

## HOW ONLINE LEARNING CAN HELP ADDRESS THREE PERSISTENT PROBLEMS IN LEGAL EDUCATION

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### I. INTRODUCTION

Over the last decade in the United States there has been an unfolding crisis in legal education. This has had some elements of a classic identity crisis, where the machinery of legal education has lost a strong connection to its mission and purpose. Critics of legal education have not hesitated to point this out, with some strident criticism online and in the mainstream press.<sup>1</sup> At the same time, in 2009, the cost of legal education increased while law firms reduced their hiring in the economic downturn, causing law school employment outcomes to become depressed.<sup>2</sup> As a

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1. See, e.g., Lincoln Caplan, *An Existential Crisis for Law Schools*, N.Y. TIMES (July 14, 2012), <http://www.nytimes.com/2012/07/15/opinion/sunday/an-existential-crisis-for-law-schools.html>; David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES (July 16, 2011), <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html>. See generally Paul Campos, *Inside the Law School Scam*, BLOGSPOT, <http://insidethelawschoolscam.blogspot.com> (last updated Mar. 4, 2015, 2:49 PM) (arguing there is a genuine crisis in legal education because law schools are turning out too many graduates at far too high of a cost).

2. A 2018 Gallup-Access Lex report revealed that less than half of post-recession law school graduates had “good jobs” waiting for them after graduation. GALLUP-ACCESSLEX REPORT, EXAMINING VALUE, MEASURING ENGAGEMENT: A NATIONAL STUDY OF THE LONG-TERM OUTCOMES OF A LAW DEGREE, 4 (2018), [http://www.abajournal.com/files/Access-Lex\\_report\\_1.17-2018.pdf](http://www.abajournal.com/files/Access-Lex_report_1.17-2018.pdf). A 2018 NALP report found that the number of jobs found by law

result of all of these dynamics, law school applications dropped dramatically between 2010 and 2015.

Historically, industries that are in crisis rarely recognize it while it is happening,<sup>3</sup> but this one has been hard to miss. Is there another industry that experienced a thirty-six percent reduction in demand for its primary product<sup>4</sup> and survived?<sup>5</sup> The precipitous drop in applications captured everyone's attention, as did the reduced demand for our graduates. But our folly was thinking this was something new – that restructuring in a downturn had never happened before. Of course it happens all the time in many industries.<sup>6</sup> It is painful, certainly, but not new.

In response, many schools downsized their class size, and some faculty members were let go—often senior faculty with generous buyouts into early retirement. But so far, legal education as a whole has survived fairly well. There has been a merger of two schools (William Mitchell College of Law and Hamline University, now Mitchell Hamline School

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school graduates had continued to fall, with the data showing that “for the third year in a row the actual number of jobs obtained was flat or went down in virtually every sector except the largest law firms of more than 500 lawyers.” Even though “the largest law firms of more than 500 lawyers hired more law school graduates than at any time since the recession, the number of entry-level jobs at those firms is still off by nearly 600 positions compared with the peak hiring measured with the Class of 2008.” NALP, EMPLOYMENT FOR THE CLASS OF 2017—SELECTED FINDINGS 2, (2018), <https://www.nalp.org/uploads/SelectedFindingsClassof2017.pdf>.

3. CLAYTON M. CHRISTENSEN, *THE INNOVATOR'S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL* xx (Harvard Bus. Sch. Press, ed. 1997).

4. Bernard A. Burke, Jerome M. Organ, & Emma B. Raisel, *Competitive Coping Strategies in the American Legal Academy: An Empirical Study*, 19 NEV. L. REV. 583 (forthcoming 2019); David I. C. Thomson & Stephen Daniels, *If You Build It, They Will Come: What Students Say About Experiential Learning*, 16 FAMU L. REV. (forthcoming 2019). See *Archive: 2000–2015 ABA End-of-Year Summaries—Applicants, Admitted Applicants & Applications*, LSAC, <https://www.lsac.org/archive-2000-2015-aba-end-year-summaries-applicants-admitted-applicants-applications> (last visited Sept. 12, 2019).

5. Examples of industry failure when demand for its main product falls are certainly not uncommon. See, e.g., Greg Satell, *A Look Back at Why Blockbuster Really Failed and Why it Didn't Have To*, FORBES (Sept. 4, 2014) (outlining the collapse of the video rental industry), <https://www.forbes.com/sites/gregsatell/2014/09/05/a-look-back-at-why-blockbuster-really-failed-and-why-it-didnt-have-to/#5c1ae83f1d64>.

6. For example, the United States is currently in the midst of a restructuring of its retail industry, caused in part by the rise in online shopping. See Derek Thompson, *What in the World is Causing the Retail Meltdown of 2017?*, THE ATLANTIC (Apr. 10, 2017), <https://www.theatlantic.com/business/archive/2017/04/retail-meltdown-of-2017/522384/>. In addition to retail, the oil and gas, healthcare, and shipping industries are facing significant changes. See *Restructuring Activity to Rise in 2017*, OIL & GAS J. (Feb. 20, 2017), <http://www.ogfj.com/articles/print/volume-14/issue-2/features/restructuring-activity-to-rise-in-2017.html>; Ryan Eagle, *Restructuring in the Shipping Industry*, FERRIER HODGSON SECTOR FOCUS (Aug. 2014), <https://www.ferrierhodgson.com/au/~media/Ferrier/Files/Documents/Other/SectorFocus.pdf>.

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of Law),<sup>7</sup> and three closures of lower tier schools (Whittier Law School, Indiana Tech and Valparaiso Law Schools),<sup>8</sup> which were already struggling before the downturn.<sup>9</sup>

Whether in industry or education, it is fashionable to predict the latest earth-shattering change looming just out of sight on the horizon. A recent example has been the potential impact of Artificial Intelligence (AI) on the practice of law, and by implication, legal education. It is certainly true that AI is having an impact on many industries, and it will impact law as well.<sup>10</sup> But the dystopian visions of the “Robot Lawyer” overseeing a vastly restructured legal landscape, are, in the view of this author, likely overblown.<sup>11</sup> We should be mindful that AI has a long history—at least forty years long—of predicted impact that mostly has never come to pass.<sup>12</sup>

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7. *US News* data revealed a sharp plunge in law school applicants between 2008 and 2016, with the top fourteen ranked law schools seeing their applications decrease by 20.6%, with the remaining law schools seeing their average number of applicants decrease 52.3% during the same period. Ilana Kowarski, *Less Competitive Law School Admissions a Boon for Applicants*, U.S. NEWS & WORLD REPORT (Aug. 8, 2017), <https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2017-08-08/law-school-admissions-less-competitive-than-2008>.

8. Whittier Law School in Costa Mesa, California, announced in April 2017 that it will close, making it the first ABA-accredited law school to do so. Elizabeth Olson, *Whittier Law School Says It Will Shut Down*, N.Y. TIMES (Apr. 19, 2017), [https://www.nytimes.com/2017/04/19/business/dealbook/whittier-law-school-to-close.html?\\_r=0](https://www.nytimes.com/2017/04/19/business/dealbook/whittier-law-school-to-close.html?_r=0). Indiana Tech Law School, which had provisional accreditation from the ABA, had previously announced that it will close on June 30, 2017. *Id.*; Staci Zaretsky, *Indiana Tech Law School to Close, Citing \$20 Million in Losses*, ABOVE THE LAW (Oct. 31, 2016), <http://abovethelaw.com/2016/10/indiana-tech-law-school-to-close-citing-20-million-in-losses/>. Valparaiso Law School announced on October 29, 2018 that it will close and implement a “teach out” process for its remaining students. Stephanie Francis Ward, *Valpo Law School Closing; Teach-out Plan in the Works*, A.B.A. J., (Oct. 30, 2018) [http://www.abajournal.com/news/article/Valpo\\_law\\_school\\_closing\\_teach\\_out\\_plan\\_in\\_the\\_works](http://www.abajournal.com/news/article/Valpo_law_school_closing_teach_out_plan_in_the_works).

9. *Id.*; Olson, *supra* note 8.

10. See, e.g., Julie Sobowale, *How Artificial Intelligence is Transforming the Legal Profession*, A.B.A. J. (Apr. 2016), [http://www.abajournal.com/magazine/article/how\\_artificial\\_intelligence\\_is\\_transforming\\_the\\_legal\\_profession](http://www.abajournal.com/magazine/article/how_artificial_intelligence_is_transforming_the_legal_profession).

11. Others agree, at least for now. See Steve Lohr, *A.I. Is Doing Legal Work. But it Won't Replace Lawyers. Yet.*, N.Y. TIMES (Mar. 29, 2017), <https://www.nytimes.com/2017/03/19/technology/lawyers-artificial-intelligence.html>.

12. See Tanya Lewis, *A Brief History of Artificial Intelligence*, LIVESCIENCE (Dec. 4, 2014), <https://www.livescience.com/49007-history-of-artificial-intelligence.html> (The field of AI was formally founded in 1956, but has experienced many intervals of inactivity; research and funding have been more steady since 1997 when IBM's computer, Deep Blue, defeated chess champion Garry Kasparov). See also Lee Bell, *AI Will Play a Vital Role in our Future, Just Don't Expect Robot Butlers*, THE INQUIRER (Mar. 14, 2014), <https://www.theinquirer.net/inquirer/opinion/2334325/will-robots-play-a-vital-role-in-our-future> (noting that AI software “is running underneath all sorts of modern technological tasks from autopilot to

It does seem more than likely that some repetitive aspects of legal practice will be improved and made more efficient with technology, and indeed this has already happened in the area of litigation document discovery. Over the last decade, there has been an explosion in the discovery of relevant documents in electronic format, and technology has made a significant improvement in speed and efficiency in this space. In particular, the application of Technology Assisted Review (TAR) in litigation is making significant improvements to document productions in electronic format, and the application of machine learning will likely continue to do so.<sup>13</sup>

But this shift, and others like it to come, is more likely to “shift up” the types of work that lawyers do, not gut the substance. That is, lawyers in the future will rely on intelligent assistants, which will allow them to focus on more substantively complex work that the multivariate business world of the future will likely require. Lawyers will not be replaced by robots, but rather work alongside them doing more advanced work than is typical today. Legal education will need to adjust to these changes to some degree, but the primary skills that law school teaches will still be useful and necessary in a legal world assisted by Artificial Intelligence.

It should tell us something that despite many of these realities and concerns, legal education continues to muddle through much as it always has. True, many schools survived, in a somewhat improved form post-crisis: many schools have finally put greater focus on practical legal education, as it seemed to be what was needed to attract students, but legal education as a whole had been criticized for years for being too theoretical.<sup>14</sup> It is good that law schools have made some progress in this part of what they do, but there remain concerns that we will slide back if downsizing solves the immediate crisis, and application numbers improve. Indeed, predictions are that there has been a Trump Effect<sup>15</sup>—where more young people concerned about the state of the political and legal system

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the . . . gyroscope ability of Segways,” but we are far from the long-anticipated “servant droids.”).

13. See, e.g., James A. Sherer et al., *Court Guideposts for the Path to Technology Assisted Review Adoption*, 35 COMPUT. & INTERNET LAW 1 (2018).

14. See, e.g., Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1233 (1991); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992).

15. See Nicholas W. Allard, *An Unexpected Trump Effect: Lawyer as Hero*, THE HILL (Feb. 24, 2017, 2:20 PM), <http://thehill.com/blogs/pundits-blog/the-judiciary/321051-an-unexpected-trump-effect-lawyer-as-hero>; Karen Sloan, *The ‘Trump Bump’ for Law Schools is (Kind of) a Thing*, THE NAT’L L. J. (Mar. 20, 2017, 8:48 AM), <http://www.law.com/sites/almstaff/2017/03/20/the-trump-bump-for-law-schools-is-kind-of-a-thing/>.

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in the United States will be inspired to apply to law school. If the pressure of competition for the best students eases, we should watch out for backsliding on practical education and renewed arguments for its reduction.<sup>16</sup>

### II. THREE PERSISTENT PROBLEMS

Underneath the crisis-talk surrounding reduced applications and declining enrollments and potential improvement of experiential learning and practical education, are three long-standing criticisms of legal education pre-dating the current situation. They remain critically important because they have implications for legal education and how we need to think about its future. For many years—well, well before the recent crisis—legal education has suffered from three significant persistent and interrelated problems. They are:

1) the often overlooked incongruity of the fact that some of our graduates struggle to find employment while many in our society lack legal representation;<sup>17</sup>

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16. Indeed, this has already started. See Douglas A. Kahn, *The Downside of Requiring Experiential Learning in Law School*, 31 PROB. & PROP. 38 (2017). For a critique of the Kahn article, see Deborah Merritt, *What do Students Do in Clinics?*, LAW SCHOOL CAFE (May 17, 2017), <http://www.lawschoolcafe.org/2017/05/17/what-do-students-do-in-clinics/>. Defenses of traditional law school pedagogy have sprung up in recent years. See Jay Sterling Silver, *The Case against Tamanaha's Motel 6 Model of Legal Education*, 60 UCLA L. REV. DISCOURSE 50 (2012) (defending the traditional model of legal education); Jamie R. Abrams, *Reframing the Socratic Method*, 64 J. LEGAL EDUC. 562 (2015) (outlining the advantages of the Socratic Method over several innovations in legal education, including experiential methods such as clinics); Jonathan K. Van Patten, *Skills for Law Students*, 61 S.D. L. REV. 165, (2016) (describing the Socratic method and traditional legal pedagogy as excellent for developing foundational legal skills); Otis Grant, *Teaching Law Effectively with the Socratic Method: The Case for a Psychodynamic Metacognition*, 58 S. TEX. L. REV. 399 (2017) (defending the use of the Socratic Method based on psychodynamic psychology). Critiques of practice-focused legal education have a long history. See ROBERT J. KACZOROWSKI, *FORDHAM UNIVERSITY SCHOOL OF LAW: A HISTORY* 21 (Fordham Univ. Press, ed., 1st ed. 2012) (quoting Judge Victor J. Dowling in 1911, praising Fordham Law School's curriculum for its historical and philosophical courses, as necessary for a student to "acquire thoroughness in the scientific principles of the law."). In total, Kaczorowski's book reinforces the view that philosophical and historical study are at the heart of a legal education, rather than a practice-focused education that reduces the legal profession "to a trade," and the lawyer to a "clerk." *Id.* at 18.

17. ABA COMM'N ON THE FUTURE OF LEGAL SERV., REPORT ON THE FUTURE OF LEGAL SERVS. IN THE UNITED STATES 11, 16 (2016) (among the report's findings are these: "Despite sustained efforts to expand the public's access to legal services, significant unmet needs persist," and "[m]any lawyers, especially recent law graduates, are un- or underemployed despite the significant unmet need for legal services."), <http://abafuturesreport.com/#1>. The unmet need for legal services in the United States has been well-documented. See LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 14 (2017) (revealing that "eighty-six percent of the civil legal problems faced by low-income Americans in a given year receive inadequate or no legal help"),

2) the rising cost of legal education and high student debt to pay for it;<sup>18</sup> and

3) the embarrassingly low levels of diversity in the upper ranks of the legal profession.<sup>19</sup>

We should be ashamed, frankly, about how little progress we have made in addressing these well-known and long-identified problems. They have been nothing less than moral failings and may also have contributed to the drop in applications we have seen in recent years, as the data revealing these failings came out into the open. Graduating students with large debt loads unable to do what they went to law school to do—or unable to pass the bar and become lawyers—raises moral concerns about whether schools are misrepresenting what they are selling at such a high cost. Further, not being honest with ourselves about diversity in the profession and making such little progress on the issue is also a moral failure of legal education of a different kind. There have been “blue ribbon” panels and reports of the bar associations,<sup>20</sup> numerous conferences on these questions,<sup>21</sup> and much hand wringing, but only modest gains have been

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<https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf>. See also Robert Grey Jr., *There is No Justice as Long as Millions Lack Meaningful Access to it*, ABA JOURNAL (Aug. 30, 2018), [http://www.abajournal.com/news/article/there\\_is\\_no\\_justice\\_as\\_long\\_as\\_millions\\_lack\\_meaningful\\_access\\_to\\_it](http://www.abajournal.com/news/article/there_is_no_justice_as_long_as_millions_lack_meaningful_access_to_it).

18. ABA TASK FORCE ON THE FIN. OF LEGAL EDUC., FINAL REPORT 7 (2015) (“Using the higher education price index . . . private law school tuition increased 29% between AY1999-00 and AY2014-15, and public law school in-state tuition increased 104%. Using the familiar consumer price index . . . the increases were 46% and 132%, respectively.”).

19. ABA PRESIDENTIAL INITIATIVE COMM’N ON DIVERSITY, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 13 (2010) (noting that while diversity has improved somewhat in the “lower ranks” of the profession, “diversity remains thin in the ‘higher ranks’ of law firm managing and equity partners, general counsels, state or federal appellate judges, and tenured law professors.”). A 2019 ABA survey revealed that women make up only 36% of the legal profession. *ABA National Lawyer Population Survey: 10-Year Trend in Lawyer Demographics (2017)*, AM. BAR ASS’N, [https://www.americanbar.org/content/dam/aba/administrative/market\\_research/national-lawyer-population-10-year-demographics-revised.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-10-year-demographics-revised.authcheckdam.pdf) (last visited Sept. 13, 2019) (2017 figures show that 35% of active attorneys were women and 15% were racial or ethnic minorities). Racial and ethnic diversity in the legal profession is also poor. *Id.* In 2019 only 5% of lawyers in the United States identified as black or African American and only 5% identified as Hispanic or Latino. *Id.* Attorneys identifying as Asian comprised only around 2% of U.S. attorneys, and attorneys identifying as Native American are also underrepresented at around 1%. *Id.*

20. See, e.g., NALP, 2016 REPORT ON DIVERSITY IN U.S. LAW FIRMS (2017); ABA COMMISS’N ON THE FUTURE OF LEGAL SERVS., *supra* note 17; ABA TASK FORCE ON THE FIN. OF LEGAL EDUC., *supra* note 18; ILL. STATE BAR ASS’N, FINAL REPORT, FINDINGS & RECOMMENDATIONS ON THE IMPACT OF LAW SCHOOL DEBT ON THE DELIVERY OF LEGAL SERVICES (2013); ABA PRESIDENTIAL INITIATIVE COMMISS’N ON DIVERSITY, *supra* note 19.

21. See, e.g., Symposium, *State of Diversity and Inclusion in the Legal Profession* (Institute for Inclusion in the Legal Profession, 2017), <https://perma.cc/LED5-AT8U>; Brian McNeill, *Conference to Focus on Increasing Diversity in the Legal Profession*, UNIV. OF VA.

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made over the years.

Less than stellar employment outcomes for law school graduates likely made significant contribution to the drop in applications. Until 2012, law schools had been less than forthcoming about their employment rates, but the American Bar Association (ABA) put a stop to that,<sup>22</sup> and with full reporting, it turns out that—at least below the top fifty schools (leaving roughly 150 schools)—our employment outcomes were not very good. While they have improved recently, there are many law schools that remain with “J.D. required” or “J.D. Advantaged” employment rates in the fifty to sixty percent range.<sup>23</sup>

This fact seems completely at odds with the long-known non-consumption of legal services problem.<sup>24</sup> If there are so many who need lawyers, why is our employment rate so low? When so many of our students come to law school wanting to address unmet legal needs, why do they gravitate to other jobs after law school?

The answer to this of course is quite obvious: the cost of legal education is so high that our graduates often carry substantial debt loads after law school. In just the last fifteen years, average debt loads for law graduates have more than doubled, and routinely our students graduate with

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SCHOOL OF LAW (Oct. 27, 2011), [http://content.law.virginia.edu/news/2011\\_fall/diversity\\_conference.htm](http://content.law.virginia.edu/news/2011_fall/diversity_conference.htm); *Increasing Diversity in the Legal Profession Conference*, BAR ASS'N OF SAN FRANCISCO (Mar. 22, 2013), <http://www.sfbbar.org/calendar/eventdetail.aspx?id=X130050/X130050>.

22. *Updated Statement of the ABA's Section of Legal Education and Admissions to the Bar Regarding Collection of New Job Placement Data*, ABA (Mar. 15, 2012), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/2012\\_3\\_15\\_updated\\_statement\\_regarding\\_employment\\_data.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/2012_3_15_updated_statement_regarding_employment_data.authcheckdam.pdf). See also Rick Seltzer, *Law Schools Flagged for Job Data*, INSIDE HIGHER ED (Nov. 1, 2016), <https://www.insidehighered.com/news/2016/11/01/initial-audit-finds-flaws-some-law-school-employment-reporting-practices>; Kellie Woodhouse, *ABA Tightens Rules on Employment Reporting*, INSIDE HIGHER ED (Aug. 4, 2015), <https://www.insidehighered.com/quicktakes/2015/08/04/aba-tightens-rules-employment-reporting>.

23. *2017 Raw Data Law School Rankings*, INTERNET LEGAL RESEARCH GROUP, <https://www.ilrg.com/rankings/law/index/1/desc/EmployGrad> (last visited Nov. 22, 2019) (employment rates for 2014 graduates by school). Detailed employment information by school is available from the ABA's employment database, [https://www.americanbar.org/groups/legal\\_education/resources/statistics.html](https://www.americanbar.org/groups/legal_education/resources/statistics.html).

24. ABA COMMISSION ON THE FUTURE OF LEGAL SERVICES, *supra* note 17, at 11 (“Most people living in poverty, and the majority of moderate-income individuals, do not receive the legal help they need.”). Jennifer S. Bard & Larry Cunningham, *The Legal Profession is Failing Low-income and Middle-class people. Let's Fix That*. WASH. POST (June 5, 2017), [https://www.washingtonpost.com/opinions/the-legal-profession-is-failing-low-income-and-middle-class-people-lets-fix-that/2017/06/02/e266200a-246b-11e7-bb9d-8cd6118e1409\\_story.html?utm\\_term=.a834881b20ae](https://www.washingtonpost.com/opinions/the-legal-profession-is-failing-low-income-and-middle-class-people-lets-fix-that/2017/06/02/e266200a-246b-11e7-bb9d-8cd6118e1409_story.html?utm_term=.a834881b20ae).

in excess of \$130,000 in debt.<sup>25</sup> Debt loads such as these limit what a recent law school graduate can do. Public interest work—which many law students come to law school to do—is either financially impossible, or if they do that work (such as work in a Public Defender’s office) they have to stay there for ten to twenty years in exchange for income-based repayment and loan forgiveness opportunities.<sup>26</sup> Today, there are looming concerns that some of these loan repayment opportunities may soon be limited in the United States,<sup>27</sup> which may further depress applications to law schools.

As for the diversity problem, while political appointments to judge-ships in the United States have become more diverse in the last two decades,<sup>28</sup> minority representation in medium to large law firms has persistently lagged our increasingly diverse population.<sup>29</sup> An instructive

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25. Data from the ABA’s 2013 Annual Questionnaire to law schools indicate that during the 2012–2013 academic year, law students in public institutions borrowed an average of \$32,289 and those in private institutions an average of \$44,094. These amounts are for a single year. *Statistics Archives*, ABA, [https://www.americanbar.org/groups/legal\\_education/resources/statistics/statistics-archives](https://www.americanbar.org/groups/legal_education/resources/statistics/statistics-archives) (follow “Average Amount Borrowed” hyperlink) (last visited Sept. 12, 2019). However, many law students borrow far more money during the course of their education. See *Which Law School Graduates Have the Most Debt?*, U.S. NEWS & WORLD REP., <https://www.usnews.com/best-graduate-schools/top-law-schools/grad-debt-rankings> (last visited Sept. 12, 2019).

26. The Public Service Loan Forgiveness Program forgives the balance on direct student loans after the borrower has made 120 “qualifying monthly payments” while working for a “qualifying employer,” usually a government or non-profit organization. *Public Service Loan Forgiveness*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service> (last visited Nov. 22, 2019). Income-driven repayment programs set a graduate’s monthly student loan payment at an amount based on income and family size. *Income-Driven Plans*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven> (last visited Feb. 18, 2019).

27. Maria Danilova, *Trump Budget Seeks End to Subsidized Student Loans, Forgiveness*, DENVER POST (May 23, 2017), <https://www.denverpost.com/2017/05/23/trump-budget-student-loans-forgiveness/>; Karen Sloan, *Trump’s Bid to Axe Public Service Loan Forgiveness Would Sever Lifeline, Opponents Say* (May 24, 2017), <http://www.law.com/sites/almstaff/2017/05/24/trumps-bid-to-axe-public-service-loan-forgiveness-would-sever-lifeline-opponents-say/>.

28. See, e.g., David Ingram, *Obama’s Diverse Bench*, NAT’L L.J. (Jan. 24, 2011), <https://www.law.com/nationallawjournal/almID/1202478921020/obamas-diverse-bench/>; see also Mark D. Killian, *Bush Made Diversity in Judicial Appointments a Priority*, FLA. B. NEWS, Oct. 2006, at 5 (discussing Governor Jeb Bush’s appointment of 103 women, forty-six Hispanic and thirty-three African American judges during his two terms in office). But see Maida R. Milone, *States’ High Courts Sorely Lacking in Diversity*, NAT’L L.J. (June 6, 2016), <https://www.law.com/nationallawjournal/almID/1202759242829/states-high-courts-sorely-lacking-in-diversity/> (stating that twenty five states have all-white Supreme Court benches).

29. See, e.g., *Representation of Women and Minorities Among Equity Partners has Increased Only Slightly*, NAT’L ASS’N FOR LAW PLACEMENT, <http://www.nalp.org/0417research>, (last visited Sept. 13, 2019) (2016 figures from NALP show that 18.1% of law firm equity partners were women and 5.8% were racial or ethnic minorities); *ABA National Lawyer Population Survey: 10-Year Trend in Lawyer Demographics (2017)*, AM. BAR ASS’N,



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example can be found in a recent issue of the Law Week Colorado,<sup>30</sup> which on its cover touted the forty-four “New Partners” who had “Climbed the Ladder” at Denver area-law firms.

Despite nearly two decades of efforts in the two Colorado law schools to support minority admissions and a minority first year law student (“1L”) firm clerkship, of the forty-four new partners in Denver this year, only one was African-American. And he was Penfield Tate, a long-time legislator and well-known connector of the powerful in Denver.<sup>31</sup> Before re-joining legal practice at Kutak Rock in the Denver office, Mr. Tate was a former state senator and state representative, a former aide to Mayor Federico Peña and Director of Administration for Governor Roy Romer.<sup>32</sup> There is no doubt that Mr. Tate is a fine man, and that he is well regarded throughout the Denver legal community, and rightly so. But he is not exactly someone who had just finished “climbing the ladder” to partnership. His inclusion in the listing was a stretch, and damning in and of itself. While this is just one example, the data on minority representation in the bar cited here indicates that it is not an isolated one.

So, we have three intractable problems in legal education: unmet legal needs, the high cost of legal education, and legal communities that do not reflect the diverse society that surrounds them.

### III. ONE SOLUTION

There is, fortunately, something we can do that would go a long way toward addressing these persistent and seemingly unsolvable problems. This article proposes that many law schools transition most of the first year of school to an online teaching environment and deliver it for less cost, and do away with the Law School Admission Test (LSAT) as a barrier to entry.<sup>33</sup>

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[https://www.americanbar.org/content/dam/aba/administrative/market\\_research/national-lawyer-population-10-year-demographics-revised.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-10-year-demographics-revised.authcheckdam.pdf) (last visited Sept. 13, 2019) (2017 figures show that 35% of active attorneys were women and 15% were racial or ethnic minorities).

30. See Law Week Contributor, *New Partners*, L. WK. COLO. (Feb. 24, 2017), <https://law-weekcolorado.com/2017/02/new-partners/>.

31. See *id.*

32. See *id.* See also *Penfield W. Tate III*, THE HIST. MAKERS (Sept. 25, 2016), <https://www.thehistorymakers.org/biography/penfield-w-tate-iii>.

33. The idea of doing away with the LSAT would have been unthinkable only a few years ago. But in February 2016, the University of Arizona James E. Rogers College of Law announced that it will accept either the LSAT or the Graduate Record Exam (GRE), and in March 2017, Harvard Law School announced that it will also accept the GRE. See Karen Sloan, *Harvard Becomes Second Law School to Accept GRE for Admission*, NAT'L L.J. (Mar. 8, 2017), <http://www.nationallawjournal.com/id=1202780869877/Harvard-Becomes-Second-Law-School-to-Accept-GRE-for-Admission>. Northwestern University's Pritzker School

We can accomplish most of the outcomes for first year in an online—or more appropriately hybrid—learning environment. Learning outcomes for online environments have been shown to equal or better in-class instruction.<sup>34</sup> Even so, many law professors in law schools today are horrified at this idea and reject it out of hand. Many of them feel that something special happens in the traditional large first year doctrinal classes, but there is little evidence of that.

But the debate about whether we should teach law online is over. Indeed, it has been over for some time, we just may not have noticed. Today the tools, disciplines, and practices of online learning pervade law school courses, whether nominally taught online or not. Whether through a site that offers quizzes on legal subjects, or through a full-featured learning management system which hosts links to myriad supplemental materials for the course, law professors are regularly using interactive and engaging online learning tools to enhance their courses.<sup>35</sup>

With new technology in all spheres we tend to think in binary terms. Yes or no. On or off. All or none. But history teaches us that this is not how technology is adopted,<sup>36</sup> and as a result, it is rarely the most productive way to think of it, and it does little to help us prepare for the new paradigm. This is because, quite simply, we live in a hybrid world, and have for decades. We have cell phones, but we still speak to each other in person or on land lines. We send and receive copious amounts of email, but we still use the phone. We prepare documents with a computer, but we still write notes in longhand. We stream music online, but vinyl records are making a comeback.<sup>37</sup> Legal education is somewhat late to recognize the hybrid nature of our lives, but the future of legal education will

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of Law, another top-ranked law school, is reportedly considering a similar move. See Ally Marotti, *Chicago Law Schools Consider Accepting GRE as Test Alternative to LSAT*, CHI. TRIB. (May 30, 2017), <http://www.chicagotribune.com/business/ct-law-schools-accept-gre-0530-biz-20170530-story.html>.

34. See William R. Slomanson, *Blended Learning: A Flipped Classroom Experiment*, 64 J. LEGAL EDUC. 93, 94–95 (2014) (Meta-analysis done by the U.S. Department of Education of empirical studies found that “students in online learning courses performed better than those receiving exclusively face-to-face instruction.” The analysis also found that students in blended environments, which combine online and face-to-face learning, had stronger learning outcomes than face-to-face teaching).

35. See, e.g., *Resources for TWEN*, THOMSON REUTERS, <https://lawschool.westlaw.com/marketing/display/si/1> (last visited Nov. 10, 2019); *Main Menu*, THE CTR. FOR COMPUTER ASSISTED LEGAL EDUC. (CALI), <https://www.cali.org/> (last visited Nov. 10, 2019).

36. ROBERT FRIEDEL, A CULTURE OF IMPROVEMENT: TECHNOLOGY AND THE WESTERN MILLENNIUM, 3-8 (2007); see DAVID I. C. THOMSON, LAW SCHOOL 2.0: LEGAL EDUCATION FOR A DIGITAL AGE 73–75 (2009).

37. DAVID SAX, REVENGE OF THE ANALOG: REAL THINGS AND WHY THEY MATTER 4 (PublicAffairs, ed., 1st ed. (2017)).

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inevitably be even more hybrid of a learning experience than it already is.

The reality is that most of what is taught in the first year of law school is heavily content based. It is focused on the foundational topics of the law: Contracts, Torts, Property, Civil Procedure, and Criminal Law. Each of these topics has a structure, method, and key principles that every law student needs to learn. These classes are often large—between fifty and eighty students in each.

To learn this information, students typically read cases for each class, which have embedded in them the rules and principles of law. Class time is often spent in a combination of a professor's lecture—interspersed with dialog with a student about what each case illustrates. Over the course of the semester, all the students in the class are supposed to determine the structure and principles embedded in the cases, and prepare for a final exam, which often determines all (or most) of their grade for the course.

It is certainly true that one professor teaching a large number of students is economically efficient, but it was a model designed for efficiency and tuition revenue, not as an ideal model for learning. During a typical class, if one student is the only one on "Call" all the other students are in a passive mode, listening. This is a particularly good example of time spent in class that could be replicated online. In that case, the other students are already "watching" what is going on—they are just watching it in a video stream, rather than in the classroom with the student being questioned. And video has an additional advantage: the student can start and stop the tape and review as they go through it, which is obviously impossible to do in a live class.

It is also certainly true that students learn a lot from each other. That is, in between classes, when they review together concepts they learned in class, this is a helpful—although informal—element of their learning. If they are members of a disciplined study group, this can be even more supportive of their learning. But today, with the application of widely available (and regularly used) technology, none of that sort of 1L "magic" needs to happen in the same physical space. This generation of students is adept—indeed fluent—in the ability to keep in contact with, and learn from, people they mostly know through the numerous social apps that they use on their phones.

So, online learning works, and it can be an effective delivery system for much of the content that is contained in the 1L courses. Moving the 1L year online, particularly if it has some hybrid components and technology-assisted community building, should be successful.

It must be said here that this article does not, in any way, intend to argue that these changes should take place immediately, or all at once, or in every school. There will be, and should be, a period of experimentation. Some schools will lead the way in this, being committed to doing so, or just needing to for various financial reasons or otherwise. It will take at least a decade for this proposal to be implemented widely in law schools, and some schools will have little hybrid course work in the first year, and some will fully maximize the allowable limits imposed by the ABA Accreditation process.

Despite recent movement by the ABA to liberalize the limitations on online legal education, there remains a one third of total law school credits limitation (roughly thirty in most schools) for distance learning, and thus this concept is currently a non-starter.<sup>38</sup> The ABA Standard 306 makes it impossible for a law school that wants to receive or retain its ABA Accreditation.<sup>39</sup> Until August of 2018, there was a fifteen credit limitation for online instruction in all of law school,<sup>40</sup> and a limitation that no law student may take an online course during the *first year* of law school.<sup>41</sup> But what is the basis for banning online learning from the first year? It likely involved a belief that something special happens in the first year of law school—in the physical space—that would be hard or even impossible to replicate online. Even the Carnegie Report refers admiringly to the first year as including the “signature pedagogy” of law school.<sup>42</sup> This is primarily referring to the “Socratic” case method of teaching that law schools have employed for over 100 years.

#### IV. ONLINE LEARNING IN LAW SCHOOL

It is not widely known, but there has been a fully online law school in operation for well over a decade. It is Concord Law School, recently acquired from Kaplan by Purdue University.<sup>43</sup> However, Concord is not

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38. STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. Standard 306(e) (AM. BAR ASS'N 2018) (“A law school may grant a student up to one-third of the credit hours required for the J.D. degree for distance education courses qualifying under this Standard. A law school may grant up to 10 of those credits during the first one-third of a student’s program of legal education.”) [hereinafter 2018–19 ABA STANDARDS].

39. *Id.*

40. *See* STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. Standard 306(e) (AM. BAR ASS'N 2016) [hereinafter cited as 2016 ABA STANDARDS].

41. 2016 ABA STANDARDS, *supra* note 40, Standard 306(f).

42. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 23 (2007).

43. *See* Stephanie Francis Ward, *Purdue Acquires Online-Only Concord Law School*, A.B.A. J. (May 4, 2017), [http://www.abajournal.com/news/article/purdue\\_acquires\\_online-only\\_concord\\_law\\_school/](http://www.abajournal.com/news/article/purdue_acquires_online-only_concord_law_school/).

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an ABA Accredited school, and this limits where its graduates may practice law. But in January of 2015, Mitchell Hamline law school, as part of the merger between those two Minneapolis-based schools, received a waiver from the ABA to develop and test a fully online four year accredited program of legal education.<sup>44</sup> This program is being watched by many in legal education, because if it is successful, and learning outcomes for the program are comparable or better than those for the “live” program they are still operating, we can expect that many other law schools will apply for a similar waiver from the ABA. Note that the Mitchell-Hamline program includes a significant amount of “live” teaching, making it truly a hybrid program of education.

So we already have two fully online 1L programs, with some hybrid elements in one of them. Both of them also include the upper level years of law school (“2L” and “3L”) in a largely online format. This article takes a different approach, suggesting that the upper level years should be mostly in residence at the law school, learning the law in context through simulations and by serving in clinics and externships, with the content of the 1L year provided primarily online.

Now that the ABA allows up to ten credits of “online instruction” (defined as more than one third of the content provided at a distance) in the first year—and thirty overall<sup>45</sup>—the question quickly becomes how to best structure a curriculum to take advantage of that. This article suggests that a larger cohort be admitted to law school in a heavily online format, with a smaller subset of those students being admitted to the second year, which would be a greater in-residence program.

One of the concerns about a heavily online program during the first year is the traditional legal research and writing (“LRW”) program, which in most schools is less content based than the doctrinal courses and places a heavy emphasis on skills training and development. Some of the learning outcomes of LRW are harder to accomplish in a fully or heavily online program.<sup>46</sup> The answer to this concern is to provide an *Introduction* to Legal Writing I & II for one online credit each in the fall and spring

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44. See Maura Lerner, *William Mitchell Welcomes its First Hybrid ‘Online’ Law School Class*, STAR TRIB. (Jan. 12, 2015), <http://www.startribune.com/william-mitchell-welcomes-its-first-hybrid-online-law-school-class/288350831/>.

45. 2016 ABA STANDARDS, *supra* note 40, Standard 306(f).

46. See generally David I. C. Thomson, *Effective Methods for Teaching Legal Writing Online* (Univ. of Denver Strum Coll. of Law Legal Research Paper Series, Working Paper No. 08-17, 2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1159467##](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159467##) (discussing which LRW learning outcomes are difficult to replicate in an online program, and then suggesting remedies for these difficulties).

of the first year, and this course then provides some legal writing experience that 1Ls need to fairly accomplish the first year essay examinations, but saves for the second year more in-person instruction in the traditional LRW pedagogy. This model also allows for students to obtain—or retain—their jobs, thus not having to give up their current employment to attend law school, as most law students currently do.

With these concepts in mind, this is what a hybrid (but heavily online) first year curriculum could look like:

**1L**, 10 credits online, 18 total, low residency

Fall semester:

- Torts (4 online credits) 15% in person, 85% online
- Contracts (4 non-online credits) 67% in person, 33% online
- Intro to Legal Writing I (1 online credit) 15% in person, 85% online

Spring semester:

- Property (4 online credits) 15% in person, 85% online
- Civil Procedure (4 non-online credits) 67% in person, 33% online
- Intro to Legal Writing II (1 online credit) 15% in person, 85% online

At the end of each semester, students would have to pass rigorous examinations in the doctrinal courses, and take a writing test—much like the bar examination’s “performance test”—and pass that as well. Only about half of the cohort would pass these tests, but those that did not would be awarded a Masters in American Law (of some sort), and this could become one of the qualifications for further study to become a Limited License Legal Practitioner (“LLLT”), which is currently allowed in Washington and Utah, and is being considered in four additional states.<sup>47</sup>

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47. The states that are currently considering a version of an LLLT program are: California, Oregon, Minnesota, and Colorado. At least seven states have considered an LLLT program and rejected it (for now): Michigan, Montana, Ohio, Illinois, Indiana, Virginia & Texas. See, Mary E. McClymont, *Nonlawyer Navigators in State Courts: An Emerging Consensus*, JUSTICE LAB, GEORGETOWN LAW (June 2019), <http://napco4courtleaders.org/wp-content/uploads/2019/08/Nonlawyer-Navigators-in-State-Courts.pdf>; Patrick McGlone, *Can licensed legal paraprofessionals narrow the access-to-justice gap?*, A.B.A. J. (Sept. 6, 2018), [http://www.abajournal.com/news/article/can\\_licensed\\_legal\\_paraprofessionals\\_narrow\\_the\\_access\\_to\\_justice\\_gap](http://www.abajournal.com/news/article/can_licensed_legal_paraprofessionals_narrow_the_access_to_justice_gap); Catherine J. Dupont, *Licensed Paralegal Practitioners*, UTAH B. J. <https://www.utahbar.org/wp-content/uploads/2019/02/LPP-Article-Cathy-Dupont2.pdf>; Debra Cassens Weiss, *First Paralegal Practitioners in Utah are Expected to be Licensed in 2019*, A.B.A.J. (Aug. 7, 2018), [http://www.abajournal.com/news/article/first\\_paralegal\\_practitioners\\_in\\_utah\\_are\\_expected\\_to\\_be\\_licensed\\_in\\_2019](http://www.abajournal.com/news/article/first_paralegal_practitioners_in_utah_are_expected_to_be_licensed_in_2019); *Licensed Paralegal Practitioner Program*, UTAH STATE B., <https://www.utahbar.org/licensed-paralegal-practitioner/> (last visited Nov. 22, 2019).

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As LLLT opportunities spread across the country, some students would come to law school only with the intention of doing that work, and this would help to address the access to justice gap. They would be able to do that work because they would have significantly less debt, having taken a year at a reduced cost in this model, and not continued for two more years. Those that pass would be admitted to what we traditionally think of as “Second Year.”

In the Second year, students would take fifteen credits of hybrid online instruction, and their curriculum could look like this:

**2L**, 15 credits online, transition year to reduce outside work, greater in-residence at the law school:

Fall semester:

- Con Law (4 online credits) 15% in person, 85% online
- Admin (3 online credits) 15% in person, 85% online
- Lawyering Process I (3) 67% in person, 33% online

Spring semester:

- Criminal Law (4 online credits) 15% in person, 85% online
- Evidence (4 online credits) 15% in person, 85% online
- Lawyering Process II (3) 67% in person, 33% online

If a student were to take four years to finish the degree, they would stay with this sort of 2L year, and might again be able to keep their jobs and attend law school in the evenings or on weekends. If they were going to take three years to finish the degree, they would need to take an additional course or clinic each semester in the 2L year. And because the first year was “light” on credits (at least compared to what first year students currently take), they would need to take 6 credits to catch up in the summer after their 2L year. Of course, many students—particularly part-time students—take summer courses for similar reasons already.

At this point, if they were taking four years to complete the degree, they would have thirty-nine credits completed, but if they were taking three years, they would have fifty-one credits completed, and have thirty-nine to go. That would, admittedly, leave a heavy 3L year of 19.5 credits per semester, but with externship and semester-in-practice programs that are becoming common in law schools today, this is also happening already.

For the remainder of their time in law school—however the time was allocated—students would still have five credits left they could take in online courses. Legal Profession is typically the remaining required class at most law schools, which would count for three additional online credits, since it could also be taught 15% in person and 85% online, and count as an online class. That leaves a two credit online class—and there

are many options in the curricula of most law schools that could be developed into a 15% in person and 85% online hybrid class format, such as Oil & Gas Law or Gender and the Law. Such a model would tap out the total of thirty credits currently approved by the ABA to be provided online, but there should be no requirement that every student do that. After the first year, students should have the option – as the school’s manpower allows – to take courses such as Legal Profession in an online format or in a primarily in-person format.

As is no doubt obvious by now, this article proposes a curricular model that promotes the broad use of hybrid teaching, with portions of the course content delivered in person, and portions delivered in an online environment, with lectures, quizzes, links, video explanations, documents, and opportunities to support spaced repetition learning,<sup>48</sup> and similar cutting-edge pedagogical teaching methods.

In the current “signature pedagogy,” it is common for one student to be “on call” for much of the class, with the rest of the students watching. Replicating that on video would not be difficult or substantially different. But to allow exposure and benefit from experiencing this form of law school pedagogy live, while they were taking most of their first year coursework online, they could be attending occasional Saturday classes where that pedagogy was employed. And of course, some of the signature pedagogy could simply be moved to the second year of law school, which—together with the third year—would under this proposal be primarily in residence at the school in experiential coursework and in clinics and externships.

So, for a substantially reduced cost, law schools could allow many more students to enter the first year online, where they would study the basic first year courses at their own pace over the period of a year or even two. Typically, they would be working during this period and thus would not lose the opportunity cost currently forfeited while in the first year of law school as it is currently structured. Students complete the “first” year when they pass their competency exams for each course. Not everyone would pass, but this would allow for an admissions process based more on suitability for law study than a test known to be discriminatory. At least some of those applications that are currently barred from law school would, in fact, succeed.

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48. See, e.g., James H. Reynolds & Robert H. Glaser, *Effects of Repetition and Spaced Review Upon Retention of a Complex Learning Task*, 55 J. EDUC. PSYCHOL. 297 (1964) (explaining the effect of spaced review on memory retention of material); Gabriel H. Teninbaum, *Spaced Repetition: A Method for Learning More Law in Less Time*, 17 J. HIGH TECH. L. 273, 303 (2017); CEREGO, <https://www.cerego.com/> (last visited Feb. 20, 2019); SERIOUS, <http://www.spacedrepetition.com> (last visited Nov. 10, 2019).



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This is because while many law schools refuse admission to applicants who have an LSAT score below 155, students with scores in that range are not *all* unable to pass the bar. They just have a predicted higher rate of failure than others.<sup>49</sup> Law schools are widely criticized for admitting students who had a low likelihood of passing the bar and then taking their money for three years at full rates.<sup>50</sup> But if schools only charged one year of a reduced tuition it would allow for more students—and more diverse students—to show that they have the capacity to excel at legal study, and to not be barred from law school as a result of one admission test. By admitting students based on the LSAT, we in legal education have implicitly suggested that an admitted student would eventually pass the bar exam. But under this model, professors would have a much better indicator than the LSAT to go on—the success or failure with *the actual first year content* of law school. Those that were successful would advance, and know that they had a better chance of passing the bar, and thus be more willing to take the risk of the higher tuition in second and third year.

### V. IT IS TIME TO DISPENSE WITH THE LSAT

#### A. *The LSAT as a Barrier to the Legal Profession*

As has been noted, law schools for many years have struggled to enroll a sufficiently diverse class, one that reflects the general population and the applicant pool as a whole. This has been a perennial problem, but one that has been difficult to solve, and it has led to a less diverse profession that many would hope for and would be reasonable to expect.<sup>51</sup> The world our students are preparing to join will be even more diverse even than the one we have today (in all senses of that term)<sup>52</sup> and it is imperative that we provide a learning environment that is diverse and inclusive.

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49. See, e.g., Staci Zaretsky, *LSAT Scores v. Bar Exam Performance: How Did Your Law School Do?*, ABOVE THE LAW (Apr. 7, 2016, 2:31 PM), <http://abovethelaw.com/2016/04/lSAT-scores-v-bar-exam-performance-how-did-your-law-school-do/> (Thurgood Marshall School of Law—Texas Southern University—and Charlotte Law School have median LSAT scores well below 155; 2014 bar passage rate for Thurgood Marshall was 63.3% and 57% for Charlotte.).

50. Scott Jaschik, *Study: Law Schools Admit Those Unlikely to Pass Bar*, INSIDE HIGHER ED (Oct. 27, 2015), <https://www.insidehighered.com/quicktakes/2015/10/27/study-law-schools-admit-those-unlikely-pass-bar>.

51. See, e.g., Deborah L. Rhode, *Law is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That*, WASH. POST (May 27, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/>.

52. See AM. BAR ASS'N, *supra* note 19, at 10 (noting that the “U.S. population is getting older and more diverse,” the report cites Bureau of Census projections indicating the United

But law students are accepted to law schools based primarily on their LSAT score (a standardized test that every applicant must take), and their undergraduate GPA. Because it has been shown that LSAT scores are disproportionately lower for many ethnic groups,<sup>53</sup> this has essentially acted as a barrier to the kind of inclusive profession that many of us think we need to solve the legal problems of the twenty first century.

Professor William Kidder examined this issue in his ground-breaking study of the subject.<sup>54</sup> He concluded that racial and ethnic gaps on the LSAT are larger than differences in undergraduate GPA, law school grades, or success in the legal profession.<sup>55</sup> His data resulted in the following findings within his sample group at Boalt Hall:

- African Americans scored on average 9.2 points lower on the LSAT than white students. This is greater than a standard deviation (of the national applicant pool).
- Chicanos and Latinos scored on average 6.8 points lower
- Native Americans scored on average four points lower

Ten years later, an additional study at Stanford confirmed Professor Kidder's findings.<sup>56</sup> Professor Marjorie Shultz concluded that admission practices based upon standardized test admission (namely, the LSAT) reinforces racial and class privileges. Her work also referenced Wightman, who concluded "that sole reliance on LSAT and UGPA would result in systematic exclusion of minorities from law school programs." These tests are often looked at as a way to predict law school success, but while they are a moderate predictor of first year GPA, and do not correlate well to success in a law career.

More recently, Professor Aaron N. Taylor examined LSAC data from the 2016-2017 admissions cycle and discovered that "it took

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States will be a majority-minority country by 2050).

53. See Aaron N. Taylor, *The Marginalization of Black Aspiring Lawyers*, 13 FIU L. Rev. 489 (2019); Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 LAW & SOC. INQUIRY 620, 621 (2011) ("Research consistently shows that affluent White students perform better on standardized tests, including the LSAT, than their less advantaged or minority peers."); William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975, 978, 982 (2004) (citing studies finding that historically, minority students have achieved "significantly lower scores than their white counterparts" and that time-limited tests have a disproportionate effect on performance of minority students).

54. William C. Kidder, Comment, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment? A Study of Equally Achieving "Elite" College Students*, 89 CALIF. L. REV. 1055, 1123 (2001).

55. *Id.* at 1074.

56. See Shultz & Zedeck, *supra* note 53, at 621.

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about 1,960 Black applicants to yield 1,000 offers of admission, compared to only 1,204 among White applicants and 1,333 overall. These trends are explained in large part by racial and ethnic disparities in average LSAT scores.”<sup>57</sup> The LSAC data for the 2016–2017 application cycle showed that the average score for Black test-takers is 142, which is eleven points lower than the average for White and Asian test-takers,<sup>58</sup> so it seems the trend is both confirmed to exist, and getting worse over time.<sup>59</sup> Professor Taylor explains in his article how this disparity funnels Black law students into schools with less favorable outcomes, and withholds scholarships at a higher rate, making the law school experience more expensive overall, and producing Black graduates with higher debt loads.<sup>60</sup>

### *B. The GRE as a Barrier to the Legal Profession*

After the ABA allowed the Graduate Record Examination (GRE) in 2016, sixteen law schools have announced that they would be accepting the GRE in lieu of the LSAT.<sup>61</sup> However, there are reasons to be concerned about the GRE as a predictor of law school performance—by minorities—as well.

In a study published in 1985, Professors Richard Scott and Marvin Shaw found that for both races studied, the GRE was a statistically good predictor of GPA.<sup>62</sup> However, the relationship between GRE score and GPA was different for African-American and white students; for white students there was a positive corollary, where for African-American students there was a negative relationship—just the inverse.<sup>63</sup> Thus it is not clear that the GRE is any more reliable as a predictor of performance in law school than the LSAT.

So one of the important features of this proposal is to dispense with the LSAT and the GRE as a barrier, making law school more accessible for minority students in one stroke. Instead of being judged

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57. Taylor, *supra* note 53, at 490.

58. *Id.*

59. Taylor, *supra* note 53, at 500.

60. *Id.* at 507.

61. See e.g., Alex Swoyer, *Top Law Schools Accepting GRE Instead of LSAT to Broaden Pool*, WASH. TIMES (Jan. 1, 2018), <https://www.washingtontimes.com/news/2018/jan/1/gre-being-accepted-by-top-law-schools-instead-of-l/>.

62. Richard R. Scott & Marvin E. Shaw, *Black and White Performance in Graduate School and Policy Implications of the Use of Graduate Record Examination Scores in Admissions*, 54 J. NEGRO EDUC. 14, 19 (1985).

63. *Id.*

on their LSAT score—a test that has little relationship to what lawyers do<sup>64</sup>—students in the primarily online first year would be judged on how well they learned what lawyers need to know. If some students never advanced, they would have paid a lower cost for a basic understanding of how the law operates which would be a public good in itself. A Master's in American Law would be conferred, and it might be all those students want or need. Further, those 1L graduates could take a small amount of additional training, and be ready to be a Limited License legal professional, much as the State of Washington has recently approved.<sup>65</sup> And they can afford to do this, because their investment was so much less. Expansion of LLLTs will go a long way toward addressing the access issue.

*C. LLLTs Will Increase Access to the Legal Profession for Practitioners and Clients*

Indeed, in Washington State, the LLLT rules<sup>66</sup> were explicitly put in place to address “troubling” findings from the 2003 Civil Legal Needs Study, which found that many low-income or minority groups do not/cannot receive adequate legal assistance. The LLLT can assist by performing legal tasks more affordably and increase availability of these services to the public. The legal duties are limited to specific practice areas, work should be supervised by a Washington lawyer, and the LLLT may not represent a client in court or negotiate for a client.<sup>67</sup> To become an LLLT,

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64. Shultz & Zedeck, *supra* note 53, at 624–25 (citing a number of studies and reports identifying qualities that are at least as, if not more, predictive of professional success than the analytical reasoning skills measured by the LSAT). *See also* David L. Chambers, et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 401 (“LSAT scores . . . correlate with law school grades, but they seem to have no relationship to success after law school, whether success is measured by earned income, career satisfaction, or service contributions.”).

65. LeAnn Bjerken, *Program Creates New Type of Law Professional*, SPOKANE J. BUS. (Mar. 30, 2017), <https://www.spokanejournal.com/local-news/program-creates-new-type-of-law-professional/> (Limited License Legal Technicians can advise clients, draft documents, and do legal research but cannot represent clients in courts or negotiations. Family law is the only practice area that has been approved but more are expected.). *See also* WASH. ST. B. ASS'N, LIMITED LICENSE LEGAL TECHNICIAN PROGRAM, <http://www.wsba.org/licensing-and-lawyer-conduct/limited-licenses/legal-technicians> (last visited Nov. 10, 2019).

66. WASH. APR 28(A) (“The purpose of this rule is to authorize certain persons to render limited legal assistance or advice in approved practice areas of law. . . . This rule is intended to permit trained Limited License Legal Technicians to provide limited legal assistance under carefully regulated circumstances in ways that expand the affordability of quality legal assistance which protects the public interest.”).

67. *Id.* at 28(f).

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there are Educational, Examination, and Experience requirements.<sup>68</sup>

In Washington, an LLLT may only provide services if the client's issue lies within a prescribed practice area.<sup>69</sup> Within that area, the LLLT may obtain facts and explain the relevancy of those facts to the client, inform the client of procedures and documents that may be required, provide self-help materials (approved by the Board or a Washington lawyer), review opposing documents and explain to the client, complete and file certain forms, perform legal research, draft opinion letters (to be read by other than the client), draft additional documents if reviewed and reviewed by a Washington lawyer, and assist the client in obtaining government documents.<sup>70</sup>

There are currently approximately thirty-five licensed LLLTs in Washington.<sup>71</sup> The review Board is in the process of proposing a new practice area for LLLTs (in addition to the only current one, Family Law), School and Work. The Board meeting minutes from March 2018 indicate that this may end up being two separate practice areas.<sup>72</sup> This proposed area will cover topics such as special education, hearings, and unemployment compensation.<sup>73</sup>

There are several other states that are considering or actively moving toward adopting an LLLT model.<sup>74</sup> Among them are Oregon, which is considering a similar program for the same reasons: inadequate legal aid for low-income households.<sup>75</sup> Utah has recently approved a type of LLLT certification, after the Supreme Court of Utah supported a Licensed Paralegal Practitioners program.<sup>76</sup> In 2014, New York State began a "Court Navigator" program to assist unrepresented litigants in landlord-tenant

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68. *Id.* at 28(e).

69. *Id.* at 28(f).

70. *Id.*

71. See LeAnn Bjerken, *Legal Technician Profession Gains Interest*, SPOKANE J. BUS. (May 29, 2018), <https://www.spokanejournal.com/local-news/legal-technician-profession-gains-interest/>.

72. *Limited License Legal Technician (LLLT) Board Meeting Minutes*, WASH. ST. B. ASS'N 3 (Mar. 15, 2018), [https://www.wsba.org/docs/default-source/legal-community/committees/lllt-board/lllt-board-meeting-minutes-march-15-2018.pdf?sfvrsn=726c07f1\\_4](https://www.wsba.org/docs/default-source/legal-community/committees/lllt-board/lllt-board-meeting-minutes-march-15-2018.pdf?sfvrsn=726c07f1_4).

73. *Id.*

74. These states are listed in note 47, *supra*.

75. OREGON STATE BAR FUTURES TASK FORCE, EXECUTIVE SUMMARY 8 (2017), <https://perma.cc/K67M-V9K4> ("The most compelling argument for licensing paraprofessionals is that the Bar's other efforts to close the access-to-justice gap have continued to fall short."); OREGON STATE BAR BOARD OF GOVERNORS, AGENDA (Sept. 27, 2019), 111, <https://perma.cc/TM5B-6N8N> (approving the Futures Task Force recommendation to create a paraprofessional licensing program).

76. See UTAH SUPREME COURT TASK FORCE TO EXAMINE LTD. LEGAL LICENSING, REPORT AND RECOMMENDATIONS 8–10 (2015).

and consumer debt cases.<sup>77</sup> California is examining a pilot program for LLLTs in one practice area, and also considering a program like the Court Navigators in New York.<sup>78</sup> Several other states are in preliminary evaluation steps of the LLLT or other alternative licensure models.<sup>79</sup>

So, as the options for a second career track short of requiring the J.D. develops, many students will choose to take the first year of law school, receive the Master's degree, and at a much lower cost, seek out a career as an LLLT. However, many students will want to advance to finish the J.D., and if they do well enough in the intensive examinations to be admitted, the "second" year would include the remaining core courses in the first semester (such as Professional Responsibility, Constitutional law, and Administrative law), and transition to more simulation-based experiential learning in the spring semester, including training in legal research, writing, and advocacy. This year would be the first year that students were actually on campus, and in which they would leave their jobs behind. "Third" year would continue with more experiential learning, and add a supervised externship and a clinic. Students taking an externship can now be paid a modest amount for their work,<sup>80</sup> thus reducing the cost of tuition further.

## VI. CONCLUSION

Law schools adopting a mostly online 1L year for their program of legal education would receive nearly the same tuition revenue they currently receive because they would admit many more students to that first year—and could admit more diverse applicants—at a much lower cost. Students in a larger entering class could then discover and show that they have a facility for learning this material—not on one discriminatory test, but over the course of perhaps even two years while they work at other jobs, which would, of course also lower the opportunity cost for them.

By re-engineering the first year of law school and making it more

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77. See *NYC Housing Court: Court Navigator Program*, N.Y. CTS., <http://www.nycourts.gov/courts/nyc/housing/rap.shtml> (last visited Nov. 10, 2019).

78. See STATE BAR OF CAL. CIVIL JUSTICE STRATEGIES TASK FORCE, REPORT & RECOMMENDATIONS 19–20 (2015).

79. See generally *Jurisdictions' Activity on Alternative Licensed Legal Professionals*, NAT'L ORG. OF BAR COUNSEL (May 2015), [https://cdn.ymaws.com/www.inbar.org/resource/resmgr/Conclave/Alt\\_license\\_table\\_May\\_18\\_20.pdf](https://cdn.ymaws.com/www.inbar.org/resource/resmgr/Conclave/Alt_license_table_May_18_20.pdf) (describing activity regarding alternative licensed legal professionals by state). See also Lori W. Nelson, LLLT - Limited License Legal Technician: What It Is, What It Isn't, and the Grey Area in between, 50 FAM. L.Q. 447, 455-461 (2016) (describing activity regarding alternative licensed legal professionals for select states).

80. Chris Morgan, *A Case for Paid Externships*, ABA FOR L. STUDENTS (Nov. 2, 2016), <http://abaforlawstudents.com/2016/11/02/the-case-for-paid-law-student-externships>.

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accessible in a hybrid online format, we would remove a significant barrier to entry, lower the cost, and graduate a more diverse class. Those who only take the first year will have much less invested and thus be more able to afford to serve the under-lawyered in our society under a limited license to practice. In one stroke, we would go a long way toward addressing these three persistent problems that have plagued legal education for decades. These changes need not happen all at once, or at every school, but those schools that do make these changes will reap these benefits, and lead the way for others.