentering and displacement of lawyers by nonlawyers of both the human and nonhuman sort.

Consider first the human version. Over the past decade, access to justice advocates have built a searing critique.<sup>42</sup> Its core is that the system suffers from a gross mismatch of mythology and reality. On one hand, American law is full of paens to adversarialism—the clash of lawyers in court before a neutral and passive decisionmaker. So strong is this commitment to a lawyer-centered, law-as-tournament ideal that all states impose criminal penalties on anyone who, without a license, engages in what is considered the unauthorized

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40. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 251 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chicago Press 1992) (1835).

41. See Robert W. Gordon, *Lawyers, the Legal Profession & Access to Justice in the United States: A Brief History*, *DAEDALUS*, Winter 2019, at 177.

42. A single-volume overview of the field can be found in the magnificent Winter 2019 volume of *Daedalus*. See *DAEDALUS*, Winter 2019, <https://www.amacad.org/daedalus/access-to-justice> [<https://perma.cc/394F-TTPE>].

practice of law.<sup>43</sup> And yet, in three-quarters of the millions of civil cases filed in state courts each year, one side is pro se and so does not have a lawyer at all.<sup>44</sup> Worse, the overwhelming majority of individuals with actionable claims choose to “lump it,” and thus do not seek recourse at all, either because of the high cost of lawyers or a tendency not to see problems as legal in the first place.<sup>45</sup>

The result is an increasingly angry divide. On one side are those who claim that only lawyers can ethically and competently perform legal work because that work involves multifaceted skill, command of a dispute’s wider context, and problemsolving creativity. On the other side are those who say lawyers long ago stopped serving the worst off in society and so a fundamental overhaul is in order.

Two of the most common proposed fixes form bookends: embrace “Civil Gideon”<sup>46</sup> and thus make having a lawyer a taxpayer-financed right even in civil cases, or simplify procedures so the lawyerless can navigate the system on their own.<sup>47</sup> But the severity of the COVID-19 crisis, and the deep budget cuts it will bring, means that a further, middle-ground idea, long on the menu, is likely to win out over the others: discard the legal profession’s monopoly over work it will not

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43. MODEL RULES OF PRO. CONDUCT r. 5.5 (AM. BAR ASS’N 2019). The classic account is Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981). For an updated overview of state-level unauthorized practice rules and links to examples, see *State Changes of Model Rules*, AM. BAR ASS’N, <http://legalinnovationregulatorysurvey.info/state-changes-of-model-rules/> [https://perma.cc/TN5N-MLGT] (last visited Sept. 18, 2020).
  44. PAULA HANNAFORD-AGOR, SCOTT GRAVES & SHELLEY SPACEK MILLER, NAT’L CTR. FOR STATE CTS., *THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS*, at iv, vi, 32 (2015), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0020/13376/civiljusticereport-2015.pdf](https://www.ncsc.org/_data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf) [https://perma.cc/6ZGU-JFDV]. Pro se rates in federal court are roughly 25 percent. *Table C-13: U.S. District Courts—Civil Pro Se and Non-Pro Se Filings, by District, During the 12-Month Period Ending September 30, 2018*, U.S. CTS., [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_c13\\_0930.2018.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_c13_0930.2018.pdf) [https://perma.cc/WN4W-JUV8] (last visited Aug. 12, 2020).
  45. See REBECCA L. SANDEFUR, *ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 11–12* (2014), [http://www.americanbarfoundation.org/uploads/cms/documents/sandefur\\_accessing\\_justice\\_in\\_the\\_contemporary\\_usa\\_aug\\_2014.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf) [https://perma.cc/SX8B-9RCY]; Rebecca L. Sandefur, *Money Isn’t Everything: Understanding Moderate Income Households’ Use of Lawyers’ Services*, in *MIDDLE INCOME ACCESS TO JUSTICE* 222, 236 (Michael Trebilcock et al. eds., 2012). On “lumping” it, see DAVID M. ENGEL, *THE MYTH OF THE LITIGIOUS SOCIETY: WHY WE DON’T SUE* (2016).
  46. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).
  47. See BENJAMIN H. BARTON & STEPHANOS BIBAS, *REBOOTING JUSTICE: MORE TECHNOLOGY, FEWER LAWYERS, AND THE FUTURE OF LAW* 201–04 (2017); Jeanne Charn, *Celebrating the “Null” Finding: Evidence-Based Strategies for Improving Access to Legal Services*, 122 YALE L.J. 2206 (2013). *But see* Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can’t Solve Inequality*, *DAEDULUS*, Winter 2019, at 128 (2019) (arguing that court simplification cannot deliver substantially more justice to low-income litigants because courts have been left to handle the consequences of welfare state retrenchment and rising inequality but are neither designed nor equipped to do so).

perform, deregulate the system, and welcome other, less expensive service providers into the mix.

The United Kingdom offers a glimpse of what this might look like. In 2007, the sweeping Legal Services Act deregulated legal services by minting new types of nonlawyer service providers and creating an independent agency to field disciplinary complaints. The Act also overrode longstanding rules—still a fixture in the United States<sup>48</sup>—prohibiting lawyers from sharing fees with nonlawyers, thus opening the way to nonlawyer financing and ownership of law firms and new multidisciplinary service providers.<sup>49</sup>

While deregulation has long been a goal of the Big Four accounting firms who covet BigLaw's revenue streams, the potential is also great to improve legal services for moderate- and low-income individuals. Think, for instance, of a partnership between a lawyer, accountant, and social worker to provide wraparound services in family law matters, or new nonlawyer specialists, akin to specialized nurse practitioners, licensed to handle only landlord-tenant matters, personal bankruptcy filings, or restraining orders in criminal and family cases.<sup>50</sup>

The most important return on the U.K. experiment has been to bolster research finding that task specialization and experience matter as much as or more than full legal training in many of the routine litigation areas most likely to see post-COVID-19 upticks: welfare benefits, consumer debt, employment, family law, and immigration.<sup>51</sup> At the same time, concerns that nonlawyer ownership and marketization will subtly shift the professional ethos of the system away from client service and toward pursuit of profit—a Walmart-ization of legal services—have not materialized.<sup>52</sup>

The U.K. experience has also spurred tentative reform steps on American shores. In August 2020, the Utah Supreme Court approved a two-year pilot

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48. MODEL RULES OF PRO. CONDUCT r. 1.5 (AM. BAR ASS'N 2019) (a version of which has been adopted by most states).

49. An impressive analysis is John Armour & Mari Sako, *AI-Enabled Business Models in Legal Services: From Traditional Law Firms to Next-Generation Law Companies?*, 7 J. PRO. & ORG. 27 (2020).

50. See Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 HASTINGS L.J. 1191, 1214–23 (2016).

51. See Elizabeth Chambliss, *Evidence-Based Lawyer Regulation*, 97 WASH. U. L. REV. 297, 321 (2019); JASON SOLOMON, DEBORAH L. RHODE & ANNIE WANLESS, *HOW REFORMING RULE 5.4 WOULD BENEFIT LAWYERS AND CONSUMERS, PROMOTE INNOVATION, AND INCREASE ACCESS TO JUSTICE* 8–12 (2020), <https://law.stanford.edu/publications/how-reforming-rule-5-4-would-benefit-lawyers-and-consumers-promote-innovation-and-increase-access-to-justice> [<https://perma.cc/U8HM-R5S8>]. For an earlier contrary view, see Nick Robinson, *When Lawyers Don't Get All the Profits: Non-Lawyer Ownership, Access, and Professionalism*, 29 GEO. J. LEGAL ETHICS 1 (2016).

52. Chambliss, *supra* note 51, at 322.

permitting nonlawyer ownership of law firms and nonlawyer service providers.<sup>53</sup> Other jurisdictions have flirted with reforms, whether in the form of grand-scale brainstormings by blue-ribbon commissions, as in California, or smaller-scale pilots of alternative service providers in housing, family, or other courts.<sup>54</sup> Even the American Bar Association (ABA), long a stalwart defender of the lawyer monopoly, passed a hotly debated resolution in February, before the extent of the COVID-19 pandemic or its consequences were clear, encouraging states to consider “regulatory innovations” to meet civil justice needs.<sup>55</sup>

The other half of supersession—the machine variety—may in time prove the more important. Technological predictions can seem inflated in an age of handwaving references to so-called black box artificial intelligence (AI) systems. A growing shelf of books and articles does not help by engaging in loose talk about a futuristic legal system populated by robojudges and robolawyers.<sup>56</sup> But the COVID-19 crisis has come on the heels of one of the most significant AI advances in a generation—a quantum leap in natural language processing, the branch of machine learning that performs text analytics and so holds the most promise in a

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53. Standing Order No. 15, Utah Sup. Ct. (Aug. 14, 2020), <http://www.utcourts.gov/utc/rules-approved/wp-content/uploads/sites/4/2020/08/FINAL-Utah-Supreme-Court-Standing-Order-No.-15.pdf> [<https://perma.cc/58ZM-PEV8>]; *Supreme Court Regulatory Reform—Effective August 14, 2020*, UTAH CTS. (Aug. 13, 2020), <http://www.utcourts.gov/utc/rules-approved/2020/08/13/supreme-court-regulatory-reform-effective-august-14-2020> [<https://perma.cc/F3EQ-JYJL>] (revising the Utah Rules of Professional Conduct). The Court’s order and rule revisions implement a proposal from a working group the Court had created to study potential regulatory reforms. See UTAH WORK GRP. ON REGUL. REFORM, NARROWING THE ACCESS-TO-JUSTICE GAP BY REIMAGINING REGULATION (2019), <https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf> [<https://perma.cc/9JY3-JJC8>].
  54. See Chambliss, *supra* note 51, at 336–37, 347 (cataloging reform efforts); Hadfield & Rhode, *supra* note 50, at 1220–23 (same); *Task Force on Access Through Innovation of Legal Services*, STATE BAR CAL., <http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees-Commissions/Task-Force-on-Access-Through-Innovation-of-Legal-Services> [<https://perma.cc/6CVZ-29U6>] (last visited Aug. 12, 2020); see generally *Legal Innovation Regulatory Survey*, ABA CTR. FOR INNOVATION, <http://legalinnovationregulatorysurvey.info> [<https://perma.cc/2BLU-F8JM>] (last visited Aug. 11, 2020) (offering interactive 50-state survey); *Unlocking Legal Regulation Knowledge Center*, INST. FOR ADVANCEMENT AM. LEGAL SYS., <https://iaals.du.edu/knowledge-center> [<https://perma.cc/3GRV-YYQG>] (last visited Aug. 12, 2020) (documenting reforms across states and localities).
  55. *Resolution 115 Revised With Proposed Amendment*, ABA (Feb. 2020), <https://www.americanbar.org/content/dam/aba/administrative/news/2020/02/midyear2020/resolutions/115.pdf> [<https://perma.cc/JUP3-AENT>].
  56. Compare, e.g., Jason Koebler, *Rise of the Robolawyers*, ATLANTIC (Apr. 2017), <https://www.theatlantic.com/magazine/archive/2017/04/rise-of-the-robolawyers/517794> [<https://perma.cc/JXP6-Y6ZF>], with Milan Markovic, *Rise of the Robot Lawyers?*, 61 ARIZ. L. REV. 325 (2019).



legal system built around words.<sup>57</sup> Legal tech is coming on strong and, like any automation, will only gain steam in a faltering economy as everyone looks for ways to do more with less.

A prime example at the frontier is machine learning tools that can already perform one of the costliest litigation tasks better and cheaper than lawyers alone: flagging documents for relevance and privilege to decide which, among millions of possibilities, must be turned over to the other side.<sup>58</sup> Other tools generate something even more valuable in litigation: information.<sup>59</sup> Some of these latter tools help lawyers perform legal research, predict case outcomes, or even decide which arguments to put before *this* particular judge. Others, though fewer, are directed at the unrepresented: online legal advice via chatbot; apps such as TurboTax, LegalZoom, and Rocket Lawyer that help the lawyerless complete legal documents, from taxes to nondisclosure agreements (NDA) to divorces; and online dispute resolution (ODR) platforms that substitute for courts.<sup>60</sup>

As we think about how legal tech will reshape our post-COVID-19 courts, the question that looms largest is whether legal tech will widen or narrow the gap between “haves” and “have nots.” Some see legal tech as a force-multiplier that will allow smaller firms to do battle with larger, corporate-facing ones.<sup>61</sup> Legal tech can also, as with remote proceedings, improve access to justice by reducing the cost of

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57. For natural language processing’s (NLP) quantum leap, see Jacob Devlin, Ming-Wei Chang, Kenton Lee & Kristina Toutanova, *BERT: Pre-Training of Deep Bidirectional Transformers for Language Understanding*, in PROCEEDINGS OF NAACL-HLT 4171 (2019), <https://www.aclweb.org/anthology/N19-1423.pdf> [<https://perma.cc/QR8R-U58Z>]. For general accounts of the state of NLP and legal analysis, see KEVIN D. ASHLEY, *ARTIFICIAL INTELLIGENCE AND LEGAL ANALYTICS: NEW TOOLS FOR LAW PRACTICE IN THE DIGITAL AGE* (2017), and *LAW AS DATA: COMPUTATION, TEXT, AND THE FUTURE OF LEGAL ANALYSIS* (Michael A. Livermore & Daniel N. Rockmore eds., 2019).

58. David Freeman Engstrom & Jonah B. Gelbach, *Legal Tech, Civil Procedure, and the Future of Adversarialism*, 169 U. PA. L. REV. (forthcoming 2021) (reviewing studies of the efficacy and efficiency of “predictive coding”). On discovery costs, see NICHOLAS M. PACE & LAURA ZAKARAS, RAND INST. FOR CIV. JUST., *WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY* (2012).

59. Engstrom & Gelbach, *supra* note 58 (cataloging flavors of legal tech).

60. See REBECCA L. SANDEFURET AL., *LEGAL TECH FOR NON-LAWYERS: REPORT OF THE SURVEY OF US LEGAL TECHNOLOGIES* (2019), [http://www.americanbarfoundation.org/uploads/cms/documents/report\\_us\\_digital\\_legal\\_tech\\_for\\_nonlawyers.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/report_us_digital_legal_tech_for_nonlawyers.pdf) [<https://perma.cc/5X7S-JT8V>]. On online dispute resolution, see RICHARD SUSSKIND, *ONLINE COURTS AND THE FUTURE OF JUSTICE* (2020), and J. J. Prescott & Alexander Sanchez, *Platform Procedure*, in *SELECTION AND DECISION IN JUDICIAL PROCESS AROUND THE WORLD* 30 (Yun-Chien Chang ed., 2019).

61. Albert H. Yoon, *The Post-Modern Lawyer: Technology and the Democratization of Legal Representation*, 66 U. TORONTO L.J. 456, 457 (2016).

representation.<sup>62</sup> PeopleLaw, the steadily shrinking sector that serves individuals rather than corporations, might rebound.<sup>63</sup>

The darker view is that legal tech will replicate or even exacerbate existing disparities. Early evidence suggests that some of the best legal tech tools will come from large law firms, with privileged access to client data and the resources to build internal technical capacity.<sup>64</sup> While Silicon Valley entrepreneurs talk of disrupting the legal industry, legal tech may not spell doom for BigLaw. Quite the opposite: It may instead provide a new profit center.

Bleakest of all is the possibility that legal tech will enable the “haves” to more efficiently deploy law against the “have nots,” particularly in the high-volume processes that tend to ensnare the disadvantaged. Witness, for instance, use of robo-approaches in mortgage foreclosures and consumer credit disputes after the Great Recession.<sup>65</sup> Legal tech may make it easier for employers, creditors, and landlords to prosecute cases against employees, debtors, and tenants—not the other way around.<sup>66</sup> ClickNotices, a “delinquency management solution” for landlords, is only one example.<sup>67</sup> Predictive analytics applied to datasets of past cases could also allow creditors and mortgagees to determine which debtors will

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62. See Dana Remus & Frank Levy, *Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law*, 30 GEO. J. LEGAL ETHICS 501 (2017).
  63. Bill Henderson, *The Decline of the PeopleLaw Sector*, LEGAL EVOLUTION (Nov. 19, 2017), <https://www.legalrevolution.org/2017/11/decline-peoplelaw-sector-037> [<https://perma.cc/5X7S-JT8V>]. It is also possible, however, that legal tech tools that automate relatively simple legal tasks will hit solo practitioners and smaller firms hardest. See Remus & Levy, *supra* note 62, at 518–19.
  64. Roy Strom, *Littler Mendelson Gambles on Data Mining as Competition Changes*, LAW.COM (Oct. 26, 2016, 6:21 PM), <https://www.law.com/sites/almstaff/2016/10/26/littler-mendelson-gambles-on-data-mining-as-competition-changes/?slreturn=20200818233017> [<https://perma.cc/WCQ3-4PF3>]; see also Kate Beioley, *Workplace Litigation: Why US Employers Are Turning to Data*, FIN. TIMES (Dec. 9, 2019), <https://www.ft.com/content/865832b4-0486-11ea-a958-5e9b7282cbd1> [<https://perma.cc/G35D-XMVN>] (ranking a dozen BigLaw firms based on data analytics capacity).
  65. See Danielle Keats Citron & Frank A. Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 4 (2014).
  66. Frank Pasquale & Glyn Cashwell, *Prediction, Persuasion, and the Jurisprudence of Behaviourism*, 68 U. TORONTO L.J. 63, 104 (2018).
  67. CLICKNOTICES, [www.clicknotices.com](http://www.clicknotices.com) [<https://perma.cc/8HGR-R85D>] (last visited Aug. 11, 2020). For analysis of how “proptech” is empowering landlords (but also, potentially, tenants), see Erin McElroy, Meredith Whittaker & Genevieve Fried, *COVID-19 Crisis Capitalism Comes to Real Estate*, BOS. REV. (May 7, 2020), <http://bostonreview.net/class-inequality-science-nature/erin-mcelroy-meredith-whittaker-genevieve-fried-covid-19-crisis> [<https://perma.cc/DUD7-WTKB>]. Another example is Walmart’s reported use of AI to litigate personal injury and employment disputes. Brenna Goth, *Walmart Using AI to Transform Legal Landscape, Cut Costs*, BLOOMBERG L. (Apr. 26, 2018, 10:02 AM), <https://news.bloomberglaw.com/daily-labor-report/walmart-using-ai-to-transform-legal-landscape-cut-costs> [<https://perma.cc/3RA7-ZSEY>].

quickly roll over or fail to show up to court and suffer a default judgment. Those predictions can have a racial cast. The combination of U.K.-style deregulation and technological advances could yield the worst of all worlds: predation at scale.<sup>68</sup>

Momentum, in short, was already gathering to reshape the legal landscape in ways that are both promising and perilous from an access to justice perspective. The COVID-19 crisis did not initiate these shifts. But the coronavirus pandemic plainly arrived at a key inflection point in the life of American law. The question now is how to move the legal system down the right path.

## VI. A (CHIEF JUSTICE) MARSHALL PLAN

Lawyers have a name for the inability of those who suffer legal wrongs to get justice: the rights-remedy gap. The idea has a powerful heritage. In *Marbury v. Madison*, Chief Justice John Marshall, faced with a political dispute between outgoing President John Adams and incoming President Thomas Jefferson about whether a judicial appointee should get his job, pulled off a strategic masterstroke, punting on the appointment but establishing several great principles of American law. One was judicial review—the notion, not obvious then, that courts can sit in judgment of the other branches and declare their actions illegal. Another was an enduring metric, however aspirational, for judging the work of the courts themselves. “It is a settled and invariable principle,” intoned Marshall, “that every right, when withheld, must have a remedy, and every injury its proper redress.”<sup>69</sup>

Marshall, of course, was not quite right. A legal system in which *every* legal violation, however small, is exhaustively litigated and remedied would squander society’s scarce resources.<sup>70</sup> But Marshall’s framing is useful as we think about the post-COVID-19 courts because it offers a shorthand way to capture the grave possibility that the coming case surge, combined with the deregulation and marketization of legal services and continued advances in legal tech, will widen rather than narrow an already unacceptable gap between rights and remedies. If so, then what may be needed is a new Marshall Plan, not of the post-WWII variety, but for our courts, to close the gap Chief Justice Marshall identified.

Such a plan will be an all-hands-on-deck moment. Judges and rulemakers must move decisively to build out the best ideas that the COVID-19 crisis is

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68. Chambliss, *supra* note 51, at 333.

69. *Marbury v. Madison*, 5 U.S. 137, 147 (1803).

70. Federal courts scholars will see a further finesse: Chief Justice John Marshall was referring only to writs of mandamus and prohibition as applied to the ministerial, not discretionary, acts of public officials. But his language, citing Blackstone before him, has become a fixture of American legal rhetoric. See, e.g., John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999).

catalyzing, from remote hearings to diversion programs and beyond. They will also have to adapt rules to assimilate new professionals and new technologies into the system. Doing so, as already noted, will not be easy because the tradeoffs among values—efficiency, adversarial testing, and access—are hard and will vary across types of proceedings and technologies.<sup>71</sup> As the COVID-19 crisis lifts and legal tech continues to proliferate, judges and rulemakers will face increasingly urgent questions about how to blunt the effects of unequal access to new technology in a fast-digitizing system.

Bar associations must drop their reflexive opposition to any change to the status quo. To this point, the ABA has mostly engaged in positiontaking without building any research capacity to make their case.<sup>72</sup> Many state bar associations have done worse, opposing any change that does not retain lawyers as the beating heart of the system. A vivid example is the successful war waged against Avvo, an online lawyer-client matching service that merely sought to connect *human* lawyers to clients.<sup>73</sup> If the organized bar is to meaningfully participate in the reform efforts to come, it must recognize that nonlawyers of both the human and machine sort can improve the system and then engage in an evidence-based debate about when lawyers are needed and when they are not.<sup>74</sup>

Law schools must also get to work. They must better train their graduates—including, in time, the new nonlawyer professionals<sup>75</sup>—to use technology to serve the most disadvantaged among us. Law schools must also break free from their preoccupation with preparing lawyers to provide bespoke, highly customized advice to individual clients and instead aspire to graduate a new kind of hybrid professional.<sup>76</sup> Project management, process improvement, design

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71. See Scott Dodson, Hon. Lee Rosenthal & Christopher L. Dodson, *The Zooming of Federal Civil Litigation*, 104 JUDICATURE (forthcoming 2020) (manuscript at 12, 14), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3676614](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3676614) [<https://perma.cc/3PKR-CGA6>] (discussing “post-pandemic practice” and the challenges facing judges and rulemakers, from “discerning the line between remote-acceptable and in-person-preferred events” to “the proportionality calculus” in discovery).

72. Chambliss, *supra* note 51, at 321.

73. See Benjamin H. Barton & Deborah L. Rhode, *Access to Justice and Routine Legal Services: New Technologies Meet Bar Regulators*, 70 HASTINGS L.J. 955 (2019) (recounting bar regulator challenges to Avvo, particularly on grounds of improper fee-splitting because Avvo’s marketing fees were pegged to the amount ultimately charged for legal services obtained through Avvo’s attorney-client matching system).

74. See D. James Greiner, *The New Legal Empiricism & Its Application to Access-to-Justice Inquiries*, DAEDALUS, Winter 2019, at 64, 72 (listing key questions).

75. See Dan Rodriguez, *Limited Practice Experiments: The Educational Piece of the Puzzle*, LEGAL EVOLUTION (Feb. 2, 2020), <https://www.legalevolution.org/2020/02/limited-practice-experiments-the-educational-piece-of-the-puzzle> [<https://perma.cc/LB3S-WSLG>].

76. See Andrew M. Perlman, *The Public’s Unmet Need for Legal Services & What Law Schools Can Do About It*, DAEDALUS, Winter 2019, at 75, 75–76.

thinking, and data science will be at the core of lawyers' professional identity going forward, and law schools must teach those skills.<sup>77</sup>

Finally, legislators must see the declining capacity of the legal system to serve ordinary Americans for what it is: a democracy problem, not just a legal or technocratic problem. This may mean overruling foot-dragging state supreme courts and rulemaking bodies, even at risk of encroaching on the “inherent” constitutional power of the courts to oversee their affairs.<sup>78</sup> It also means funding technology upgrades despite belt-tightening in the face of budget constraints.<sup>79</sup> Even the transition to virtual hearings will not work without quality technology.

Perhaps the most impactful thing legislators can do is widen access to the court data that are legal tech's lifeblood. The federal courts, where e-filing is mandatory, sit atop a growing mountain of data but have refused to make it available except on a fee-per-document basis.<sup>80</sup> Considered individually, the charges are not much—but, when combined, they put the large datasets needed to power the new legal tech toolkit beyond the reach of all but the most well-heeled entities. As e-filing becomes the norm, state judicial administrators may similarly succumb to the temptation to put documents behind paywalls to shore up budgetary shortfalls. Access to data, in short, is fast becoming an access to justice issue<sup>81</sup>—and a crucial way to counter the privileged position of litigation's “haves.”

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77. See, e.g., Daniel Martin Katz, *The MIT School of Law? A Perspective on Legal Education in the 21st Century*, 2014 U. ILL. L. REV. 1431; Margaret Hagan, *Justice Innovation With Law School Design Labs*, ABA: DIALOGUE (June 15, 2018), [https://www.americanbar.org/groups/legal\\_services/publications/dialogue/volume/21/spring-2018/iolta-design-labs](https://www.americanbar.org/groups/legal_services/publications/dialogue/volume/21/spring-2018/iolta-design-labs) [<https://perma.cc/7SE9-JFRF>]. Law schools must also teach technology so that lawyers can fully satisfy duties of competence, obtain informed consent from clients when using technology in litigation, and exercise due diligence in overseeing third-party vendors. For an initial exploration, see Jamie J. Baker, *Beyond the Information Age: The Duty of Technology Competence in the Algorithmic Society*, 69 S.C. L. REV. 557 (2018).

78. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 855 (1992) (analyzing the “inherent powers” doctrine).

79. Current signs are not encouraging. See Madison Alder, *Judiciary Funding Absent in House, Senate Covid-19 Relief Bills*, BLOOMBERG L. (July 30, 2020, 11:11 AM), <https://news.bloomberglaw.com/us-law-week/judiciary-funding-absent-in-house-senate-covid-19-relief-bills> [<https://perma.cc/5GXX-QJ9Q>].

80. See PACER, <http://www.pacer.gov> [<https://perma.cc/NX8U-L98V>] (last visited Aug. 12, 2020). A federal appeals court recently held that the courts were charging excessive fees in violation of the PACER authorizing legislation and the E-Government Act of 2002. See *Nat'l Veterans Legal Servs. Program v. United States*, Nos. 2019-1081 & 2019-1083, 2020 WL 4516079 (Fed. Cir. Aug. 6, 2020).

81. See Adam R. Pah et al., *How to Build a More Open Justice System*, 369 SCIENCE 134 (2020). For the broader initiative, see *About Scales*, SCALES, <https://scales-okn.org/about-the-project> [<https://perma.cc/7TQ6-VL84>] (last visited Aug. 12, 2020). For some further thinking about what “public option” legal tech tools might look like, see Richard M. Re & Alicia Solow-Niederman, *Developing Artificially Intelligent Justice*, 22 STAN. TECH. L. REV. 242, 285 (2019).

Advocating for these changes requires respect for the suffering the COVID-19 crisis has caused. Calls to reimagine institutions can seem facile and flippant in the smoldering ruins of a crisis. Winston Churchill's "never let a good crisis go to waste" comes to mind. But delaying action out of respect would be foolhardy. We will lose the propulsion of a crisis with real human costs and real potential for improvement. Worse, failure to address access to justice issues in the coming months and years, when Americans are hurting most, risks further flight from the legal system and further erosion of the notion that courts are neutral, evenhanded dispensers of justice to all those with problems, big or small. The legitimacy of the system—and its ability to cajole and persuade those around it to obey its mandates—depend on it. No one, not even lawyers with a good-faith commitment to the view that only they can adequately protect rights and rule of law, should want that to happen.