Howard F. Twiggs Memorial Lecture

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Strengthening the Profession by Recommitting to Professionalism

Thank you for that warm introduction and this opportunity to speak to the American Association for Justice and the National Civil Justice Institute. It is indeed an honor to speak before all of you, and I am grateful that so many of you have chosen to spend some of your conference time with me. In my remarks, I'm going to comment on the topic of lawyer professionalism, consistent with the historical theme and purpose of the Twiggs Lecture. As many of you are certainly aware, this lecture is named in honor of the late Howard F. Twiggs, whose work and legacy serve as an inspiration to those of us who believe that lawyers play an essential role in ensuring both access to justice and actual justice through spirited and zealous advocacy within the justice system, a system that, all-too-often, dispenses too little justice. At a time when the legal profession faces many threats and challenges, some of them from outside the profession but also some that are emanating from within, I argue that it is a recommitment to a robust and multi-faceted professionalism that will help the profession rise to these challenges. Not a "thin" version of professionalism if you will—one that focuses on civility or skills training alone. But instead, a "thick" version of professionalism, one that goes beyond the bare minimum of what we can expect from lawyers, encompasses far broader concepts, concepts that I will work here to convince you are necessary for the profession to find its way through the challenges it and the nation face at present, and those we will most certainly face in the future.

Before I embark upon this endeavor, please allow me to provide a little biographical information beyond that which you may have in the conference materials. As mentioned there, prior to joining the law faculty at Albany, I served in several non-profit legal services organizations where I worked with low-income tenants, consumers, and low-wage workers to bring civil lawsuits, mostly as mass actions (working with tenant associations and groups of workers in restaurants and other low-wage settings) and I also participated in broad impact work, including

class actions and test cases, involving welfare recipients, the homeless, and prisoners and detainees with psychiatric disabilities being held in jail on Riker's Island. My team also represented two men who were abused while in federal detention as they were caught up in the post-9/11 law enforcement activities in communities of color throughout the nation. The first of these clients was Ehab Elmaghraby, a name that may not ring a bell. The second individual's name, however, might be more familiar to you: Javed Iqbal. Yes, I'm sorry to say that my colleagues and I at the Urban Justice Center, together with private counsel, filed a run-of-the-mill prisoner abuse case on his behalf; we just happened to name the U.S. Attorney General and the director of the FBI at the time Robert Mueller, and the rest is history. Now that the court has overturned the *Chevron* decision,[1] maybe it will one day take another look at *Ashcroft v. Iqbal*.[2] I'm not holding my breath; moreover, if they do, they might just make it harder than it already is to overcome a 12(b)(6) motion.

But I digress. I will not talk about pleading requirements or anything like that today. What I *will* address are some of the challenges the legal profession faces in the present and the years to come and try to propose ways to address them.

First, the challenges.

No one can doubt that the profession faces a series of challenges. I'll list just four of the significant challenges here. The first of these is the introduction of new technologies that are likely to impact the practice of law considerably over the next ten years. Bill Gates is fond of saying that we overestimate the impact that technology will have on our lives over the next two years but underestimate the impact that technologies, both those that already exist and those in development, will have over the next ten.[3]

Well, a perfect example of this adage is certainly generative artificial intelligence. We are just about twenty months out from the introduction of the company OpenAI's revolutionary program ChatGPT 3. Let us recall that there were those who predicted, and still predict, that the introduction of generative AI would completely disrupt the practice of law and perhaps even

[1] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).
[2] Ashcroft v. Iqbal, 556 U.S. 662 (2009).
[3] BILL GATES, THE ROAD AHEAD, 316, 2d ed. 1996 ("People often overestimate what will happen in the next two years and underestimate what will happen in ten. I'm guilty of this myself.").

displace lawyers themselves. It might have been intriguing to imagine that lay individuals would have the opportunity to simply ask ChatGPT to write a letter to a landlord to resolve a rent dispute, prepare a patent application or paperwork needed for an initial public offering, or litigate an anti-trust case. Of course, apart from some clunky correspondence that generative AI might produce, to paraphrase Samuel Clemens, reports of the legal profession's demise were greatly exaggerated.

Instead, we've gotten awkward and obtuse work product that often looks like it's been created by, well, a computer. And some poor souls, both lawyers and pro se litigants, have relied on these tools to produce legal pleadings and work product. Plagued by what has euphemistically become known as "hallucinations," the technology produces decisions that seem to be on point or legislation that one might think addresses one's client's situation, only to learn that that material is completely fictional.[4]

Still, we can anticipate, if the Bill Gates rule stands, that over the next ten years, there will be significant changes to the practice of law. And some of these changes will, no doubt, have—shall we say, interesting—impacts on the legal profession. Some of it good; some of it bad.

Just as technology completely transformed the practice of law over 100 years ago with the introduction of the telephone, typewriter, and rapid reproduction of judicial decisions; and then again forty years ago with the advent of computer-assisted research; I do believe we are on the cusp of a significant disruption to the practice of law by the introduction of new technologies, the full impacts of which are only starting to come into focus. We can either harness these changes in a positive way, or allow events—and technology—to overtake us.

It's hard to imagine that, 100 years ago, some law offices resisted the introduction of telephones and typewriters as new-fangled contraptions that would interfere with the attorney-client relationship. As late as 1929, a prominent lawyer from Philadelphia, Henry Drinker, while speaking at an ABA convention, asked "Was John Marshall—the great Marshall, was Blackstone…were they great lawyers, and did one of those great lawyers have a telephone in his office? Not one. Therefore you would all be better off, you would have more effective offices, if you threw away your telephones."[5] Again, this was 1929.

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[4] Mata v. Avianca, Inc., 678 F. Supp. 3d 443 (S.D.N.Y. 2023).

[5] PROCEEDINGS OF THE SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR 52 ANNU. REP. A.B.A. 605, 622 (1929)(Statement of Henry S. Drinker).

What client would want to speak to a lawyer on the phone or receive anything but a hand-written note from their attorney, some lawyers would ask. But most lawyers at the time knew that they could serve more clients and generate a lot more work product if they adopted these technologies. Lawyers also learned that they couldn't bluster their way through trials and oral arguments by relying on "general principles" where their adversaries were actually doing research and analyzing cases. Moreover, today, what lawyer could walk into court and say, "you know, judge, funny thing, I went to the local law library, and the most recent pocket part of Shephard's Tennessee reports must have been on the librarian's cart when I checked my citations. I'm sorry I didn't catch that several of the cases on which I had relied were overturned since the last bound version of Shephard's hit the shelves"?

There is no question that new technologies are likely to transform the practice of law considerably in the next decade. I do believe we are at a key inflection point when it comes to technology similar to the one the profession faced at the turn of the 19th to the 20th century. However, the introduction of new technologies is not the only challenge the profession faces at present. There are at least three more significant ones that I would like to address here.

The second of these challenges that the profession faces at present is the access to justice crisis. According to various reports, 80% of low-income Americans and 50% of middle-income Americans do not face their legal problems with a lawyer by their side.[6] Some of this occurs simply because too many Americans can't afford a lawyer. But that's not the only reason. Indeed, we know from the important work of researcher Rebeccah Sandefur that there are also other reasons many Americans fail to secure representation to address their legal problems,[7] including that they do not know a lawyer or how to find one easily; they turn to a trusted member of their community or a loved one for guidance; or they do not see their problem as one that is legal in nature, something a lawyer might help them to resolve. This crisis is a critical one that we, as a profession, must confront if we are to serve our appropriate role within society.

[6] For a discussion of the justice gap in America, see, e.g., LEGAL SERVICES CORPORATION, THE JUSTICE GAP: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2022) (hereinafter JUSTICE GAP REPORT) (documenting the unmet legal needs of millions of Americans).

[7] REBECCA L. SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 4 (2014).

The third challenge the profession faces is that our ranks, especially those of our leaders, largely do not match the demographics of the nation as a whole when it comes to race, ethnicity, gender, gender expression, sexual orientation, and disability. This has profound consequences for our ability to serve the entire community well, to ensure that everyone with the skills and character necessary to join the profession is able to do so. Once in the profession, anyone should be able to strive to join leadership positions in law firms, in bar associations, in academia, and in the state and federal bench. A legal profession that does not look like America cannot serve the American people well, a notion that I will return to shortly.

The final challenge I want to raise is one that should give all members of the profession great pause. This is the fact that lawyers are contributing to the undermining of the rule of law in this country. We have gone through, and are still going through, a period in our history where threats to the rule of law and the institutions of our democracy are real, and many of these threats have been led or orchestrated by lawyers. I have no intention of being partisan here, but as lawyers, we need to look in the mirror and understand that lawyers were at the heart of the efforts to undermine the results of the 2020 election. While some of those lawyers have faced the most severe professional discipline possible, it is likely that others will step forward to take their place in the coming months to do the same in November of this year if their preferred candidate does not win. Every lawyer has an obligation to stand up to and resist such efforts.

What is more, while the threat to the rule of law is certainly real, the first three challenges the profession faces actually make the rule-of-law situation worse. The access-to-justice crisis means that too many Americans face their legal problems without a lawyer. This becomes a rule-of-law problem for several reasons. The fact that many people face their legal problems without a lawyer means that many disputes and conflicts are not resolved in accordance with the law, true procedural justice, or with the full protections of the adversarial system. This could result in people taking matters into their own hands, which, thankfully, is relatively rare, for now, the events of January 6th notwithstanding (although that problem was not one that arose because of a lack of lawyers, as I will address shortly).

When a litigant is unrepresented, there is often a lawyer on the other side of the dispute and few checks on the way in which that dispute is resolved. For example, while I appeared in places like housing court in New York City, where just about every landlord was represented by counsel

and most tenants went without, I witnessed an extreme asymmetry of expertise, knowledge, and power. Tenants routinely surrendered valuable rights to the lawyer on the other side, with no one to provide any guidance to those tenants other than the advice to go find counsel. Or, to paraphrase Marie Antionette, "just let them get a lawyer." Asymmetries of power, knowledge, and expertise are striking and create a significant rule-of-law problem in these disputes because they are not being resolved in the way a true adversarial system is supposed to operate.

With respect to technology and the rule of law, technology certainly will feed into the challenges facing the rule of law if we find that people are using unregulated, unmonitored, and unprofessional services to try to resolve their legal disputes; and if that technology offers hackneyed advice that surrenders people's rights and puts the technology's consumer in a worse position than if they had received no such help at all.

The access-to-justice crisis and introduction of new technologies certainly can contribute to the rule-of-law challenge the nation and the profession face, but lawyers, too, are contributing to this crisis. In many ways, the events of January 6th were the by-product of lawyer advocacy. Lawyers who had failed to present any credible evidence of fraud in the election tried to cook up one final heist: to suggest that the Vice President could overturn the results of the election. I doubt the rioters were versed in the intricacies of the Electoral Count Act.[8] Someone had to feed them that argument. It wasn't just lawyers, like former New York City Mayor Giuliani, who literally demanded trial by combat. Others also gave voice to the mob who said it should "hang Mike Pence," and mob rule is the antithesis of the rule of law.

Finally, like with the access-to-justice problem, when communities and groups historically underrepresented in the legal profession do not see lawyers with similar backgrounds in courtrooms, on the bench, and in law offices in their communities, there's a disaffection that occurs, and a lack of trust in the legal system. While we have come a long way in sixty years—when women and lawyers of color made up less than five percent of the profession—we still have a very long way to go, particularly in leadership roles. In a multi-racial democracy like our own, our legal system must reflect the diversity of the communities it serves, there must be match or a

[8]Electoral Count Act, 1887, ch. 90, 24 Stat. 373, *repealed by* Electoral Count Reform and Presidential Transition Improvement Act of 2022, 3 U.S.C. §§ 1-22.

fit between who we are as a nation and who we are as a profession. I'll return to these notions of match and fit shortly.

So, how do we, as a profession, address these challenges? I submit that if we see these challenges as, in essence, threats to and failings of professionalism, then perhaps a way to address them—by improving professionalism—emerges. It is fairly easy to see all of these challenges as problems of or threats to professionalism.

First, if technology is adequate to address a legal problem, what is the role for the lawyer? Similarly, is what the lawyer does so special? Does it require special training, expertise, and judgment—at a premium—if an app can do it just as well, or, in some instances, better, than a lawyer? Is it appropriate to classify the work a lawyer does as worthy of a *profession* and as requiring that the lawyer exhibit *professionalism* if the service he or she provides can be supplied by a non-professional, especially a silicon-based one?

What about the challenge of access to justice? The legal profession is granted a monopoly on the provision of legal services. For the anti-trust experts in the room, if a utility denied basic services to eighty percent of low-income people and fifty percent of middle-income people on account of the monopoly that utility enjoyed, many would be running to the courthouse at the first possible moment. The professionalism problem at the heart of the access-to-justice crisis is that we all, as the Preamble to the Model Rules says, must commit ourselves to the quality of justice and access to justice.[9] That is a pillar of our professional values, but that pillar is extremely weak.

Similarly, a profession that does not welcome into its ranks anyone with the skill and character to serve their community, that does not support and mentor them to advance and lead in the profession, is not serving the community in ways in which it must.

Finally, defense of the rule of law should be a core element of the profession's professional values, especially in a democracy where we are supposed to be a government of laws and not of people. Just about every one of the dozens of lawsuits filed to overturn the results of the 2020 elections in different jurisdictions was thrown out, with many of the lawyers filing such cases finding themselves on the business end of Rule 11 sanctions.[10] While some of the claims were

[9] MODEL RULES OF PRO. CONDUCT Preamble (AM. BAR ASS'N 1983).
[10] Fed. R. Civ. P. 11(c).

relatively straightforward and modest, just about all of them would ultimately fail. But some were wild and utterly frivolous. One complaint asked the federal court to place the Executive Branch and the U.S. Congress under a stewardship because there was no rightful president. You know, like Gondor in the Lord of the Rings. As Boromir famously said, "Gondor has no king. Gondor needs no king,"[11] and thus the line of stewards had to reign for generations. Now, I do like a good Tolkien reference from time to time, and it's one of the few cultural references I can make in class that my students and I both appreciate. But I'm not making this up, there was actually a case that sought to put the Executive Branch and Congress under control of a steward.[12] And the lawyer actually cited the epic Tolkien Trilogy as precedent for how this could be done, not in Middle Earth mind you, but here on planet Earth.

When actions such as these occur, the professionalism of the profession, even by a few bad apples as they say, is called into question. It is some comfort that at least some of the lawyers who engaged in such unprofessional conduct have recently lost, or are about to lose, the privilege to practice law for their actions. Still, threats to the rule of law, when advanced by lawyers themselves, raise serious questions of lawyer professionalism. Taken together, one might say these four challenges reveal deeper threats to professionalism as well as the profession itself. But if we are to accept that as being the case, we might acknowledge that lawyers and others have raised concerns about lawyer professionalism for decades, even centuries, stretching back to before we were a nation.

John Adams, when speaking about advocates in the colonial courts, raised concerns about what he called "deputy sheriffs, petit justices, and pettifogging meddlers" who were "attempt[ing] to draw writs and draw them wrong more oftener than they do right," and "receive[] the fees established for lawyers and stir[] up unnecessary suits," while they did so.[13]

In the years following the Civil War, the *New York Times* would urge the creation of a bar association in New York City, which had none at the time, because of the rampant corruption in

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[11] THE FELLOWSHIP OF THE RING (New Line Cinema 2001). See https://www.youtube.com/watch?v=-YtLbqtV1v0.

[12] Amended Motion for Temporary Restraining Order at 2, Latinos for Trump et. al. v. Sessions et al., 2021 WL 4302536 (W.D. Tex. 2021) (No. 6:21-CV-43), 2021 WL 354970. The motion specifically quotes "Gondor has no King," which, ironically, is from the Peter Jackson-directed film trilogy and not from the pen of Tolkien."

[13] John Adams, *Diary of John Adams, Volume I, Wednesday [January 1759]*, MASSACHUSETTS HISTORICAL SOCIETY, https://www.masshist.org/publications/adams-papers/index.php/volume/DJA01/pageid/DJA01p69#DJA01d215n1.

the profession and the legal system.[14] By century's end, President Theodore Roosevelt would complain that lawyers were "hired cunning," willing to serve the ends of their wealthy clients to the detriment of the community.[15]

After Watergate and the Savings & Loan Crisis of the 1980s, the question was posed: "where were the lawyers?"[16]

In 194, the ABA created a commission to "rekindle" professionalism and public service.[17] It would do so again in 2009.[18]

So concerns about professionalism appear to be as old as the profession itself, but perhaps these concerns about professionalism really beg the question: what is and what should be professionalism within the profession? I submit that one of the reasons we keep coming back to the apparent failures of at least some members of the profession to exhibit professionalism is that we have largely used a narrow definition of professionalism when trying to determine the course of action necessary to revive professionalism itself. I submit to you that we need not a narrow, but a robust and well-developed sense of professionalism in order to address the challenges we as a profession currently face.

In conjuring this broader vision, I want to draw an analogy to the study of the principle of the rule of law. Legal scholar Brian Tamanaha calls a "thick" version of the rule of law one that includes ideals such as respect for individual rights and equality before the law. A "thin" version looks to formal, procedural justice alone.[19] In a thick version of the rule of law, the individual dignity of each member of society means that all have the same meaningful and equal role as other community members to participate in the selection of elected representatives and to participate in

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[14] JACK HENKE, LAWYERS AND THE LAW IN NEW YORK 24 (1979). .

[15] Theodore Roosevelt, *The Harvard Spirit, Address at Harvard University Commencement*, June 28, 1905, in 4 PRESIDENTIAL ADDRESSES AND STATE PAPERS 419–20 (1905).

[16] Lincoln Savings & Loan Ass'n v. Wall, 743 F. Supp. 901, 920 (D.D.C. 1990).

[17] See, AM. BAR ASS'N COMMISSION ON PROFESSIONALISM, ".... IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986), reprinted in 112 F.R.D. 243 (1986) [hereinafter ABA Blueprint].

[18] For the product of that commission's work, see RONALD K. MINKOFF, REVIVING A TRADITION OF SERVICE: REDEFINING LAWYER PROFESSIONALISM IN THE 21ST CENTURY (2009), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/professionalism_migrated/century.pdf.

[19] See, e.g., RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 3 (2002) (discussing thick and thin versions of rule of law).

the deliberations that ultimately lead to the laws that form the governing structure of society.[20] The thin version does not look to outcomes, but asks only whether the formal procedures by which disputes are resolved and laws made appear fair.

Drawing from this sort of typology, one of the problems with lawyer professionalism over the years is that, I believe, we have embraced a thin version of professionalism itself, as opposed to one that is more robust or "thick" if you will.

Perhaps the best example of this is the significant changes the elites in the profession put in place at the turn of the 19th to the 20th century, when they created the modern legal profession. They perceived the crisis of professionalism as a function of too many immigrants from Southern and Eastern Europe, from religious and ethnic minority groups, joining the profession because the barriers to entry were so low. They also didn't like the fact that these *arriviste* lawyers could do things like advertise and earn contingency fees. Such practices meant these new lawyers' clients—injured workers or others harmed by the elite lawyers' industrialist clients—might actually bring the elites/industrialists to justice. They created educational requirements and other barriers to entry that made it more expensive to become a lawyer.[21] They tried to rein in practices like sharing legal fees with "touters" who operated in low-income communities to bring clients to these lawyers and banned advertising outright.[22] They set rules that required courts to monitor and approve any contingency fee arrangement.[23]

Let us also not forget the animus behind many of these recommended changes: a belief that new immigrants were emerging from the teeming tenements to rustle up lawsuits against the clients of the elite members of the bar, those who led the ABA at the time. Remember that fine fellow Drinker who suggested that lawyers should throw away their telephones? Well, he also suggested that the new wave of lawyers joining the profession learned ethics from their fathers, who peddled "shoe strings and other merchandise" operating under the "competitive methods they use down in the slums." This new lawyer also worked "in a sweat shop or somewhere in the daytime and he studies law at odd times," without the "chance to absorb American ideals." For Drinker, who

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[20] BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 91-113 (2004).

[21] RICHARD ABEL, AMERICAN LAWYERS 84-86 (1989).

[22] AM. BAR ASS'N, MEMORANDUM FOR USE OF AMERICAN BAR ASSOCIATION'S COMMITTEE TO DRAFT CANONS OF PROFESSIONAL ETHICS 45 (1908).

[23] AM. BAR ASS'N, *The Canons of Professional Ethics*, in FINAL REPORT OF THE COMMITTEE ON CODE OF PROFESSIONAL ETHICS, 31 ANN. REP. A.B.A. 579 (1908).

said he had read the files involving complaints against lawyers in Philadelphia and noted that "an extraordinarily large proportion" of these lawyers coming before the grievance committee "were Russian Jew boys, young fellows who had been at the Bar a few years."[24]

The changes to the profession that occurred at the turn of the last century, including the dominant role law schools would play in educating lawyers, the adoption of codes of ethics, the imposition of bar examinations: I submit that these efforts to ensure a particular vision of professionalism—like using artificial barriers to regulate entry rather than looking to engage in real reform—and others over the years have been inspired by what I have called this thin view of professionalism.

Instead, what I will advocate for here is a thick version of professionalism, one that commits itself fully to the rule of law, to access to justice, and to inclusion.

But how would we come to this thick version of professionalism? In order to define this more robust version of professionalism, let me return to notions of "match" or "fit" introduced earlier. Borrowing from environmental studies, I want to use the concept known as institutional fit to assess the appropriate contours of professionalism that should align with the American legal, political, and civic systems. According to environmental scholar Oran Young, institutional fit deals with the "congruence or compatibility between ecosystems and institutional arrangements created to manage human activities affecting these systems."[25] For Young, "the presumption is that the closer the fit between ecosystems and institutional systems the better the relevant institutions will perform at least in terms of sustainability."[26]

This definition begs two questions: First, what is a particular ecosystem? Second what are institutions?

I will take for the purposes of this discussion that the American "ecosystem" is our political, social, and civic community as a whole.

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[24] PROCEEDINGS OF THE SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, 52 ANN. REP. A.B.A. 605, 622 (1929).

[25] ORAN R. YOUNG, THE INSTITUTIONAL DIMENSIONS OF ENVIRONMENTAL CHANGE: FIT, INTERPLAY, AND SCALE 20 (2002).

[26] *Id.*

In terms of institutions, the academic disciplines of economics, politics, sociology, and law, all disagree a bit about what institutions are and how they operate. They are not just organizations as we might commonly think of them. They are also norms, habits, and practices; norms, habits, and practices, that are embedded in larger organizational and professional networks.[27] In turn, for those individuals operating within those organizations and networks, those norms, habits and practices guide behavior of those within them. What the concept of institutional fit says is that within the ecosystem in which any norms operate, there should be congruence between the ecosystem's needs and the norms, habits, and practices in order to ensure and maintain the ecosystem's sustainability.

To try to deploy this concept of institutional fit as a mode of analysis, one must embark on a two-step process. First, one must talk about the features of the relevant ecosystem. Second, one must identify its norms, habits, and practices that are appropriate to that ecosystem to ensure its long-term viability.

Following the first step, let us look at the features of the relevant ecosystem. For our purposes, the American system—at least its aspirations, even if this does not accurately describe it in practice—contains the following. First, we have or should have a participatory, multi-racial democracy. Participatory in the sense that we engage in voting for elected officials who are supposed to carry out what they believe to be the wishes of their constituents. In turn, those actions carried out by our elected representatives shape the legal environment by passing laws and governing in a way that their constituents would prefer. Those laws govern behavior, and it is against this body of laws that our actions are measured. These laws also serve as the field in which we, as lawyers, operate. The community's commitment to and trust in those laws reflects the polity's trust in the electoral process and the legal system as a whole. Our adherence to the legal system is a core concept of the rule of law. This is all a bit idealistic, I know, but these features are what we believe and profess are key features of our society and the legal system.

Another key feature of this ecosystem is that our laws and the disputes that might arise under them are mediated through an adversarial system of justice. And our adversarial system is one

[27] *See, e.g.*, Elisabeth S. Clemens & James M. Cook, *Politics and Institutionalism: Explaining Durability and Change*, 25 ANN. REV. OF SOCIOLOGY 441, 444 (1999)(describing "the interrelationships among formal rules, informal norms, social networks, and purposive action")(citation omitted).

that, we believe, is the product of fair procedures chosen through the democratic process. Again, this is theoretical, of course.

A connected feature is our belief that it is through spirited, zealous advocacy, carried out by members of the legal profession within this adversarial system, that results in fair outcomes. We do not have an inquisitorial system where the judge conducts discovery, leads his or her own investigation, and comes up with a result. We have a system based on procedural fairness that involves adversaries engaging in advocacy in a way that brings about a just result. Since the adversarial system is one that we have chosen as appropriate to the American system of justice, the outcomes of that system are ones the community generally accepts.

There are also additional core features of the American system that are relevant to our discussion. The first is that it is based on respect for the dignity of the individual and the understanding that, at times, an individual advocating for his or her rights within the adversarial system helps to promote change in that system. This leads to another feature of our system: it is supposed to be adaptable and will change as the interests and needs of the populace change. That change can come through the electoral process, through the adversarial system, through constitutional amendments, through ballot referenda, what have you. Indeed, a feature of the American system is that it does, in fact, change over time. The moral arc of the universe is long, and it certainly bends, as Martin Luther King famously said.[28] I would like to say that I agree with the other part of his famous phrase: that it also bends toward justice. Regrettably, recent events suggest that is not always the case. Still, it bends, and a feature of our system is that it is not always static, that it does evolve and change. Sometimes that change comes slowly, sometimes quickly.

All of these features represent elements of the broader ecosystem, and, we believe, these elements work together to bring about the common good; they serve in an interconnected fashion to advance our sense of community well-being.

In sum, we have a participatory, multi-racial democracy, one in which individual rights and community well-being are held in balance through an adversarial system, and yet it is one that has the capacity to change. What, then, are the norms, habits, and practices that the profession should embrace in order to ensure institutional fit—a congruence between the ecosystem's needs and the

[28] MARTIN LUTHER KING JR., COMMENCEMENT ADDRESS FOR OBERLIN COLL.: REMAINING AWAKE THROUGH A GREAT REVOLUTION (Jun. 14, 1965).

practices of the profession within that ecosystem to ensure its long-term health, viability, and sustainability?

I submit that if you're looking for a heuristic for this sense of professionalism, it is found in a phrase that we used to maintain in our code of ethics: zealous advocacy within the bounds of the law.

This approach involves pursuing the dignity of the individual client but also doing so within the bounds of the law, recognizing that the "law" is the embodiment of democratic processes and reflects the popular will. At the same time, that advocacy for individual rights and dignity means that we can—in a lawful way and through the adversarial system—also pursue meaningful change, to try to bend the arc of the moral universe towards justice. We must protect against that adversarial system becoming rigged, however, where the overwhelming majority of individuals on the lower end of the income scale have very little use for, trust in, or access to that system. Similarly, we must ensure that our elected representatives are elected, and our laws adopted in an inclusive manner so that they truly reflect our multi-racial democracy. In addition, we must define "zeal" in a way such that we truly understand the needs of our clients. This requires that we have a more inclusive profession as well.

Ninety years ago, Charles Hamilton Houston, Dean of Howard Law School and counsel to the NAACP, argued that the African-American community, operating within the Jim Crow system at the time, needed African-American lawyers because they could authentically serve as "interpreter[s] and proponent[s]" of the Black community's "rights and aspirations."[29] An emphasis on diversity, equity, and inclusion throughout the ranks of the profession, including in its leadership roles, serves as a reflection of this notion of professionalism and will also help the profession foster greater trust for, in, and of the legal system.

[29] Charles H. Houston, *The Need for Negro Lawyers*, 4 J. NEGRO ED. 49, 49 (1935).

Lawyers who successfully manage these sometimes conflicting forces operate at the height of their craft. They advance individual rights, ensure equality before the law, and promote community well-being. Maintaining the proper balance between individual and community well-being helps us to see the big picture, and enables us to press for change when change is appropriate, particularly when it is needed to realize a more robust democracy.

Is this difficult to do? Of course it is. And that is why what we do is, and should be considered, something special, something apart, something unique. It is what makes us professionals in the first place: doing something that others cannot do. That is why this cluster of aptitudes and skills represents our values: professional values. It serves as an indicator of professional exceptionalism. And there is nothing wrong with this sort of exceptionalism. All professionals reflect a degree of exceptionalism to them; it is what makes them professionals.

Thus, this sort of thick professionalism, one that is calibrated to and fits the needs and features of American legal, political, and civic life, empowers the legal profession to fulfill its critical role within the community: that of fostering equality, the rule of law, and respect for individual rights.

How would a thick version of professionalism help us address the four threats to professionalism that I mentioned earlier: the threats of new technologies, access to justice, a lack of inclusivity, and the rule of law?

First, with respect to technology, our thick concept of professionalism means that we must approach the introduction of new technologies with curiosity, openness, and disinterestedness. Or, put another way, as fiduciaries—putting the interests of the community ahead of our own. We must recognize that there are some functions that a lawyer may do today that he or she will not do tomorrow. That there may be instances where a technology-based solution may be in the best interest of the consumer, especially when the alternative is no legal assistance at all. Long ago, the legal profession ceded the preparation of tax forms to tax preparers, who then, in turn, have lost some business to Turbo Tax. I fully expect that we will see the introduction of Turbo Tax like programs and apps in the near future in a wide range of legal service areas. In fact, we are seeing them already.

To the extent that these types of services—services that look a lot like legal services—provide adequate and competent assistance to the consumer, the profession should welcome them. In fact, the profession should be at the forefront of building them. I tell my students that it is not AI that is going to take your job; it's someone who understands AI better than you that probably will.

What a thick version of professionalism suggests is that the goal of the profession is not that every lawyer can make a living, but, rather, that every American should have legal assistance to help solve their legal problem. To the extent that new technologies can provide competent, effective, and affordable services to the community to help close the justice gap, we should embrace them.

Similarly, a thick version of professionalism will strive to advance full access to justice, whether it is through the delivery of full-service legal assistance to every American who needs it or the creation of some meaningful channels through which consumers can receive a modicum of legal guidance and assistance, at no or low cost. That means not only making ourselves more available through pro bono and low bono efforts but also striving to make court processes and laws simpler and easier to navigate where possible. Again, this may mean there might be less work for lawyers to do in some instances, but that's ok. Remember that 80% of low-income and 50% of middle-income Americans face their legal problems without a lawyer; there is still plenty of work to go around.

When it comes to the rule of law, we must, once again, put the well-being of the community ahead of our own personal interests; in essence, we must be professionals. That might mean telling a client no when they seek to use the lawyer's services to undermine the rule of law. That might mean a wealthy client or a powerful political figure; it might mean a low-income person who is about to lose their home. Regardless of the context, professionalism demands zealous advocacy but always within the bounds of the law. When lawyers skirt the law to seek a favorable outcome, for their clients or for themselves, that undermines the rule of law and is contrary to professionalism. What might play to the crowd in the court of public opinion; when presented under the cold, fluorescent lights of the courtroom, such arguments often fall short, as they should.

Finally, a thick version of professionalism, one calibrated through institutional fit, will also recognize that we, as a profession, have a long way to go in all levels, sectors, and elements of our profession to promote the value of inclusion, which, in a multi-racial democracy, requires more from and better of us. While the ranks of the entering classes of law schools across the country have largely balanced out along gender lines, and I am hopeful that we will improve the balance of the profession along such lines over the coming generations as a result, we still have a long way to go before the profession, especially elites within and leadership of the profession, matches the demographics of the nation as a whole, especially when it comes to race, ethnicity, gender and gender expression, and disability.

In conclusion, I submit that a thick version of professionalism, one calibrated to and fitting the many and complex needs of our legal, political, and civic ecosystem and the communities within it, will serve the nation well by advancing the principles of the rule of law, access to justice, and inclusion.

Thank you for the opportunity to share these thoughts with you.