UNIVERSITY OF PITTSBURGH LAW REVIEW

Vol. 85 ● Winter 2023

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ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.1003
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A PERFECT STORM FOR LEGAL EDUCATION: PRIVATIZATION, POLARIZATION, AND PEDAGOGY

Rachel F. Moran*

Law is one of the three high-status professions that gained prominence, along with medicine and theology, in England in the late medieval period.[1] At the time, these professionals served the landed gentry: doctors cared for the body, lawyers tended to financial affairs, and theologians addressed reckonings with a higher power.[2] In these transactions, lawyers aspired to be trustworthy experts, serving elite clients with efficiency and aplomb.[3] Today, we would say that these early attorneys' legitimacy turned on demonstrating expert professionalism: effectively marshalling the knowledge and skills to achieve a client's goals.[4] As law practice evolved, over

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* Professor of Law, Texas A&M University School of Law. I want to thank Bernard Hibbitts and Richard Weisberg as well as the *University of Pittsburgh Law Review* for inviting me to be a part of this symposium. I also want to thank Scott Cummings, who thoughtfully allowed me to share some of my ideas on polarization and professional identity at the International Legal Ethics Conference (ILEC) in Los Angeles. I also am grateful to Yasutomo Morigiwa, Kyoko Ishida, Naoki Idei, Yoko Tamura, and Tatsu Katayama, the organizers of International Legal Ethics Symposium Tokyo (ILEST) 2023 in Tokyo, for the opportunity to present my research on new technologies and the ethical challenges they pose for the American legal profession.

[1] STEVEN BRINT, IN AN AGE OF EXPERTS: THE CHANGING ROLE OF PROFESSIONALS IN POLITICS AND PUBLIC LIFE 26–27 (1994).

[2] *Id.* at 27. Meanwhile, clerks and scriveners played a vital role in the local administration of law in medieval England, serving as intermediaries who could "bridge the gap between the multilingual and literacy dependent culture of written law and the vernacular, 'illiterate,' oral tradition of the average medieval layperson who need to somehow access the law." Kitrina Lindsay Bevan, Clerks and Scriveners: Legal Literacy and Access to Justice in Late Medieval England 15 (Ph.D. dissertation, University of Exeter, 2013), https://core.ac.uk/download/pdf/12827905.pdf.

[3] BRINT, *supra* note 1, at 27–28.

[4] *See* Rachel F. Moran, *The Three Ages of Modern American Lawyering and the Current Crisis in the Legal Profession and Legal Education*, 58 SANTA CLARA L. REV. 453, 456–57 (2019).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.1003
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the centuries and in the United States, expert professionalism remained the dominant paradigm for providing legal services to corporate clients, the modern-day equivalent of the landed gentry.[5] At the same time, though, lawyers in the nineteenth century confronted the prospect of populist backlash over their monopoly on legal services.[6] In the face of these attacks, lawyers continued to value expert professionalism but added a commitment to social trustee professionalism—that is, an obligation to serve the greater social good as well as individual clients.[7] Although the precise meaning of the greater good might be hotly contested, efficiency in serving clients alone was no longer enough to establish the profession's preeminence.[8] Service to the community, often through pro bono representation, became a watchword,[9] and the profession expanded to better serve persons of modest means as well as elite corporate clients.[10]

Today, the legal profession faces new challenges to its integrity and legitimacy due to technological change, rising political polarization, and a stratified bar. In this Article, I first explore how technological innovations are undermining lawyers' claims to a unique monopoly on expertise. These technologies are designed to transform routinized law practice in ways that improve efficiency. With little focus on attorneys' obligations to serve the greater good, technology entrepreneurs emphasize practical advantages over traditional forms of representation. These proponents promise reduced costs and superior results through a single-minded commitment to market dynamics. Those promises in turn depend on displacing conventional lawyers and the expense they entail.

I then turn to the challenges that an increasingly polarized populace poses for any ambitious notion of social trustee professionalism. As it becomes increasingly difficult to find common ground, one form of service to the greater good that may generate broad consensus is safeguarding the administration of justice. This commitment can be cast as a purely procedural one that does not choose among competing substantive claims about the good life and the American way. Yet that narrow framing leaves the profession ill-prepared to resolve intensifying differences: proceduralism alone will not appease those who are results-oriented and distrustful

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[5] *Id.*

[6] *Id.* at 461–62.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 469–70.

[10] *Id.* at 491–92. Efforts to provide legal services to the poor ultimately triggered significant resistance. *Id.* at 493–94.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.1003
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of others who hold opposing views. Unlike technological advances, debates over polarization cannot plausibly be resolved through market solutions. Because seemingly irreconcilable values are at stake, lawyers as social trustees must demonstrate how the law sets boundaries for civil discourse and creates conditions for compromise.

Finally, I examine how the combined forces of technology and polarization are likely to affect legal education and the legal profession. As technology displaces various forms of routinized practice, lawyers who perform these services will be less in demand. Their share of the legal sector will shrink, and less prestigious law schools that train graduates for solo or small-firm practice will see enrollments drop. As these schools contract significantly, legal education will become increasingly identified with elite law schools that train graduates who serve privileged clients. At the same time, ordinary people will come to view their contact with the legal system as more akin to an online transaction. As a result, the basic understanding of law that arises through ordinary interactions with practicing attorneys will become increasingly rare. The general population will perceive law and the legal profession as a province of elites, and there will be growing distrust of legal institutions as a result. When lawyers have to resolve deeply polarized disputes—that is, the hard cases that make bad law—there will be few reserves of popular goodwill to support their efforts.

I. EMERGING TECHNOLOGIES, EFFICIENCY, AND THE PRIVATIZED WORLD OF EXPERT PROFESSIONALISM

The rise of new technologies poses challenges for some forms of legal practice. The use of technology in legal disputes has its roots in the private sector.[11] When the Internet became widely available in the 1990s, there was explosive growth in e-commerce.[12] With that growth came a problem: how could companies assure customers that there would be a trustworthy and efficient way to resolve disputes over transactions in cyberspace?[13] Without consumer confidence, people might become reluctant to engage in online market exchanges.[14] There were challenges in

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[11] *See* Oladeji M. Tiamiyu, *The Impending Battle for the Soul of ODR: Evolving Technologies and Ethical Factors Influencing the Field*, 23 CARDOZO J. CONFLICT RESOL. 75, 77–82 (2022).

[12] *See id.* at 79. From the late 1990s to the early 2000s, eBay saw revenues increase nearly twenty-fold, while Amazon saw revenues grow ten-fold from 1996 to 1997 alone. *Id.*

[13] *See id.* at 79–80.

[14] *Id.*

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.1003
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designing a dispute resolution process for this situation. The process had to be relatively inexpensive because e-commerce transactions were usually small in value.[15] At the same time, the resolution had to be expeditious, given that Internet users often put a premium on speed.[16] Finally, the process could not presume any pre-existing relationship between the parties. Often, the transactions were highly impersonal: the buyer and seller were strangers who might not even know one another's real names or locations.[17] In short, there was no sense of familiarity or trust to draw on in resolving disagreements. In addition to these empirical realities, there were some unique norms that dominated cyberspace. Many users saw the Internet as a new frontier that should be largely unregulated; in fact, they feared that regulation would kill innovation.[18] As a result, there was little appetite for resolving disputes by using a top-down system in which judges exercised authority to apply rules and regulations.[19] Instead, the dispute resolution system focused on serving users' needs and interests through a process of voluntary arbitration based on mutual consent.[20]

These characteristics made technology-driven methods attractive: they were cheap, quick, and efficient. The technology could facilitate an arm's-length resolution even if parties had relatively little knowledge or contact,[21] so long as the rules were transparent, fair, and mutually acceptable. The lack of regulation meant that technologies for resolving disputes could be highly innovative, in some instances deviating significantly from traditional top-down legal systems.[22] The most conventional approach relied on facilitative online dispute resolution, which brought parties together in digital forums but otherwise relied on traditional methods of arbitration or mediation.[23] There were, however, more substantial departures from

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[15] *Id.* at 80–81.

[16] *Id.*

[17] *Id.* at 81.

[18] *See id.*; Jonathan B. Wiener, *The Regulation of Technology, and the Technology of Regulation*, 26 TECH. SOC'Y 483, 483–84 (2004) (discussing how regulation has generally been seen as an adversary to innovation among new technologies).

[19] *See* Tiamiyu, *supra* note 11, at 83.

[20] *Id.* at 82.

[21] *See id.* at 81–82.

[22] *Id.* at 82–83.

[23] *See* Leon E. Trakman, *From the Medieval Law Merchant to E-Merchant Law*, 53 U. TORONTO L.J. 265, 284 n.101 (2003) (outlining the development of ODR, its manifestations among various online platforms, and its similarities to arbitration and mediation). The National Center for State Courts defines these types

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historical practice. With the rise of artificial intelligence, some online dispute resolution systems deployed it to supplement or even supplant the work of human arbitrators or mediators.[24] If the systems left autonomy and discretion with a human decision-maker, artificial intelligence could be viewed as a useful tool to improve the efficiency of arbitration or mediation. However, when artificial intelligence became a substitute for human judgment, major concerns arose about the moral capacities of the programs and the transparency with which they were developed and applied.[25] Perhaps the most dramatic departure from conventional methods utilized blockchain to crowdsource online dispute resolution, entirely forgoing reliance on authorities with special expertise.[26] In marked contrast to traditional legal systems, no overarching principles governed the blockchain network's preferences.[27] This crowdsourcing approach rewarded groups whose decisions matched the majority's proposed resolution of the dispute.[28] Unlike conventional legal systems that prize dissent as a way to explore both sides of an issue, blockchain punished those who failed to conform to prevailing views and made dissent a costly form of self-sacrifice.[29]

So long as online dispute resolution systems remained the province of e-commerce, any concerns about their divergence from traditional legal methods were mitigated by the fact that the parties voluntarily chose to participate. Today, however, online dispute resolution is being used in traditional legal settings in which individuals expect to pursue their claims in a conventional way.[30] Some in-roads into

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of online dispute resolutions as "public facing digital space in which parties can convene to resolve their dispute or case." *What is ODR?*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/odr/guidance-and-tools (last visited Jan. 10, 2024).

[24] *See, e.g.*, John Zeleznikow, *Using Artificial Intelligence to Provide Intelligent Dispute Resolution Support*, 30 GRP. DECISION & NEGOT. 789, 793 (2021) (explaining the ways that artificial intelligence supplements online dispute resolution negotiations); Darren Gingras & Joshua Morrison, *Artificial Intelligence and Family ODR*, 59 FAM. CT. REV. 227, 229 (2021).

[25] Tiamiyu, *supra* note 11, at 89–94.

[26] *See* Orna Rabinovich-Einy & Ethan Katsh, *Blockchain and the Inevitability of Disputes: The Role for Online Dispute Resolution*, 2019 J. DISP. RESOL. 47, 59–73 (describing the few companies using blockchain ODR).

[27] *See id.* at 59.

[28] *Id.*; Tiamiyu, *supra* note 11, at 97–98.

[29] Tiamiyu, *supra* note 11, at 99.

[30] *Online Dispute Resolution Moves from E-Commerce to the Courts*, PEW CHARITABLE TRS. (June 4, 2019), https://www.pewtrusts.org/pl/research-and-analysis/articles/2019/06/04/online-dispute-resolution-moves-from-e-commerce-to-the-courts; Amanda R. Witwer, Lynn Langton, Duren Banks,

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.1003
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the courts have happened because of an access to justice gap.[31] Often, people with limited means have difficulty securing the services of an attorney, so they must represent themselves in actions. In fact, most cases in state civil trial courts involve at least one pro se party.[32] According to advocates seeking to close this gap, technological support is better than no support at all.[33] In fact, court-implemented online dispute resolution systems have been growing rapidly. According to an American Bar Association report, the number grew from just one in 2014 to sixty-six in 2019.[34] Court closures during the pandemic accelerated these trends.[35] So far, most court-based efforts rely on facilitative technology that allows parties to convene online but does not fundamentally alter the nature of the proceedings.[36] Data suggest that the courts' experiments with online platforms have produced speedier results for

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Dulani Woods, Michael J.D. Vermeer & Brian A. Jackson, *Online Dispute Resolution: Perspectives to Support Successful Implementation and Outcomes in Court Proceedings*, RAND CORP.: PRIORITY CRIM. JUST. NEEDS INITIATIVE 3–4 (2021), https://www.rand.org/content/dam/rand/pubs/research_reports/RRA100/RRA108-9/RAND_RRA108-9.pdf; *see also* Info. Tech. Advisory Comm., Jud. Council of Cal., *Online Dispute Resolution (ODR): Workstream Findings & Recommendations*, CAL. CTS. 8–13 (2021), https://www.courts.ca.gov/documents/ODR_Workstream_Report.pdf (describing judicial initiatives using online dispute resolution in Alaska, California, Connecticut, Michigan, New Hampshire, and Utah).

[31] *E.g.*, Kimberly Paulson, *Technology: The Future of Access to Justice*, MICH. BAR J., Nov. 2021, at 28, 29–30 (describing how the Michigan Legal Help program offers fifty do-it-yourself tools on a comprehensive website and how Michigan has used artificial intelligence to create a conversational human-like approach on Legal Server, an online case management platform). For an early account of how technology might bridge access to the justice gap, see James E. Cabral, Abhijeet Chavan, Thomas M. Clarke, John Greacen, Bonnie Rose Hough, Linda Rexer, Jane Ribadeneyra & Richard Zorza, *Using Technology to Enhance Access to Justice*, 26 HARV. J.L. & TECH. 241, 246–56 (2012).

[32] *See* Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEO. L.J. 509, 511 (2022).

[33] *Online Dispute Resolution Moves from E-Commerce to the Courts*, *supra* note 30.

[34] *Online Dispute Resolution in the United States: Data Visualizations*, ABA CTR. FOR INNOVATION 3 (Sept. 2020), https://www.americanbar.org/content/dam/aba/administrative/center-for-innovation/odrvisualizationreport.pdf.

[35] *How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations*, PEW CHARITABLE TRS. (Dec. 1, 2021), https://www.pewtrusts.org/en/research-and-analysis/reports/2021/12/how-courts-embraced-technology-met-the-pandemic-challenge-and-revolutionized-their-operations.

[36] *Id.* (describing digital tools like e-filing, e-signatures, e-discovery, e-records, and virtual hearings, all of which preserve the traditional character of the proceedings).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.1003
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some satisfied users, while others have found it daunting to navigate the technology effectively.[37]

Recently, there has been some interest in using artificial intelligence in the courts, but these efforts have prompted significant pushback. In January 2023, a private company called DoNotPay announced that it would use an artificial intelligence chatbot to represent defendants in traffic court.[38] Because some courts allow defendants to wear hearing aids in the courtroom, company officials planned to provide defendants with wireless headphones.[39] The headphones would allow the chatbot to listen in on the proceedings and then feed responses to the defendant.[40] The plan eventually was dropped when multiple state bars threatened to prosecute DoNotPay for the unauthorized practice of law.[41] In family law practice, technology has been more than simply facilitative; some private companies have partnered with courts to use technology to support a collaborative rather than adversarial approach to disputes.[42] For example, technology can help parties to cooperate with one another during the proceedings.[43] Available research, admittedly done by a technology company in the field, indicates that parties have been satisfied with the services and that the technologies have resulted in a reduced number of hearings, improved child support collection, and fewer warrants for nonpayment of support.[44]

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[37] *Id.* Technology increased participation in civil courts and reduced default judgments, but individuals with disabilities or without lawyers, high-speed Internet, computers, or English proficiency struggled to use online resources. *Id.*

[38] Megan Cerullo, *AI-Powered "Robot" Lawyer Won't Argue in Court After Jail Threats*, CBS NEWS (Jan. 26, 2023), https://www.cbsnews.com/news/robot-lawyer-wont-argue-court-jail-threats-do-not-pay/; David Lumb, *It's Starting as a Stunt, but There's a Real Need*, CNET (Jan. 15, 2023, 5:00 AM), https://www.cnet.com/tech/computing/an-ai-lawyer-will-challenge-speeding-tickets-in-court-next-month/; Bailey Schulz, *DoNotPay Says It's Pivoting from Plans to Argue Speeding Tickets in Court with AI*, USA TODAY (Jan. 9, 2023, 4:25 PM), https://www.usatoday.com/story/tech/2023/01/09/first-ai-robot-lawyer-donotpay/11018060002/.

[39] Jacquelyne Germain, *The First 'A.I. Lawyer' Will Help Defendants Fight Speeding Tickets*, SMITHSONIAN MAG. (Jan. 26, 2023), https://www.smithsonianmag.com/smart-news/the-first-ai-lawyer-will-help-defendants-fight-speeding-tickets-180981508/.

[40] Cerullo, *supra* note 38; Lumb, *supra* note 38; Schulz, *supra* note 38.

[41] Debra Cassens Weiss, *Traffic Court Defendants Lose Their 'Robot Lawyer,'* ABA J. (Jan. 26, 2023, 1:24 PM), https://www.abajournal.com/news/article/traffic-court-defendants-lose-their-robot-lawyer.

[42] Rebecca Aviel, *Family Law and the New Access to Justice*, 86 FORDHAM L. REV. 2279, 2281–90 (2018).

[43] *See id.* at 2282.

[44] *Family Court Results: Family Court Compliance Results at the Friend of the Court, 20th Circuit Court, Ottawa County Michigan*, MATTERHORN, https://web.archive.org/web/20221006111602/https://

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Despite a mixed reception for artificial intelligence, interest in this emerging technology remains intense. In November 2022, ChatGPT launched,[45] and there were immediate efforts to evaluate how it would perform on law school tests and bar examinations.[46] Two months later, the media reported that ChatGPT had successfully passed four finals at the University of Minnesota Law School, earning an average grade of C-plus.[47] That said, it would have been on academic probation had this record been "applied across the curriculum" there.[48] ChatGPT's highest grade was a B in constitutional law, and its lowest grades were C-minuses in torts and taxation.[49] Like many law students, it seemed to do "better on the essays than the multiple-choice questions."[50] On the bar exam, ChatGPT initially had mixed success but recently passed with flying colors.[51] ChatGPT has even written hypothetical legal briefs.[52] ChatGPT's initial success prompted one CEO to offer $1 million to any litigator who would let a chatbot argue a case before the Supreme Court.[53] To date, there have been no takers, perhaps because ChatGPT still has a

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getmatterhorn.com/get-results/family-court/; Kevin Bowling, Jennell Challa & Di Graski, *Improving Child Support Enforcement Outcomes with Online Dispute Resolution*, 2019 TRENDS STATE CTS. 43, 43.

[45] *See* Kevin Roose, *How ChatGPT Kicked Off an A.I. Arms Race*, N.Y. TIMES (Feb. 3, 2023), https://www.nytimes.com/2023/02/03/technology/chatgpt-openai-artificial-intelligence.html.

[46] Michael J. Bommarito II & Daniel Martin Katz, *GPT Takes the Bar Exam*, SSRN (Dec. 31, 2022), https://dx.doi.org/10.2139/ssrn.4314839.

[47] Karen Sloan, *ChatGPT Passes Law School Exams Despite 'Mediocre' Performance*, REUTERS (Jan. 25, 2023, 1:40 PM), https://www.reuters.com/legal/transactional/chatgpt-passes-law-school-exams-despite-mediocre-performance-2023-01-25/.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] Debra Cassens Weiss, *AI Program Earned Passing Bar Exam Scores on Evidence and Torts; Can It Work in Court?*, ABA J. (Jan. 12, 2023, 9:03 AM), https://www.abajournal.com/news/article/ai-program-earned-passing-bar-exam-scores-on-evidence-and-torts-can-it-work-in-court; Debra Cassens Weiss, *Latest Version of ChatGPT Aces Bar Exam with Score Nearing 90th Percentile*, ABA J. (Mar. 16, 2023, 1:59 PM), https://www.abajournal.com/web/article/latest-version-of-chatgpt-aces-the-bar-exam-with-score-in-90th-percentile.

[52] Jenna Greene, *Will ChatGPT Make Lawyers Obsolete? (Hint: Be Afraid)*, REUTERS (Dec. 9, 2022, 2:33 PM), https://www.reuters.com/legal/transactional/will-chatgpt-make-lawyers-obsolete-hint-be-afraid-2022-12-09/.

[53] Jody Serrano, *DoNotPay Offers Lawyers $1 Million to Let Its AI Argue Before the Supreme Court in Their Place*, GIZMODO (Jan. 9, 2023), https://gizmodo.com/donotpay-ai-offer-lawyer-1-million-supreme-court-airpod-1849964761.

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limited understanding of the Court: an experiment done by SCOTUSblog demonstrated that ChatGPT could err even on clear-cut factual matters.[54] It first wrongly reported that Justice Ruth Bader Ginsburg had dissented in *Obergefell v. Hodges*, the decision establishing a constitutional right to same-sex marriage.[55] Upon further questioning, ChatGPT agreed that Justice Ginsburg voted with the majority but then reversed itself again after apologizing for any confusion.[56]

There have clearly been some hiccups with artificial intelligence in civil proceedings, and in some areas of law, such as criminal cases, emerging technologies have not made significant in-roads, presumably on normative grounds. There is certainly no aversion to technological innovation in the criminal justice system as a whole; indeed, the triumphs of new forensic techniques, like the use of DNA databases to identify culprits and victims in cold cases, are regularly celebrated.[57] But when the process turns from investigation to trial, technology becomes a much more fraught issue. Some objections are based on the right to counsel in criminal cases, an entitlement that has no counterpart in civil litigation.[58] In the intensely adversarial and highly unequal relationship between the state and the defendant, an attorney is seen as essential to safeguarding the fairness of the proceedings.[59] Even the prospect of facilitative online proceedings has raised significant concerns about whether a defendant can receive a fair trial and effective assistance of counsel.[60]

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[54] James Romoser, *No, Ruth Bader Ginsburg Did Not Dissent in* Obergefell*—and Other Things ChatGPT Gets Wrong About the Supreme Court*, SCOTUSBLOG (Jan. 26, 2023, 10:57 AM), https://www.scotusblog.com/2023/01/no-ruth-bader-ginsburg-did-not-dissent-in-obergefell-and-other-things-chatgpt-gets-wrong-about-the-supreme-court/.

[55] 576 U.S. 644 (2015).

[56] Romoser, *supra* note 54.

[57] *See, e.g.*, Michelle Taylor, *How Many Cases Have Been Solved with Forensic Genetic Genealogy?*, FORENSIC (Mar. 3, 2023), https://www.forensicmag.com/594940-How-Many-Cases-Have-Been-Solved-with-Forensic-Genetic-Genealogy/ (reporting that, as of the end of 2022, 545 cases had been solved using forensic genetic genealogy).

[58] Tonya L. Brito, *The Right to Civil Counsel*, DÆDALUS, Winter 2019, at 56, 56–57 (describing the imperfectly realized right to counsel in criminal proceedings, the lack of access to representation in civil cases, and the movements to expand the right to a lawyer in the civil setting).

[59] P.M. Bekker, *The Right to Counsel at Trial for a Defendant in the Criminal Justice System of the United States of America, Including the Right to Effective Assistance of Counsel*, 38 COMPAR. & INT'L L.J. S. AFR. 453, 453–56 (2005).

[60] *See, e.g.*, Jason Tashea, *The Legal and Technical Danger in Moving Criminal Cases Online*, BROOKINGS INST. (Aug. 6, 2020), https://www.brookings.edu/techstream/the-legal-and-technical-danger-in-moving-criminal-courts-online/; Deniz Ariturk, William E. Crozier & Brandon L. Garrett,

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Of course, most criminal prosecutions do not result in a full-scale trial; instead, the defendant enters a guilty plea in exchange for leniency.[61] Even here, though, there could be reluctance to use artificial intelligence to expedite the plea bargaining process, even if this seems to resemble a negotiation. For one thing, defendants are often incarcerated and have limited education and resources.[62] Proceeding through an online plea negotiation without substantial input from a lawyer could substantially undermine their ability to get a fair deal.[63] Moreover, using artificial intelligence to create a digital defense lawyer might raise red flags. If the program was created by government officials without much transparency, there could be legitimate concerns about whether the defendant received truly vigorous representation.[64] These ethical issues are substantial barriers in their own right. In addition, most criminal courts are strapped for resources and might not seem like promising markets for technology entrepreneurs,[65] particularly if the products could be subject to litigation over the constitutionality of the representation.

Virtual Criminal Courts, U. CHI. L. REV. ONLINE (Nov. 16, 2020), https://lawreviewblog.uchicago.edu/2020/11/16/covid-ariturk/.

[61] Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, but Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does It Matter?*, 101 JUDICATURE, Winter 2017, at 26, 28–32 (reporting on the decline in both criminal and civil trials in federal and state courts; only 2% of federal criminal cases went to trial with similarly low percentages in state court).

[62] U.S. COMM'N ON C.R., THE CIVIL RIGHTS IMPLICATIONS OF CASH BAIL 22–23 (2022) (describing rising rates of pre-trial detention so that those awaiting trial account for over half the jail population in all but eight states); Magnus Lofstrom & Steven Raphael, *Crime, the Criminal Justice System, and Socioeconomic Inequality*, 30 J. ECON. PERSPS., Spring 2016, at 103, 114 (noting that most prison and jail inmates have less than a high school degree).

[63] Tashea, *supra* note 60; Ariturk et al., *supra* note 60.

[64] *See, e.g.*, Jule Pattison-Gordon, *Risk Assessment Algorithms Can Unfairly Impact Court Decisions*, GOV'T TECH. (Sept. 27, 2021), https://www.govtech.com/public-safety/risk-assessment-algorithms-can-unfairly-impact-court-decisions (showing that judges who used risk assessment algorithms tended to prioritize different risks that ultimately made sentencing more racially unequal); Vignesh Ramachandran, *Exploring the Use of Algorithms in the Criminal Justice System*, STAN. ENG'G (May 3, 2017), https://engineering.stanford.edu/magazine/article/exploring-use-algorithms-criminal-justice-system (arguing that algorithms can estimate risk but cannot account for the totality of factors in every case).

[65] *See, e.g.*, Michael J. Graetz, *Trusting the Courts: Redressing the State Court Funding Crisis*, 143 DÆDALUS 96, 97–99 (2014) (explaining how repeated cuts to state court funding have increased delays in judicial proceedings, affected public safety, and been costly to regional economies). *See also* Press Release, Office of Public Affairs, Department of Justice, Justice Department Establishes Initiative to Strengthen Use of Criminal Justice Data (Jan. 26, 2022), https://www.justice.gov/opa/pr/justice-department-establishes-initiative-strengthen-states-use-criminal-justice-data (noting that state criminal justice systems lack the resources to invest in technology to gather and analyze data).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.1003
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Emerging technologies elevate expert professionalism by emphasizing the efficient deployment of knowledge and skills rather than service to the greater good. These innovations are justified as a means of dispensing with large numbers of small-scale disputes in a quick and decisive fashion. Evaluations of the technologies' performance seldom discuss matters of social trustee professionalism by considering whether online dispute resolution systems advance larger interests beyond those of the individual parties. In family law, for instance, there has been a commitment to using cooperative approaches to deal with conflict.[66] This might reflect an obligation to advance an overarching goal of family harmony. However, the outcome measures used to gauge success suggest a preoccupation with efficiency in resolving disputes: metrics look at reduced time on hearings and fewer problems in collecting child support.[67]

The access to justice gap has led some scholars to frame the benefits of technology in terms of both efficiency and distributive fairness. In civil cases, plaintiffs often lack access to counsel.[68] For instance, in family law, cases typically involve two parties who are unrepresented, leading to what some have described as "lawyerless courts."[69] Despite the lack of representation, courts continue to apply conventions that assume involvement by legal advocates.[70] Under these circumstances, digital dispute resolution, especially when aided by artificial intelligence to navigate the process, can provide more support for laypeople than the traditional legal system. Purely as a matter of efficiency, parties will have greater access to legal knowledge and skills in resolving disputes when they rely on a digital forum.[71] Some advocates also contend that technological assistance performs the

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[66] *See* Aviel, *supra* note 42, at 2280.

[67] *See* Bowling et al., *supra* note 44 and accompanying text.

[68] *Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019*, U.S. CTS. (Feb. 11, 2021), https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019 (reporting on high rates of pro se representation by plaintiffs in many areas of civil litigation in federal court); *see also* Christine E. Cerniglia, *The Civil Self-Representation Crisis: The Need for More Data and Less Complacency*, 27 GEO. J. POVERTY L. & POL'Y 355, 360–62, 370–73 (2020) (providing evidence on increasing rates of self-representation in state courts and calling for more systematic data collection).

[69] Carpenter et al., *supra* note 32, at 511–12.

[70] *Id.* at 557.

[71] Robert J. Derocher, *Old Problem, New Solutions: Improving Access to Justice Through Innovation, Collaboration*, 40 BAR LEADER, Jan.–Feb. 2016, https://www.americanbar.org/groups/bar-leadership/publications/bar_leader/2015-16/january-february/old-problem-new-solutions-improving-access-justice-innovation-collaboration/.

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underpaid legwork involved in pro bono cases,[72] thereby advancing social trusteeship obligations and ensuring greater access to justice. That said, digital systems can also entrench stratification in the legal system, particularly in a nation marked by wide disparities in income and wealth. Rather than inspire confidence in the administration of justice, using online dispute resolution systems could reinforce perceptions that a robust version of law is reserved for elites, while others must rely on automated mass processing to address their concerns.[73]

II. POLARIZATION, PUBLIC VALUES, AND THE PRECARIOUS STATE OF SOCIAL TRUSTEE PROFESSIONALISM

The rise of political polarization poses distinct challenges for the legal profession. The American people are increasingly at odds, as the nation witnesses "the division of society into mutually distrustful camps in which political identity becomes a social identity."[74] Some political scientists have described this phenomenon in affective terms: as individuals "come to *feel* differently about the two parties . . . , partisan divides are not only about substantive political issues—more taxes or fewer taxes, say—but about whether the other party and those who support it are fundamentally good or bad."[75] With this dynamic comes a deeply divisive approach to politics that undermines trust in legal institutions and the democratic process.[76] According to the Pew Research Center, when the National Election Survey first asked about Americans' trust in government in 1958, about 75% of respondents believed that the federal government would do the right thing "almost always or most of the time."[77] That confidence began to erode in the 1960s with dissension over the Vietnam War and remained low in the 1970s as the

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[72] *Id.*

[73] *See* Ashwin Telang, *The Promise and Peril of AI Legal Services to Equalize Justice*, JOLT DIGEST (Mar. 14, 2023), https://jolt.law.harvard.edu/digest/the-promise-and-peril-of-ai-legal-services-to-equalize-justice.

[74] Jennifer McCoy & Benjamin Press, *What Happens When Democracies Become Perniciously Polarized?*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Jan. 18, 2022), https://carnegieendowment.org/2022/01/18/what-happens-when-democracies-become-perniciously-polarized-pub-86190.

[75] JOHN SIDES, CHRIS TAUSANOVITCH & LYNN VAVRECK, THE BITTER END: THE 2020 PRESIDENTIAL CAMPAIGN AND THE CHALLENGE TO AMERICAN DEMOCRACY 10 (2022).

[76] McCoy & Press, *supra* note 74.

[77] *Public Trust in Government: 1958–2023*, PEW RSCH. CTR. (Sept. 19, 2023), https://www.pewresearch.org/politics/2023/09/19/public-trust-in-government-1958-2023/.

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Watergate scandal shocked the nation.[78] Although trust in government has sometimes rebounded, there have now been over two decades of growing cynicism.[79] Since 2007, fewer than 30% expressed faith that federal officials would nearly always or mostly do the right thing.[80]

Relatively few democracies that are deeply divided escape some degree of degradation and decline.[81] The United States provides a unique case because it "is quite alone among the ranks of perniciously polarized democracies in terms of its wealth and democratic experience."[82] In part, America's pattern of sustained polarization reflects a two-party electoral system that increasingly produces partisan sorting.[83] Law and the legal profession have played an integral role in creating and perpetuating these dynamics. As Professor Stephen E. Gottlieb notes, for decades the legal system permitted gerrymandering to grow unchecked, creating safe seats and entrenching polarization.[84] More recently, the Supreme Court has exacerbated the situation by adopting a laissez-faire approach to campaign finance that treats political donations as a form of free speech.[85] This emphasis on the liberty to speak leaves both parties dependent on large donors.[86] In Gottlieb's view, that dependency

> skew[s] political discussion further from the center to satisfy the financial base of each party, emphasizing the particular concerns of major givers, regardless of the position of the mass of the American public. Contributions loosen the tie between politics and public opinion. Ours is not a politics of working people largely because working people cannot provide the funds that campaigns require. It is a

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[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] McCoy & Press, *supra* note 74.

[82] *Id.*

[83] *Id.*

[84] Stephen E. Gottlieb, *Law and the Polarization of American Politics*, 25 GA. STATE U. L. REV. 339, 357–59 (2012).

[85] Citizens United v. FEC, 558 U.S. 310 (2010).

[86] Gottlieb, *supra* note 84, at 361–64.

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> politics that responds heavily to the "base" of each party, as defined in part by money and legal restrictions on who can contribute what.[87]

According to Gottlieb, these polarizing features of the political process are worsened by a legal framework that adopts a hands-off approach to mass media.[88] This laissez-faire approach turns on a belief that the market will correct misinformation, but in fact, a free market allows room for partisan enclaves with "little way for those who are annoyed by the broadcasts to object . . . and little way for people to discover the competing views."[89] The result is "a media that plays less to the political center and more to the extremes."[90]

Rising polarization in turn casts doubt on the legitimacy of law and legal institutions. Deep divisions undermine what constitutional law professor Richard Fallon describes as sociological legitimacy, "prevailing public attitudes towards government, institutions, or decisions."[91] For Fallon, sociological legitimacy hinges on "whether people (and, if so, how many of them) believe that the law or the constitution deserves to be respected or obeyed for reasons that go beyond fear of adverse consequences."[92] Consider, for instance, diminishing confidence in the United States Supreme Court as it has tackled high-profile, controversial cases. The Court has had ups and downs when it comes to public approval,[93] but landmark decisions, most notably the 1954 mandate in *Brown v. Board of Education*[94] to end *de jure* public school segregation and the 1973 declaration of a woman's right to

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[87] *Id.* at 366. According to law professor Ann Southworth, the failure to place limits on campaign donations not only entrenched polarization but also was a product of a polarized constitutional discourse. ANN SOUTHWORTH, BIG MONEY UNLEASHED: THE CAMPAIGN TO DEREGULATE ELECTION SPENDING 150–53 (2023).

[88] Gottlieb, *supra* note 84, at 351.

[89] *Id.* at 354.

[90] *Id.*

[91] RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 21 (2018). Fallon also identifies moral legitimacy, which is based on whether it is normatively appropriate for officials to enforce compliance with the laws, and legal legitimacy, which turns on decisionmakers' adherence to internally recognized norms. *Id.* at 23, 35–36.

[92] *Id.* at 22.

[93] Benjamin H. Barton, *American (Dis)Trust of the Judiciary*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. 2–3 (2019), https://iaals.du.edu/sites/default/files/documents/publications/barton_american_distrust_of_the_judiciary.pdf.

[94] 347 U.S. 483 (1954).

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choose in *Roe v. Wade*,[95] triggered significant backlash.[96] According to law professor Benjamin H. Barton, "[t]he bottom line is that between *Brown* and *Roe*, the Court became much more polarizing and political, culminating in *Roe*."[97] In his view, "*Roe* was a watershed for the Court and has made the Supreme Court a salient and divisive political issue ever since."[98] In recent years, the Justices have grown identifiable by party and ideology, with Democratic appointees casting liberal votes and Republican appointees casting conservative ones.[99]

Public confidence in the Court has declined over the last thirty years,[100] though with some deviations: in a 2016 survey, the Court's approval rating was at 48%, but this rose to 62% in a 2019 survey.[101] Polling done in 2022 revealed further erosion of the public's trust in the Court with just 18% reporting a great deal of confidence, the lowest level recorded since polling began in 1973, the year *Roe* was decided.[102] Moreover, 36% said that they "had hardly any confidence in" the Court, the highest level ever recorded.[103] As a result of deepening polarization, faith in the Justices has

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[95] 410 U.S. 113 (1973).

[96] For a discussion of the backlash following *Brown*, see MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 421–42 (2004); for an analysis of the resistance to *Roe*, see KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 137–57 (1984).

[97] Barton, *supra* note 93, at 22. Barton acknowledges that though there is declining confidence in federal courts in general and that faith in state courts has also dropped, the public expresses greater trust in state than federal courts. *Id.* at 3.

[98] *Id.* at 22.

[99] Lee Epstein & Eric Posner, Opinion, *If the Supreme Court Is Nakedly Political, Can It Be Just?*, N.Y. TIMES (July 9, 2018), https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html.

[100] Amelia Thomson-DeVeaux & Oliver Roeder, *Is the Supreme Court Facing a Legitimacy Crisis?*, FIVETHIRTYEIGHT (Oct. 1, 2018, 6:00 AM), https://fivethirtyeight.com/features/is-the-supreme-court-facing-a-legitimacy-crisis/.

[101] Gillian E. Metzger, *Considering Legitimacy*, 18 GEO. J.L. & PUB. POL'Y 353, 365 (2020).

[102] *Public Confidence in the U.S. Supreme Court Is at Its Lowest Since 1973*, ASSOCIATED PRESS-NORC (May 17, 2023), https://apnorc.org/projects/public-confidence-in-the-u-s-supreme-court-is-at-its-lowest-since-1973/ [hereinafter *Public Confidence*].

[103] *Id.* This polling was done before recent reports of alleged ethical misconduct by members of the Court, which could further weaken public confidence in its integrity. *See, e.g.*, Ali S. Masood, Benjamin J. Kassow, David Miller & Joshua Boston, *Judging the Judges: Scandals Have the Potential to Affect the Legitimacy of Judges—and Possibly the Federal Judiciary, Too*, CONVERSATION (June 2, 2023, 8:42 AM), https://theconversation.com/judging-the-judges-scandals-have-the-potential-to-affect-the-legitimacy-of-judges-and-possibly-the-federal-judiciary-too-205817.

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mapped onto partisan differences. In 2019, 75% of Republicans but only 49% of Democrats held a favorable view of the Court,[104] and in the 2022 study, Democrats exhibited a significant decline in confidence in the Court with just 8% saying they had a great deal of confidence, while 26% of Republicans did.[105] The Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization*, overturning the reproductive rights first established in *Roe v. Wade*, likely accounted for some of this loss of confidence.[106]

At times, doubts about the Court's legitimacy have been raised openly. For instance, in a federal case involving gun control, an amicus brief filed by five Democratic senators declared that "[t]he Supreme Court is not well. And the people know it. Perhaps the Court can heal itself before the public demands it be 'restructured in order to reduce the influence of politics.'"[107] Meanwhile, Take Back the Court, an organization devoted to "inform[ing] the public about the danger that the Supreme Court poses to democracy,"[108] has called for increasing the number of Justices by four.[109] Planned Parenthood's CEO recently endorsed expanding the Court and imposing term limits on the Justices.[110] Calls for reform prompted President Joe Biden to appoint a bipartisan Presidential Commission on the Supreme Court in 2021. Although that Commission refused to make any specific recommendations,[111] the Constitution Project at the Project on Government Oversight convened a task force on federal judicial selection that concluded that the Court's membership need not be increased but the polarized appointment process should be tempered by, among other things, limiting the Justices' tenure.[112]

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[104] Metzger, *supra* note 101, at 366.

[105] *Public Confidence*, *supra* note 102.

[106] *Id.*; Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[107] Brief of Senators Sheldon Whitehouse, Mazie Hirono, Richard Blumenthal, Richard Durbin & Kirsten Gillibrand as Amici Curiae in Support of Respondents at 18, N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525 (2020) (No. 18-280).

[108] OUR MISSION, TAKE BACK THE COURT, TAKEBACKTHECOURT.TODAY/MISSION.

[109] *To Protect Our Rights and Democracy, We Must Expand the Court*, TAKE BACK THE CT. ACTION FUND, https://www.takebackthecourt.today/court-expansion-overview (last visited Jan. 20, 2024).

[110] Marita Vlachou, *Planned Parenthood CEO Supports Supreme Court Expansion, Term Limits*, HUFFPOST (May 15, 2023, 10:26 AM), https://www.huffpost.com/entry/planned-parenthood-scotus-reform_n_6462242de4b0c10612ecfde0.

[111] Exec. Order No. 14,023, 86 Fed. Reg. 19,569 (Apr. 9, 2021).

[112] The Task Force on Federal Judicial Selection, *Above the Fray: Changing the Stakes of Supreme Court Selection and Enhancing Legitimacy*, PROJECT ON GOV'T OVERSIGHT 9–11, 13–15 (July 8, 2021),

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Responding to calls for more sweeping change, Democrats in Congress introduced legislation to increase the number of seats on the Court by four.[113] So far, the proposal has been unsuccessful, having failed to garner any Republican support.[114]

Sustained polarization can undermine faith not only in the Court but in Congress and the Presidency. As political scientists have noted, the American electorate is intensely divided, but due to partisan parity, either side could conceivably win any given election.[115] Political parties often modify their positions when they suffer severe setbacks at the polls, but without that incentive—and in a time of partisan parity, when the next election could switch political control—"there is little incentive for the losing side to do so."[116] The fact that either party can plausibly prevail, coupled with deep distrust of the other party, has made it possible to challenge the legitimacy of the electoral process. In fact, "[i]n an era of polarization, calcification, and close competition for control of the White House and Congress, there is a growing incentive for partisans to subvert elections if it helps them win."[117] In 2020, Donald J. Trump rejected the presidential election results and refused to commit to a peaceful transfer of power.[118] These actions cast doubt not only on the legitimacy of Joseph R. Biden's presidency but also on the trustworthiness of the democratic process.[119] Polarization can undermine the willingness to compromise on political matters, with the losing side resorting to the courts to block the other side's victory. That strategy thrusts the courts into repeated

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https://www.pogo.org/reports/above-the-fray-changing-the-stakes-of-supreme-court-selection-and-enhancing-legitimacy; *Bipartisan Judicial Selection Task Force Releases Report on Supreme Court Reform*, PROJECT ON GOV'T OVERSIGHT (July 8, 2021), https://www.pogo.org/press/release/2021/bipartisan-judicial-selection-task-force-releases-report-on-supreme-court-reform.

[113] Judiciary Act of 2023, H.R. 3422, 118th Cong. § 2 (2023).

[114] Paige Moskowitz, *Democrats Reintroduce Bill to Expand U.S. Supreme Court*, DEMOCRACY DOCKET (May 16, 2023), https://www.democracydocket.com/news-alerts/democrats-introduce-bill-to-expand-u-s-supreme-court/.

[115] SIDES ET AL., *supra* note 75, at 6.

[116] *Id.* at 267.

[117] *Id.* at 248.

[118] *Id.* at 257–63.

[119] *Id.* at 260. In December 2020, 78% of Republicans did not believe that Biden was the legitimate President, and, in November 2021, 74% still questioned whether he was the winner of the election, citing electoral irregularities. *Id.*

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high-profile disputes, casting further doubt on the judiciary's legitimacy among members of a distrustful public.[120]

Lawyers are implicated in this dynamic of distrust, particularly with respect to the meaning of social trusteeship. Legal scholar W. Bradley Wendel has argued that when lawyers undertake to serve the greater good, they must contend with disagreements about its fundamental meaning.[121] Wendel suggests that attorneys instead emphasize an "ethical duty to a thinner set of commitments associated with the value of legality—even though they disagree about the substantive content of the common good—and avoid such problematic entanglements."[122] He believes the high-profile attorneys who refused to represent President Trump in his efforts to attack the validity of the 2020 election placed allegiance to the legal system above partisanship.[123] Even so, some lawyers played a highly visible role in these controversies. In many cases, attorneys were portrayed as "hired guns" or overzealous partisans, who used their status and authority to advance Trump's interests with little regard for protecting the administration of justice.[124] The bar has penalized these lawyers for ethical lapses. In 2021, Rudy Giuliani's law license was suspended after a state court judge found that he made "demonstrably false and misleading statements" on Trump's behalf about widespread election fraud and rigged voting machines.[125] Meanwhile, a bar committee in Washington, D.C., found that Giuliani violated at least one disciplinary rule when he filed suit to invalidate hundreds of thousands of ballots in Pennsylvania without evidence of election

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[120] Metzger, *supra* note 101, at 368.

[121] W. Bradley Wendel, *Pluralism, Polarization, and the Common Good: The Possibility of* Modus Vivendi *Legal Ethics*, 131 YALE L.J. 89, 92 (2021).

[122] *Id.*

[123] *Id.* at 91.

[124] *See, e.g.*, Andrew Grainger, *To Check Trump's Lies, Check His Lawyers*, WBUR: COGNOSCENTI (Oct. 31, 2019), https://www.wbur.org/cognoscenti/2019/10/31/impeachment-obstruction-rule-11-donald-trump-andrew-grainger. For an excellent discussion of the legal and ethical questions surrounding lawyers' work for Donald Trump, see Andrew M. Perlman, *The Legal Ethics of Lying About American Democracy*, *in* BEYOND IMAGINATION?: THE JANUARY 6 INSURRECTION 3, 3–25 (2022).

[125] Nicole Hong, William K. Rashbaum & Ben Protess, *Court Suspends Giuliani's Law License, Citing Trump Election Lies*, N.Y. TIMES (June 24, 2021), https://www.nytimes.com/2021/06/24/nyregion/giuliani-law-license-suspended-trump.html.

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fraud.[126] There were calls for disbarment, the harshest disciplinary action, because Giuliani violated his oath to uphold the Constitution.[127]

Former law school dean John Eastman also faces disciplinary charges and possible disbarment in California because he allegedly made false and misleading statements that amounted to "moral turpitude, dishonesty, and corruption."[128] Eastman was the architect of a strategy to prevent Biden from taking office by upending the standard process for counting votes and certifying the election, purportedly to counter massive fraud.[129] The disciplinary charges assert that Eastman knew that there was no evidence of major problems affecting the integrity of the vote.[130] As a result, he violated his "highest legal duty" by failing to adhere to the federal and California constitutions, which required him to respect a free and fair election and the peaceful transfer of power.[131] Similar charges were lodged against another member of Trump's legal team, Sidney Powell, but a Texas state court recently threw them out.[132] However, Powell was sanctioned by a federal judge in Detroit.[133] More recently, several of Trump's attorneys have been named as co-conspirators in criminal cases brought against the former President.[134]

These alleged professional shortcomings cannot be attributed to a lack of training or experience. Notably, these lawyers attended elite law schools and enjoyed positions of prominence in the legal profession. Giuliani graduated from New York

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[126] Kyle Cheney & Josh Gerstein, *D.C. Bar Panel Finds Giuliani Violated Attorney Rules in Bid to Overturn 2020 Election*, POLITICO (Dec. 15, 2022, 12:11 PM), https://www.politico.com/news/2022/12/15/d-c-bar-giuliani-attorney-overturn-2020-election-00074117.

[127] *Id.*

[128] *Attorney John Eastman Charged with Multiple Disciplinary Counts by the State Bar of California*, STATE BAR OF CAL. (Jan. 26, 2023), https://www.calbar.ca.gov/About-Us/News/News-Releases/attorney-john-eastman-charged-with-multiple-disciplinary-counts-by-the-state-bar-of-california.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] David Thomas, *Judge Tosses Attorney Ethics Case Against Trump Ally Sidney Powell*, REUTERS (Feb. 23, 2023, 8:21 PM), https://www.reuters.com/legal/judge-tosses-attorney-ethics-case-against-trump-ally-sidney-powell-2023-02-24/.

[133] *Id.*

[134] *See, e.g.*, Deborah Pearlstein, Opinion, *Why Are So Many of Trump's Alleged Co-Conspirators Lawyers?*, N.Y. TIMES (Aug. 14, 2023), https://www.nytimes.com/2023/08/14/opinion/trump-indictment-lawyers.html (describing how polarization contributed to lawyers "elevat[ing] partisan loyalty over professional ethics").

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University Law School; before becoming a hard-charging prosecutor in the Southern District of New York, he had held "the third-highest position in the Department of Justice."[135] Eastman graduated from the University of Chicago Law School and was a constitutional law professor and dean at Chapman University's Dale E. Fowler School of Law.[136] Sidney Powell got her law degree from the University of North Carolina before she served as an Assistant United States Attorney in Texas and eventually formed her own boutique law firm to specialize in appellate litigation.[137] In short, all these attorneys were members of the professional elite.

When it comes to high-profile disputes involving wealthy, powerful clients, lawyers from prestigious law schools dominate the proceedings. Perhaps because of this direct involvement in significant cases, the Court's "perceived legitimacy among . . . legal elites is extremely high—and much higher than it is for the mass public at large."[138] For members of the general public, the U.S. Supreme Court seems like a distant institution, one largely removed from everyday life except when it hands down widely publicized, controversial decisions.[139] For the typical individual, lower courts may seem more relevant because they handle concrete matters, often related to people's material wellbeing.[140] Experiences with mundane disputes can

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[135] *Career Highlights of Rudy Giuliani*, FORBES (Oct. 25, 2006, 11:20 AM), https://www.forbes.com/2006/10/25/biz-wash-cz_sc_1025giuliani_slide.html.

[136] *Dr. John C. Eastman*, FEDERALIST SOC'Y, https://fedsoc.org/contributors/john-eastman (last visited Jan. 20, 2024).

[137] Debra Cassens Weiss, *Meet Sidney Powell, the Conspiracy-Minded Lawyer Who Vowed to 'Release the Kraken' in Election Suits*, ABA J. (Dec. 1, 2020, 10:21 AM), https://www.abajournal.com/news/article/meet-sidney-powell-the-conspiracy-minded-lawyer-who-vowed-to-release-the-kraken-in-election-suits.

[138] Brandon L. Bartels, Christopher D. Johnston & Alyx Mark, *Lawyers' Perceptions of the U.S. Supreme Court: Is the Court a "Political" Institution?*, 49 LAW & SOC'Y REV. 761, 764 (2015).

[139] *See* Scott Bomboy, *Surveys: Many Americans Know Little About the Supreme Court*, NAT'L CONST. CTR. (Feb. 17, 2016), https://constitutioncenter.org/blog/surveys-many-americans-know-little-about-the-supreme-court (describing widespread lack of knowledge about who sits on the Court and the Court's role in the federal government); *Public's Views of Supreme Court Turned More Negative Before News of Breyer's Retirement*, PEW RSCH. CTR. (Feb. 2, 2022), https://www.pewresearch.org/politics/2022/02/02/publics-views-of-supreme-court-turned-more-negative-before-news-of-breyers-retirement/ (reporting declining confidence in the Court and linking it to high-profile, polarizing decisions).

[140] *See* CHASE T. ROGERS & STACY GUILLON, GIVING UP ON IMPARTIALITY: THE THREAT OF PUBLIC CAPITULATION TO CONTEMPORARY ATTACKS ON THE RULE OF LAW, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. 19–20 (2019), https://iaals.du.edu/sites/default/files/documents/publications/rogers-guillon_giving_up_on_impartiality.pdf.

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advance awareness and understanding of the legal process.[141] As civil filings in state court have declined substantially in recent years, this type of contact with the legal system is increasingly rare.[142] Meanwhile, episodic attention to divisive Supreme Court decisions may not prompt much confidence in the judiciary, especially when the media "emphasizes the negative and reveals only discrete, curated snapshots."[143]

Courts are not the only arena in which elites seem to dominate conflicts over competing ideologies. With respect to the electoral process, some economists have described values as a luxury good: "the relative weight that people place on non-material versus material issues increases [with] their absolute income." This correlation does not imply that the poor have weaker values but rather that they are more likely to vote based on issues affecting their financial security.[144] In fact, there is a relationship between those who feel materially secure enough to prioritize their ideological preferences and the groups "most preoccupied with moral and cultural issues"—that is, those on the political poles.[145] This is true on both the left and the right: progressive activists are "secure, which perhaps frees them to devote more attention to larger issues," while devoted conservatives "are one of the highest income-earning groups, and feel more secure than other Americans."[146] Voters less concerned with culture wars tend to be "materially less secure."[147] This split could have consequences for the legal profession, as elite lawyers are identified with divisive conflict, while legal representation in routine cases becomes increasingly scarce. Ordinary people may conclude that attorneys ignore their problems and instead cater to the needs of the privileged, whether progressive or conservative.

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[141] *Id.*

[142] *Id.* at 20.

[143] *See id.* at 23–24. For example, the Court's recent decision to strike down the right to abortion in *Roe v. Wade* prompted not only disagreement but also disapproval of the Court itself. *Positive Views of Supreme Court Decline Sharply Following Abortion Ruling*, PEW RSCH. CTR. (Sept. 1, 2022), https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/.

[144] Benjamin Enke, Mattias Polborn & Alex Wu, *Values as Luxury Goods and Political Polarization* 1–2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30001, 2022), https://www.nber.org/system/files/working_papers/w30001/w30001.pdf.

[145] *Id.* at 10.

[146] *Id.*

[147] *See id.*

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Lawyers ironically will return to their historical roots, as servants of the well-to-do who have the resources to express their demands and protect their interests.

III. HOW EMERGING TECHNOLOGIES AND PERSISTENT POLARIZATION WILL AFFECT AMERICAN LAW SCHOOLS AND THE LEGAL PROFESSION

We have long known that legal education and the legal profession are highly stratified. Law school rankings regularly remind students that there are elite national and even global law schools and less prominent regional ones.[148] Elite schools are feeders into high-powered practice, for example, at large law firms.[149] Big Law practitioners earn compensation that substantially outstrips that of small and solo practitioners, government attorneys, and public interest lawyers.[150] For example, in 2017, associates at some large law firms received starting salaries of $180,000, while those at mid-size firms (that is, under fifty lawyers), government lawyers, and public interest attorneys earned on average half as much or even less.[151] As a result, a law school graduate's expected practice environment and earnings are highly correlated with a school's reputation and ranking.[152] Alumni of elite law schools typically serve clients with substantial resources; these clients are not seeking advice on routine matters but on complex transactions or bet-the-company litigation.[153] Precisely because of the complicated nature of the legal questions, some of which involve cutting-edge issues, technology is not likely to displace these attorneys any time

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[148] Staci Zaretsky, *The Most Elite Law Schools on Earth (2022)*, ABOVE THE L. (Nov. 15, 2022, 1:13 PM), https://abovethelaw.com/2022/11/the-most-elite-law-schools-on-earth-2022/.

[149] Karen Sloan, *The Biggest Law Firms Turned to These Schools for U.S. Recruits*, REUTERS (Apr. 20, 2022, 2:11 PM), https://www.reuters.com/legal/legalindustry/biggest-law-firms-turned-these-schools-us-recruits-2022-04-20/.

[150] *See* Tyler Roberts, *How Much Will You Earn?*, NAT'L JURIST, Fall 2017, at 14, 16, https://nationaljurist.com/national-jurist-magazine/what-lawyers-average-salary.

[151] *Id.* at 14–16.

[152] *Id.* at 18. *See also* LAW SCH. TRANSPARENCY, https://www.lawschooltransparency.com/schools (last visited Jan. 21, 2024) (offering a search tool to determine the median salary for graduates of different law schools).

[153] *See* Matt Spiegel, *8 Benefits (and 5 Drawbacks) of Working in a Large Law Firm*, NAT'L L. REV. (Apr. 26, 2022), https://www.natlawreview.com/article/8-benefits-and-5-drawbacks-working-large-law-firm.

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soon. As we saw, no Supreme Court litigator has been willing to accept $1 million to allow a chatbot to argue a case.[154]

However, technological innovations are apt to curtail demand for less elite lawyers' services in handling routine legal matters. Some individuals represent themselves because they lack the money to hire a lawyer, but other clients of modest means still seek out professional help with legal problems. Technologies will improve as they are more widely used, and they will become increasingly attractive to those who can hire an attorney but want to cut costs in handling a legal matter. For that reason, over time, demand for the services of small-firm and solo practitioners in civil matters is likely to decline. Even if some of these attorneys continue to represent criminal defendants and to handle somewhat more complex, higher-stakes civil matters, in general the sector of the bar that handles quotidian disputes and serves ordinary people will likely shrink.

This, in turn, will lead to a contraction in less highly ranked law schools as they become less able to place their graduates. Law school enrollments peaked in 2010 and have dropped dramatically since then.[155] As a result, the number of students attending law school is now at a level last seen forty years ago.[156] A breakdown by school shows that there have been steep declines at less prestigious schools, perhaps due to concerns about placement.[157] The decrease in law school applicants has resulted in tremendous financial pressure on some institutions, many of which have lowered admissions criteria and significantly discounted tuition to compete for students.[158] Already, there have been several law school closures in recent years, including Arizona Summit School of Law, Concordia School of Law, Charlotte

[154] *See* Serrano, *supra* note 53 and accompanying text. In the longer run, even elite practice could be threatened if artificial intelligence grows in sophistication. *See, e.g.*, Wim Naudé & Nicola Dimitri, *The Race for an Artificial General Intelligence: Implications for Public Policy*, 35 AI & SOC'Y 367, 368 (2020) (finding that artificial general intelligence could achieve "singularity" by 2045).

[155] *Law School Enrollment Trends, 1963–2023*, LAW SCH. TRANSPARENCY, https://www.lawschooltransparency.com/trends/enrollment/all (last visited Jan. 22, 2024).

[156] *Id.*

[157] *See* Zaretsky, *supra* note 148; *Enrollment by Law School in the U.S., 2011 vs 2022 Comparison*, LAW SCH. TRANSPARENCY, https://www.lawschooltransparency.com/trends/enrollment/all/schools?y1=2011&y2=2022 (last visited Jan. 22, 2024).

[158] *Enrollment and Admission Standards*, LAW SCH. TRANSPARENCY, https://www.lawschooltransparency.com/trends/enrollment/admissions-standards (last visited Jan. 22, 2024); *Law School Enrollment Trends, 1963–2023*, *supra* note 155.

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School of Law, and Whittier College of the Law.[159] As schools in this segment of the legal market shut their doors, there will not be as many lawyers to practice the kind of ordinary law that affects everyday people of modest means. As a result, there will be fewer opportunities to interact with attorneys, gain a deeper understanding of the legal system, and appreciate that system's contributions and importance. Instead, individuals will grow more dependent on technological resources and increasingly liken legal interactions to other online transactions. Law eventually could seem like a purely privatized way to achieve efficient results without much regard for the greater good.[160]

Meanwhile, elite institutions will continue to train attorneys who can shape larger debates through representation of privileged clients. These law schools are apt to find themselves caught in the crosshairs of polarizing and sometimes paralyzing conflicts over the values that should inform law and legal practice. Consider, for instance, the recent high-profile controversy over Stanford law students who interrupted a conservative judge when he tried to speak at the invitation of a student chapter of the Federalist Society.[161] Jenny Martinez, the law school dean, subsequently apologized to the judge, wrote a lengthy letter to the Stanford Law School community,[162] and placed a dean for diversity, equity, and inclusion on leave

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[159] *Law School Closures*, ABOVE THE L., https://abovethelaw.com/tag/law-school-closures/ (last visited Jan. 24, 2024).

[160] *See* CHRISTOPHER BUERGER, CASEY CHIAPPETTA & RADHIKA SINGH, NAT'L LEGAL AID & DEF. ASS'N, ENSURING EQUITY IN EFFICIENCY: THE CIVIL LEGAL AID COMMUNITY'S VIEWS OF ONLINE DISPUTE RESOLUTION 13–19, 34–37 (Jan. 2021), https://www.nlada.org/sites/default/files/NLADA%20Pew%20ODR%20Report%20Ensuring%20Equity%20in%20Efficiency.pdf.

[161] Vimal Patel, *At Stanford Law School, the Dean Takes a Stand for Free Speech. Will It Work?*, N.Y. TIMES (Apr. 9, 2023), https://www.nytimes.com/2023/04/09/us/stanford-law-school-free-speech.html. Polarization will also have implications for less prestigious institutions. Here, however, the struggle will be over the parameters of academic freedom in higher education. David Maxwell & Tara D. Sonenshine, Opinion, *Academic Freedom Is Under Assault—We Have a Sacred Duty to Protect It*, HILL (Mar. 29, 2022, 9:30 AM), https://thehill.com/opinion/education/600123-undermining-higher-educations-vital-role-in-american-democracy/. To the extent that legislative efforts to constrain educators' discretion to teach divisive subjects succeeds, speech will be chilled and make high-profile controversy on these topics less likely. Darrell M. West, *Why Academic Freedom Challenges Are Dangerous for Democracy*, BROOKINGS INST. (Sept. 8, 2022), https://www.brookings.edu/blog/brown-center-chalkboard/2022/09/08/why-academic-freedom-challenges-are-dangerous-for-democracy/.

[162] Jenny S. Martinez, *Letter to Stanford Law School Community*, STAN. L. SCH. (Mar. 22, 2023), https://law.stanford.edu/wp-content/uploads/2023/03/Next-Steps-on-Protests-and-Free-Speech.pdf. Eventually, the dean for diversity, equity, and inclusion resigned. Josh Moody, *Dean at Center of Stanford Law Controversy Resigns*, INSIDE HIGHER ED. (July 21, 2023), https://www.insidehighered.com/news/quick-takes/2023/07/21/dean-center-stanford-law-controversy-resigns.

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over the way she handled the situation.[163] The dean's letter expressly dealt with the challenges that polarization poses in legal education.[164] Dean Martinez asserted that the law school should not enforce "an institutional orthodoxy" because it "would create an echo chamber that ill prepares students to go out into and act as effective advocates in a society that disagrees about many important issues."[165] She emphasized the special nature of law practice, noting that "lawyers in training must learn to confront injustice or views they don't agree with and respond as attorneys."[166] Dean Martinez went on to observe that suppressing unpalatable points of view was increasing around the globe, and she urged budding lawyers at Stanford to hold themselves to higher standards of conduct.[167] Rather than discipline the students involved, the dean instituted mandatory educational programming for the entire student body on "freedom of speech and the norms of the legal profession.[168] In response to the dean's actions, a group of students dressed in black masks and stood in silence as she walked down the corridor after class.[169] Some also posted notes in her classroom expressing disagreement with the letter's characterization of the event and the decision to apologize to the judge.[170] These students believed that Dean Martinez's actions were merely a way to stifle dissent.[171] Two conservative federal judges then announced that they would be boycotting Stanford Law School as a place to hire law clerks.[172] In short, the letter did not have the healing effect that the dean likely hoped for; instead, divisions remained profound.

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[163] Patel, *supra* 161.

[164] Martinez, *supra* note 162, at 6.

[165] *Id.*

[166] *Id.*

[167] *Id.* at 7.

[168] *Id.* at 8, 9.

[169] Harriet Alexander, *Stanford Students Vandalize Their Law School Dean's Classroom After She Apologized to Fifth Circuit Conservative Judge After Students Shouted Down His Speech on Campus*, DAILY MAIL (Mar. 15, 2023, 4:35 PM), https://www.dailymail.co.uk/news/article-11861201/Stanford-law-school-students-line-halls-dressed-black-masks-Judge-Kyle-Duncan-row-rumbles-on.html.

[170] *Id.*

[171] *Id.*

[172] Andrew Goudsward, *Conservative Judges Extend Clerk Boycott to Stanford After Disrupted Speech*, REUTERS (Apr. 3, 2023, 3:20 PM), https://www.reuters.com/legal/government/conservative-judges-extend-clerk-boycott-stanford-after-disrupted-speech-2023-04-03.

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Before the brouhaha at Stanford, Professors Aziz Z. Huq and Jon D. Michaels had written about the challenges that a polarized judiciary poses for elite law schools.[173] As they explained, "[i]f you go to the website of any one of the nation's leading law schools today, you will find prominent claims being made about the institution's links to the federal judiciary at large, and to the U.S. Supreme Court in particular."[174] That's because these ties "are central to the luxury brand that elite law schools aim to convey."[175] Yet, Huq and Michaels argue, it will be increasingly difficult to maintain those connections because of the gap between an increasingly conservative judiciary's views and those of law students and lawyers.[176] To corroborate the claim, the authors describe eruptions at elite law schools like Yale and much like the Stanford controversy.[177] According to Huq and Michaels, growing ideological polarization will likely lead to more disputes that "put[] schools at odds with many of their students" as they try to balance the benefits of being on good terms with judges against students' concerns that their school is wrongly legitimating views under the banner of First Amendment neutrality.[178] The authors predict that "[t]here is no easy way out. Law schools can look forward to more bitter public fights, more disillusioned students, and increasing doubts about the social value of a scholarly enterprise so beholden to the prevailing partisan current of the day."[179] In short, polarization threatens the legitimacy of elite law schools, often seen as operating at the pinnacle of legal education, as disputes intensify, become increasingly public, and grow more unmanageable.

Although ideological skirmishes at top law schools get the lion's share of attention, all law schools may ultimately face similar dynamics. Law professors Jennifer K. Robbennolt and Vikram D. Amar have framed polarization not as an exceptional threat at elite schools but as a pervasive social condition that requires all law schools to revisit the fundamentals of their instructional process. In contrast to Dean Martinez's call for a separate training session, Robbennolt and Amar would

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[173] Aziz Z. Huq & Jon D. Michaels, *Law Schools Have a Supreme Court Problem*, CHRON. HIGHER EDUC. (July 18, 2022), https://www.chronicle.com/article/law-schools-supreme-court-sycophancy.

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.*

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infuse the entire curriculum with methods that train students to manage ideological conflict. To that end, they have offered the following proposed reforms:

> First, law schools can strive to provide (1) an even better grounding in establishing and critically evaluating facts and a deeper understanding of empirical evidence; (2) an understanding of the habits of mind that influence policy debate; (3) more training in a wide range of approaches to dispute resolution and the relevant toolbox of skills; (4) facility in navigating the multiplicity of roles and making the nuanced distinctions required of lawyers; and (5) a foundation of essential skills for making good decisions and working effectively with other people, including adversaries.[180]

These recommendations harken back to Wendel's emphasis on legalism,[181] doubling down on features of the legal system that serve as a bulwark against the impulse to take a one-sided view. The reforms reflect a faith, still to be tested, that proceduralism can triumph over polarization.

Taken together, the dual forces of technological innovation and political polarization have created a perfect storm for legal education and the profession. While new forms of digital dispute resolution threaten to make ordinary lawyers invisible and the schools that train them defunct, high-profile ideological conflict disrupts the norms of respectability and neutrality that elite law schools use to define themselves. If prominent controversies lead top schools to become risk averse, there could be a cultural shift away from debates about social trusteeship and the greater good. Instead, law schools will emphasize the importance of skills and knowledge—that is, efficient client representation. Proposals for mandatory training or curricular reform are designed to create a safe and productive space in which debates over values can continue, but it remains unclear whether this approach can succeed in moderating discourse when division is entrench, and distrust is ubiquitous.

CONCLUSION

In legal education and law practice, notions of professionalism based on expertise and social trusteeship both face unprecedented challenges. The justification for a monopoly on legal practice depends on expert professionalism, the unique knowledge and skills that lawyers command. Today, however, emerging technologies increasingly undercut this claim to exclusive expertise, and the result is

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[180] Jennifer K. Robbennolt & Vikram D. Amar, *The Role of Lawyers and Law Schools in Fostering Civil Public Debate*, 52 CONN. L. REV. 1093, 1104–05 (2021) (footnotes omitted).

[181] Wendel, *supra* 121.

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likely to be displacement of lawyers who offer routinized services that can be readily delivered more cheaply by technological means. At the same time, a deeply polarized politics has destabilized any conception of the greater good, making it hard to know precisely what social trusteeship means. In fact, lawyers have been heavily implicated in high-profile disputes, sending a message that the legal process offers only fragile protection against wrenching ideological warfare.

Because both legal education and the legal profession are highly stratified, it may be difficult to address these coming challenges in a comprehensive way. Elites could be relatively unconcerned that less privileged sectors of the bar suffer decline due to new technologies. Meanwhile, those in less prestigious practices may not be inclined to mobilize when polarization jeopardizes the stature of elite practitioners. Only by reaffirming the profession's shared identity and interests, despite its intensifying stratification, can there be a vigorous, unified response to these threats to the legitimacy of law and legal institutions. That may be a tall order for a field that is ever more fragmented, leaving it vulnerable to increasing pressures on its most fundamental tenets of professionalism.

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