

DRAFT

LEADERSHIP IN TIMES OF SOCIAL UPEHAVAL: LESSONS FOR LAWYERS

73 BAYLOR L. REV. __ (PUBLICATION FORTHCOMING WINTER 2021).

DEBORAH L. RHODE *

ABSTRACT

This article explores the leadership challenges that arose in the wake of the 2020 COVID-19 pandemic and the widespread protests following the killing of an unarmed Black man, George Floyd. Lawyers have been key players in both crises, as politicians, general counsel, and leaders of protest movements, law firms, bar associations, and law enforcement agencies. Their successes and failures hold broader lessons for the profession generally. Even before the tumultuous spring of 2020, two thirds of the public thought that the nation had a leadership crisis. The performance of leaders in the pandemic and the unrest following Floyd’s death suggests why.

The article proceeds in three parts. Part I explores leadership challenges during the COVID-19 pandemic and the missteps that put millions of lives and livelihoods at risk. It begins by noting the increasing frequency and intensity of disasters, and the way that leadership failures in one arena—health, environmental, political, or socioeconomic—can have cascading effects in others. Discussion then summarizes key leadership attributes in preventing, addressing, and drawing policy lessons from major crises. Particular attention centers on the changes in legal workplaces that the lockdown spurred, and which ones should be retained going forward. Analysis also centers on gender differences in the way that leaders addressed the pandemic, and what they say about effective leadership generally. Part II examines leadership challenges in the wake of Floyd’s death for lawyers in social movements, political positions, private organizations, and bar associations. Part III concludes with a summary of key leadership qualities in a crises, and a call to legal educators to do more to prepare graduates for the leadership positions that so many will assume. The goal is to help the legal profession contribute more effectively to the struggle to make this country “a more perfect union,” in which opportunities for health, justice, and financial security are equally shared.

INTRODUCTION

At no time in recent history has the need for leadership been so apparent and its absence so catastrophic. Failures of leadership during the COVID-19 pandemic have placed millions of lives and livelihoods at risk in the United States and in other nations around the globe. So too, leadership missteps in the months following a particularly horrendous police killing of George Floyd, an unarmed Black man, helped fuel the most sustained and widespread social protest in American history. Even before the tumultuous spring of 2020, two thirds of the public thought that

the nation had a leadership crisis.¹ The performance of leaders in the pandemic and the unrest following Floyd’s death suggests why.

Lawyers have been key players in both crises. As politicians, general counsel, and leaders of protest movements, law firms, bar associations, law enforcement agencies, they have been at the center of crisis management. The lessons that they and the public generally have learned have implications for lawyers in other leadership contexts. This article summarizes some of the key points that should inform the legal profession in the struggle to make this country “a more perfect union,” in which opportunities for health, justice, and financial security are equally shared.

Part I of the article explores leadership challenges during the COVID-19 pandemic. It begins by noting the increasing frequency and intensity of disasters and the way they cross jurisdictional boundaries. Leadership failures in one arena—health, environmental, political, or socioeconomic—can have cascading effects in others and cross jurisdictional boundaries. Discussion then focuses on key leadership attributes for preventing, addressing, and drawing policy lessons from major crises. Attention also centers on the reforms in legal workplaces that the lockdown spurred, and on gender differences in the way that leaders addressed the pandemic. Part II examines the leadership challenges arising after the killing of George Floyd. It focuses on the particular roles of leaders in social movements, in political positions, in private organizations, and in bar associations. Part III concludes with a summary of key leadership qualities in a crises, and a call to legal educators to do more to prepare graduates for the leadership positions that so many will assume.

I. LEADERSHIP IN A PANDEMIC

The COVID-19 pandemic of 2020 was a sobering reminder of the importance of leadership. “[M]ake no mistake,” said the Director-General of the World Health Organization in July 2020, “the greatest threat we face now is not the virus itself, rather it’s the lack of leadership and solidarity at the global and national levels.”² Many medical experts have noted that this is not the worst health threat the world has faced by any means in terms of death or contagiousness; the problem is that so many countries have done such a poor job of handling it.³

While the scope and intensity of the pandemic have been unprecedented, such crises are not unpredictable. Health experts and climate scientists have been warning the public for decades about the growing risks of such pandemics and other natural disasters. Thousands of publications specifically warned about the risks of a virulent, highly contagious respiratory virus.⁴ Many of

-
- Ernest W. McFarland Professor of Law and Director of the Center on the Legal Profession, Stanford University. This article draws on material in an August 2020 supplement to DEBORAH L. RHODE, LEADERSHIP FOR LAWYERS (3d ed. 2020) the manuscript assistance of Eun Sze and research assistance of Mila Gauvin and Carrie Lebel are gratefully acknowledged.

¹S.A. Rosenthal, NATIONAL LEADERSHIP INDEX 2012: A NATIONAL STUDY OF CONFIDENCE IN LEADERSHIP (Center for Public Leadership, Harvard University, 2012).

² Joseph Guzman, *Emotional WHO Director Calls for Unity Amid “Lack of Leadership and “in Fight Against Pandemic*, THE HILL, July 9, 2020 (quoting Tedros Adhanom Ghebreyesus).

³ Science Journalist Ed Yong on the Future of the Pandemic, NPR FORUM, July 16, 2020, <https://www.kqed.org/forum/20110878685/science-journalist-ed-yong-on-the-future-of-the-pandemic>.

⁴⁴ Sten Vemund, *Health Care at Risk*, YALE ALUMNI MAGAZINE, July/Aug., 2020, at 54, citing for example, WARREN ANDIMAN, ANIMAL VIRUSES AND HUMANS: A NARROW DIVIDE (2018).

these risks are at least partly attributable to human action and inaction, particularly at leadership levels. These disasters increasingly appear not as unfortunate events that just happen, but as the avoidable consequences of difficult political choices, government policies, and organizational practices. As one expert noted, “[t]he ‘Act of God’ argument or its profane corollary (‘shit happens’) no longer suffices to account for the occurrence and severity of a crisis.”⁵

In an increasingly interconnected world, the consequences of environmental disasters, humanitarian and health emergencies, terrorist activity, and economic failures typically cross jurisdictional boundaries.⁶ Bad leadership in one locality can have toxic effects elsewhere. Disasters in one arena—political, economic, environmental, health—cause cascading crises in others.⁷ Experts worry about the emergence of another epidemic that might further overload our already strained medical systems. If even the wealthiest countries such as the United States “could underperform so badly against one rapidly spreading virus, how would [these countries] . . . fare against two?”⁸ The military’s term VUCA captures our current reality: volatile, uncertain, complex, and ambiguous.

Experts have written extensively about what is necessary for effective leadership during such crises. Although none of these strategies are unique to such circumstances, their absence in disasters can have particularly catastrophic consequences for the individuals and organizations affected. To be sure, crises vary considerably in their scope, predictability, duration, and broader political implications, but the research in this field suggests some generalizable lessons about how to “inform, connect, guide, and unite.”⁹

Informed Strategic Thinking

One lesson is that leaders need to think strategically, informed by the best available information. Their first step should be to seek facts and guidance from a broad array of constituencies, including not only those with relevant scientific or financial expertise, but also those affected by the crisis on the front lines. As the Chair of Global Health at the University of Edinburgh Medical School has noted, “the only way to avoid ‘group think’ and blind spots is to ensure representatives with diverse backgrounds and expertise are at the table when major decisions are made.”¹⁰ Leaders need to have, or to create, systems before, during, and after crises for gathering data, planning responses, and managing risks.¹¹ And they need a defensible evidence-based process for balancing tradeoffs between short and long-term outcomes, and incommensurable values involving health, safety, and financial consequences. It is not enough for

⁵ ARJEN BOIN ET AL., *THE POLITICS OF CRISIS OF MANAGEMENT: PUBLIC LEADERSHIP UNDER PRESSURE* 146 (2d ed. 2016).

⁶ BOIN ET AL., *THE POLITICS OF CRISIS OF MANAGEMENT*, 1.

⁷ BOIN ET AL., *THE POLITICS OF CRISIS OF MANAGEMENT*, 7.

⁸ Ed Yong, *America Should Prepare for a Double Pandemic*, ATLANTIC, July 15, 2020.

⁹ RHR INTERNATIONAL, *Executive Insight: Leadership in Times of Uncertainty: Helping People Cope in Challenging Times*, 2, https://www.rhrinternational.com/sites/default/files/pdf_files/Leadership-in-Times-of-Uncertainty.pdf.

¹⁰ Amanda Taub, *Why Are Women-Led Nations Doing Better With Covid-19?*, N.Y. TIMES, May 15, 2020.

¹¹ Michael Useem, *It’s Your Leadership Moment*, KNOWLEDGE@WHARTON, Mar. 30, 2020 (strategic thinking and short and long-term assessments); Michaela J. Kerrissey & Amy C. Edmondson, *What Good Leadership Looks Like During This Pandemic*, HARV. BUS. REV., Apr. 13, 2020 (expert and diverse advisors); David Robson, *Covid-19: What Makes a Good Leader During a Crisis*, BBC (Mar. 27, 2020), <https://www.bbc.com/worklife/article/20200326-covid-19-what-makes-a-good-leader-during-a-crisis> (procedures and infrastructure for data collection).

leaders to ask for candid advice. They must show by their actions that they value differing opinions and won't shoot the messenger bearing bad tidings. For their own political survival, as well as the literal survival of others, no leaders should be metaphorically "social distancing" themselves from those who tell them what they would rather not hear.¹²

Many American leaders failed miserably along these dimensions. Donald Trump's personal motivations, misstatements, and missteps have been chronicled in dispiriting detail elsewhere.¹³ What is more surprising and even more disheartening is the number of federal and state officials, including lawyers, who put politics before public health, and engaged in turf battles over whose agendas mattered most. For example, Georgia's governor and former practicing lawyer Brian Kemp filed a lawsuit challenging Atlanta's mayor Keisha Lance Bottoms' orders mandating masks in public and issuing guidelines urging restaurants to close indoor dining rooms. Bottoms responded on Twitter that "reading is fundamental. @Kemp is suing Atlanta over RECOMMENDED guidelines."¹⁴ Kentucky's Attorney General, Daniel Cameron, a former lawyer-lobbyist and aide to Republican Senator Mitch McConnell, reportedly used the COVID-19 pandemic to continue his mission "to make things miserable for [Democratic governor Andy] Beshear." He brought suits to roll back mandates on masks, social distancing, business closures, and related actions as an "arbitrary and unreasonable burden" on citizens' constitutional rights.¹⁵

Florida governor Ron DeSantis, also a lawyer, pushed for early reopening of beaches and non-essential establishments such as tattoo parlors despite rising COVID-19 cases, and refused to require masks. "We're gonna trust people to make good decisions," he said, in the face of overwhelming evidence that many people were not.¹⁶ The DeSantis administration also fired a scientist in its health department who claimed that the decision resulted from her refusal to fudge numbers supporting the governor's reopening plan. Rebekah Jones, who created Florida's coronavirus data portal, said that the department's leadership asked her to lower the percentage of positive COVID-19 cases in some counties so they would qualify for reopening. According to her account, when she refused, the department hired a private vendor who produced the desired results. After she resisted other requests to delete and suppress data, she was removed from the dashboard team and then fired without a reason. A spokesperson for the governor disputed her account and said only that Jones "exhibited a repeated course of insubordination during her time with the department."¹⁷

¹² David Remnick, *The Politics of the Virus*, NEW YORKER, Apr. 20, 2020, 8.

¹³ Michael D. Shear et al., *Passing Off Virus Burden, White House Fueled Crisis*, N.Y. TIMES, July 19, 2020, 8

¹⁴ Greg Bluestein, *Kemp's Office Seeks to Block Atlanta Mask Mandate in Court*, POLITICAL INSIDER BLOG (July 15, 2020), <https://www.ajc.com/politics/politics-blog/kemps-office-files-lawsuit-seeking-to-block-atlanta-mask-mandate/JJQ5DQW2QFE6PN7TTVO2ISNFDQ/>.

¹⁵ Ed Scarce, *Kentucky's Attorney-General Tries to Block All of Gov. Andy Beshear's COVID-19 Orders*, POLITICS, July 16, 2020.

¹⁶ Chris Cillizza, *Can Florida's Governor Admit He Was Wrong About Coronavirus?*, CNN POLITICS (July 14, 2020), <https://www.cnn.com/2020/07/14/politics/ron-desantis-florida-coronavirus/index.html> (quoting DeSantis).

For other failures, see Erin Schumaker & Ivan Pereira, *Too Little Too Late: The Story of How Florida Shattered the Country's Single-day COVID Record*, ABC NEWS (July 13, 2020), <https://abcnews.go.com/Health/late-story-florida-shattered-countrys-single-day-covid/story?id=71750390>.

¹⁷ NPR KQED, *Florida Scientist Says She Was Fired for Not Manipulating COVID-19 Data*, MORNING EDITION, NPR, (June 29, 2020), <https://www.npr.org/2020/06/29/884551391/florida-scientist-says-she-was-fired-for-not-manipulating-covid-19-data>.

Support for Collaborative Initiatives Across Jurisdictional Boundaries

Crisis management experts often distinguish between what former Defense Secretary Donald Rumsfeld labeled “known unknowns” and “unknown unknowns.”¹⁸ The first category involves disasters that can be anticipated, although their exact location, scale, and timing cannot; these include hurricanes, wildfires, flooding, or airplane crashes. The second category involves “black swans,” truly rare events that do not follow predictable patterns, and may have far reaching impact. COVID-19 was one of those. Particularly for these crises, leaders cannot simply address the disaster immediately before them in their own jurisdiction: they need to build and support transnational institutions and collaborative initiatives.¹⁹

The Trump administration has done precisely the opposite. It has attempted to withdraw from the World Health Organization at exactly the moment when the international community needs that institution most.²⁰ Experts worry that this could encourage other nations to follow suit. And even if they do not, the result of the U.S. withdrawal will be not only to harm the WHO, but also to “further diminish America’s already damaged international standing. A country that has badly mishandled its own outbreak, that has bought up the world’s stock of important drugs, and that has petulantly withdrawn from global alliances is less likely to receive warnings or support if a new crisis emerges.”²¹ Trump administration officials also removed COVID-19 data collection from the Center for Disease Control to Health and Human Services, which has more political appointees and is viewed as less independent and trustworthy than the largely scientific career staff of the CDC.²²

Even more disastrous was the decision by Trump and his top officials to pursue what they called the “state authority handoff.”²³ This avoidance of collaboration and attempt to minimize federal accountability and political backlash left individual states with the impossible task of obtaining adequate essential resources such as tests and protective equipment. The result was a bidding war that forced up the price of scarce supplies and channeled them to the richest bidders, not necessarily the places that needed them most.²⁴

Acting Quickly and Adjusting Constantly

Another crisis management imperative is for leaders to act and adapt quickly and decisively.²⁵ They should avoid the temptation to delay or downplay the crisis in order to prevent panic and to wait for more information that could clarify the situation.²⁶ A failure to make strategic decisions is itself a decision, and in circumstances such as a pandemic, a failure to act quickly is deadly, literally as well as figuratively.²⁷ American historians have noted that leveling with the

¹⁸ BOIN ET AL., *THE POLITICS OF CRISIS OF MANAGEMENT*, 6.

¹⁹ BOIN ET AL., *THE POLITICS OF CRISIS OF MANAGEMENT*, 2.

²⁰ Yong, *America Should Prepare* and Guzman, *Emotional WHO Director Calls for Unity*.

²¹ Yong, *America Should Prepare*.

²² Shannon Firth & Joyce Frieden, *As COVID Data Collection Moves From CDC to HHS, Questions Mount*, MEDPAGE TODAY (July 17, 2020), <https://www.medpagetoday.com/infectiousdisease/covid19/87632>.

²³ Shear et al., *Passing Off Virus Burden*.

²⁴ Jonathan Mahler, *In the Whirlwind*, N.Y. TIMES MAG., June 28, 2020, 23.

²⁵ Useem, *It’s Your Leadership Moment*.

²⁶ Kerrissey & Edmondson, *What Good Leadership Looks Like*.

²⁷ Joan Michelson, *What’s the Surprising Leadership Lesson in the COVID-19 Crisis?*, FORBES (Mar. 28, 2020), <https://www.forbes.com/sites/joanmichelson2/2020/03/28/whats-the-surprising-leadership-lesson-in-the-covid-19-crisis/#2a00a49949b6>. See also Charles M. Blow, *A Deadly Lack of Leadership*, N.Y. TIMES, Mar. 15, 2020.

public as quickly and candidly as possible has been the best strategy for seeing the country through crises ranging from the Great Depression and World War II, to more recent acts of international aggression and terrorism.²⁸

Many commentators have contrasted the leadership responses in South Korea and the United States. Both had their first case of COVID-19 on the same day. Korea's president had stockpiled kits before the virus arrived, and within a week asked companies to prepare for mass production. The country pioneered drive-through testing, and immediately began testing 10,000 people a day and providing quick results. The president also promptly initiated contact tracing, isolation of the moderately sick, and constant public briefings by scientists, not politicians.²⁹ No lockdowns were necessary; people observed social distancing and wore masks.³⁰ The government's action inspired what the Seoul *New York Times* Bureau chief described as a "wartime sense of purpose."³¹ When a later outbreak occurred, the government again responded quickly and decisively. The United States, by contrast, was "beset by denial and dysfunction," and lost seventy precious days that could have been devoted to similar efforts to contain the outbreak.³² A few months into the pandemic, South Korea had experienced eighty-five fatalities and the United States had that many an hour.³³ The Trump administration's failures have led to disastrous results. These failures include a lack of prompt national action to accelerate production and manage distribution of scarce supplies, and to encourage masks, social distancing, widely available testing, provision of prompt results and contact tracing. As this article went to press in August 2020, the United States had the highest rate of COVID-19 infections and deaths in the world and South Korea one of the lowest.³⁴ The United States accounts for four percent of the world's population and a quarter of pandemic deaths.

As the South Korean example suggests, effective crisis leadership also requires the capacity to learn from mistakes, adjust quickly, and enlist others in light of new knowledge and circumstances.³⁵ As experts note, few preexisting crisis plans "survive contact with reality."³⁶ Continuing adaptation is always essential, as is collaboration and cooperation. Command and control strategies are often necessary but never sufficient. Leaders need to engage diverse stakeholders in collective efforts toward shared goals.³⁷ Facilitating these relationships is itself a challenge, given preexisting animosities, rivalries, and conflicting personal agendas, all of which

²⁸ Jon Meacham, *Great Leadership in a Time of Crisis*, N.Y. TIMES, Mar. 24, 2020.

²⁹ Robson, *COVID-19*; Ludo Van der Heyden, *A Crisis Management Blueprint for COVID-19*, INSEAD, Apr. 3, 2020; Derek Thompson, *What's Behind South Korea's Covid-19 Exceptionalism?*, ATLANTIC, May 6, 2020.

³⁰ Thompson, *What's Behind South Korea's Covid-19 Exceptionalism?*

³¹ Robson, *COVID-19*; Van der Heyden, *A Crisis Management Blueprint for COVID-19*. See also Thompson, *What's Behind South Korea's Covid-19 Exceptionalism?*

³² Yasmeeen Abutaleb et al., *The U.S. Was Beset by Denial and Dysfunction as the Coronavirus Raged*, WASH. POST, Apr. 4, 2020.

³³ Thompson, *What's Behind South Korea's Covid-19 Exceptionalism?*

³⁴ *Coronavirus Map: Tracking the Global Outbreak*, N.Y. TIMES, July 6, 2020.

³⁵ Eric J. McNulty, *Leading Through COVID-19: Finding Hope and Opportunity in a Global Calamity*, MIT SLOAN MGMT. REV., (Mar. 6, 2020), <https://sloanreview.mit.edu/article/leading-through-covid-19>; Kerrissey & Edmondson, *What Good Leadership Looks Like*. For a general discussion of leadership in crises, see LEONARD J. MARCUS ET AL., *YOU'RE IT: CRISIS, CHANGE, AND HOW TO LEAD WHEN IT MATTERS MOST* (2019).

³⁶ BOIN ET AL., *THE POLITICS OF CRISIS OF MANAGEMENT*, 65.

³⁷ Lindsey Anderson, *Leadership During Crisis: Navigating Complexity and Uncertainty*, LEADER TO LEADER (Mar. 3, 2020), <https://www.corporatelearningnetwork.com/leadership-management/articles/leadership-during-crisis>; BOIN ET AL., *THE POLITICS OF CRISIS OF MANAGEMENT*, 73.

can be exacerbated by the stress of high-stakes circumstances.³⁸ By necessity, leadership in a crisis often comes from the bottom up. For instance, following a devastating hurricane in Puerto Rico, residents built a pulley system to bring in food and water when the bridge connecting their village to supplies was destroyed and the central government was too overwhelmed to respond.³⁹

Again, the United States response has fallen short. As the Republican mayor of Miami, Francis X. Suarez, noted, the “White House approach had only one focus. It was all predicated on reduction [of cases and fatalities], open [businesses], reduction, open more, reduction, open. There was never what happens if there is an increase after you reopen.”⁴⁰ Even as cases continued to climb, and many jurisdictions lacked resources and the capacity to quickly process test results to enable quarantines, the White House minimized the risks. President Trump told reporters that 99 percent of cases “are totally harmless,” and that many involved “young people that would heal in a day. They have the sniffles.”⁴¹

Credible and Compassionate Communication

Clear, consistent, credible, and compassionate messaging is also critical. Effective crisis leadership does not just involve “doing the right thing on the ground.”⁴² It also requires a compelling narrative that helps to clarify the problem and unites the public behind the necessary responses. Here again, leaders must begin communicating quickly, “before competing narratives fill the space.”⁴³ At a minimum, their message should express empathy and explain what the government is going to do and why.⁴⁴ Although delivering bad news is a thankless task, it is important not to sugarcoat the truth, which will ultimately erode credibility and trust.⁴⁵ Leaders need to avoid creating unrealistic expectations, but also to instill hope.⁴⁶ They must be aspirational and inspirational, and leave their audience with a belief that they will get through the disaster together and emerge on the other side with resilience and an increased ability to prevent or mitigate such catastrophes or disasters in the future.⁴⁷ Humility, which is “a valuable leadership attribute in the best of times, becomes essential during a crisis,” because leaders will inevitably make mistakes.⁴⁸ The public will be much more likely to be forgiving if those in charge acknowledge error than if they “become obsessed with dodging blame and claiming glory.”⁴⁹ Reaching out with honesty, humility, warmth, and support is essential.⁵⁰

³⁸ BOIN ET AL., *THE POLITICS OF CRISIS OF MANAGEMENT*, 36-37, 66-73.

³⁹ Anderson, *Leadership During Crisis*.

⁴⁰ Michael D. Shear et al., *Inside Trump’s Failure: The Rush to Abandon Leadership Role on the Virus*, N.Y. TIMES, July 18, 2020 (quoting Suarez).

⁴¹ Annie Karni & Maggie Haberman, *As Virus Rages and Poll Numbers Slip, ‘American Carnage’ Redux*, N.Y. TIMES, July 5, 2020; Felicia Sonmez, *Trump Declines to Say Whether He Will Accept November Election Results*, WASH. POST, July 20, 2020 (quoting Trump).

⁴² Robson, *COVID-19*.

⁴³ Robson, *COVID-19*.

⁴⁴ Tanveer Naseer Leadership, *3 Important Lessons On Crisis Management from the COVID-19 Pandemic*, <https://www.tanveernaseer.com/crisis-management-lessons-from-covid-19-pandemic/>.

⁴⁵ Kerrssey & Edmondson, *What Good Leadership Looks Like*; Tanveer Naseer Leadership, *3 Important Lessons*; BOIN ET AL., *THE POLITICS OF CRISIS OF MANAGEMENT*, 93.

⁴⁶ Van der Heyden, *A Crisis Management Blueprint for COVID-19*.

⁴⁷ McNulty, *Leading Through COVID-19*.

⁴⁸ Van der Heyden, *A Crisis Management Blueprint for COVID-19*.

⁴⁹ Blow, *A Deadly Lack of Leadership*.

⁵⁰ RHR, *Leadership in Times of Uncertainty*, 2.

Such skills are particularly important in a polarized political environment. One challenge for lawyer leaders such as Gretchen Whitmer, the Democrat Governor of Michigan, was that wealthy conservative Republicans joined forces with right wing groups to mount massive protests to lockdown, social distancing, and mask requirements.⁵¹ Extremists used Nazi symbolism to accuse Whitmer, dubbed Whitler, of engaging in dictatorial, fascist tactics, and spread disinformation that CDC expert Anthony “Faux-Fauci” were orchestrating the pandemic to prevent Trump’s reelection.⁵² President Trump amplified the protests by denouncing and demeaning Whitmer as “that woman from Michigan.”⁵³ She responded with measured resolve, and managed to retain a sense of humor that helped deflect vitriol; she appeared on Trevor Noah’s late night comedy show wearing a “That Woman from Michigan” tee shirt as a badge of honor.⁵⁴

So too, leaders communicate by actions and examples, not just prepared texts. Consider the message that President Trump conveyed by not wearing a mask for the first four months of the pandemic, and holding rallies where participants also went without masks and did not observe social distancing. The mayor of Austin, Texas, where intensive care cases stretched local hospitals to capacity, watched residents’ conduct with obvious frustration. “When we were trying to get people to wear masks,” he noted, “they would point to the president and say, ‘Well, that’s not something that we need to do.’”⁵⁵ Miami’s mayor agreed. “People follow leaders.” Then he paused and rephrased his remarks. “People follow those who are supposed to be leaders.”⁵⁶

Practicing what they preach can sometimes confront leaders with difficult tradeoffs. A case in point is Chicago Mayor Lori Lightfoot’s decision to have a hair stylist come to her home when salons were closed due to stay-at-home orders. Lightfoot had previously defended her decision to close those businesses because “getting your roots done is not essential.” Her own haircut, she claimed, was necessary because “I’m the public face of this city. I’m on national media, and I’m out in the public eye.”⁵⁷ But countless other professional women may understandably have felt that they too were in the public eye, and that their reputations and job security also depended on maintaining certain standards of appearance.⁵⁸

Post-Crisis Accountability, Learning, and Reform

Once a crisis has abated, effective leadership requires accountability, learning, and strategies for reform. People want a thorough and unbiased investigation into what caused the disaster, what attempts were made to prevent and manage it, how effective the responses were, and what should be done differently in the future. Such inquiries are necessary to provide closure and promote reform.⁵⁹ An all too common tendency is for political leaders to attempt to shape the

⁵¹ Luk Mogulson, Nothing to ose But Your Maks, *New Yorker*, August 24, 2020, 34. n

⁵² *Id.*, at 39.

⁵³ Kathleen Gray, *Trump vs. the Women Who Lead Michigan: A Battle with 2020 Implications*, *N.Y. TIMES*, July 21, 2020; Jonathan Mahler, *A Governor on Her Own, With Everything at Stake*, *N.Y. TIMES MAG.*, June 25, 2020.

⁵⁴ Gray, *Trump v. Women*, *supra* note .

⁵⁵ Shear et al., *Passing Off Virus Burden* (quoting Steve Adler).

⁵⁶ Shear et al., *Passing Off Virus Burden* (quoting Francis Suarez).

⁵⁷ Kaelan Deese, *Chicago Mayor Defends Getting a Haircut Amid Coronavirus*, *THE HILL*, Apr. 7, 2020 (quoting Lightfoot).

⁵⁸ For discussion of the heightened standards that women professionals face relative to their male colleagues, see DEBORAH L. RHODE, *WOMEN AND LEADERSHIP* 45-46 (2017); Deborah L. Rhode, *The Injustice of Appearance*, 61 *STAN. L. REV.* 1034, 1054-1057 (2009).

⁵⁹ BOIN ET AL., *THE POLITICS OF CRISIS MANAGEMENT*, 16-18.

inquiry in ways that will minimize damage to them personally, by picking sympathetic members of any investigatory body, or selectively withholding information. But a strategy of “ducking, displacing, and deflecting responsibility” may get in the way of useful self-evaluation, an honest reckoning of what went wrong and the strategies necessary to fix it.⁶⁰ In the end, according to an international overview of crises responses, “buckpassing only undermines authority while proactive, genuine, and well-communicated [assumption of] responsibility may well underpin it.”⁶¹

Crises often provide policy windows for reform because they dramatically expose “underlying societal vulnerabilities and governance problems.”⁶² A classic illustration is America’s Great Depression in the 1930s, which paved the way for New Deal social welfare programs. Because a sense of urgency may vanish quickly after all but the most cataclysmic crises, leaders face difficult tradeoffs between getting policy proposals on the agenda quickly and doing a thorough enough investigation to generate the best long-term solutions. Many reform efforts are derailed by letting political agendas dictate timing. If “creating a public appearance of responsible and forceful action now is given priority over launching more highly informed proposals later,” the public may pay the price.⁶³

The qualities needed during the most urgent phase of the crisis are not the ones needed in its aftermath. At the height of a disaster, people generally want a return to normalcy; only later are they most receptive to critical self-reflection and policy proposals that will pay off only in the long term.⁶⁴ Moreover, the command and control decision-making style that may be necessary or tolerable in the urgent phase of a crisis must give way to a more persuasion-based strategy when the objective is significant reform. Many hope that the COVID-19 pandemic, like the Great Depression of the 1930s, will prompt discussion of the need for a better safety net for vulnerable individuals.⁶⁵ In particular, it should underscore the failures of the American health system. It is shameful that the United States, one of the richest countries in the world, ranks 175 out of 195 countries in health care access according to the Global Health Security Index.⁶⁶ At the very least, the COVID-19 pandemic should trigger much better preparation for the major crises that are sure to follow. The ravages of COVID-19 in prisons, where adequate social distancing is impossible, should also prompt increased focus on more humane and effective alternatives to mass incarceration.⁶⁷

Lessons For Legal Workplaces: The Conditions of Work and Pro Bono Service

For lawyers leading organizations affected by the shutdown, there are other lessons from the experience. One is the importance of embracing new technologies, and taking advantage of

⁶⁰ BOIN ET AL., THE POLITICS OF CRISIS MANAGEMENT, 118.

⁶¹ BOIN ET AL., THE POLITICS OF CRISIS MANAGEMENT, 163.

⁶² Boin et al., THE POLITICS OF CRISIS MANAGEMENT, 132.

⁶³ BOIN ET AL., THE POLITICS OF CRISIS MANAGEMENT, 132.

⁶⁴ BOIN ET AL., THE POLITICS OF CRISIS MANAGEMENT, 139.

⁶⁵ Michelle Goldberg, *Is a New Deal Coming?*, N.Y. TIMES, May 3, 2020.

⁶⁶ Jessica Bell, *The U.S. and COVID-19: Leading the World by GHS Index Score, Not by Response*, NTI ATOMIC PULSE (Apr. 21, 2020), <https://www.nti.org/anysis/atomic-pulse/us-and-covid-19-leading-world-ghs-index-score-not-reponse>.

⁶⁷ Terry Gross, *How San Francisco’s DA is Decreasing the Jail Population Amid COVID-19*, FRESH AIR (NPR KQED), (Apr. 9, 2020), <https://www.npr.org/2020/04/09/829955754/son-of-60s-radicals-is-the-new-d-a-in-san-francisco-facing-the-covid-19-crisis>.

opportunities to reduce unnecessary travel and office facetime. One survey of workers in countries hit hard by the coronavirus found that on average, those in the United States reported an increase in productivity from employees working at home. Other less systematic research confirmed these findings.⁶⁸ Lawyers learned that for many tasks, they could be equally effective working remotely with flexible schedules.⁶⁹ Despite challenging home situations, childcare responsibilities, and social isolation, individuals often found compensating physical and psychological wellbeing from eliminating stressful travel and rigid work hours.⁷⁰ Society also benefitted from reduced carbon emissions and traffic congestion. In the San Francisco Bay Area, the gains were so substantial that its Air Quality Management District asked employers to sign a “Cut the Commute” pledge by offering remote work options to at least a quarter of workers whose jobs would permit it.⁷¹ So too, the pandemic brought home to many leaders the importance of demonstrating recognition of the worker, not just the work.⁷² Finding more ways to express empathy and support may help lawyer leaders build more compassionate as well as productive workplaces.

Yet not all evidence was positive. One study that looked at data from more than 21,000 companies and sixteen large metropolitan areas worldwide in the two months before and after local lockdowns found that the average workday was almost an hour longer, and the number of meetings increased by 13 percent.⁷³ As Jeffrey Polzer, one of the coauthors noted, although workers had added flexibility to address caretaking needs during the day, having job obligations bleed into evening hours had corresponding downsides. Employees were expected to be constantly accessible. “Is it working from home or living at work or both?” Polzer asked.⁷⁴ That is not a new phenomenon for professionals such as lawyers, who have commonly been expected to be accessible 24/7.⁷⁵ While technology has expanded opportunities to work from home, it has reduced opportunities to not work from home. And expectations of accessibility have intensified during the pandemic for many workers, given their fears about losing jobs and their limited options to be out of the house.

In the aftermath of the pandemic, the “new normal” should not incorporate these longer workdays and heightened expectation of constant accessibility. Such norms have already been toxic for lawyers, who suffer disproportionate rates of mental health challenges and substance abuse, due in part to work/life conflicts.⁷⁶ Lawyers report almost three times the rate of depression

⁶⁸ David Gelles, *Are We More Productive in a Pandemic*, N.Y. TIMES, June 27, 2020.

⁶⁹ Susan Smith Blakely, *What Can Law Firms Learn from a Pandemic?*, ABA J., May 14, 2020; Joan C. Williams, *The Pandemic Has Exposed the Fallacy of the “Ideal Worker,”* HARVARD BUSINESS REV. May 11, 2011.

⁷⁰ Blakely, *What Can Law Firms Learn?*, Williams, *Pandemic Has Exposed the Fallacy*.

⁷¹ Cindy Chavez, *When COVID-19 Disruptions End, Let Remote Work Continue*, SILICON VALLEY BUS. J., July 9, 2020.

⁷² Blakely, *What Can Law Firms Learn?*

⁷³ Evan D. Filippis et al, *Collaboration During Coronavirus: The Impact of COVID-19 on the Nature of Work*, NBER Working Paper, June, 2020, <https://www.nber.org/papers/w27612>. For discussion, see Jena McGregor, *Remote Work Really Does Mean Longer Days—and More Meetings*, WASHINGTON POST, August 4, 2020. <https://www.washingtonpost.com/business/2020/08/04/remote-work-longer-days/>

⁷⁴ McGregor, *Remote Work* (quoting Polzer).

⁷⁵ See Deborah L. Rhode and Lucy Buford Ricca, *Diversity in the Legal Profession: Perspectives from Managing Partners and General Counsel*, 83 FORDHAM . REV. 2483, 2500-2501 (2015).

⁷⁶ Deborah L. Rhode, *Preparing Leaders: The Evolution of a Field and the Stresses of Leadership*, 58 SANTA CLARA LAW REVIEW 411 (2019).

and almost twice the rate of substance abuse as other Americans.⁷⁷ Law ranks among the top five careers for suicide.⁷⁸ Current norms are not sustainable without immeasurable costs to individual lawyers, and corresponding costs to legal organizations and clients, who do not get cost-effective service from blurry, burned out practitioners. Failure to address these work/life conflicts also compromises diversity and exacerbates gender inequalities in the profession. Women still shoulder a disproportionate share of caretaking responsibilities in the home and pay the price in the world outside it.⁷⁹ That disparity has heightened in many families during the pandemic, with women assuming the vast majority of additional caretaking and distancing learning obligations.⁸⁰ Many men remain oblivious to disparity. According to a *Harper's* report, half of father assisting with remote learning thought they were doing most of the instruction; only one in 33 mothers agreed.⁸¹ Leaders in both the public and private sector need to do more to lessen these disparate burdens, and it is in the interest of legal employers to do so. Considerable evidence suggests that workplaces with more humane schedules reap the benefits in higher morale, retention, and gender equity, and lower turnover and stress-related impairments.⁸² Those in positions of influence in the profession need to act on what we know.

On a more unequivocally positive note, many lawyer leaders during the pandemic saw the importance of increased *pro bono* commitments. One of the first firms to launch a major COVID-19 initiative was Paul Weiss. In mid-March, chair Brad Karp sent a firm-wide email seeking volunteers to build “swat teams” to help vulnerable individuals access new relief programs. Almost 400 attorneys immediately volunteered to identify programs and to staff a 24/7 hotline. The firm expected that its lawyers would spend 2,500 hours a day on the effort, which Karp knew would not be “nearly enough” but hoped would inspire similar efforts by others.⁸³

By mid-April, many firms were stepping up their *pro bono* programs to handle a wide variety of matters, including housing, health, unemployment, immigration, government relief programs, prison conditions, and abortion access. As the director of *pro bono* programs at one major firm noted, these initiatives were beneficial for the givers as well as the recipients of assistance. Many attorneys felt “scared [and] isolated. . . . *Pro bono* . . . allows them to feel like maybe they can help . . . and connect with the community as well as connect with other people in

⁷⁷ Fred Zaharias, *A Word of Caution for Lawyer Assistance Programming*, 18 GEO. J. LEGAL ETHICS 237, 241 n.15 (2004); Sue Shellbarger, *Even Lawyers Get the Blues: Opening Up About Depression*, WALL ST. J. (Dec. 12, 2007, 11:59 PM), <https://www.wsj.com/articles/SB119751245108525653>. Most of these accounts rely on earlier data. Current data are lacking but earlier studies find that lawyers’ rates of depression (19%) were three and a half times higher than that of 104 other occupational groups. See Anthony Eaton & Garrison Mandel, *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. OCCUPATIONAL MED. 1079 (1990); G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse and Cocaine Abuse Among United States Lawyers*, 13 INT’L J. L. & PSYCHIATRY 233 (1990).

⁷⁸ Rosa Flores & Rose Marie Arce, *Why Are Lawyers Killing Themselves?*, CNN (Jan. 20, 2014, 2:42 PM), <http://www.cnn.com/2014/01/19/us/lawyer-suicides/>.

⁷⁹ DEBORAH L. RHODE, *WOMEN AND LEADERSHIP* 84-88 (2017).

⁸⁰ Lauren Weber, *Women’s Careers Could Take Long-Term Hit from Coronavirus Pandemic*, WALL ST. J. July 14 2020; Joan C. Williams, *Real Life Horror Stories From the World of Pandemic Motherhood*, N.Y. TIMES. August 6, 2000.

⁸¹ Harpers Index, HARPERS, Aug. 2020, reprinted as *Harper’s Index*, FUNNY TIMES, Sept. 2020., at 17.

⁸² See DEBORAH L. RHODE, *THE TROUBLE WITH LAWYERS* 73 (2015) (citing research) and Rhode, *Preparing Leaders*, *supra* note 70; Williams, *Pandemic Has Exposed the Fallacy*.

⁸³ Dan Packel, *Paul Weiss Mobilizes Army of Lawyers to Help Navigate Coronavirus Relief*, AM. LAW, Mar. 16, 2020.

the firm. It's kind of a perfect storm of a huge amount of need and a huge amount of interest."⁸⁴ In the wake of the pandemic, some firms increased their *pro bono* hourly expectations, some states created *pro bono* networks to coordinate efforts, and some firms made substantial financial contributions.⁸⁵ Many hoped that such commitments would persist after the worst of the pandemic passed, but huge needs would remain.

Styles of Leadership and Gender Differences.

In summer 2020, a *Harvard Business Review* overview reported that countries headed by women had suffered six times fewer confirmed deaths from COVID-19 than countries with governments led by men.⁸⁶ Female heads of state in New Zealand, Germany, and Taiwan received particular praise for empathetic and effective efforts to control infections.⁸⁷

Many commentators were, however, cautious not to draw broad conclusions based on "a few exceptional individuals acting in exceptional circumstances."⁸⁸ Women head only eighteen countries, which account for only seven percent of the world's population, and which is not enough to generate statistically reliable gender comparisons.⁸⁹ Moreover, some of female leaders' success may be related to the kind of countries that are willing to elect them.⁹⁰ Selection bias may also play a role; the women who are selected to become leaders are more likely to be exceptionally gifted than their male counterparts. One paradoxical consequence of sexism is that because women need to work harder and perform better to achieve positions of power, they may be more effective when they reach those positions. If women heads of state managed the pandemic better than their male counterparts, the main reason may be that the standards for women are higher, not that they are on average superior in leadership qualities.⁹¹

Still, as *New York Times* columnist Nicholas Kristof noted:

It's not that all the leaders who best managed the virus were all women. But those who bungled the response were *all* men, and mostly a particular type, authoritarian, vainglorious and blustering . . . Virtually every country that has experienced coronavirus mortality at a rate of more than 150 per million inhabitants is male-led.⁹²

⁸⁴ Jacqueline Thomsen, 'A Pro Bono Boom': Doctors, Inmates & Immigrants Get Big Law Help as COVID-19 Spreads LAW.COM (Apr. 8, 2020), <https://www.law.com/americanlawyer/2020/04/08/a-pro-bono-boom-doctors-inmates-immigrants-get-big-law-help-as-pandemic-worsens/>.

⁸⁵ Thomsen, 'A Pro Bono Boom'; David Thomas, *Chicago Plaintiffs Firm's Donations Help Local Restaurants, Businesses Fighting Virus*, LAW.COM (Apr. 16, 2020), <https://www.law.com/americanlawyer/2020/04/16/chicago-plaintiffs-firms-donations-help-local-restaurants-businesses-fighting-virus/> (describing \$250,000 donation by 43-lawyer firm by cutting back partner profits).

⁸⁶ Tomas Chamorro-Premuzic & Avivah Wittenberg-Cox, *Will the Pandemic Reshape Notions of Female Leadership?* HARV BUS. REV., June 26, 2020.

⁸⁷ Taub, *Why Are Women-Led Nations Doing Better With Covid-19?*; Editorial Board, *In a Crisis, True Leaders Stand Out*, N.Y. TIMES, Apr. 30, 2020; Nicholas Kristof, *Nations May Be Safer Under Women*, N.Y. TIMES, June 14, 2020.

⁸⁸ Taub, *Why Are Women-Led Nations Doing Better With Covid-19?*

⁸⁹ Chamorro-Premuzic & Avivah Wittenberg-Cox, *Will the Pandemic Reshape Notions of Female Leadership?*

⁹⁰ Kristof, *Nations May Be Safer*; Chamorro-Premuzic & Avivah Wittenberg-Cox, *Will the Pandemic Reshape Notions of Female Leadership?*

⁹¹ Chamorro-Premuzic & Avivah Wittenberg-Cox, *Will the Pandemic Reshape Notions of Female Leadership?*

⁹² Kristof, *Nations May Be Safer*.

Susan Rice, who was National Security Advisor under President Barack Obama, similarly observed, “I don’t think it’s a coincidence that some of the best run places have been run by women. . . . And where we’ve seen things go most badly wrong—the U.S., Brazil, Russia, the U.K.—it’s a lot of male ego and bluster.”⁹³

Many commentators attributed some of the gender differences in leadership effectiveness to gender differences in leadership style.⁹⁴ In general, female leaders seemed more willing than male counterparts to consult broadly, listen to medical experts, prioritize health, opt for risk-averse measures, and display compassion.⁹⁵ Authoritarian men who botched the response were “suspicious of experts and too full of themselves.”⁹⁶ When Donald Trump visited the Center for Disease Control and Prevention in March 2020, he complimented himself rather than deferring to the medical experts surrounding him. “I really get it,” he said, and added, “Maybe I have natural ability.” He then wondered aloud if he should have become a scientist.⁹⁷ By contrast, the *New York Times* observed about Angela Merkel that although she may be among the least “flashy” of Europe’s leaders, she also listened to fellow scientists (without bragging about her own degree) and displayed “qualities of character that can’t be faked, chiefly compassion.”⁹⁸ Merkel closed one television address with a simple message: “Take good care of yourselves and your loved ones.”⁹⁹

Difficult Tradeoffs: Health vs Financial Security

In March, 2020, as COVID-19 cases began to surge in hot spots around the United States, federal, state, and local leaders faced difficult challenges in how to respond. One of the most controversial issues was when and what to close down in the hopes of preventing the spread of the virus and “flattening the curve” so that hospitals and other care facilities would not be overwhelmed. One prominent lawyer leader during this period was Andrew Cuomo, governor of New York. By April, 2020, a poll showed him to be the nation’s second most popular Democrat, after Barack Obama.¹⁰⁰ By contrast, many health experts were highly critical of the governor’s delay in ordering a shutdown, and claimed that it may have more than doubled the death rate.¹⁰¹ Although at one point Cuomo and California governor Gavin Newsom were looking at similar projections, Newsom issued a shelter-in-place order sooner, and by mid-May, New York had twice as many deaths as California.¹⁰² While Cuomo’s approval ratings hit all-time highs, some commentators suggested he should be “one of the most loathed officials in America.”¹⁰³

Although many of the facts underlying these assessments are unclear or contested, certain basic points are not in dispute. First, New York City confronted some unique problems, given its

⁹³ Kristof, *Nations May Be Safer* (quoting Rice).

⁹⁴ Taub, *Why Are Women-Led Nations Doing Better With Covid-19?*

⁹⁵ Taub, *Why Are Women-Led Nations Doing Better With Covid-19?*

⁹⁶ Kristof, *Nations May Be Safer*.

⁹⁷ Kristof, *Nations May Be Safer*.

⁹⁸ Editorial Board, *In a Crisis*.

⁹⁹ Editorial Board, *In a Crisis* (quoting Merkel).

¹⁰⁰ Chris Smith, *The Making of Andrew Cuomo*, VANITY FAIR, June 2020, 60.

¹⁰¹ Britta L. Jewell & Nicholas P. Jewell, *The Huge Cost of Waiting to Contain the Pandemic*, N.Y. TIMES, Apr. 14, 2020; Joe Sexton & Joaquin Sapien, *Two Coasts. One Virus. How New York Suffered Nearly 10 Times the Number of Deaths as California*, PROPUBLICA (May 16, 2020), <https://www.propublica.org/article/two-coasts-one-virus-how-new-york-suffered-nearly-10-times-the-number-of-deaths-as-california>; Lyta Gold & Nathan Robinson, *Andrew Cuomo is No Hero. He’s to Blame for New York’s Coronavirus Catastrophe*, THE GUARDIAN, May 20, 2020.

¹⁰² Gold & Robinson, *Andrew Cuomo is No Hero*.

¹⁰³ Gold & Robinson, *Andrew Cuomo is No Hero*.

high population density, reliance on mass transit, and large concentration of particularly vulnerable populations, including African Americans. These challenges were compounded by longstanding rivalry and turf battles between Cuomo and New York Mayor Bill de Blasio. By contrast, in California, Governor Gavin Newsom had effective partnerships with key mayors, such as San Francisco's London Breed.¹⁰⁴

Second, Cuomo, and to a lesser extent de Blasio, initially underestimated the threat and disregarded advice from their own health officials about the need for a shutdown. When, in early March, De Blasio said it was time to consider a shelter-in-place order, Cuomo responded with derision. In his view, the term sounded like a response to a nuclear apocalypse, and invited panic; he said that seasonal flu was a greater worry.¹⁰⁵ By the time he ordered a shutdown, the infection and death rates were escalating so rapidly, and hospitals were so overwhelmed, that the vast majority of New Yorkers accepted the necessity for the restrictions. Columbia researchers estimated that more than 22,000 deaths could have been averted in the New York City area if social distancing had started just one week earlier.¹⁰⁶

In later defending his timing, Cuomo argued that the decision required the art of politics as well as the science of epidemiology:

You cannot move until people understand they have to move. You can't proclaim anything here. All I have is moral suasion. That is hard on a mass basis. . . . There is no king. And it's especially not how New York works. If I said to you, 'We have to do this, California had a case'—who gives a goddamn that California had a case? California is totally the other end of the country. So, until it was a reality here, why would people listen? . . . [Their response would be] You're asking me to stay home? You're uprooting my entire life? Because it happened in California?' So when you're dealing with an order that you have no capacity to enforce, where people could dismiss it immediately, you better be very careful, because if they dismiss you, you are now at a place where no one's been before, where you have a metropolitan region where people are still going to be doing what they want to do, and you have no credibility and no way to enforce the rules. . . . Those are the calibrations—the public and public tolerance, the acceptance to have compliance.¹⁰⁷

While acknowledging the limits of hard power, some critics have faulted Cuomo and de Blasio for not doing a better job of public education, and for muzzling health experts who were sounding early alarms. And they criticize these leaders for not accepting more responsibility for their mistakes and for blaming the CDC and President Trump for inadequate responses. At one April briefing, as hundreds of New Yorkers were dying daily, Cuomo claimed,

Today, we can say that we have lost many of our brothers and sisters, but we haven't lost anyone because they didn't get the right and best health care that they could.

¹⁰⁴ Sexton & Sapient, *Two Coasts*.

¹⁰⁵ Sexton & Sapient, *Two Coasts*; Gold & Robinson, *Andrew Cuomo is No Hero*.

¹⁰⁶ Derek Watkins et al, *It Started Small*, N.Y. TIMES, July 5, 2020.

¹⁰⁷ Smith, *The Making of Andrew Cuomo*, 144 (quoting Cuomo).

The way I sleep at night is I believe that we didn't lose anyone we could have saved.¹⁰⁸

By contrast, supporters of Cuomo respond that he was right to indict the federal government for its failures, and note that Cuomo was much more willing than other political leaders to provide candid as well as empathetic messages through daily public briefings. To supporters, the time for full acknowledgment of miscalculations is not the middle of a crisis, when the need for public trust is greatest. And Cuomo's ability to learn from his mistakes, together with the public's eventual appreciation of the urgency of the situation, helped turn New York's response around. As this article went to press in the summer of 2020, New York had dramatically lowered its infection, hospitalization and death rates; California's rates had surged.¹⁰⁹

II. LEADERSHIP AND SOCIAL PROTESTS

On May 25, 2020, a video went viral showing Minneapolis police officer Derek Chauvin pressing his knee into the neck of George Floyd, an unarmed Black man, handcuffed and lying on the pavement. Floyd was gasping for breath, yelling "I can't breathe" and "I am dying," as two other officers held Floyd by the legs and a third stood by to prevent members of the public who were filming the scene from intervening.¹¹⁰ The scene lasted for over eight minutes, and after Floyd's death, the video's circulation on social media triggered protests in at least 700 cities. As a historian of Black social movements noted, these protests were unparalleled in American history in terms of their scope, intensity, cross-racial participation, and demands for fundamental changes in the nations' social, political, economic, and law enforcement systems.¹¹¹ In 2013, when civil rights organizer Alicia Garza coined the term "Black Lives Matter," after the acquittal of the killer of Trayvon Martin, an unarmed seventeen-year-old, the phrase evoked resistance among many white Americans. They insisted that "all lives matter."¹¹² A year later, when Eric Garner died at the hands of a police officer under somewhat circumstances similar to Floyd, the number of tweets with the hashtag #BlackLivesMatter peaked at around 146,000.¹¹³ By contrast, in the week following Floyd's killing, more than eight million tweets with that hashtag appeared on Twitter.¹¹⁴ The Movement for Black Lives includes about 150 Black- led organizations that work on issues

¹⁰⁸ Sexton & Sapien, *Two Coasts* (quoting Cuomo).

¹⁰⁹ *Governor Cuomo Update New Yorkers on State's Progress During COVID-19 Pandemic*, Press Release, July 11, 2020, <https://www.governor.ny.gov/news/governor-cuomo-updates-new-yorkers-states-progress-during-covid-19-pandemic-6>; Sara Sidner, *After Bending the Curve, California Has Overtaken New York for the Most Covid-19 Cases*, CNN (July 22, 2020), <https://www.cnn.com/2020/07/21/us/california-coronavirus-surge/index.html>.

¹¹⁰ *See Attorney General Ellison charges Derek Chauvin with 2nd-degree murder of George Floyd, three former officers with aiding and abetting 2nd-degree murder*, THE OFFICE OF THE ATTORNEY GENERAL OF MINNESOTA KEITH ELLISON (June 3, 2020), https://www.ag.state.mn.us/Office/Communications/2020/06/03_GeorgeFloyd.asp, for details about the indictments of the four police officers who killed George Floyd. The video is available at *How George Floyd Was Killed in Police Custody*, N.Y. TIMES, May 31, 2020, <https://www.nytimes.com/video/us/100000007159353/george-floyd-arrest-death-video.html>.

¹¹¹ Mathew Countryman, *Why the George Floyd Protests are Unprecedented and Historic*, THE NATIONAL INTEREST: THE REBOOT (June 10, 2020), <https://nationalinterest.org/blog/reboot/why-george-floyd-protests-are-unprecedented-and-historic-161941>; Peniel E. Joseph, *A More Diverse, Aware Group of Protesters*, POLITICO MAGAZINE (June 4, 2020), <https://www.politico.com/news/magazine/2020/06/04/protest-different-299050>.

¹¹² Jenna Wortham, *A 'Glorious Poetic Rage'*, N.Y. TIMES, June 7, 2020, § SR, at 3.

¹¹³ *Id.*

¹¹⁴ *Id.*

not only involving police violence but housing insecurity, voter suppression, sexual violence, and criminal justice reform.¹¹⁵ Almost three quarters of moderate Americans and over half of conservatives reported a favorable impression of the movement.¹¹⁶

Why Now?

What changed? Commentators point to several factors. First is the power of technology and social media. “What if There Were No George Floyd Video?,” asked editorial writer Nicholas Kristof in the *New York Times*?¹¹⁷ He speculates that “there would have been a bland statement that he had died resisting arrest, and none of us would have heard of him.”¹¹⁸ Increasing numbers of police killings are now being recorded by onlookers or police body cams. And with horrific pictures such as those of Floyd, or Breonna Taylor, a Black woman shot in her bed months earlier after a misdirected drug raid, police rationalizations become far less credible. Technology has also enabled better coverage by the mainstream media of the waves of unrest. The attempt by President Trump, echoed by other conservative politicians and commentators, to portray many protesters as “looters, thugs, Radical Left[ists], and all other forms of Lowlife & Scum,” could be countered with footage of peaceful activists being brutally repelled by excessively militarized police.¹¹⁹

A second key factor is timing. The killing of Floyd ignited a tinderbox of pent up anxiety, frustration, and felt injustice that had accelerated during the pandemic. Communities of color were disproportionately ravaged by COVID-19; Blacks and Latinxs were especially likely to suffer devastating health and economic costs.¹²⁰ At the same time, most Americans, subject to social distancing rules and economic shutdowns, were spending more time glued to their screens, and had fewer distractions to occupy them as protests began to accelerate throughout the United States and abroad. The distress of social distancing, coupled with rage unleashed after centuries of systemic racism, erupted on the streets. Most activists were peaceful, but some were not. There was occasional opportunistic looting, and provocations caused by far-right activists, some donning the all-black clothing reminiscent of Antifa, presumably in an effort to blame violence on the far left.¹²¹ Anti-government liberation groups such as the Boogaloos, saw Black Lives Matter protests as an opportunity to sow chaos and backlash through violence and provocation.¹²²

More violence erupted in response to excessive use of force by local, state, and federal law enforcement officers against peaceful protesters; this brutality seemed to replicate the oppression that had triggered the activism in the first instance. In one of the most notorious incidents, federal officers teargassed peaceful activists outside the White House to make way for President Trump to walk across the street to St. John’s Church, where he posed brandishing a Bible for a photo

¹¹⁵ Jenna Wortham, *Vision Forward*, N.Y. TIMES MAGAZINE, Aug. 30, 2020, at 32.

¹¹⁶ Arnie Karni & Maggie Haberman, *As Virus Rages and Poll Numbers Slip, ‘American Carnage’ Redux*, N.Y. TIMES, July 5, 2020, § A, at 1.

¹¹⁷ Nicholas Kristof, Opinion, *What If There Were No George Floyd Video?*, N.Y. TIMES, June 7, 2020, § SR, at 11.

¹¹⁸ *Id.*

¹¹⁹ Khalil Gibran Muhammad, *An Especially Brutal Police Response*, POLITICO MAGAZINE (June 4, 2020), <https://www.politico.com/news/magazine/2020/06/04/protest-different-299050>

¹²⁰ Kristof, *What if There Were No George Floyd Video?*; Wortham, *A ‘Glorious Poetic Rage’*.

¹²¹ Cynthia Miller Idriss, *The New Influence of the Far Right*, POLITICO MAGAZINE (June 4, 2020), <https://www.politico.com/news/magazine/2020/06/04/protest-different-299050>.

¹²² Leah Sottile, *The Chaos Agents*, N. Y. TIMES MAGAZINE, Aug. 23, 2020, at 38-39.

op.¹²³ Other examples occurred in Portland, where Trump had dispatched federal troops over the objection of the mayor and governor, ostensibly to protect the federal courthouse, but also to gain political capital among law-and-order constituencies. Oregon’s governor Kate Brown responded that “it’s appalling to me that they are using federal taxpayer dollars for political theater and making no effort to really keep our communities safe” by providing much needed COVID-19 tests and personal protective equipment.¹²⁴

A third factor that helps explain the overwhelming response to Floyd’s killing is increased polarization. Social scientists have long noted that in order to deal with social unrest, including potentially violent protests, communities need connections and trust among people who are dissimilar.¹²⁵ Those bonds have declined over the last several decades. Technology, residential segregation, work/family challenges, and similar factors have decreased Americans’ involvement in organizations, and their opportunities for interaction with those of different backgrounds and different political views.¹²⁶ Moreover, the information silos made possible by the fragmentation of media make it easier for people to operate from different sets of facts and to demonize their opponents.¹²⁷ Increasing numbers of individuals say that most of their friends share their opinions, and that the other political party is a “threat to the nation’s well-being.”¹²⁸ In this climate, conflicts are more likely to escalate and become harder to resolve.

These conditions have occurred against a backdrop of longstanding social, political, and economic inequalities that have reinforced systemic racism. These forces have been analyzed at length elsewhere, and cannot be adequately explored here. But they constitute challenges for leaders in attempting to respond adequately to the Black Lives Matter protests following Floyd’s death. In this, as in other moments in American history, conflicts have escalated because of failures in leadership. They “start with a resolvable problem and grow beyond hope of resolution because they are not dealt with early [and effectively].”¹²⁹ One or more parties fail to acknowledge the scope of the problem, which forces opponents to escalate in order to gain recognition of their concerns. Positions become further entrenched, and effort is spent on quelling conflict instead of addressing its root causes.¹³⁰ These challenges confront lawyers in positions of influence in social movements, public interest organizations, government, the criminal justice system, bar associations, law firms, and corporations.

¹²³ Ella Nilsen, “*The Presidency is a Duty To Care*”: Read Joe Biden’s full speech on George Floyd’s Death, VOX (June 2, 2020), <https://www.vox.com/2020/6/2/21277967/joe-biden-full-speech-george-floyd-death-trump>.

¹²⁴ Nicholas Kristof, Opinion, *In Portland’s ‘War Zone,’ Troops Menace*, N.Y. TIMES, July 26, 2020, § SR, at 9.

¹²⁵ Robert D. Putnam & Lewis M. Feldstein, BETTER TOGETHER: RESTORING THE AMERICAN COMMUNITY 9-10 (Simon & Schuster, 1st ed. 2003); Robert Wuthnow, *United States: Bridging the Privileged and the Marginalized?*, in DEMOCRACIES IN FLUX: THE EVOLUTION OF SOCIAL CAPITAL IN CONTEMPORARY SOCIETY 101-102 (Robert D. Putnam ed., 2002).

¹²⁶ Putnam & Feldstein, BETTER TOGETHER, at 2-4; Nancy H. Rogers, *When Conflicts Polarize Communities: Designing Localized Offices That Intervene Collaboratively*, 30 OHIO ST. J. DISPUTE RES. 173, 195-196 (2014).

¹²⁷ Lee Drutman, *It Really Is Different This Time*, POLITICO MAGAZINE (June 4, 2020), <https://www.politico.com/news/magazine/2020/06/04/protest-different-299050>.

¹²⁸ *Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affect Politics, Compromise, and Everyday Life*, PEW RESEARCH CTR. (June 12, 2014), <https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/>.

¹²⁹ Susan L. Carpenter and W. J. D. Kennedy, MANAGING PUBLIC DISPUTES: A PRACTICAL GUIDE FOR GOVERNMENT, BUSINESS AND CITIZEN’S GROUPS 11 (1st. ed. 1988).

¹³⁰ Carpenter & Kennedy, MANAGING PUBLIC DISPUTES; Rogers, *When Conflicts Polarize Communities*, at 191.

Social Movement Leaders

Leaders of social movements need ways of encouraging peaceful protests, and redirecting the rage that leads to looting and burning toward more constructive pressures for reform.¹³¹ That is not to say that all violence is counterproductive. Particularly when it erupts in response to white supremacist provocations or excessive police force, it is a way of building mainstream public support for fundamental change. That is the lesson of “Bloody Sunday,” and other examples of police brutality in the early 1960s, which led to the passage of federal civil rights legislation.¹³² But movement leaders also need to be mindful of the fear and backlash that arises from what appears to be unprovoked lawlessness. In the wake of protests following Floyd’s death, Clayborne Carson, Professor of History and Director of the Martin Luther King, Jr Research and Education Institute at Stanford, expressed this concern.

The outbursts of the 1960s fed the reactionary law-and-order rhetoric that was potently weaponized through the Nixon, Reagan, and even Clinton presidencies to facilitate the militarization of the police and mass incarceration. While we now have the benefit of hindsight, I worry that we have not made the most of it, and that the current situation too closely mirrors the conditions that enabled the rise of law-and-order politics in the first place. President Trump has read this playbook, and protesters must adopt strategies that prevent it from playing out once again. Violent protests risk provoking a reactionary law-and-order politics that equates protest and civil disobedience with lawlessness and rioting that must be contained at all costs. . . . Whether peaceful protesters can unite around a clear set of nonviolent demands, including police disarmament, will determine the strength with which law-and-order fearmongering can be defeated. As before, the consequences of leadership failure will fall predominantly on the black community, and it is the responsibility of nonblack protesters to recognize this if they hope to build lasting multiracial coalitions.¹³³

In the long term, movement leaders also need a process for prioritizing demands for change, and determining what compromises may be acceptable. One way in which the 2020 protests seem different is that so many leaders and activists recognize the scope of changes that are necessary. As they note, the criminal justice system is just,

one part of a panorama of structures of oppression across this country, from the criminalization of the poor to widespread, unequal access to housing, nutritious food, employment, environmental safety, health care, clean air, water and citizenship. Organizations from BLM to prison abolitionists have come to the table with more than just outrage; they have sharp, clear-eyed radical proposals to defund the criminal justice system and redirect resources that currently are spent punishing, incarcerating and killing black communities into investments that will allow these neighborhoods to thrive. . . . [This is a] generational opportunity to achieve black dignity and full citizenship by ending institutional racism¹³⁴

¹³¹ Rogers, *When Conflicts Polarize Communities*, at 206.

¹³² See the discussion in the text accompanying notes *infra*.

¹³³ Clayborne Carson, *Law and Order Politics Has Stayed the Same*, POLITICO MAGAZINE (June 4, 2020).

¹³⁴ Joseph, *A More Diverse, Aware Group of Protesters*, POLITICO MAGAZINE (June 4, 2020).

Movement leaders also need to be attentive to their own biases and blind spots in choosing their priorities. Two months before Floyd’s death, police had shot Breonna Taylor, an unarmed Black medical technician during a misdirected drug raid. The officers had been looking for two men who they believed were selling drugs out of a house located near Taylor’s. They entered in plainclothes with a no-knock warrant, and Taylor’s boyfriend fired a gun toward the intruders in self-defense. The officers returned fire and killed Taylor.¹³⁵ The case had attracted relatively little outrage.¹³⁶ It took over four months for Louisville leaders to even schedule a hearing about the city’s response to her death, and the police walked out of that hearing without answering questions.¹³⁷ In a *Daily Show* segment on the case, host Trevor Noah asked where was the outrage? He ended the show on a hopeful note. The belated focus on the case might result in a new law, Breonna’s law, that will ban no-knock warrants.¹³⁸ But the fact that it took the death of an unarmed Black man to ignite the movement to demand justice for an unarmed Black woman speaks volumes about unacknowledged gender bias within the movement for racial justice.

Law professor Kimberlé Crenshaw, who coined the term intersectionality to draw attention to interlocking patterns of racial and gender subordination, has given a celebrated TED Talk focusing on this dynamic in the context of police shooting. In her talk, she asked the audience to stand if they recognized the most famous Black male victims of excessive force, and then if they recognized the names of Black women.¹³⁹ The dramatic disparity in awareness makes the point. And this marginalization of women of color is long standing. To take only one example, Ida Wells-Barnett is now justly recognized for her leadership role in the nation’s struggle against lynching, but during her lifetime, and decades afterward, she was dismissed as a “difficult” woman and received little of the recognition that comparably difficult Black male leaders received.¹⁴⁰

Political Leaders

In the short term, the first priority of elected officials is generally to restore safety and trust in institutions that can do that. In the long term, leaders need to address the underlying factors that gave rise to the unrest. What specific strategies are most likely to be effective obviously depends on context. But commonly recommended strategies include:

- engaging stakeholders and building trust and collaboration with those who can address short and long-term concerns;

¹³⁵ Karma Allen, *Louisville Top Cops Refuse to Answer Questions on Breonna Taylor Case*, ABC News, August 4, 2020, <https://abcnews.go.com/US/louisvilles-top-cops-refuse-answer-questions-breonna-taylor/story?id=72165319>; The Daily Show With Trevor Noah, *Breonna Taylor: Who She Was, How She Died, Why Justice Is Overdue*, YOUTUBE (July 30, 2020), <https://www.youtube.com/watch?v=ZWBppiSkr1M>.

¹³⁵ The Daily Show With Trevor Noah, *Breonna Taylor: Who She Was, How She Died, Why Justice Is Overdue*, YOUTUBE (July 30, 2020), <https://www.youtube.com/watch?v=ZWBppiSkr1M>.

¹³⁶ Noah, *Breonna Taylor*.

¹³⁷ Allen, *Louisville Top Cops Refuse to Answer Question*.

¹³⁸ Noah, *Breonna Taylor*.

¹³⁹ Kimberlé Crenshaw, TED, *The Urgency of Intersectionality*, YOUTUBE (Dec. 16, 2016), <https://www.youtube.com/watch?v=akOe5-UsQ2o>.

¹⁴⁰ See Deborah L. Rhode, *Character: What it Means and Why It Matters* 155-166 (2019) and Deborah L. Rhode, *Leadership Lessons From a Heroic, If “Difficult” Woman: A Tribute to Ida B. Wells*, 14 TENN. J.L. & POL’Y 464 (2020).

- developing communication strategies that can express support without exacerbating conflict or condoning violence;
- consulting experts in volatile conflict resolution.¹⁴¹

Political leaders also can use their platforms to channel protests towards structural change. Former President Barack Obama rose to this challenge. In a rare public statement, he shared “some basic lessons to draw from past efforts that are worth remembering.” While acknowledging the “legitimate frustration” that has led millions of Americans to take to the streets to protest, he argued that violence is not the answer. “If we want our criminal justice system, and American society at large, to operate on a higher ethical code, then we have to model that code ourselves.” He also stressed the importance of voting for politicians at all levels, state, local and federal, “who are responsive to our demands . . . for criminal justice and political reform [T]he choice isn’t between protest and politics. We have to do both.”¹⁴² So too, Stacey Abrams, who founded the voting rights group Fair Fight Action, after narrowly losing an election for Georgia Governor, wrote a *New York Times* op-ed under the title “I Know Voting Feels Inadequate Right Now.” “But,” she argued,

Voting is first step in a long and complex process tedious but vital. . . . Protest to demand attention to the wrenching pain of systemic injustice. Vote because we deserve leaders who see us, who hear us and who are willing to act on our demands. Voting will not save us from harm, but silence will surely damn us all.¹⁴³

More lessons emerged in the summer following George Floyd’s death when Georgia congressman and civil rights icon John Lewis died. Lewis had been a leader of the civil rights movement since his twenties, when he heard Dr. Martin Luther King, Jr. on the radio talking about the rationale for nonviolent protest. He led the famous 1965 “Bloody Sunday” march across the Edmund Pettus bridge, which was met with brutal resistance by Alabama state troopers. Those who knelt to pray made their heads easier targets. Lewis was struck in the skull. Photographers were present, and pictures ran in on national media. After Lewis emerged from the hospital, his head bandaged, he predicted that “more marchers will come now.”¹⁴⁴ They did. And their courage helped build the support necessary to enact the Voting Rights Act.

In an op-ed that Lewis had asked the *New York Times* to publish following his death, he recalled King’s message.

He said we are all complicit when we tolerate injustice. . . . He said each of us has a moral obligation to stand up, speak up, and speak out. When you see something that is not right, you must say something. You must do something Ordinary

¹⁴¹ DIVIDED COMMUNITY PROJECT, OHIO STATE UNIVERSITY MORITZ COLLEGE OF LAW PROGRAM ON DISPUTE RESOLUTION, KEY CONSIDERATIONS FOR COMMUNITY LEADERS FACING CIVIL UNREST: EFFECTIVE PROBLEM-SOLVING STRATEGIES THAT HAVE BEEN USED IN OTHER COMMUNITIES, 3, 8 (2015), <https://moritzlaw.osu.edu/program-on-dispute-resolution/wp-content/uploads/sites/37/2016/02/Key-Considerations-January-2016.pdf>.

¹⁴² Barack Obama, *How to Make this Moment the Turning Point for Real Change*, MEDIUM (June 1, 2020), <https://obama.medium.com/how-to-make-this-moment-the-turning-point-for-real-change-9fa209806067>

¹⁴³ Stacey Abrams, Opinion, *I Know Voting Feels Inadequate Right Now*, N.Y. TIMES, June 4, 2020, § A, at 27.

¹⁴⁴ Christina Paz, *Read Barack Obama’s Eulogy for John Lewis*, ATLANTIC (July 30, 2020), <https://www.theatlantic.com/politics/archive/2020/07/read-barack-obamas-eulogy-for-john-lewis-full-text/614761/> (quoting Lewis).

people with extraordinary vision can redeem the soul of America Voting and participating in the democratic process are key Though I may not be here with you, I urge you to answer the highest calling of your heart and stand up for what you truly believe Now it is your turn to let freedom ring.¹⁴⁵

Former President Barack Obama delivered the eulogy at John Lewis' memorial service. He echoed Lewis' plea.

[T]his country is a constant work in progress. We're born with instructions to form a more perfect union [W]hat gives each generation purpose is to take up the unfinished work of the last and carry it further than any might have thought possible [R]emember what John said. . . . You only pass this way once. You have to give it all you have.¹⁴⁶

In his eulogy, Obama also made a veiled reference to the conservative politicians who had made moving tributes to Lewis and shown up to honor him at the memorial service. "I'm so grateful for the legacy and work of all the congressional leaders who are here, but there's a better way than a statement calling him a hero. You want to honor John? Let's honor him by revitalizing the law that he was willing to die for."¹⁴⁷ Obama was referring to proposed legislation to strengthen the 1964 Voting Rights Act, which had been curtailed by a recent Supreme Court decision, and had proven inadequate to deal with various recent strategies of voter suppression.¹⁴⁸ The proposed bill, now renamed the John Lewis Voting Rights Act, had been blocked by Congressional Republicans.¹⁴⁹

In an earlier statement following Lewis' death, the Reverend Dr. William J. Barber II delivered a more explicit critique in a statement titled "Republicans Who Refuse To Restore The Voting Rights Act While Decorating The Grave of Representative John Lewis With Flowery Words Testify Against Themselves." Barber elaborated:

As this nation mourns the loss of one of her most faithful sons, we should beware of those in power who issue statements praising the memory of John Lewis while they continue to stand in the way of the genuine democracy he risked his own life to press toward over and over again For politicians who opposed his work to honor Lewis now is a greater insult than those honestly hurled at him by the segregationists of Alabama and Tennessee in his youth.¹⁵⁰

Obama and Barber's challenge to conservative political leaders who had paid lip service to Lewis's contributions while working to undercut them was more than a denunciation of hypocrisy. Such critiques have become increasingly common in our increasingly partisan and polarized political climate. Rather, these denunciations have invited all political leaders to think more deeply about what they want their own legacy to be, and what balance they strike between political principles and political expediency. For elected leaders, as a recent book on Congress noted, the

¹⁴⁵ John Lewis, Opinion, *Together, You Can Redeem the Soul of Our Nation*, N.Y. TIMES, July 31, 2020, § A, at 23.

¹⁴⁶ Paz, *Read Barack Obama's Eulogy for John Lewis*.

¹⁴⁷ Paz, *Read Barack Obama's Eulogy for John Lewis*.

¹⁴⁸ The Supreme Court decision was *Shelby County v. Holder*, 570 U.S. 529 (2013). For proposed legislation, see Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. (2019). For discussion of voter suppression, see STACEY ABRAMS, *OUR TIME IS NOW* (2020).

¹⁴⁹ Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. (2019).

¹⁵⁰ William J. Barber II, *How We Remember a Prophet*, THE NATION (July 19, 2020), <https://www.thenation.com/article/activism/john-lewis-obituary-prophet/>.

first priority is almost always to keep power and increase power.¹⁵¹ The interesting question is how *much* weight they give to that objective, what principles they are prepared to sacrifice in pursuit of power, and how they resolve tensions between good politics and good policy.¹⁵²

The vast majority of Americans are skeptical of the ability of political leaders to subordinate their own self-interest to that of the public. Four-fifths of those surveyed believe that most politicians are more interested in winning elections than in doing what is right.¹⁵³ Three-quarters believe that most elected officials put their own interests ahead of the country's, and are more concerned with managing their images than with solving the nation's problems.¹⁵⁴ Yet as the outpouring of tributes to Lewis makes clear, the leaders that the country most needs and most reveres are those who use their power to empower others in the cause of social justice and the common good.¹⁵⁵

Leaders of Private Sector Organizations

One challenge for leaders of large organizations who are largely white, and whose leadership team is also largely white, is how to respond to protests about systemic racism in a truly meaningful way. Many have been accused of self-serving “virtue-signaling,” and shallow “performative allyship” that is relatively cheap and seemingly hypocritical.¹⁵⁶ For example, organizations such as Amazon and L’Oréal put out statements or tweets that they stood “in solidarity” with Black Lives Matter or the Black community, even though both corporations had recently been charged with racial bias. Amazon had smeared and fired a worker for organizing for safer warehouse conditions, and L’Oréal had dropped a model after she had spoken out against a white supremacist march in Charlottesville.¹⁵⁷ Nike faced backlash for launching a major marketing campaign that inverted the company’s swoosh symbol and changed its slogan from “Do It” to “Don’t Do It.” Critics pointed out that Nike’s senior leaders were almost all white, and apparently failed to see how “don’t do it” applied to them. As one commentator put it, “show us a picture of your C-Suite, who is on your board. Then we can have a conversation about diversity, equity, and inclusion.”¹⁵⁸ A *New York Times* article, running under the title “Corporate America Has Failed Black America,” noted that there were only four Black CEOs in Fortune 500 companies, fewer than one percent.¹⁵⁹

Rich white celebrities have similarly been called out for pledging relatively trivial sums (\$50) to bail funds, and highly profitable law firms were mocked for \$10,000 contributions to

¹⁵¹ JAKE SHERMAN AND ANNA PALMER, *THE HILL TO DIE ON: THE BATTLE FOR CONGRESS AND THE FUTURE OF TRUMP’S AMERICA* (2019).

¹⁵² STANLEY A. RENSHON, *HIGH HOPES: THE CLINTON PRESIDENCY AND THE POLITICS OF AMBITION* 251 (1998).

¹⁵³ JAMES DAVISON HUNTER, *THE POLITICS OF CHARACTER* 10 (2000).

¹⁵⁴ PEW RESEARCH CENTER, *BEYOND DISTRUST: HOW AMERICANS VIEW THEIR GOVERNMENT*, August 27-October 4, 2016, <https://www.pewresearch.org/politics/2015/11/23/beyond-distrust-how-americans-view-their-government/>; HUNTER, *POLITICS OF CHARACTER*, 10, 57, Table 19.

¹⁵⁵ Marshall Ganz, *Leading Change: Leadership Organization, and Social Movements*, in NITIN NOHRIA & RAKESH KHURANA EDS., *HANDBOOK OF LEADERSHIP THEORY AND PRACTICE* 509.

¹⁵⁶ Amy Harmon, Apoorva Mandavilli, Sapna Maheshwari & Jodi Kantor, *An Awakening in America Is Prying at Racism’s Grip*, N.Y. TIMES, June 14, 2020, § A, at 1.

¹⁵⁷ E. Alex Jung, *The Revolution Will Not Be Branded*, VULTURE (June 2, 2020), <https://www.vulture.com/2020/06/the-revolution-will-not-be-branded.html>.

¹⁵⁸ Harmon, Mandavilli, Maheshwari & Kantor, *An Awakening in America Is Prying at Racism’s Grip*.

¹⁵⁹ David Gelles, *Corporate America Has Failed Black America*, N.Y. TIMES, June 7, 2020, § BU, at 1. e

racial justice organizations.¹⁶⁰ Millions of white individuals and organizations were also criticized for flooding Instagram with empty black squares or for adding #BlackLivesMatter to posts; this virtue-signaling unwittingly squeezed out valuable information that activists wanted to share, such as videos of brutality and details about where to protest and donate. Particularly infuriating were organizations that coupled politically correct messages with efforts to sell beauty products or home furnishings.¹⁶¹ Many lawyers of color were also annoyed by leadership statements that did little more than denounce racism, express “support and compassion,” endorse “diversity and inclusion,” or promise additional programming or task forces on racial justice issues.¹⁶²

At the same time, many white leaders, including lawyers, felt caught between conflicting messages. They heard that silence is complicity, but so is speaking out if it looks like grandstanding. They were told to “use [their] voice . . . unless it’s [their] time to just listen.”¹⁶³ One white college student, concerned about these competing signals, wrote to Anthony Appiah’s Ethicist Column in the *New York Times Magazine*. He wanted to know how to be a “better racial-justice advocate.” He had recently attended a protest, donated to bail funds and nonprofits, called his representatives, and tried to educate himself about “black history and black voices.”¹⁶⁴ He wondered whether he should also post on his personal social media. Appiah offered a nuanced response. As he noted “some philosophers have argued that public discourse is debased when people seek to raise their status with an in-group by . . . grandstanding,” namely actions “that are motivated by the vanity of self-representation, by a desire to show that one is on the side of the angels.” But, Appiah noted, “virtue-signaling isn’t always a vice.” Even signs, bumper stickers, and social media posts can help change moral norms which then change moral practices; these minor expressive efforts can convince the general population that “doing the right thing” is necessary for social respect. But, as Appiah concludes, “there has to be more than talk. People [also] have to take action.”¹⁶⁵

Many white leaders have attempted to do so in ways that are meaningful and respectful of their need to listen. Several celebrities have given their platforms to Black artists and activists and enabled them to single out a charity for their compensation and for viewer donations.¹⁶⁶ Similarly, some talk show hosts have regularly dedicated full segments of their episodes to discussing Black

¹⁶⁰ Jung, *The Revolution Will Not Be Branded*; ALM Staff, *Law Firms Voice Support for Change—and Pledge to Donate and Take Action*, THE AMERICAN LAWYER (June 18, 2020), <https://www.law.com/americanlawyer/2020/06/18/law-firms-voice-support-for-change-and-pledge-to-donate-and-take-action/>.

¹⁶¹ Rebecca Jennings, *Who are the Black Squares and Cutesy Illustrations Really For?*, VOX (June 3, 2020), <https://www.vox.com/the-goods/2020/6/3/21279336/blackout-tuesday-black-lives-matter-instagram-performative-allyship>.

¹⁶² For examples, see ALM Staff, *Law Firms Voice Support for Change—and Pledge to Donate and Take Action*.

¹⁶³ See Real Time with Bill Maher, *New Rules: The Guardians of Gotcha*, YOUTUBE (June 26, 2020), <https://www.youtube.com/watch?v=Yv0P1-gpEFc>.

¹⁶⁴ Kwame Anthony Appiah, *I’ve Protested for Racial Justice. Do I Have to Post on Social Media Too?*, N.Y. TIMES MAGAZINE, July 5, 2020, at 12.

¹⁶⁵ Kwame Anthony Appiah, *I’ve Protested for Racial Justice. Do I Have to Post on Social Media Too?*, at 12-13 (discussing Justin Tosi And Brandon Warmke’s work on grandstanding).

¹⁶⁶ Examples include Selena Gomez, Lady Gaga, and Lizzo. Liz Calvario, *Lady Gaga, Selena Gomez and More Turn Over Their Instagrams to Black Leaders: Here’s What They Said*, ENTERTAINMENT TONIGHT (June 8, 2020), <https://www.etonline.com/lady-gaga-selena-gomez-and-more-turn-over-their-instagram-to-black-leaders-heres-what-they-said>.

Lives Matter and the protests.¹⁶⁷ Many law firms made substantial financial contributions to racial justice organizations, and established *pro bono* programs and partnerships to partner with communities of color on strategies to deal with systemic racism.¹⁶⁸ Such actions help narrow the gap between our country's principles and practices regarding equal justice under law.

Leaders of Bar Associations

In the wake of protests following the killing of George Floyd, bar leaders called for the resignation of Texas Bar President Larry McDougal. The demands began after McDougal made a Facebook comment suggesting that an election worker wearing a Black Lives Matter t-shirt was violating election laws that prohibit campaigning in a polling place.¹⁶⁹ He cited a case in which a court held that wearing a Make America Great Again hat was electioneering.¹⁷⁰ "I see no difference in that hat and this shirt," he wrote underneath a photo of a person wearing a Black Lives Matter shirt.¹⁷¹ When protests began, he issued a statement posted on the Texas Bar Association's Facebook page stating that "I was not intending to take a political stance on the social movement of #BlackLivesMatter. I was merely trying to answer someone's question with my interpretation of the law. I meant no offense."¹⁷² Then someone uncovered a 2015 comment in which McDougal had stated that "Black Lives Matter has publicly called for the death of just not police officers but also white Americans. This is a terrorist group."¹⁷³

Following calls for his resignation, McDougal made a videotaped apology in which he stated in part,

Let me be clear: As a Texas attorney who has sworn to uphold the Constitution of this state and the United States, I denounce racism in any and all forms I want to assure you that those comments do not reflect my beliefs today. They have changed and not just as a result of this, but they have changed quite a while back. I want to work hard to eradicate any issues of white supremacy and assure equal justice for all Black Americans.¹⁷⁴

Reactions were mixed. Many observers, myself included, took issue with McDougal's characterization of support for the Black Lives Matter movement, which is nonpartisan, as equivalent to support of MAGA, which is President Trump's campaign slogan. One lawyer,

¹⁶⁷ Examples include Jimmy Kimmel, Oprah, Seth Myers, Trevor Noah, Conan O'Brien, and Bill Maher.

¹⁶⁸ Examples include Kirkland & Ellis, Latham & Watkins, and Fenwick & West. Patrick Smith, *Over 125 Firms Have Joined the Law Firm Antiracism Alliance*, THE AMERICAN LAWYER. (June 24, 2020), <https://www.law.com/americanlawyer/2020/06/24/over-125-firms-have-joined-the-law-firm-antiracism-alliance/>.

¹⁶⁹ Angela Morris, *Lawyers Call On Texas Bar President to Resign Over Black Lives Matter Comment*, THE AMERICAN LAWYER. (July 13, 2020), <https://www.law.com/texaslawyer/2020/07/13/lawyers-call-on-texas-bar-president-to-resign-over-black-lives-matter-comments/>.

¹⁷⁰ Deborah Casens Weiss, *Texas Bar President's Comments About Black Lives Matter Bring Calls for Resignation*, ABA J., July 13, 2020.

¹⁷¹ Weiss, *Texas Bar President's Comments* (quoting McDougal); Angela Morris, *Lawyers Call On Texas Bar President to Resign Over Black Lives Matter Comment*, THE AMERICAN LAWYER (July 13, 2020), <https://www.law.com/texaslawyer/2020/07/13/lawyers-call-on-texas-bar-president-to-resign-over-black-lives-matter-comments/>.

¹⁷² For the statement, see State Bar of Texas, FACEBOOK, <https://www.facebook.com/statebaroftexas/posts/10158753156711111>.

¹⁷³ Morris, *Lawyers Call on Texas Bar President to Resign*.

¹⁷⁴ State Bar of Texas, *Apology from State Bar of Texas President Larry McDougal*, YOUTUBE (July 11, 2020), <https://www.youtube.com/watch?v=ICmmShk8PrA>.

expressing widespread sentiment, wrote in a Facebook comment on the Texas Bar website that “the State Bar President doesn’t get to have private racist views and threaten election workers with criminal prosecution without consequences and without disgracing the entire organization.”¹⁷⁵ By contrast, another attorney responded, “I support Larry McDougal fully in this matter and I condemn the State Bar for enforcing groupthink.”¹⁷⁶ Texas Bar leaders, including the past president, the President elect, the Board Chair, and the Executive Director, began drafting a statement in which leaders of the Texas Young Lawyer Association could join.

The statement that the leaders ultimately posted said that McDougal’s comments “don’t reflect the Texas Bar’s values.” The leaders pledged to work toward improving diversity and inclusion in the profession and announced that they were creating a task force on the topic. The statement also assured members of the association that:

We are united against racism and dedicated to the bar’s mission of advancing diversity and inclusion in the administration of justice and the practice of law. Indeed, we applaud any organization whose primary goal seeks to ensure equal justice for all Americans.¹⁷⁷

At a subsequent meeting of the Texas State Bar Board of Directors, the organization heard from over sixty speakers and accepted hundreds of letters. The actions that it approved included;

- Creating a Task Force on Diversity headed by the Bar President Elect, Borunda Firth, the state’s first Hispanic bar president to consider various proposed initiatives;
- Requiring members of the Board to complete implicit bias training;
- Requesting the State Bar Minimum Continuing Legal Education Committee to consider making implicit bias training a requirement for Texas attorneys;
- Directing the board’s Policy Manual Committee and Nominations and elections Subcommittee to propose revisions to board policy to provide increased vetting of candidates for president;
- Studying whether the Texas should adopt the ABA Model Rule 8.4(g) prohibiting discrimination as part of the Texas Code of Professional Conduct;
- Calling a special meeting for the board when President McDougal is available to consider a motion restricting the duties of the State Bar president.¹⁷⁸

As this article went to press, it was not clear what further action the bar might take against McDougal, and what broader changes might result. But the case offers some useful lessons about what strategies bar organizations should be considering. It should not take an incident like McDougal’s comment to force leaders of professional associations to rethink the policies and practices that lead to such incidents. And it should prompt all lawyers to consider whether they are

¹⁷⁵ Morris, *Lawyers Call on Texas Bar President to Resign* (quoting Melissa Kingston, Comment, FACEBOOK, <https://www.facebook.com/statebaroftexas/posts/10158753156711111>).

¹⁷⁶ Morris, *Lawyers Call on Texas Bar President to Resign* (quoting Mike Gray, Comment, FACEBOOK, <https://www.facebook.com/statebaroftexas/posts/10158753156711111/>).

¹⁷⁷ Morris, *Lawyers Call on Texas Bar President to Resign*, quoting State Bar of Texas, FACEBOOK.

¹⁷⁸ Amy Starnes, *State Bar Board of Directors Takes Action at Special Meeting*, TEXAS BAR BLOG, July 28, 2020, <https://blog.texasbar.com/2020/07/articles/state-bar/state-bar-board-of-directors-takes-action-at-special-meeting/>.

modeling, personally and collectively, the commitment of equal justice under law, which is inscribed on courthouse doors but seldom describes what goes on inside them.¹⁷⁹

III. CONCLUSION

The key qualities of effective leadership in times of social upheaval track those that are necessary in most other leadership contexts. They cluster in five categories:

- values (such as integrity, honesty, trust, and an ethic of service);
- personal skills (such as self-awareness, self-control, and self-direction);
- interpersonal skills (such as emotional intelligence, inclusiveness, empathy, persuasion, and conflict management);
- vision (such as foresight and the ability to inspire);
- technical competence (such as knowledge, preparation, and judgment).¹⁸⁰

In addition, crisis leadership demands humility—a willingness to consult broadly and to defer to those with greater scientific expertise or experience with the circumstances on the ground. And most of all, it requires a willingness to subordinate personal considerations of reputation and political expedience in the service of the common good.

The need for such qualities has never been greater. Contemporary leaders confront a landscape of increasing complexity, scale, pace, and diversity. Many decisions play out on a wider stage, with less time for informed deliberation, and more constituencies with different backgrounds and values. Developing those leaders should be a core priority of legal education, and one in which law schools have fallen well short.

As I have noted on more than one occasion,

It is ironic that the occupation most responsible for producing America's prominent leaders has done so little to educate them for that role. The legal profession [although only .4 percent of the population] has supplied a majority of American presidents, and in recent decades, almost half of Congress. Lawyers occupy leadership roles as governors, state legislators, judges, prosecutors, general counsel, law firm managing partners, and heads of corporate, government, and nonprofit organizations. Almost none of these lawyers received academic

¹⁷⁹ For examples of some of the profession's failures to address systemic racism, see Deborah L. Rhode, CHARACTER: WHAT IT IS AND WHY IT MATTERS 75, 87-89(2019); and Deborah L. Rhode, *Character in Criminal Justice Proceedings: Rethinking its Role in Rules Governing Evidence, Punishment, Prosecutors, and Parole*, 45 AMERICAN JOURNAL OF CRIMINAL LAW 353 (2019).

¹⁸⁰ For this list, see DEBORAH L. RHODE, LEADERSHIP FOR LAWYERS 621 (3d ed. 2020). For values, see WARREN BENNIS, ON BECOMING A LEADER 32-33 (2d ed. 1994) (citing integrity, trust); MONTGOMERY VAN WART, DYNAMICS OF LEADERSHIP IN PUBLIC SERVICE: THEORY AND PRACTICE 16, 92-119 (2005) (citing integrity and an ethic of public service); JAMES M. KOUZES & BARRY Z. POSNER, THE LEADERSHIP CHALLENGE: HOW TO MAKE EXTRAORDINARY THINGS HAPPEN IN ORGANIZATIONS 21 (4th ed. 1995) (citing honesty). For personal skills, see DANIEL GOLEMAN, RICHARD BOYATZIS & ANNIE MCKEE, PRIMAL LEADERSHIP: REALIZING THE POWER OF EMOTIONAL INTELLIGENCE 253-56 (2002) (citing self-awareness, self-management); VAN WART, DYNAMICS, 16 (citing self-direction). For interpersonal skills, see GOLEMAN, BOYATZIS & MCKEE, PRIMAL LEADERSHIP, 253-56 (citing social awareness, empathy, persuasion, and conflict management). For vision, see BENNIS, ON BECOMING A LEADER 33 (citing vision); KOUZES & POSNER, LEADERSHIP CHALLENGE, 21 (citing forward looking, inspiring). For competence, see KOUZES & POSNER, LEADERSHIP CHALLENGE, 21; LORSCH, A CONTINGENCY THEORY, 417. For judgment, see NOEL M. TICHY & WARREN G. BENNIS, JUDGMENT: HOW WINNING LEADERS MAKE GREAT CALLS (2007).

training for their leadership responsibilities. Although leadership development is now a forty-five billion dollar industry, it is missing or marginal in legal education.¹⁸¹

Although that has started to change, aided by the recent creation of a section on leadership in the Association of American Law Schools and an increase in teaching materials, the subject still lacks credibility among many constituencies¹⁸² Lawyers, law students, and law professors have often viewed the subject as a “touchy feely” curricular “frill,” unlike the more doctrinal issues tested on bar exams. But that substantive knowledge can readily be acquired later, aided by technology and paralegals. That is not true for the so-called “soft skills,” particularly those demanding personal and interpersonal skills such as self-awareness and emotional intelligence.¹⁸³ And by training and temperament, these are not the skills in which lawyers and law students excel.¹⁸⁴ Lawyers rank lower than the general population on interpersonal skills and resilience, and tend to devalue their importance.¹⁸⁵ For many legal students and practitioners, “the soft stuff is the hard stuff.”¹⁸⁶

A related challenge is that many students are reluctant to advertise an interest in leadership. The term seems to conjure up visions of high school student body presidents or overreaching politicians desperate for power and adulation. Yet whatever their discomfort in law school, most of these students will go on to exercise leadership. Even if they do not rise to the top of an organization, they will lead teams, committees, task forces, and *pro bono* and other charitable initiatives. When I was a law student, I never thought of myself as a potential leader and would never have taken a leadership course. But I would surely have benefitted from one. And after stumbling into leadership roles, I have deeply regretted that I did not know earlier some of what I know now.

¹⁸¹ Deborah L. Rhode, *Preparing Leaders: The Evolution of a Field and the Stresses of Leadership*, 58 SANTA CLARA LAW REVIEW 411 (2019) (quoting Deborah L. Rhode, *Developing Leadership*, 52 SANTA CLARA L. REV. 689, 689-90 (2012)).

¹⁸² Rhode, *Preparing Leaders*, *supra* note at 412-13. When I published the first casebook in the field, Deborah L. Rhode & Amanda K. Packel, *Leadership: Law, Policy, and Management* (2011), there were only a few courses in law school. Now there are at least eighty-five, the Association of American Law Schools’ Section on Leadership includes around 250 members, and the casebook is in its third edition. See Materials Compiled by Leah Jackson Teague (August 7, 2020) (Email correspondence on file with the author) and section numbers compiled by Section Chair Douglas Blaze (email correspondence on file with author).

¹⁸³ For the importance of these soft skills, see MAUREEN BRODERICK, *THE ART OF MANAGING PROFESSIONAL SERVICES: INSIGHTS FROM LEADERS OF THE WORLD’S TOP FIRMS* 266-280 (2011); DANIEL GOLEMAN ET AL., *PRIMAL LEADERSHIP: REALIZING THE POWER OF EMOTIONAL INTELLIGENCE* app. B 253-256 (2002) (self-awareness, self-management, social awareness, empathy persuasion, and conflict management); RONALD H. HUMPHREY, *EFFECTIVE LEADERSHIP: THEORY, CASES, AND APPLICATIONS* 97-98, 233 (2014) (self-management, conscientiousness); and sources cited in Rhode, *Leadership in Law*, *supra* note 2, at 1609-10.

¹⁸⁴ Most lawyers prefer learning focused on analytic rather than non-cognitive skills. See Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1392-93 (1997).

¹⁸⁵ Larry Richard, *Herding Cats: The Lawyer Personality Revealed*, 29 ALTMAN WEIL 2, 4 (2002), <http://www.managingpartnerforum.org/tasks/sites/mpf/assets/image/MPF%20-%20WEBSITE%20-%20ARTICLE%20-%20Herding%20Cats%20-%20Richards1.pdf>; Douglas B. Richardson & Douglas P. Coopersmith, *Learning to Lead*, AM. LAW., Jul. 2008, at 57; RHODE, *LAWYERS AS LEADERS*, at 4-

¹⁸⁶ RHODE & PACKEL, *supra* note 2, at 71 (discussing Richard J. Leider, *The Ultimate Leadership Task: Self-Leadership*, in *THE LEADER OF THE FUTURE: NEW VISIONS, STRATEGIES, AND PRACTICES FOR THE NEXT ERA* 189 (Frances Hesselbein et al. eds., 1996)).

One hopeful byproduct of this nation's tragic recent experience with leadership failures is that they may prod law schools to take the need for leadership education more seriously. Lawyers lead, and law schools inevitably produce leaders; it is time that they did so intentionally, informed by the best available research, case studies, simulations, and other curricular and extracurricular initiatives.

Obama closed his statement on the Floyd protests on a note of optimism:

[W]atching the heightened activism of young people in recent weeks, of every race and every station, makes me hopeful. If, going forward, we can channel our justifiable anger into peaceful, sustained, and effective action, then this moment can be a real turning point in our nation's long journey to live up to our highest ideals.¹⁸⁷

I too, am optimistic. If that activism, and the example supplied by John Lewis, has prompted more lawyers, law students, and law schools to think seriously about what they want their own legacy to be, then this moment of suffering may not be entirely in vain. Law as a profession offers its members boundless opportunities to do good. Let us hope that these recent crises have pushed more of us to reflect on what our contributions should be.

¹⁸⁷ Obama, *How to Make this Moment the Turning Point for Real Change*.