

5-5-2022

On the Horns of a Dilemma: Climate Adaption and Legal Profession

Mark S. Davis

Follow this and additional works at: <https://scholarship.richmond.edu/pilr>



Part of the [Environmental Law Commons](#), and the [Public Law and Legal Theory Commons](#)

Recommended Citation

Mark S. Davis, *On the Horns of a Dilemma: Climate Adaption and Legal Profession*, 25 RICH. PUB. INT. L. REV. 197 (2022).

Available at: <https://scholarship.richmond.edu/pilr/vol25/iss3/8>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in Richmond Public Interest Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

ON THE HORNS OF A DILEMMA: CLIMATE ADAPTION AND
LEGAL PROFESSION

*Mark S. Davis**

* Research Professor at Tulane University Law School. Director of the Tulane Institute on Water Resources Law and Policy and the Tulane Center for Environmental Law. Many of the observations in this paper are based on the author's observations and experiences with major ecosystem, urban resilience and climate change adaption plans and programs. As such it is somewhat subjective and is not intended to suggest that other involved persons necessarily saw the same things the same way.

Few aspects of life will be spared disruptions attributed to climate change, but those disruptions will not be evenly distributed or borne. While much attention is being given to large-scale plans and programs aimed at effectively and equitably coping with those disruptions, the fact is the burdens and responsibility of planning and acting are falling mostly on individual families, businesses, and communities. Those with access to resources and professional assistance, specifically legal services, will stand a better chance of adapting and prospering. Those without will likely fare worse—and already are. In order to get better and more equitable outcomes, it will be necessary to appreciate the wide range of legal issues, rights, and responsibilities that adapting to climate change raises and respond to them with robust legal services. The American legal profession is not presently ready to meet that challenge.

INTRODUCTION

For the most part, lawyers do what they do well. When it comes to business transactions, tax matters, trusts and estates, administration of public institutions and litigation of all stripes, lawyers are very, very good at covering those bases—if you know a lawyer and can afford to hire them. And there is the rub. To equate the market for legal services with the ability to pay for them has never been a safe—or morally defensible—bet, but the simple fact is that is how the legal profession works for the most part. To be sure, there have been and are remarkable examples of pro bono and public-spirited lawyering, but those mostly constitute the exceptions rather than the rule.

The legal profession's absence from a variety of issues and communities did not happen by accident, a fact that gave rise to alternative forms of organizing personal and business affairs and resolving disputes. In Louisiana, there was no pathway for a Black person to become a lawyer until 1947 when an all-Black law school was created at Southern University to avoid integrating the law school at LSU.¹ Tulane University Law School did not admit nonwhite students until 1963.² Of course, this does not mean that people of color did not do business, own and pass property, make contracts, or have legal disputes prior to this date. It just meant that, for the most part, they did those things outside of the “legal profession.” Instead of probating estates, property was passed based on arrangements made within families and communities, perhaps with the aid of a pastor or other respected member of the community.

¹ Gail S. Stephenson, *The Desegregation of Louisiana's Law Schools: A Slow and Tortuous 23-Year Journey*, 69 LA. B.J. 220, 221 (2021).

² *Id.* at 222.

The gap between the world served by “polite law” and underserved communities, long under recognized, is becoming increasingly visible and demanding attention. Social and economic barriers have lowered and new social challenges, like the need to adapt to climate change, are bringing the two worlds closer. As a result big changes are in store, both for those who need high quality, timely legal services and the legal profession that is not currently well equipped to deliver them. This article will explore some of the reasons for that and why the profession’s responses to these challenges are a matter of utmost importance.

Section I of this article will discuss how the gap between the served and the underserved was baked into the development of the American legal system and profession. It will also examine how climate change and natural disasters are exposing the persistence of that gulf and the importance of addressing it. Section II will address some of the key factors that will need to be addressed if the legal profession is going rise to the challenge of helping broader communities to prepare for and adapt to nontraditional challenges such as those posed by climate change and sea-level rise. Section III discusses current barriers to the access of legal services faced by underserved communities and how climate change will exacerbate this gap in service.

I. A PROFESSION APART—THE GAP BETWEEN THE LEGAL PROFESSION AND THOSE MOST IMPACTED BY CLIMATE CHANGE AND SEA LEVEL RISE

A. Legal Practice—The Conventional Model

Apart from the development of agriculture and religion, it is hard to imagine a factor more important to the development of complex human societies than the invention of laws and legal systems. Whether rooted in a leader’s edict, legislation, or divine revelation, these legal systems largely served to establish and maintain social order and create a basis for framing and resolving disputes. Indeed, that remains true today, though the nature of the order being protected and the relative rights and responsibilities of persons operating within the system certainly have changed and continue to do so.

Just as significant as the evolution of legal systems is the development and evolution of the legal profession. There was no such thing as the legal profession for much of human history, certainly not in the traditions that shaped American law. In early Greco-Roman times, the notion of accepting payment to help someone resolve a dispute was discouraged.³ The legal profession as we know it did not begin to take shape until the latter part of the Roman

³ Anton-Hermann Chroust, *Legal Profession in Ancient Athens*, 29 NOTRE DAME L. REV. 339, 350 (1954).

empire, reinforced by the establishment of the Roman Catholic Church as the imperial religion and the emergence of canon law.⁴

Our modern legal profession began to develop in England and continental Europe. As civil and common law systems grew to accommodate increasingly complex societies and economies, so did the need for skilled legal practitioners. Centuries of Western imperialism carried European and American legal systems around the globe, expanding lawyers' roles and reach and helping to establish "the rule of law" as a fundamental principle of modern society. Much good has come from the order, predictability, and recourse provided by those systems, but they are not perfect and cannot help but reflect the ideals and biases of those who craft and carry out the laws. That means our system is always in flux to keep pace with a changing world and to better effect justice.

B. The Served and the Underserved

It is no coincidence that laws governing property, inheritance, contracts, and sovereign privilege are at the core of Anglo-European legal systems. For the most part, these were also laws made by and for white males that afforded few, if any, rights, or protections for others. Indeed, for much of our nation's history, even white women had limited legal capacity to vote, hold office, own and control property, and enter into contracts.⁵ For women, marriage only complicated things further, abridging some rights (e.g., the right to make some contracts and hold or control property) and even costing a woman her citizenship if she married a foreign national, while affording some additional protections such as rights to alimony and against disinheritance.⁶

It is beyond the scope of this paper to trace and analyze the many ways that laws and the legal system prioritize certain persons and groups. By way of illustration, legal formalities did nothing to protect a fugitive slave (itself a loaded term) seeking freedom or Native Americans facing expulsion from their lands even when they were ostensibly protected by treaty. Nor did they keep Japanese-Americans from being interned during World War II, a fate

⁴ See e.g., R.H. HELMHOLZ, *THE CAMBRIDGE COMPANION TO ROMAN LAW: CANON LAW AND ROMAN LAW* 4, 7, 25 (David Johnston, ed., 2015); Roscoe Pound, *What is a Profession - the Rise of the Legal Profession in Antiquity*, 19 *NOTRE DAME L. REV.* 203, 226–28. (1944).

⁵ Nan D. Hunter, *Reconstructing Liberty, Equality, and Marriage: The Missing Nineteenth Amendment Argument*, 108 *GEO. L. REV.* 73, 75–76, 83 (2020); *Women and the Law*, HARV. BUS. SCH. WOMEN, ENTER. & SOC'Y, https://www.library.hbs.edu/hc/wes/collections/women_law/ (last visited Mar. 15, 2022).

⁶ Section 3 of the Expatriation Act of 1907 provided that a woman who was a citizen of the United States would lose her U.S. citizenship if she married a foreign national. That Act was subsequently tempered by the Cable Act of 1922 which nonetheless retained citizen forfeiture for American women that married "aliens ineligible to citizenship" a term that referred to Asians. John P. Roche, *The Loss of American Nationality—The Development of Statutory Expatriation*, 99 *U. PA. L. REV.* 25, 44, 47–48 (1950); *Women and the Law*, *supra* note 5.

not similarly suffered by persons of German or Italian descent. The rule of law may have created an orderly playing field, but not everyone could play, and if they could, the rules of the game were too often anything but fair and evenhanded.

In the first two examples, the law viewed Native Americans and persons of African origin or descent not only as non-citizens, but as lesser human beings who were subordinate to white people.⁷ In the third example, Japanese-Americans—including native born citizens—were interned not just because of their ethnic proximity to enemies of the United States during a time of war but because they were not white.⁸ As repugnant as these examples are, they remain powerful reminders of how fundamentally important race has been and is in our society and of how the very notion of race as a legal concept was largely driven by the social necessity of knowing who is white and who is not. Those are unpleasant facts, but they are facts.

It is also a fact that some of the prouder chapters in the history of our nation and the legal profession involve efforts to correct those imbalances. The movements to secure civil rights for women, laborers, and people of color are prime examples. Nonetheless, the fact remains that when it comes to how our system of laws works and who has access to legal services, there are still important disparities between people and communities. As our nation

⁷ This was made abundantly clear in the U.S. Supreme Court's now infamous opinion in *Dred Scott v. Sanford*, which grounded America's subordination of persons of African origin and descent in the context of European laws and customs. The Court stated, "They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit." *Dred Scott v. Sanford*, 60 U.S. 393, 407 (1857). The opinion went on to explain why the Declaration of Independence's plain language that "all men are created equal" did not mean what it said. *Id.* at 410. The Court in *Scott* also distinguished the treatment of Native Americans from that of Africans. Native American tribes were recognized as possessing a measure of sovereignty but were still subject to subjugation by the white race. *Id.* at 403–04. For a more expansive discussion of the treatment and evolution of Native Americans in the United States and under American law, see, e.g., CLAUDIO SAUNT, *UNWORTHY REPUBLIC: THE DISPOSSESSION OF NATIVE AMERICANS AND THE ROAD TO INDIAN TERRITORY*, (W.W. Norton & Company, 2020).

⁸ Pro white bias runs deep in American immigration and naturalization law. The Naturalization Act of 1790 barred immigrants who were not of white descent (modified in 1870 to allow persons of African descent) from becoming naturalized citizens. ANDREW M. BAXTER & ALEX NOWRASTEH, *CATO INST., A BRIEF HISTORY OF U.S. IMMIGRATION POLICY FROM THE COLONIAL PERIOD TO THE PRESENT DAY* 443 (2015). Specific anti-Asian restrictions were introduced in the Chinese Exclusion Act of 1882 and the Immigration Act of 1924, restrictions that remained until the Immigration Act of 1952. *Id.* The lack of a path to naturalization was a significant contributing reason for the different manner in which internment was conducted in World War II. The detention of persons ethnically connected to enemies of the United States during times of war was not unique to World War II or persons of Japanese descent. German and Italian nationals were also interned as enemy aliens but in far smaller numbers. Those who were naturalized citizens of the U.S. and those born in the U.S. to persons of German or Italian origin or descent were largely spared internment. See Gabriel J. Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, a Policy Analysis of Affirmative Action*, 4 *ASIAN PAC. AM. L.J.* 129, 147 (1996).

grapples with the twin challenges of adapting to climate change and sea-level rise, some of those disparities are becoming more clear and urgent. Planning for and adapting to those challenges will require lawyering of the highest order, and it will require the legal profession to provide those services in unconventional ways.

II. THE CASE FOR CHANGE

When it comes to resolving disputes, closing a deal, or organizing one's personal or commercial affairs, it is hard to argue against the value of the legal profession in America. But that record of success comes with a catch. To benefit under our system of laws, one has to understand how that system works and how to make it work. This often boils down to two factors: knowing competent lawyers and being able to pay them. The fee-for-service model defines how most legal services are provided today and, based on the high number of practicing lawyers, seems to be efficacious.⁹ Simply put, the practice of law is mostly a business, and business is good.

However, it is a mistake to view the practice as just a business or the market for legal services as defined by those able to hire a lawyer. The practice of law is not merely a trade; it is a profession, and that means something. In the narrowest of terms, this means that the legal profession is a regulated monopoly, a guild that controls who can be a lawyer and who is allowed to provide legal services. More idealistically, it means that the profession must endeavor to see that access to justice and equity is not forgotten and that the causes of the oppressed and defenseless be kept in mind.¹⁰ One of the legal profession's biggest challenges is what to do about underserved populations. To get a sense of the magnitude of the problem, one need only look to the experiences of communities hit by natural disasters or adapting to increasing flood and fire risks. South Louisiana offers examples of both.

The devastation of New Orleans ("the City") by Hurricane Katrina in 2005 stands as one of the greatest calamities in our nation's history. The tragic consequences of the combined impacts of the powerful hurricane and a litany of human incompetence and poor decision-making are well known.¹¹ The deaths of more than 1,800 people and the dislocation of an estimated one million people set this event apart from any prior event in our nation's

⁹ See generally *How Do Lawyers Make Money? Five Different Ways...*, ELAW TALK, <https://elaw-talk.com/how-lawyers-make-money/> (last visited Mar. 20, 2022) (listing different ways lawyers make money, all under the fee-for-service method).

¹⁰ See e.g., *Bar Admission in Louisiana: Layers Oath*, LA. S. CT. ON BAR ADMISSIONS, <https://www.lascba.org/Admissions.aspx?tab=oath> (last visited Mar. 20, 2022).

¹¹ Sarah Pruitt, *How Levee Failures Made Hurricane Katrina A Bigger Disaster*, HISTORY (Aug. 27, 2020), <https://www.history.com/news/hurricane-katrina-levee-failures>.

history.¹² The governmental and civic responses were also unprecedented in their scale and generosity. Those metrics, however good or bad, are impressive but hardly complete. The real importance of Katrina is not just what it did but what it revealed. It revealed that many of those who died did so because they had not been planned for or had been discounted. The recovery of the City was hampered by the fact that significant numbers of people did not qualify for post-storm recovery assistance because they could not prove that they owned their homes.¹³ The recovery was further slowed by the outmigration of decision-making, authorizing people with few ties to the community to make decisions for it and ultimately disempowering members of the community.¹⁴ Our system of laws and their administration were significant but largely undiscussed factors in turning a natural event into a human tragedy.

It is beyond the scope of this article to investigate most of those factors. Instead, this analysis will concentrate on two aspects of the Katrina experience that are most relevant to the subject of this article. The first aspect is how communities that were poorly understood and underserved by the legal profession lagged in returning to the City and participating in recovery. The second is how differences in the ways response and recovery efforts were experienced across the City impaired the recovery of the entire New Orleans metropolitan area.

Hurricanes are a natural part of many coastal areas, and to some extent, people who live in those areas assume a measure of that risk. However, those risks are not evenly distributed: some people live at distinctly higher risk, not just as a result of forces of nature and personal choice but because, as a matter of law and policy, it is preordained. That is not to suggest malevolence, but the outcome could scarcely have been worse had it been. The manner in which neighborhoods were developed and how “flood protection” projects

¹² *Katrina Impacts*, UNIV. R.I., <http://www.hurricanescience.org/history/studies/katrinacase/impacts/> (last visited Mar. 20, 2022).

¹³ REILLY MORSE, *Come On In This House: Advancing Social Equity in Post-Katrina Mississippi*, in *RESILIENCE AND OPPORTUNITY: LESSONS FROM THE U.S. GULF COAST AFTER KATRINA AND RITA* 131 (Amy Liu et al., 2011).

¹⁴ MUKESH KUMAR, *A Tale of Uneven Comebacks: Community Planning and Neighborhood Design on the Mississippi Gulf Coast*, in *RESILIENCE AND OPPORTUNITY: LESSONS FROM THE U.S. GULF COAST AFTER KATRINA AND RITA* 149 (Amy Liu et al., 2011).

were sited and designed put people and their possessions at risk, and induced them to believe they were better protected than they actually were.¹⁵

Although the risk differential was not per se intentional, it was not quite accidental either. Some risks are disproportionately borne by wealthier communities and individuals, as the 2021 collapse of Champlain Towers South in Surfside, Florida demonstrated.¹⁶ But since those communities generally do not lack access to legal services and find themselves in a risky place by choice, albeit not totally informed choice, they will not be the focus of this paper.

On the other hand, low-income people, Native Americans, and people of color are often concentrated in more environmentally challenged and flood-prone areas and often have lower levels of government attention, such as “flood risk reduction.”¹⁷ Generations of *de facto* and *de jure* segregation revealed that the enactment of civil rights and fair housing laws did not undo what had been done. The risks to low-income neighborhoods and communities are compounded by the fact that they can be hard-pressed to prove that they are worth protecting or afford their share of a project’s costs. Decision rules that govern infrastructure investments, while intended to deter waste, are skewed to favor wealth. For example, the level of flood protection that the federal government will commit to is based on the property value of what would be protected.¹⁸ Under those cost/benefit laws, that generally means looking at the value of property, but not at the going-concern value of a community or the number or value of human lives at stake.¹⁹ The presumption is that somehow, some way, people will get out of harm’s way. Katrina proved

¹⁵ Indeed, one of the first things to change after Hurricane Katrina was the decision by the federal government to stop referring to flood walls, flood gates and levees as “flood protection.” The term now used is “flood risk reduction.” This change was adopted following the failure of levees and flood walls during Hurricane Katrina to reflect the reality that such structures do not eliminate flooding risk but rather reduce or shift risk. This terminology is evident in the testimony of Lt. General Robert Van Antwerp in his testimony to the Adhoc Subcommittee on Disaster Recovery of the U.S. Senate Committee on Homeland Security and Governmental Affairs on August 26, 2010. *Hearing on Five Years Later: Examination of Lessons Learned, Progress Made, and Work Remaining From Hurricane Katrina Before the Subcomm. On Disaster Recovery of the S. Comm. on Homeland Sec. & Governmental Affairs*, 111th Cong. 2 (2010) (statement of Lieutenant General Robert Van Antwerp, Chief of Engineers, U.S. Army Corps of Engineers).

¹⁶ Matthew Shaer, *The Towers and the Ticking Clock*, N.Y. TIMES MAGAZINE (Jan. 28, 2022), <https://www.nytimes.com/interactive/2022/01/28/magazine/miami-condo-collapse.html>.

¹⁷ Eric Tate, et al., *Flood Exposure and Social Vulnerability in the United States*, 106 NATURAL HAZARDS, 435, 436, 441 (2021).

¹⁸ See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-20-113R, U.S. ARMY CORPS OF ENGINEERS: INFORMATION ON EVALUATIONS OF BENEFITS AND COSTS FOR WATER RESOURCES DEVELOPMENT PROJECTS AND OMB’S REVIEW 3 (2019).

¹⁹ See, e.g., Penny Loeb, *Too Poor to Protect: When Cost-Benefit Analysis Leaves Towns to “Wash Away”*, DAILY YONDER (Apr. 29, 2021), <https://dailyyonder.com/too-poor-to-protect-when-cost-benefit-analysis-leaves-towns-to-wash-away/2021/04/29/>.

how fatally flawed that presumption is. The poor and the elderly are far more likely to lack access to transportation and financial resources to evacuate or have any place to go.²⁰

Even if a community can clear the cost/benefit hurdle necessary to authorize a federal infrastructure project, it will still likely have to find a way to share the cost of the project with the federal government. That burden can be significant, generally 50% for a feasibility study, 25-35% for design, engineering, at least 35% for construction, and 100% for operations and maintenance.²¹ Many communities, especially smaller and less affluent ones, find the cost-sharing burden to be more than they can bear, thus forcing them to seek funding from their state government or by doing without.

This is only a thumbnail sketch of the legal architecture that governs how storm and flood risks are allocated and dealt with. Well-intended as it certainly is, it contains built-in preferences that favor wealth, those with access to information, professional services, and decision-makers. The challenges posed by climate change are only going to make things worse.

A. Climate Change and Sea Level Rise

After decades of research, debate, controversy, and political wrangling, it is clear that climate change and sea-level rise are real, and society will have to adapt to them. While reducing and managing greenhouse gas emissions have understandably commanded most of the attention for most communities, families, and businesses, adaptation is where the action will be. For some, it already is.

The increasing frequency and intensity of storms, droughts, and fires are prompting a realization that we are facing challenges out of sync with our customary experiences and approaches to planning and response.²² A decade ago, it would have been unusual to be asked by a securities regulator, insurer, bond rater, or institutional investor to explain your plans to be sustainable and resilient as the world and climate around you change; that is not the case

²⁰ *Id.*

²¹ The U.S. Army Corps of Engineers Non-Federal Sponsor Package is an informative source for the responsibilities of any entity seeking to partner with the Federal Government. The Corps of Engineers is not the only Federal Agency that can sponsor a project and each agency and program can have its own rules and procedures. U.S. ARMY CORPS OF ENGINEERS, NON-FEDERAL SPONSOR PACKAGE 5, 7, 9 (n.d.).

²² Shiv Someshwar, *Adaptation to Climate Change: Moving Beyond "Reactive" Approaches*, WORLD RES. INST., <https://www.wri.org/our-work/project/world-resources-report/adaptation-climate-change-moving-beyond-reactive-approaches> (last visited March 26, 2022).

today.²³ Individuals may not be asked these questions, but they have a stake in how those questions are planned for and answered by their employers, governments, and civic institutions. Each and every such plan would benefit from the kind of legal services that are marshalled every day in support of commercial transactions, estate planning, and dispute resolution proceedings. However, more often than not, this is not happening. To understand why, one has to understand how different this sort of adaptation planning is from most other planning and how it differs from one sector to another. Only then will it become clear why the legal profession's absence is so conspicuous and why it would be a mistake—even a tragedy—to allow it to continue. The two examples below will help illustrate this point.

i. The Slow Walk Recovery of New Orleans

As noted earlier, the flooding associated with Hurricane Katrina resulted in the evacuation of most of the city's 484,684 residents, an evacuation that for most lasted months in many cases.²⁴ Several months after the storm, I had lunch with the managing partner of a large regional law firm. When I asked how things were going, he replied that the firm was doing well enough but that many of its local clients were struggling because many of their employees were not able to return to New Orleans. Those employees, most of whom were not affluent, could not return for a number of reasons—their homes and neighborhoods had been destroyed, they lacked the funds, and some vital services were still missing—but one reason stood out. Many of them could not avail themselves of the programs designed to help people repair or rebuild their homes because they could not prove they owned their homes. In those families, the name on the tax rolls, deed, or utility bill often did not match the name of the persons living in the home. Occupancy was more a matter of agreement than a legal formality. If the owner of the record died or moved, no will was probated, no estate was administered, no lease was executed, and no lawyers were involved. Indeed, in many instances they did not seem to know any lawyers except for personal injury or divorce lawyers. Yet, life went on, and order was maintained—until Katrina made it so it could not. This phenomenon is not limited to New Orleans or the aftermath of natural disasters. The problem of uncertain and fractional ownership, or “heirs

²³ Allison Herren Lee, Acting Chair, Sec. Exch. Comm'n, A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC (March 15, 2021). As the threats of climate change and sea level rise become more apparent and immediate, they are beginning to constitute a risk to the viability of businesses and local governments. That concern is now reflected in disclosures required by the Securities and Exchange Commission and by various interests in the private sector. *See, e.g., SEC Responses to Climate and ESG Risks and Opportunities*, SEC. EXCH. COMM'N (Oct. 26, 2021), <https://www.sec.gov/sec-response-climate-and-esg-risks-and-opportunities>.

²⁴ Allison Plyer, *Facts for Features: Katrina Impact*, DATA CTR. (Aug. 26, 2016), <https://www.datacenterresearch.org/data-resources/katrina/facts-for-impact/>. The City's population has been slow to recover. In July 2012 the population was only 369,250, 76% of its 2000 population. *See id.*

property,” has been getting more attention because of its impact on African-American landholding and wealth dissipation.²⁵ That attention is overdue, but until the bar commits to serving communities in full, this attention will do little to stem patterns of intestacy that hold too many people and communities back.

I asked my companion if his firm had any clients in those heavily impacted neighborhoods. He responded that there were none that he knew of. Quite simply, they were not the kinds of clients that the firm sought; the firm’s rates were well beyond what most of these people could afford. There was absolutely nothing wrong or surprising about that. Yet in that moment, it became evident that the firm’s clients and the community as a whole were paying the price for presuming the presence of its workers, instead of planning for their presence. The legal community had no reason to foresee the levee failures that flooded New Orleans, but viewed in the broader context of the city’s slow recovery and the ongoing fragility of Louisiana’s coastal communities in the face of rising seas and repeated storms, it is increasingly clear that the gap between those with robust access to legal services and those without is a drag on the sustainability of the entire region.²⁶

ii. Isle de Jean Charles

Most at-risk communities continue to address their environmental vulnerabilities by some combination of denial, delay, planning, and infrastructure. In the face of challenges such as indisputable sea level rise, some discuss relocating people and communities. On the island community of Isle de Jean Charles in southern Louisiana, relocation is not just talk: it is the plan. The small island community of about forty families is dominated by members of the Isle de Jean Charles Band of Biloxi-Chitimacha-Choctaw tribe, a Native American tribe with around six hundred members that is recognized by the State of Louisiana, but not yet by the United States.²⁷ In 2016, Louisiana received a \$48 million grant from the United States Department of Housing and Urban Development (“HUD”) with the specific aim of relocating—not just moving—the tribe to a new community on less but still flood-prone land nearby.²⁸ The threats from storms and encroaching seawater were expressly cited as reasons, thus making this a clear, if not conclusive, test of how some

²⁵ See, e.g., Faith James Rivers, *Inequity in Equity: The Tragedy of Tenancy in Common for Heirs’ Property Owners Facing Partition in Equity*, 17 TEMPLE POL. & CIV. RTS. L. REV. 1, 9 (2007).

²⁶ See Rachel Ramirez, *Louisiana Hasn’t Yet Recovered from Two Major Hurricanes in 2020. Now Another is Taking Aim*, CNN (Aug. 28, 2021), <https://www.cnn.com/2021/08/28/us/hurricane-ida-louisiana-climate-change/index.html>.

²⁷ THE LOWLANDER CTR. & GCR, INC., RESETTLEMENT AS A RESILIENCE STRATEGY AND THE CASE OF ISLE DE JEAN CHARLES 11–12 (Oct. 2015).

²⁸ See *State of Louisiana’s Phase II Application to the National Disaster Resilience Competition*, LOUISIANA.GOV (Oct. 27, 2015), <https://www.isledejeancharles.la.gov/>.

communities might adapt to coastal change.²⁹ The resettlement concept was developed for and with the tribe by the Lowlander Center with a strong emphasis on stakeholder-driven planning and implementation.³⁰ Some key features of the HUD-funded project and the issues they raised are:

- a. The premise of the resettlement program is to resettle and recongregate Native American people, not to simply buy them out. Unfortunately, it was not clear who was eligible to participate in the program. Were nonnative American islanders eligible? Did one have to actually live on the island to qualify (many tribal members had already moved from the island but were interested in living in the new settlement)? If public funds are being used to move and resettle these people, just what was it buying, and what would prevent new development on the island?
- b. The resettlement proposal and initial program effort presumed that the tribe itself would have an active role in helping to negotiate on behalf of its members. In actuality, since the tribe is not federally recognized, it could not act as the direct party representative of its members.
- c. Without the tribe as an intermediary, the island's residents were dealing directly with state and federal officials in what can only be described as a major real estate transaction unlike any the residents had been part of before. The resulting confusion and distrust were compounded by the fact that many of the islanders had no access to legal counsel.³¹

Since the program is still ongoing, it is not possible to reach conclusions at the time of this writing, but it is possible to draw some lessons from the legal dimensions of what is perhaps the largest and most visible climate adaptation project in the nation. One clear lesson is that lawyering matters: there is a price to be paid when those structuring programs don't recognize that, and when the bar fails to see service opportunities even when so many lives, dollars, rights, and obligations are at stake.

If the resettlement of the Isle de Jean Charles community were an isolated situation, it would probably not command much attention, certainly not this article. But it is not. It was conceived and funded as a teaching model for others that are or that will be facing displacement. It deserves respect for that.

III. FINDING ITS PLACE—CONFRONTING THE BARRIERS

There are many factors that shaped the evolution of the aforementioned examples, but it should be absolutely clear that there are entire communities that are underserved by the legal profession. That gap comes with a cost that is more pronounced and visible as the pace and scope of climate change

²⁹ See ST. TAMMAMY PARISH, STATE OF LOUISIANA'S PHASE II APPLICATION TO THE NATIONAL DISASTER RESILIENCE COMPETITION 1–4 (2015).

³⁰ The Lowlander Center was created to support the resilience and welfare of low-lying communities. See *Who We Are: Mission*, LOWLANDER CTR., <https://www.lowlandercenter.org/mission> (last visited Mar. 20, 2022).

³¹ Author's personal conversation with Chief Albert Naquin.

become more understood. That cost is being paid not just by immediately impacted communities, but by the broader communities and economies of which they are a part. These examples may seem hyperlocal, but there are parallel findings across the country as the realities of climate and sea-level change become apparent. The business of armoring, consolidating, or shrinking communities will be the defining social transaction of our time. The issue of relocation alone raises questions. Who is the buyer? What responsibilities does the buyer assume? Who and what is left behind? Where do people go, and is there a receiving community ready to accommodate them? Is structured relocation really possible? Is it fair? To what extent will the legal profession be involved, and to whose benefit? Answering those questions, especially regarding the one about how the legal profession fits, requires addressing several dilemmas.

A. The Distance Dilemma

Although the modern-day practice of law is global, it is not uniform. For example, Chicago-based Kirkland and Ellis may be one the largest law firms on the planet, with more than 3,000 lawyers and offices in seventeen cities around the world.³² Even with that impressive reach, it is a safe bet that a restaurant worker in any of those cities (much less in a rural area) who wanted a will drafted or to have an apartment lease reviewed would not know of the firm nor would the firm know them. They are just too far apart physically, culturally, and financially. The same can be said for many full-service law firms, regardless of their size or location. Many people may know who to call if they are in a car wreck (thanks to lawyer advertising), but they have no idea where to turn for other legal services. If that is to improve, it is important to appreciate and address the factors that account for the legal services gap.

i. Physical Distance

The connection—or disconnection—between health and proximity to health care has been frequently studied and discussed, with most studies finding the closer an individual is to health care providers, the better their health.³³ A similar connection is almost certainly true with respect to proximity to legal services, but the question is much less studied, and the metrics of the benefits of legal services are much softer and harder to prove. Nonetheless, the relationship is fundamental to the missions of organizations like

³² David Lat, *The 500 Largest Law Firms in the U.S.*, ABOVE L. (Jul. 20, 2021), <https://abovethelaw.com/2021/07/the-500-largest-law-firms-in-the-united-states/>; *Locations*, KIRKLAND & ELLIS, <https://www.kirkland.com/offices> (last visited Mar. 19, 2022).

³³ See, e.g., Charlotte Kelly et al., *Are Differences in Travel Time or Distance to Healthcare for Adults in Global North Countries Associated With an Impact on Health Outcomes? A Systematic Review*, 6 *BMJ OPEN* 1, 1 (2016).

the Legal Services Corporation (“LSC”)³⁴ and other professional organizations such as the American Bar Association (“ABA”).³⁵ According to the LSC, twenty percent of our country’s population lives in rural areas, but only two percent of lawyers do.³⁶ The result is “legal deserts,” where access to legal assistance, and hence access to justice, that is necessary to engage in our legally complex society on anything akin to a fair footing, is missing.³⁷ The physical distance dilemma is often framed as a rural issue, but it is not.³⁸ One can live in a city or suburb, but if one does not drive or have access to public transportation, the challenge of getting to a lawyer’s office can be just as daunting as it is for a rural community. This situation is not at all unusual for the elderly, disabled, or the low-income, and it was a contributing factor to the uneven recovery of post-Katrina New Orleans.³⁹

ii. Cultural Distance

Even if the nearest full-service law firm is next door, the likelihood that nearby residents will have access to those services is anything but certain. Simply put, the best predictor of who is served by the legal community—and how—is whether that person or the social/economic strata they identify with have been served before.⁴⁰ As anyone that has spent much time abroad can attest, the role and status of the legal system and the legal profession in the United States is anything but universal.⁴¹ On closer inspection, it is clear that even within our country, there are different perspectives about them. The reasons vary, and many of them are cultural, rooted in factors such as language, religion, immigration status, and ethnicity. For example, as noted earlier, if

³⁴ See *Model Practices & Innovations*, LEGAL SERVS. CORP., <https://www.lsc.gov/i-am-grantee/model-practices-innovations> (last visited Mar. 23, 2022).

³⁵ The ABA’s Access to Justice Committee expressly recognizes that access to affordable—even free—legal services is essential to equitable legal system. See Dalton Courson & Rachel Pereira, *About the Committee*, ABA, <https://www.americanbar.org/groups/litigation/committees/access-justice/about/> (last visited Mar. 23, 2022).

³⁶ Press Release, Legal Services Corp., *Talk Justice, an LSC Podcast: Expanding Access to Justice in Rural Communities* (Jan. 11, 2022), <https://lsc.gov/press-release/talk-justice-lsc-podcast-expanding-access-justice-rural-communities>.

³⁷ *Id.*

³⁸ See, e.g., Lisa R. Pruitt et al., *Legal Deserts: A Multi-State Perspective On Rural Access To Justice*, 13 HARV. L. & POL’Y REV. 15, 22 (2018); *Legal Deserts*, ABA, <https://www.abalegalprofile.com/legal-deserts/> (last visited Mar. 20, 2022).

³⁹ See Richard A. Webster, *In Louisiana Civil Courts, The Poor Are Left to Defend Themselves*, TIMES-PICAYUNE (Mar. 14, 2019), https://www.nola.com/news/article_f7a10a25-a042-50a6-85e5-3e07fe07e4a7.html (discussing the difficulty of providing legal services in Louisiana, including Orleans Parish).

⁴⁰ See, e.g., Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173, 174–75 (2008) (discussing the stratification of the legal profession and the clients they serve).

⁴¹ See, e.g., Natalie Anne Knowlton, *Trusting the Public’s Perception of Our Justice System*, INST. ADVANCEMENT AM. LEGAL SYS. BLOG (Aug. 27, 2020), <https://iaals.du.edu/blog/trusting-public-s-perception-our-justice-system>.

the law and the profession spent years excluding groups of people from their civil rights, the resulting behavioral patterns may remain culturally ingrained for years, despite efforts to change the system.⁴²

One of the better efforts to explain the cultural aspects of the legal services gap is a 2011 report commissioned by the Legal Assistance to the Disadvantaged Committee of the Minnesota State Bar Association.⁴³ Its aim was to address the chronic unmet legal services needs of low-income individuals, and even then, much is left to do.⁴⁴ The added challenges of climate change, rising sea levels, and more extreme weather only make the situation worse and more urgent. Compared to the traditional access to justice and service needs, we are now seeing the demand for comprehensive legal services playing out on a broader scale, encompassing not just individuals but entire communities as well, such as the Isle de Jean Charles community discussed above.⁴⁵

That trend is mirrored on the dispute representation and resolution front. It is hard enough to match clients and lawyers for typical local or domestic disputes, but the fate of communities, families, and businesses is increasingly being impacted by national and international actors such as insurers, bond raters and institutional investors.⁴⁶ A decision by one of those actors can result in sources of private wealth such as, home equity and tax and employment bases being eroded almost overnight. Those actions and the disputes they trigger can lead to an urgent need for legal services that cannot be met if the impacted people and communities do not recognize the nature of the need or cannot find a lawyer to look out for them.

The cultural gap is not one-sided. On the flip side of the culture coin is the reluctance of some in the legal community to take on new or “controversial” issues or clients, whether for personal reasons or for fear of alienating existing clients or other relationships.⁴⁷ This conservative tendency has never been one of the better traits of the profession, and if extended into the realm of

⁴² See e.g., HANNAH LIEBERMAN CONSULTING & JOHN A. TULL & ASSOCS., OVERCOMING BARRIERS THAT PREVENT LOW-INCOME PERSONS FROM RESOLVING CIVIL LEGAL PROBLEMS 67 (2011).

⁴³ See *id.* at vi.

⁴⁴ See *id.*

⁴⁵ See generally *Isle De Jean Charles Resettlement: The Story of Isle De Jean Charles*, LOUISIANA.GOV, <https://www.isledejeancharles.la.gov/> (last visited Mar. 16, 2022).

⁴⁶ See, e.g., Lisa Calvano, *Multinational Corporations and Local Communities: A Critical Analysis of Conflict*, 82 J. BUS. ETHICS 793, 793–805 (2008).

⁴⁷ The author has personally encountered this “cultural conflict of interest” barrier in the legal and other professions when seeking in organizing a land trust to conserve coastal wetlands. The notion of an environmental organization as a client was more than the thought they could explain to some existing clients. Perhaps that was true and the self-preservation of the firm a rational priority. If so, it only puts the profession’s difficulties in providing needed services into sharper relief.

climate and sea level mitigation and adaptation could have tragic consequences.

iii. Financial Distance

The most straightforward factor that separates those who need legal services from those who provide them is the ability to pay. The fee-for-service model is what drives the profession.⁴⁸ Although it is true that *pro bono* services, public interest law firms, and clinics have made huge contributions to the expanding access to services and justice, there is also no question that the legal services gap remains large.⁴⁹ For certain types of cases, the use of contingent fee arrangements, class actions, and the statutes allowing for the recovery of attorney's fees can greatly reduce the affordability gap. These include torts, certain environmental cases, and workers compensation cases.⁵⁰ However, for many practice areas, such as contracts, domestic matters, property matters, conveyancing, taxes, and wills and estates, the ability to pay is still an insurmountable barrier, as Isle de Jean Charles and post-Katrina New Orleans demonstrate.⁵¹

Financial capacity is also a significant factor in the ability of governmental bodies to get the legal services they need. While hardly a new development, planning for and adapting to climate change and sea-level rise requires dimensions of planning and actions beyond conventionally available legal services. The Isle de Jean Charles project is a good example of this, but it only scratches the surface of the challenges that some communities will face. That is because one of the consequences of climate and coastal change is that it brings fundamental changes to the economic and tax bases of those communities. This will undermine their ability to handle what today are conventional responsibilities, let alone plan for change. It is important to be clear about this. Whether the driver is fire, drought, floods, or coastal inundation, the value, and even ownership, of significant tracts of land can be dramatically impacted. To see how, consider the situation in coastal Louisiana, which, since 1930, has seen over 1,900 square miles of land yield to open water, a change that ultimately affects the transformation of privately-owned tax-

⁴⁸ See David F. Levi et al., 148 J. AM. ACAD. ARTS & SCI. 30, 34 (2019).

⁴⁹ See Jo-Ann Wallace, *Corporate Support for Legal Services*, 148 J. AM. ACAD. ARTS & SCI. 136, 136 (2019).

⁵⁰ Stacie L. Fatka & Jason Miles Levien, *Protecting the Right to Petition: Why a Lobbying Contingency Fee Prohibition Violates the Constitution*, 35 HARV. J. LEGIS. 559, 580 (1998).

⁵¹ Martha Bergmark, *We Don't Need Fewer Lawyers. We Need Cheaper Ones.*, WASH. POST (June 2, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/06/02/we-dont-need-fewer-lawyers-we-need-cheaper-ones/>.

paying property into state-owned water bottoms.⁵² If sea-level rise projections are correct, similar fates are in store for others which could cripple the ability of those communities to function.⁵³

B. The Client Dilemma

Dealing with climate change and ecosystem management is a big challenge and the plans for responding to often large and ambitious. Efforts such as the Green New Deal⁵⁴, the plans for saving the Everglades⁵⁵ and coastal Louisiana⁵⁶ or the Greater New Orleans Urban Water Plan⁵⁷ make a deep impression about the scale and cost of confronting climate risks, and the scale and cost of failing to do so. These plans all call for managing natural resources and human society at a scale rarely seen except perhaps during the times of war. The plans and programs reflect the robust engagement of engineers, scientists, architects, and planners.⁵⁸ Lawyers have been involved too, but for the most part the legal profession has been less prominent. It certainly is not because there is a scarcity of important legal and policy issues involved.

⁵² Caitlyn Kennedy & Stephen Gill, *Underwater: Land Loss in Coastal Louisiana Since 1932*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN. (Apr. 5, 2013), <https://www.climate.gov/news-features/featured-images/underwater-land-loss-coastal-louisiana-1932>.

⁵³ See *2022 Sea Level Rise Technical Report: Updated Projections Available Through 2150 for all U.S. Coastal Waters*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., <https://oceanservice.noaa.gov/hazards/sealevelrise/sealevelrise-tech-report.html> (last visited Apr. 5, 2022).

⁵⁴ A Green New Deal was proposed in the United States in 2010 as a vehicle for transforming America's communities, economy and energy sector via federal investment in communities, infrastructure and technologies to achieve a variety of aims including shifting the nation to 100% clean energy by 2030. *Green New Deal*, GREEN PARTY, https://www.gp.org/green_new_deal (last visited Apr. 5, 2022).

⁵⁵ The Comprehensive Everglades Restoration Plan was authorized by Congress in 2000 with the aim of securing the ecologic security of the Everglades system while also providing or the water supply needs of South Florida. *Comprehensive Everglades Restoration Plan (CERP)*, NAT'L PARK SERV., <https://www.nps.gov/ever/learn/nature/cerp.htm> (last updated June 2, 2021).

⁵⁶ Louisiana's Comprehensive Master Plan for Sustainable Coast (2017) was developed by the Louisiana Coastal Protection and Restoration Authority and generally updated every five years to reflect changing conditions, knowledge, and technologies. The Master Plan is the blueprint for the State and guides the development of project plans and programs aimed at sustaining the ecologic and human dimensions of the coast. *Louisiana's Comprehensive Master Plan for a Sustainable Coast*, COASTAL PROT. RESTORATION AUTH. LA., <https://coastal.la.gov/our-plan/2017-coastal-master-plan/> (last visited Mar. 20, 2022).

⁵⁷ This 2013 plan was developed by an interdisciplinary team under a grant from the US Department of Housing and Urban Development to the Louisiana Office of Community Development. The project was administered by Greater New Orleans Inc. which engaged Waggoner & Ball Architectures to assemble the project team. Notably the project considered not only landscape and hydrologic features but governance and implementation. The author was a member of this team and led the portion of the project dealing with governance and funding. The plan received a National Planning Excellence Award from the American Planning Association in 2015 and has been embraced by governmental and civic organizations in the Metro New Orleans area as a basis for regional water management. The plan has been influential in other water planning efforts across the country. *Greater New Orleans Urban Water Plan*, WAGGONER & BALL, <https://wbae.com/projects/greater-new-orleans-urban-water-plan-2/> (last visited Mar. 20, 2022).

⁵⁸ See Diana Budds, *The Green New Deal Is Really About Designing an Entirely New World*, CURBED (Sept. 19, 2019), <https://archive.curbed.com/2019/9/19/20872719/green-new-deal-infrastructure-design>.

It takes no imagination to see that implementing those programs is going to involve massive transactions and inevitable disputes. The works of the Tennessee Valley Authority (“TVA”) or the development of the Interstate Highway system will be modest in comparison.⁵⁹

What is not abundant are paying clients—the force that propels and directs the legal profession. The legal profession is almost completely reactive, waiting for someone to engage it with a dispute or a domestic or commercial need. For those reasons, the hallmarks of our legal profession are (1) the fee-for-service model and (2) an adversarial approach to representation.⁶⁰ This results in a binary tendency whereby potential clients are reduced to those who are for or against something and who can pay. This may be good for individual lawyers and firms, but is it inadequate for the profession and harmful to society.

The adversarial fee-for-service models are not going to go away, but they can be augmented. After all, the law is not the only profession that relies on clients. In the realm of climate and ecosystem management, what planners, engineers, architects, and scientists are doing better than lawyers is looking for alternative, broader ways of providing services that produce immediate value while positioning themselves for future work. To put it succinctly, they are comfortable working with diverse groups of stakeholders, and then using their expertise to generate new work, often with a public interest focus. Lawyers can do that, too. Any ecosystem restoration or climate adaptation plan that does not address private and public property rights, governmental structure and authorizations, and dispute resolution is not really a plan that can be implemented, yet that is often exactly what happens.

The Everglades, coastal Louisiana, and New Orleans urban water plans mentioned earlier are good examples of how it can be done better.⁶¹ Planning grants and program authorizations are creating significant work opportunities

⁵⁹ The TVA was one of the signature programs for President’s Franklin Roosevelt’s New Deal. The TVA was created in 1933 as independent public corporation charged with improving the physical, economic and social development of one of the most remote and economically depressed regions of the country. See *Tennessee Valley Authority Act 1933*, NAT’L ARCHIVES (Feb. 8, 2022), <https://www.archives.gov/milestone-documents/tennessee-valley-authority-act>. The Interstate Highway System (created as the National Defense Highway System) was an outgrowth of World War II when the need to improve the movement of people and material across the country became clear. See *National Interstate and Defense Highways Act (1956)*, NAT’L ARCHIVES (Feb. 8, 2022), <https://www.archives.gov/milestone-documents/national-interstate-and-defense-highways-act>. Both of these programs required massive, coordinated investments that had wide ranging impacts on the environment, communities and economies.

⁶⁰ See Shai Agmon, *Undercutting Justice—Why Legal Representation Should Not Be Allocated by the Market*, 20 POL., PHIL. & ECON. 99, 100–02 (2020); see also Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. POL’Y ANALYSIS & MGMT. 369, 372 (1991).

⁶¹ See *Comprehensive Everglades Restoration Plan (CERP)*, NAT’L PARK SERV., <https://www.nps.gov/ever/learn/nature/ceerp.htm> (last updated June 2, 2021); see also LA. CPRA, LOUISIANA’S COMPREHENSIVE MASTER PLAN FOR A SUSTAINABLE COAST ES-2 (2017); WAGGONER & BALL, GREATER NEW ORLEANS URBAN WATER PLAN 13 (2013).

that help shape things like climate change adaptation options.⁶² By way of illustration, Rebuild by Design (New York and New Jersey post Hurricane Sandy)⁶³, Changing Course (focused on saving the Mississippi River's delta)⁶⁴, and the Tulane University Nutrient Reduction Challenge⁶⁵ were design competitions that put real dollars on the table to engage talent pools that might not otherwise have an incentive to get involved. Each was successful in attracting impressive multidisciplinary teams — including some with lawyers, which is evidence that it can be done. However, the level of participation by private law firms was much smaller than that of design and engineering firms likely because these firms do not seem to even know these opportunities exist.⁶⁶

C. The Timing Dilemma

The third dilemma that keeps the bar from engaging robustly in adapting to climate change is timing. Every lawyer is trained to look at prospective work through the lens of time. This involves considerations such as whether the matter is ripe for consideration and whether it is being brought in a timely manner. For traditional work, those considerations are entirely appropriate, but when it comes to dealing with climate scale issues, it will not work. By the time rights and injuries have crystallized to the point of justiciability, it will probably be too late to do much, and the remedies will be extremely limited. Even outside of the dispute resolution context, before a lawyer can help a client respond to a contracting opportunity that grows out of one of these mega adaptation programs, the scope of the engagement is already set, and the lawyering will be defined by the interest of a single client. So much more is needed because entire communities, businesses, and ecosystems are in a race against the clock.

⁶² *Funding Opportunities*, U.S. CLIMATE RESILIENCE TOOLKIT, <https://toolkit.climate.gov/content/funding-opportunities> (last modified Feb. 10, 2022).

⁶³ This design competition was launched in 2012 by the Hurricane Sandy Rebuilding Task Force to encourage the development of communities that are more resilient to future storms and climate change related threats. *Rebuild by Design*, U.S. DEP'T HOUS. & URB. DEV., <https://www.hud.gov/sandyrebuilding/rebuildbydesign> (last visited Mar. 14, 2022).

⁶⁴ This design competition was catalyzed by lawyers and others at the Environmental Defense Fund to generate more creative and informed ideas for re-establishing a semblance of sustainability to the Lower Mississippi River Delta with the aim of informing the development of Louisiana's 2017 Comprehensive Master Plan for Coastal Protection and Restoration. *Navigating the Future of the Lower Mississippi River Delta*, CHANGING COURSE, <http://changingcourse.us/> (last visited Mar. 21, 2022).

⁶⁵ This challenge run by Tulane University offered a \$1 million prize for the development of techniques that could be applied at scale without reducing crop yield to reduce nutrient runoff that contributes to water quality degradation and hypoxia. The prize was awarded in 2017. The author was one of the architects of this prize. *Nitrogen Reduction Challenge*, PHYLLIS M. TAYLOR CTR. SOC. INNOVATION & DESIGN THINKING, <https://taylor.tulane.edu/nitrogen-reduction-challenge/> (last visited Mar. 21, 2022).

⁶⁶ See generally Hurricane Sandy Rebuilding Task Force, *Rebuild by Design*, U.S. DEP'T. OF HOUS. & URB. DEV., <https://www.hud.gov/sandyrebuilding/rebuildbydesign> (last visited Mar. 14, 2022); *Navigating the Future of the Lower Mississippi River Delta*, *supra* note 64.

It may seem that dollars and talent are the finite resources that define what is done and what is not, but that is not true. Those are in ample supply, albeit not allocated as they will need to be. Time is what matters most. Today's best technically sound options may be utterly useless—or worse—if deployed too late. The conventional belief that the alternative to doing something new is that things will stay the same does not hold in the case of climate change and sea-level rise. The alternative in those cases is that things get worse—much worse.

Anything that helps get options, decisions, and actions sooner should be prized, which is why the legal dimensions of such plans are so important. Presently, many legal aspects of climate and ecosystem adaptation program development, such as framing alternatives, consideration of property and cultural rights, and the nature and extent of implementing entities' jurisdiction and capacity—are handled in the advanced planning and implementation phase, which often leads to delays and conflicts that could have been anticipated and mitigated much earlier.⁶⁷ It is often policy to do so in order to hasten the development of plans.⁶⁸ That sort of expedience can be illusory. Imagine a “buyer” engaging an architect and landscaper to develop a plan for a house that is not under contract, has had no title survey done, and for which there is no identified source of funding. No lawyer would advise that approach to a prospective home buyer, but it prevails every day in the realm of public works and climate planning, where it contributes to delays and cost escalation.

Those delays do not go unnoticed and often result in blaming public engagement, environmental analysis, and judicial oversight.⁶⁹ The criticisms deserve consideration but generally miss the mark. More often, the cause of delays is the understaffing and underfunding of agencies and the manner in which things are sequenced. One should keep in mind that getting to the wrong decision sooner is no better than getting to the right decision too late for it to matter. The legal profession could pay far more attention to this dilemma than it does. It is well-positioned to make timely, purpose-driven decision-making a public priority. The time it buys also just might be the time

⁶⁷ Jeremy G. Carter et al., *Climate Change and the City: Building Capacity for Urban Adaptation*, 95 PROGRESS PLAN. 1, 7, 29, 37 (2015).

⁶⁸ See, e.g., OFF. OF ENV'T JUST., EPA, ENVIRONMENTAL JUSTICE IN THE PERMITTING PROCESS: A REPORT FROM THE PUBLIC MEETING ON ENVIRONMENTAL PERMITTING CONVENED BY THE NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL, ARLINGTON, VIRGINIA — NOVEMBER 30-DECEMBER 2, 1999, 31 (1999), <https://www.epa.gov/sites/default/files/2015-02/documents/permit-recom-report-0700.pdf>.

⁶⁹ See, e.g., Daniel R. Mandelker, *The National Environmental Policy Act: A Review of Its Experience and Problems*, 32 WASH. UNIV. J. L. & POL'Y 293, 294–96 (2010) (discussing the criticisms of the National Environmental Policy Act).

its conventional clients are going to need to develop their best adaptation options.

CONCLUSION

Rising seas and climate change will impact almost every person and community in the United States. Just what those impacts will be and how the burdens and benefits will be distributed will vary depending on a number of factors, one of which is the degree to which the changes are anticipated and planned. The focus of many adaptation conversations and plans is on how those changes will affect the geophysical, ecologic, and human landscapes. That is entirely understandable and appropriate, but it is incomplete. While not obvious to many observers, the legal landscape and dimensions of a place are every bit as important and real as the physical and human dimensions.

Knowing who has what rights and duties and who controls property and for what purposes matters. Knowing who makes decisions that affect a place matters. Knowing who has the jurisdiction and authority to take—or obstruct—action matters. Knowing all of these things is important to making plans that can work, yet they are all too often given short shrift.

That lack of attention is because of the fact that most of the undeniably talented people who develop these plans do not have the training or frames of reference to identify and address them. This void exists mostly because the legal profession has not seen this as a field ready for its attention. That needs to change. *Pro bono* services and public interest programs have made important contributions but they cannot meet this need, nor can the relatively few practitioners and academics that crafted roles for themselves in this field.

Dealing with the looming impacts of climate and sea-level change is going to require the best of the legal profession and the engagement of almost every aspect of practice. This is not just about crafting plans and programs; it is about how we align the legal architecture that defines our society with the scale and pace of change that is unfolding now. How the profession responds to this challenge will go a long way in determining how we will be judged as a people and a profession.

This page left intentionally blank.