

ONLINE LEGAL EDUCATION & ACCESS TO LEGAL EDUCATION & THE LEGAL SYSTEM

James McGrath[†] & Andrew P. Morriss^{††}

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INTRODUCTION

While there are 203 American Bar Association (ABA) accredited law schools in the United States, which in 2018 had a total enrollment in juris doctor (J.D.) programs of more than 111,000, law schools are unevenly distributed across the country.¹ While some potential lawyers are willing and able to move to a new location to study for a J.D., many are either unwilling or unable to do so.² Potential law students might need to

[†] At the inception of this article, Professor of Law & Associate Dean for Academic Success and Bar Passage, Texas A&M School of Law – now Dean and President Western Michigan University Cooley Law School; LL.M. (Temple); M.P.H. (Harvard); J.D. (Howard); B.A. (San Jose State). The authors thank Max Morris, Master's candidate in Geography, Texas A&M University, for excellent research assistance (despite the inexplicable lack of a second 's' on his last name).

^{††} Dean, School of Innovation & Vice President for Entrepreneurship and Economic Development; Professor, Bush School of Government and Public Service; Professor (by courtesy), School of Law, Texas A&M University. A.B., Princeton University; J.D., M.Pub.Aff., The University of Texas at Austin; Ph.D. (Economics), M.I.T.; M.Ed.Tech., Texas A&M University.

1. AM. BAR ASS'N, 2018 STANDARD 509 INFORMATION REPORT DATA OVERVIEW (2018), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2018-509-enrollment-summary-report.pdf; Am. Bar Ass'n, *ABA-Approved Law Schools*, https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/ (last visited Sept. 17, 2019); *see infra* Figure 1.

2. *See* Abigail Wozniak, *Going Away to College? School Distance as a Barrier to*

stay where they can help family members, be unwilling to leave their communities, or unable to afford relocation. This makes access to legal education improbable except for those with a local law school or those willing to relocate.

We take it as a given that expanding the number of Americans who have access to legal education benefits society. Between us, we have worked at eight law schools as full-time faculty and/or administrators and spent a collective forty-four years working in higher education (primarily in law schools). Together, we have collected seven post-baccalaureate degrees. In short, we are sold on the value of higher education generally and legal education in particular. We want law schools and legal education to succeed. And while we believe that there are problems, both financial and pedagogical, with the existing methods of delivery of legal education, and higher education more generally, we do not think that merit's throwing the baby out with the bathwater.

However, we do not believe expanding the number of law schools is the answer to the problem of lack of access. By many estimates, there are already *too many* law schools and establishing a new law school is an expensive proposition.³ Given the significant dip in the number of prospective students seeking admission to existing law schools since 2008,

Higher Education, ECONOFACT (Mar. 22, 2018), <https://econofact.org/going-away-to-college-school-distance-as-a-barrier-to-higher-education> (concluding that “geography is still an important determinant of not just where, but also whether, a student goes on to college”); Ellen Wexler, *Geography Matters*, INSIDE HIGHER ED (Feb. 3, 2016), <https://www.insidehighered.com/news/2016/02/03/when-students-enroll-college-geography-matters-more-policy-makers-think> (“[F]or some students, location is nonnegotiable—and often, that means their options are dramatically limited.”); see also DAVID GOODHART, *THE ROAD TO SOMEWHERE: THE POPULIST REVOLT AND THE FUTURE OF POLITICS* 3 (2017). Goodhart divided the British electorate into “[s]omewheres” and “[a]nywheres.” *Id.* The former are “more rooted . . . with little education” and are more connected to “group belonging” than anywhere. *Id.* The latter are highly educated, mobile, and generally comfortable with “new places and people.” He notes that similar characterizations can be made of other social classes in the U.S. population. *Id.*

3. See, e.g., Kathryn Rubino, *Law Schools Agree: There Are Too Many Law Schools*, ABOVE L. (Oct. 6, 2016), <https://abovethelaw.com/2016/10/law-schools-agree-there-are-too-many-law-schools/> (reporting results of a survey of law school admissions officers in which “65% of schools surveyed agree it ‘would be a good idea if at least a few law schools closed.’”); see Natalie Kitroeff, *Four Charts That Explain Why America Has Too Many Law Schools*, BLOOMBERG (Dec. 12, 2014), <https://www.bloomberg.com/news/articles/2014-12-12/four-charts-that-explain-why-america-has-too-many-law-schools> (discussing why it is the worst time to be a newly formed law school competing for prospective students’ tuition dollars); see The New Republic Staff, *How to Fix Law School*, NEW REPUBLIC (July 23, 2013), <https://newrepublic.com/article/113983/how-fix-law-school-symposium> (explaining Paul Campos’s points about the high price of legal education); see BENJAMIN H. BARTON, *GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION* 6 (2015) (“Despite the fact that the last thirty years have been lean ones for the majority of American lawyers, more law schools opened, and existing schools relentlessly raised tuition and accepted more students.

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which has slightly improved in the past year, such an expansion would be at best a risky gamble.⁴ Moreover, as many of the areas which we consider underserved by the existing model of legal education are regions with relatively sparse populations, opening a few new law schools in rural locations is unlikely to have much of an impact on the totality of the problem.⁵

Online delivery of legal education is a potential solution to this problem as it is uniquely well-suited to provide education to dispersed populations. To the extent developing online forms of legal education leads to creative efforts to rethink traditional models of legal education, rather than just putting cameras into existing classrooms and letting students in remote locations participate via technology in a class conducted elsewhere, it may also allow legal education to be provided at a lower unit cost, expanding the access benefits.

Our argument has three parts. First, the existing distribution of law schools and the delivery of legal education via in-person, synchronous classes combine to restrict access to legal education. To show this, we assembled data on the populations within reasonable commuting distance of existing law schools and compared the populations in those areas with the populations in areas outside commuting distance. If legal education could be made accessible to the population for whom distance from a law school makes in-person attendance more difficult, between 41 million and 155 million more Americans would have access to it.⁶

Second, expanding access to legal education is beneficial to more than just individuals now able to secure a J.D. or other law-related degree. Lawyers, like law schools, are unevenly distributed across the United States.⁷ By using the number of lawyers per capita as a rough proxy for access to the legal system, we can identify regions where the need for more lawyers to improve non-lawyers' access to the legal system is

Between 1987 and 2010, the number of ABA-accredited law schools increased from 175 to 200 and total JD enrollment rose from 117,997 to 147,525. Over the same period law school tuition rose over 440 percent for in-state residents at public institutions and 220 percent at private institutions.”); *see generally* BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012) (arguing law schools are too expensive).

4. *See* Paul Campos, *Perspectives on Legal Education Reform: The Crisis of the American Law School*, 46 U. MICH. J.L. REFORM 177, 213–14 (2012) (discussing how the value of a law degree will not become more valuable moving forward).

5. *See* Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. REV. 466, 471–72 (2014) (discussing the reasons why new lawyers might not want to practice in rural areas).

6. *See infra* Table 1.

7. *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, 48 (2018) (noting the uneven distribution of attorneys throughout the United States).

greater. Unsurprisingly, these tend to also be areas lacking access to legal education.

Third, online delivery (in a variety of formats) is a potential contributor to solving both these problems. Moving legal education at least partly online solves several problems. It means that a prospective student need not relocate for three years to have access to legal education. While not every community has the communications infrastructure and not every prospective student has access to the hardware to permit high-bandwidth forms of online education, the number of both lacking such capacity is dwindling.⁸ Even where the infrastructure is lacking, it can often be accessed near a prospective student's location, reducing the physical barriers to access. It also means that students from some of the communities with the greatest lack of access can acquire a legal education without leaving their community, increasing the likelihood that they will remain in that community to deliver services. We also briefly address some of the reasons we believe that online legal education need not suffer from quality problems relative to in-person, synchronous classes. Indeed, we think it is possible that well-designed, online legal education might well provide a better educational experience than some traditional law students' experience.

We make our argument using two sets of data. First, to provide the national picture, we use data on the United States as a whole. Second, to explore the issues in more detail, we chose New York (site of this symposium) and Texas (where our university is located). Of course, neither state is necessarily representative of the nation as a whole, but both present an array of issues, with law schools primarily located in urban centers in states with significant rural populations. Examining these two states also allows us to use a different data source for the number of lawyers, providing a cross-check on our calculations.

Before turning to the argument, a brief note on our data. We used the list of ABA accredited law schools (although a significant number of graduates of non-ABA-accredited schools can take the bar in some states, such as California) in the interest of comparability. We got our population

8. See, e.g., Tom Wheeler, *Closing the Digital Divide in Rural America*, FCC BLOG (Nov. 20, 2014), <https://www.fcc.gov/news-events/blog/2014/11/20/closing-digital-divide-rural-america> ("An estimated 15 million Americans, primarily in rural communities, don't even have access to entry-level broadband in their homes. Forty-one percent of America's rural schools couldn't get a high-speed connection if they tried."); see Edward Carlson & Justin Goss, *The State of the Urban/Rural Digital Divide*, NAT'L TELECOMMS. & INFO. ADMIN. (Aug. 10, 2016), <https://www.ntia.doc.gov/blog/2016/state-urbanrural-digital-divide> ("[T]he gap between rural and urban populations has remained remarkably consistent for at least as long as NTIA has been gathering data on Internet use.").

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data from the U.S. Census. Our access calculations depended on GIS data from the [D] dataset. Our national lawyer data came from the Bureau of Labor Statistics' *County Business Patterns* dataset. Our New York lawyer data came from the [E] dataset and our Texas lawyer data came from the State Bar of Texas's *2017 Attorney Population Density by Metropolitan Statistical Area* report.

I. THE SUPPLY OF LEGAL EDUCATION

We are all familiar with the claim that there are “too many” law schools. Indeed, the claim may well be true, depending on how one determines how many is “too many.” But, whether or not there are “too many” law schools offering three-year, in-person, synchronous class model J.D. degrees tells us little about whether there is too little, too much, or just the right amount of legal education being delivered by a broader array of formats. To take just one dimension, the delivery mechanism has a significant impact on the cost structure of legal education, and so, at least in part, the cost to the student.⁹ It is certainly the case that creatively-delivered, online versions of higher education can provide other degrees at a lower per unit cost than traditional, on-campus models.¹⁰ For example, Western Governors University, a public, online university supported by nineteen states, offers a variety of comparatively inexpensive online undergraduate and graduate degrees on a flat fee per six months enrollment basis.¹¹

We therefore begin with a few assumptions. First, we assume that the demand for legal education is evenly distributed among the population. This may be untrue if knowing lawyers is important for the decision to attend law school, since communities with fewer lawyers will thus have fewer potential law students. Nonetheless, we think this is a reasonable assumption. If current demand is lower in areas with fewer lawyers and if these are also places with fewer law schools (which they are), then it will be necessary, but not sufficient, to expand real access to make it

9. See John O. Sonsteng et al., *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303, 320 (2007) (suggesting that a new legal education system would control cost escalation).

10. See Frank Pasquale, *Synergy and Tradition: The Unity of Research, Service, and Teaching in Legal Education*, 40 J. LEGAL PROF. 25, 26 (2015) (“Such online courses would computerize both instruction and assessment of students, and are marketed as being far cheaper and more convenient than in-person instruction.”).

11. See Diana Hembree, *Western Governors University: The Best-Kept Secret in Online Colleges*, FORBES (Aug. 10, 2017), <https://www.forbes.com/sites/dianahembree/2017/08/10/western-governors-university-the-best-kept-secret-in-online-colleges/#6e52f6f96b48>.

possible for potential law students in those communities to be able to access law schools without moving away. The question of how to solve the additional problem of making potential students in those areas aware of the potential for legal careers would also need to be solved, but we need not try to do so here.

Second, we assume that commuting distance is a reasonable proxy for access within the community. We think this is reasonable.¹² If students can access legal education from their existing homes and communities without relocating, they avoid both the out-of-pocket costs of relocating and the emotional costs of leaving family and community. A key difference between any form of online education and in-person education is the absence of such costs. That does not mean, of course, that commuting itself is not costly.¹³

To make a rough estimate of the size of the underserved population, we used geographic information system (GIS) data to estimate which counties were at least partially within commuting distance of at least one law school. We considered commuting distance to be no more than fifteen miles from a primary road (major interstate or other similar highway) and no more than sixty miles total from a law school. If any part of a county fit these criteria, we made the conservative assumption that the entire population of the county had access to legal education.¹⁴ This approach *overstates* the degree of access, but, given the scale of the problem, we preferred a conservative methodology.

This enables us to evaluate—admittedly at a relatively crude level—the population to which in-person, legal education is available. Using our conservative assumptions and crude measure, over 271 million people in the United States have access and over 41 million people do not.¹⁵ If we restricted our access definition to the population of counties with law schools, and excluded the counties with at least one part within our definition of a reasonable commute, the number with access drops to just over

12. Indeed, the need for access to higher education in general within communities is a much broader problem than legal education. *See, e.g.,* Nicholas Hillman & Taylor Weichman, *Education Deserts: The Continued Significance of “Place” in the Twenty-First Century*, VIEWPOINTS, 2016, at 3, <https://www.acenet.edu/news-room/Documents/Education-Deserts-The-Continued-Significance-of-Place-in-the-Twenty-First-Century.pdf> (“For several decades, researchers have found that distance and geography shape students’ decisions about where to apply and enroll in college: the further a student lives from a college or university, the less likely he or she is to enroll.”).

13. *See* Peter W. Martin, *Law Schools & Emerging Frontiers: Employing Technology to Erode Legal Education’s Twin Barriers of Distance and Cost*, 61 RUTGERS L. REV. 1115, 1123 (2009) (noting that commuting to law school is a major cost).

14. *See infra* Figure 2.

15. *See infra* Table 1.

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116 million and the number without access swells to over 155 million.¹⁶ Given the crudeness of our access measure, the true number without meaningful access is somewhere between 41 million and 155 million.¹⁷

Table 1 breaks this down by population demographics for populations particularly likely to be interested in legal education (people between the ages of twenty-four and thirty-four) and for African Americans and Hispanics, two groups that are severely underrepresented both in the legal profession and with respect to access to legal professionals. Figure 5 and Figure 6 show lawyers per capita for these populations.

Table 1—Access to Legal Education

	No Access	Access		
		All “Access”	Law School Present	No Law School Present
Total population	41,460,246	271,403,446	116,249,140	155,154,306
24-34 year olds	5,193,537	36,421,328	17,311,271	19,109,085
All African Americans	3,792,836	38,784,753	20,857,704	17,927,049
All Hispanics	7,013,993	47,179,961	26,653,541	20,526,420

With respect to New York and Texas, the picture is broadly similar. In New York, 19,127,595 people have access to legal education by our broad definition (falling to 11,895,124 if we count only counties with a law school) while 250,507 do not (rising to 7,482,978 with the narrower definition).¹⁸ In Texas, 18,938,631 people have access under the broad definition (11,522,408 under the narrow) compared to 6,054,258 people without under the broad definition (13,460,481 under the narrow).¹⁹ Table 2 provides state-level statistics comparable to Table 1.

16. *See infra* Table 1.

17. *See infra* Table 1.

18. *See infra* Table 2.

19. *See infra* Table 2.

Table 2—Access to Legal Education, New York and Texas

		No Access	Access		
			All “Access”	Law School Present	No Law School Present
New York	Total popula- tion	250,507	19,127,595	11,895,124	7,232,471
	24-34 year olds	30,120	2,381,260	1,763,362	865,855
	All African Ameri- cans	9,901	3,324,649	2,306,540	1,018,109
	All His- panics	5,757	3,411,165	2,241,979	1,169,186
Texas	Total popula- tion	6,054,258	18,938,631	11,522,408	7,232,471
	24-34 year olds	799,245	2,796,601	1,830,025	966,576
	All Afri- can Ameri- cans	408,010	2,751,872	1,943,172	808,700
	All His- panics	3,210,661	6,189,917	4,554,576	1,635,341

Even taking into account the limitations of the data we used and our need to make some strong assumptions about it, we think this data makes a compelling case that broadening the means of delivery of legal education beyond the dominant model of in-person, synchronous legal education (which accounts for all but the tiny number of students enrolled in hybrid J.D. programs) would make legal education and legal careers available to millions more of Americans. Indeed, our numbers understate the need for innovation in delivery methods because they assume that everyone in our “access” counties has access. In reality, the demands of family and careers mean that many of them are unable to enroll in syn-

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chronous, in-person programs even if they are within commuting distance.

II. ACCESS TO THE LEGAL SYSTEM

A second perspective on the need to expand access to legal education is to consider the supply of legal services. While there are many complaints that there are “too many” lawyers, in general there are not enough lawyers to ensure equal access to justice.²⁰ For example, Deborah Rhode’s 2004 estimate was that four-fifths of the civil legal needs of low-income Americans were not being met by the existing legal system, nor were two- to three-fifths of the needs of middle-income households.²¹

As with other professions, the supply of lawyers is not evenly spread over the United States.²² Some communities have relatively large legal communities; others have few lawyers.²³ This is related to the location of law schools.²⁴ While new graduates of law schools and experienced lawyers can, and do, relocate from where they went to law school to new communities to practice law, there is at least anecdotal evidence that new graduates have an advantage in job hunting when they look in the area where they went to law school.²⁵ As at least a reasonable approximation, comparing our “access to legal education” counties to counties lacking such access with respect to the number of lawyers per capita is another way to think about access. Table 3 presents summary national data. Figure two presents lawyers per capita by county for the nation. Table 4 presents summary New York and Texas data, and Figure 3 and Figure 4 present lawyers per capita for those states.

20. See Michael S. Hooker & Guy P. McConnell, *Too Many Lawyers—Is It Really a Problem?*, FED. LAW., Sept. 2014, at 62, 63.

21. DEBORAH L. RHODE, ACCESS TO JUSTICE 3 (2004); see also Ben Barton, *A Comparison Between the American Markets for Medical and Legal Services*, 67 HASTINGS L.J. 1331, 1354 (2016) (arguing that the major problem is access for the working poor).

22. See AM. BAR ASS’N, ABA NATIONAL LAWYER POPULATION SURVEY: LAWYER POPULATION BY STATE (2019), https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-by-state-2019.pdf.

23. See, e.g., Theresa Amato, *Put Lawyers Where They’re Needed*, N.Y. TIMES (June 17, 2015), <https://www.nytimes.com/2015/06/17/opinion/put-lawyers-where-theyre-needed.html>.

24. See William D. Henderson & Andrew P. Morriss, *Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era*, 81 IND. L.J. 163, 176–77 (2006) (discussing the importance of location for law schools).

25. See *id.*

Table 3—Lawyers per 1000 population

	No Access	Access		
		All “Access”	Law School Present	No Law School Pre- sent
Mean	1.387	1.665	5.358	1.319
75th per- centile	1.750	1.747	6.152	1.502
Median	1.091	1.052	3.983	0.981
25th per- centile	0.736	0.663	2.574	0.636

Table 4—Lawyers per 1000 population, New York and Texas

		No Access	Access		
			All “Access”	Law School Present	No Law School Present
New York	Mean	1.086	2.459	8.178	1.267
	75th per- centile	1.173	1.982	7.637	1.638
	Median	0.000	1.336	4.434	1.018
	25th per- centile	0.947	0.832	2.709	0.727
Texas	Mean	1.293	1.191	4.252	1.267
	75th per- centile	1.724	1.257	6.009	1.136
	Median	0.952	0.815	3.360	0.784
	25th per- centile	0.736	0.555	2.514	0.535

We can see two things from this data. First, our broad assumption about access to legal education is not supported by the presence of lawyers. Counties lacking law schools but adjacent to counties with at least one law school have lawyers per capita at a rate similar to more remote counties. By contrast, counties with law schools have significantly more lawyers per capita than do more remote counties.

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The concentration of lawyers in large metropolitan areas is unsurprising, of course. Big cities attract professionals for a variety of reasons including the bright lights, higher wages, amenities, and opportunities they offer.²⁶ Perhaps new law graduates are simply taking Willie Sutton's advice and going where the money is.²⁷ We do not suggest that an appropriate goal for higher education institutions should be to equalize the number of lawyers per capita. However, those counties with law schools end up with almost four times as many lawyers per capita compared to counties without access and even the twenty-fifth percentile of the law school counties has more lawyers per capita than the seventy-fifth percentile of the no-access counties.

We think that the number of lawyers per capita is a reasonable proxy for access to the legal system. Although new tools are beginning to offer the ability to access legal advice beyond downloadable forms without having to physically visit a lawyer's office, lawyers nonetheless remain important guides to many aspects of an individual's or business's interaction with the legal system. More lawyers alone is no panacea, of course. Communities need lawyers with the skills appropriate to their problems and they need lawyers able to build sustainable careers at price points at which those communities can afford to hire the lawyers. However, at the very least, these statistics—together with other assessments of the problems of communities with insufficient access to the legal system—point to a problem that can be at least partially addressed by improving access for members of underserved communities to legal education.

III. SOLVING THE PROBLEM OF ACCESS

An online J.D. can contribute to solving two problems. First, for the significant population lacking access to a law school within a reasonable commuting distance, the availability to an online alternative provides the opportunity to acquire a legal education without relocating. The option to do so, particularly if it is at a lower cost than traditional in-person legal education, will make becoming a lawyer feasible for millions of people (between 41 and 155 million by our estimates). Second, expanding the number of lawyers in those same areas will help address access to justice issues.

One concern that regularly appears whenever online J.D. programs

26. See RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS, REVISITED* 75 (2012) (describing members of what he terms "the creative class" as partly defined by "their desire and need to live in places that offer stimulating, creative environments. Many would not even consider taking jobs in certain cities or regions . . .").

27. WILLIE SUTTON WITH EDWARD LINN, *WHERE THE MONEY WAS* 119 (1976).

are discussed is that these programs will lack the rigor of a traditional law school classroom.²⁸ We agree that if the comparison were between the platonic ideal of law school teaching and an online course, the platonic ideal could well come out on top. However, few existing law school classes meet this ideal. Complaints about the quality of law school teaching are legion.²⁹ Rather than focus on whether it is possible to replicate what is likely an unattainable ideal classroom experience, let us ask instead whether or not it is possible to develop an online program that teaches law students the knowledge and skills they need to become successful lawyers.³⁰

One way to determine if this is possible is to compare the list of competencies and knowledge necessary to become a lawyer with online programs in other disciplines. The ABA's *Roadmap* is a comprehensive survey of the competencies necessary for a legal career, and bar exams provide a minimum floor of knowledge necessary to practice law (if you do not know enough to pass the bar, we will not find out if you know enough to practice).

Hamilton combined multiple studies of legal employers' demand for specific competencies by attorneys and compiled a list of the overlap.³¹ The top twenty-one were:

1. Integrity/honesty/trustworthiness.
2. Good judgment/common sense/problem solving.

28. See, e.g., Christine Rienstra-Kiracofe, *Legal Education in the Digital Age: Online Degree Programs*, 25 J.L. BUS. & ETH. 25, 30 (2019) (expressing concern over potential lack of interaction in online programs); see also Katherine S. Mangan, *Justice Ginsburg Questions Internet-Only Law School*, CHRON. HIGHER EDUC. (Sept. 24, 1999), <https://www.chronicle.com/article/Justice-Ginsburg-Questions/31346> (quoting Justice Ruth Bader Ginsburg in 1999 that she was "troubled" at the idea that "a student can get a law degree 'without ever laying eyes on a fellow student or professor'"). Of course, there are also numerous rebuttals to these concerns. See generally Kenneth R. Swift, *The Seven Principles for Good Practice in [Asynchronous Online] Legal Education*, 44 WM. MITCHELL L. REV. 105 (2018) (concluding that online law courses can be an effective offering and fulfill many of the principles for good practice in legal education).

29. Such criticisms span a wide range. See, e.g., Gerald P. Lopez, *Transform—Don't Just Tinker With—Legal Education (Part II)*, 24 CLINICAL L. REV. 247, 250 (2018) ("What the best clinical programs offer counteracts the harm inflicted by the basic approach to legal education first introduced in 1870 and still dominant today."); Emily Grant, *Helicopter Professors*, 53 GONZ. L. REV. 2, 2 (2017) (criticizing faculty for "creating disengaged students dependent on professors for all aspects of their learning and development"); ALAN WATSON, *THE SHAME OF AMERICAN LEGAL EDUCATION* xx–xxi (2006) (criticizing legal teaching in the United States).

30. See NEIL W. HAMILTON, *ROADMAP: THE LAW STUDENT'S GUIDE TO PREPARING AND IMPLEMENTING A SUCCESSFUL PLAN FOR MEANINGFUL EMPLOYMENT* 8 (2015) ("Historically, law schools send a message that success is just about grades and ranking and do not explain clearly all the competencies that legal employers and clients want and assess.").

31. See *id.* at 14.

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3. Analytical skills: Identify legal issues from facts, apply the law, and draw conclusions.
4. Initiative/ambition/drive/strong work ethic.
5. Effective written/oral communication skills.
6. Dedication to client service/responsiveness to client.
7. Commitment to firm/department/office, its goals, and its values.
8. Initiates and maintains strong work and team relationships.
9. Project management, including high quality, efficiency, and timeliness.
10. Legal competency/expertise/knowledge.
11. Ability to work independently.
12. Commitment to professional development toward excellence.
13. Strategic/creative thinking.
14. Research skills.
15. Inspires confidence.
16. Seeks feedback/responsive to feedback.
17. Stress/crisis management.
18. Leadership.
19. Negotiation skills.
20. Pro bono, community, bar association involvement.
21. Delegation, supervision, and mentoring.³²

None of these competencies strikes us as intrinsically more difficult to teach via an online program than in the classroom, and many of them are mostly ignored in a typical legal education. Indeed, Hamilton concludes that there are “substantial opportunities for law schools and law students to differentiate themselves by focusing on one or more of the very important competencies that the *typical required curriculum does not develop*.”³³

Preparing for the bar exam presents a relatively straightforward problem to be solved by online tools. Indeed, most bar preparation courses are already largely able to be delivered online, and the majority of graduates elect that option.³⁴ The bar exam companies previously held live lectures in most major cities, but now offer streaming live or recorded lectures to nearly all of their enrollees.³⁵ The biggest problem delivering

32. *Id.* at 14–15.

33. *Id.* at 16 (emphasis added).

34. *See, e.g.*, BARBRI, <http://www.barbri.com> (last visited Sept. 17, 2019).

35. According to BARBRI, the nation’s largest commercial bar exam preparation company, although there is an advantage to attending lectures with peers, there is practically no

bar preparation online may face is eliminating distractions for the students preparing—without a place to go where distractions are minimized and the “job” of preparing is the focus, it may be harder for students to maintain the level of focus necessary to succeed. This seems to us to be a relatively minor problem that does not detract from the ability of creatively delivered pedagogy to prepare the vast majority of American law students to take the necessary professional licensing exam to engage in their profession. Knowing enough to pass the bar is not the same as knowing enough to be a competent lawyer, but the successful migration of bar preparation to asynchronous online provision suggests to us that transmitting legal knowledge is a task which online delivery can accomplish.

A recent study by the largest commercial bar preparation company revealed that a key factor to success on the bar examination was the amount of time a graduate spent on their preparation.³⁶ Unsurprisingly, examinees who passed their bar examination spent an average of about six hours per day, while those who failed averaged about four and a half hours of study each day.³⁷ Although six hours per day may appear to be a very manageable time commitment, these six hours are exclusive of study breaks, vital to retention of material, any commute involved, and of course the activities required to sustain life, relationships and fulfill familial responsibilities.³⁸ Similar to billable hours, the available time to study does not yield an equivalent amount of study time. Eliminating commute time expands the time available for study.

Online courses may be easier to design in a way that incorporates highly effective learning techniques than in a traditional live class. These highly effective techniques promote significantly higher levels of long-term retention of material,³⁹ important for practicing professionals, but essential for passing the bar exam. The task of preparing for a test with

difference in performance when participants view a video of the same lecture. The nationwide companies offer little or no opportunities to attend live lectures. See Barbri, *5 Frequently Asked Questions about Barbri Bar Review*, <https://www.barbri.com/5-frequently-asked-questions-about-barbri-bar-review/> (last visited Sept. 17, 2019).

36. BARBRI, *supra*, note 34.

37. BARBRI, *BARBRI National School Level Studies* (2019). This includes all days post-graduation, when examinees may need to relocate. It also includes weekends and holidays.

38. Familial responsibilities may disproportionately affect graduates who are the first in their family to attend law school, or even college, as their families may be unaware of the time commitment necessary for success on the bar exam. See Barbri, *Tips and Tricks When Dealing with Family Members and Friends during Bar Prep*, <https://www.barbri.com/tips-and-tricks-when-dealing-with-family-members-and-friends-during-bar-prep/> (last visited Oct. 3, 2019).

39. PETER C. BROWN, HENRY L. ROEDIGER III & MARK A. MCDANIEL, *MAKE IT STICK: THE SCIENCE OF SUCCESSFUL LEARNING* 4 (2014).

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twelve to twenty-seven subjects⁴⁰ requires a study regime that promotes long-term retention of material, as cramming for such a test is impossible.⁴¹ A carefully crafted online course can include scheduling to take advantage of a counter intuitive, but highly effective, learning technique called spaced repetition.⁴² To take advantage of the spaced repetition effect, study periods should be interrupted by days in which no study on that topic occurs. Depending on when the learner is expected to recall the information (typically on a test), the interval between the first study period and the next is important to facilitating long term retention of the material.⁴³ In the interval, students can study for other courses and not disrupt the effect. There are many reasons why spaced practice is effective, but one reason is that it takes advantage of the fact that a person's brain will attempt to make sense of that information during this interval.⁴⁴ During sleep, the brain will continue to process the learning and is most effective at memory at consolidation during the REM cycle.⁴⁵ Most people have had the experience of waking up and realizing the answer to a nagging problem, or better understanding a complex issue. This is likely due to the fact that his or her brain continued to work through the problem subconsciously. This same effect leads to more profound memories of learned material, and better opportunities for recall.

In an online course, students can be required to take quizzes or complete exercises on certain dates which correspond with optimal times to

40. For example, the Florida bar exam has twenty-seven testable subjects, while the Uniform Bar Exam (UBE) has twelve. See AmeriBar, *Florida Bar Exam Subjects*, <https://ameri-bar.com/floridabarexamssubjects.htm> (last visited Oct. 5, 2019); Kaplan, *What is the Uniform Bar Examination?*, <https://www.kaptest.com/bar-exam/what-is-the-uniform-bar-examination> (last visited Oct. 5, 2019). The UBE has been adopted in thirty-six U.S. jurisdictions as of the time of writing this article, according to the National Conference of Bar Examiners (NCBE). Nat'l Conference of Bar Exam'rs, *Uniform Bar Examination*, <http://www.ncbex.org/exams/ube/> (last visited Oct. 5, 2019).

41. Cramming clearly works for short term retention of material when being tested on a particular subject, but is not effective on a multi-subject test such as the bar examination. In one study, in just two days post-test, those who crammed for the test forgot 50% of the material learned, while those who had practiced retrieval techniques had forgotten only 13% of the learned material. See BROWN, ROEDIGER III & MCDANIEL, *supra* note 39, at 31; see also Tom Stafford, *Memory: Why Cramming for Tests Often Fails*, BBC (Nov. 18, 2014), <http://www.bbc.com/future/story/20140917-the-worst-way-to-learn>.

42. Also known as "spacing" or "distributed practice." BROWN, ROEDIGER III & MCDANIEL, *supra* note 39.

43. See *id.* at 4, 63.

44. See *id.* at 63.

45. See *id.* at 75 n.4 (citing Erin J. Wamsley et al., *Dreaming of a Learning Task is Associated with Enhanced Sleep-Dependent Memory Consolidation*, 20 CURRENT BIOLOGY 850, 850–55 (2010)).

take advantage of the spaced practice effect.⁴⁶ Exercises can be performed online (as well as in a live class) and help students become more engaged with the material. Low stakes testing with quizzes provides formative assessment, but can also greatly facilitate learning, as testing *is* learning.⁴⁷ An online class can be peppered with multiple low or no stakes testing to guide students in regular retrieval practice, another of the highly effective methods of learning for long term retention of material. Clearly, these efforts could be made in a live class, but online learning programs have options to make tests and exercises available only at certain time windows, so that an instructor may schedule them to take advantage of spaced repetition. Asynchronous online learning is also more efficient for students who more quickly grasp material, as they are not left waiting while the rest of the class catches up, and slower performing students are not pressured to move on in spite of their confusion about new material. With an online class, students could also be blocked from proceeding unless they met a certain degree of competency on any given task.

Experts on bar preparation counsel students to maintain (or adopt) a reasonably healthy lifestyle during bar preparation time, as optimal learning cannot take place without sufficient sleep, food and at least some minimal exercise.⁴⁸ Many non-traditional students are part time law students, who often may maintain full time employment while matriculating.⁴⁹ Online instruction, even with use of spaced repetition can offer far greater flexibility to these students with more complicated schedules, offering them the opportunity to utilize pockets of time on their terms. Similarly, full time students with extensive familial commitments could take advantage of the asynchronous learning to complete a legal program.

46. *See id.* at 4.

47. Testing is a highly effective learning technique, especially when coupled with immediate feedback, and explanation of what the answer is, and why the other alternatives were not correct. *See* Annie Murphy Paul, *Researchers Find That Frequent Tests Can Boost Learning*, SCI. AM. (Aug. 1, 2015), <https://www.scientificamerican.com/article/researchers-find-that-frequent-tests-can-boost-learning/>.

48. *See* CHAD NOREUIL, *THE ZEN OF PASSING THE BAR EXAM* 8 (2011). Clearly, graduates can pass the bar with incredibly unhealthy lifestyles, as it has been done countless times. *See id.* But to learn for long term retention efficiently and effectively, there should be some balance in a learner's life. *See id.* Consolidation of memory occurs during the rapid eye movement (REM) sleep cycle, which may be interrupted by excessive caffeine consumption and poor sleeping habits. *See* BROWN, ROEDIGER III & MCDANIEL, *supra* note 39, at 75 n.4 (citing Erin J. Wamsley et al., *supra* note 45).

49. One school with an access to legal education mission, Western Michigan University Cooley School of Law, enrolls eighty percent of its class in one of their part time programs. *See* W. Mich. Univ. Cooley Law Sch., *Demographics*, <https://www.cooley.edu/about/public-information/demographics> (last visited Oct. 4, 2019); *see also* W. Mich. Univ. Cooley Law School, *4-Year Part-Time Schedule (Year Round)*, <https://www.cooley.edu/admissions/schedule-options/4-year-part-time-program> (last visited Oct. 5, 2019).

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Many people are concerned that a completely online J.D. program may be less successful in teaching professionalism, and developing a student's professional persona.⁵⁰ This issue is addressed in Syracuse University's online JD program, JDinteractive, in multiple ways, including the availability of week-long "residency" twice per year, externships, and blended courses offering synchronous and asynchronous instruction.⁵¹ The possibilities for live interaction online offer creative instructors the ability to develop exercises and methods of instruction that may have been thought of as only possible in person. Online education might actually develop superior methods of teaching the aforementioned competencies identified as key to success as a lawyer. As previously stated, we tend to assume that live legal education is the standard to match, but as previously discussed, legal educators have been slow to embrace modern, empirically proven teaching methods.⁵² Online education, well designed, has the potential to not just meet but exceed that standard.

CONCLUSION

Increasing access to higher education in general and to legal education in particular is a challenge that will require creativity and resources. In turn, expanding that access is a necessary but not sufficient condition to addressing larger issues of access to the legal system. We believe expanding how legal education is delivered is part of the solution to these problems.

To the extent that the development of hybrid and fully online J.D. and other legal degrees incorporates insights from the broader education community, we think it will be more successful in meeting these needs. One of us (Morriss) taught at the University of Alabama, a successful online tax LL.M. provider. Alabama's program began with Prof. Jim Bryce driving to various locations around the state to deliver in person lectures away from the Tuscaloosa campus. It then evolved to a closed-circuit television network in multiple locations, enabling the faculty to not travel but still requiring the students to go to a location to attend class (Professor Bryce often described this as technology enabling him to see an empty

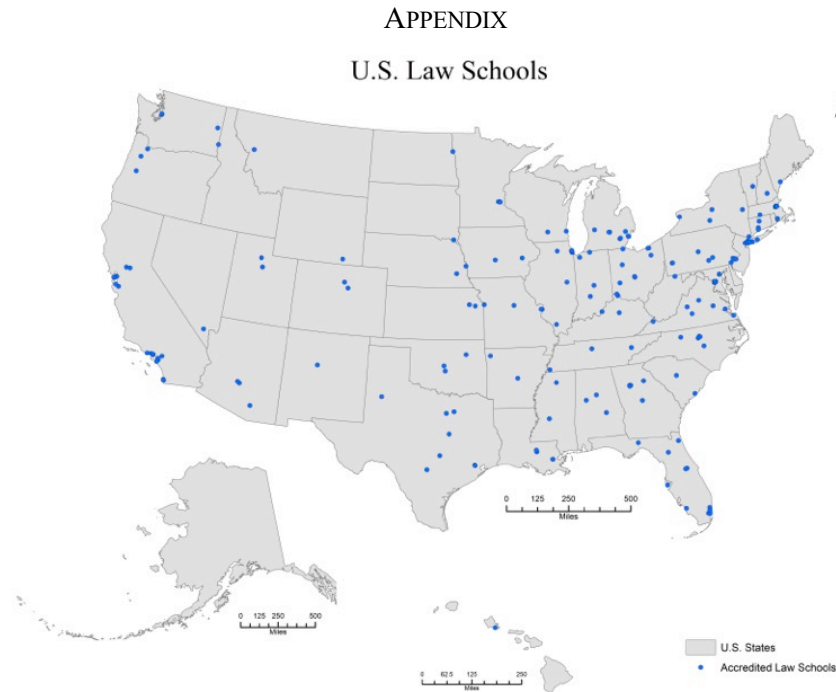
50. See Cait Etherington, *Why Online Law Degrees are Unlikely to Gain Legitimacy*, ELEARNING INSIDE (Dec. 5, 2017), <https://news.elearninginside.com/why-online-law-degrees-are-unlikely-to-gain-legitimacy/> (explaining that the legal profession's reluctance to diverge from tradition also explains the legal community's hesitation to accept online J.D. programs as suitable alternatives to in-class instruction).

51. See Syracuse Univ., *JDinteractive*, <http://jdinteractive.syr.edu> (last visited Aug. 24, 2019).

52. See, e.g., Lopez, *supra* note 29; Grant, *supra* note 29; WATSON, *supra* note 29 (criticizing legal teaching in the US).

room, as the students opted to sit on the sides, out of camera range.) Finally, the program moved to synchronous online delivery, expanding access to a national audience and enabling the program to make use of a national faculty. Aside from two short visits to Tuscaloosa, the students in the program were able to take classes from anywhere with an internet connection.

At least an equivalent degree of innovation in delivery methods is required to truly provide access to legal education outside those places where in-person programs exist. The benefits of doing so include expanding access to the legal system to underserved communities, expanding career opportunities, and ensuring that the legal system has the capacity to meet a broader array of needs.



*Figure 1 - US Law Schools*⁵³

53. See Am. Bar Ass'n, *List of ABA-Approved Law Schools in Alphabetical Order*, https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/in_alphabetical_order/ (last visited Sept. 22, 2019).

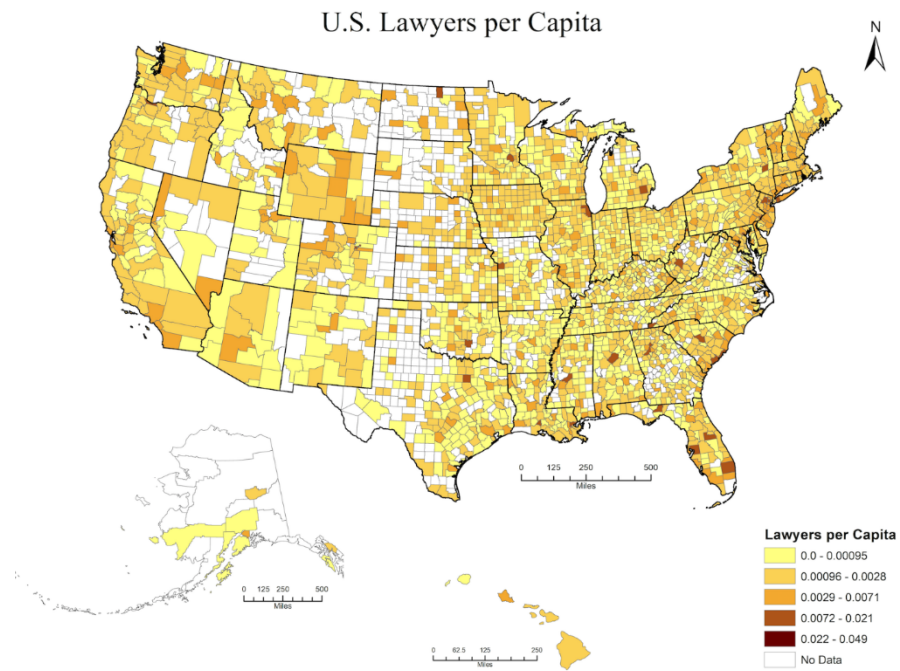
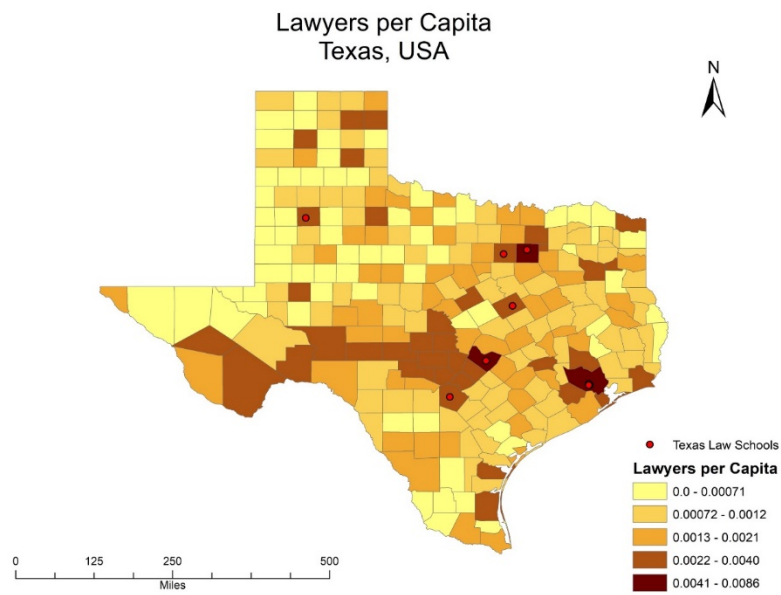


Figure 2 - Lawyers per capita by county⁵⁴

54. See Bureau of Labor Statistics, *Occupational Employment and Wages, May 2018: 23-1011 Lawyers* (Mar. 29, 2019), <https://www.bls.gov/oes/current/oes231011.htm>; see also AM. BAR ASS'N, *supra* note 22.



*Figure 3 - Texas Lawyers per capita by county*⁵⁵

55. See STATE BAR OF TEX. DEP'T OF RESEARCH & ANALYSIS, ATTORNEY POPULATION DENSITY BY METROPOLITAN STATISTICAL AREA 2018–2019 3–10 (2019).

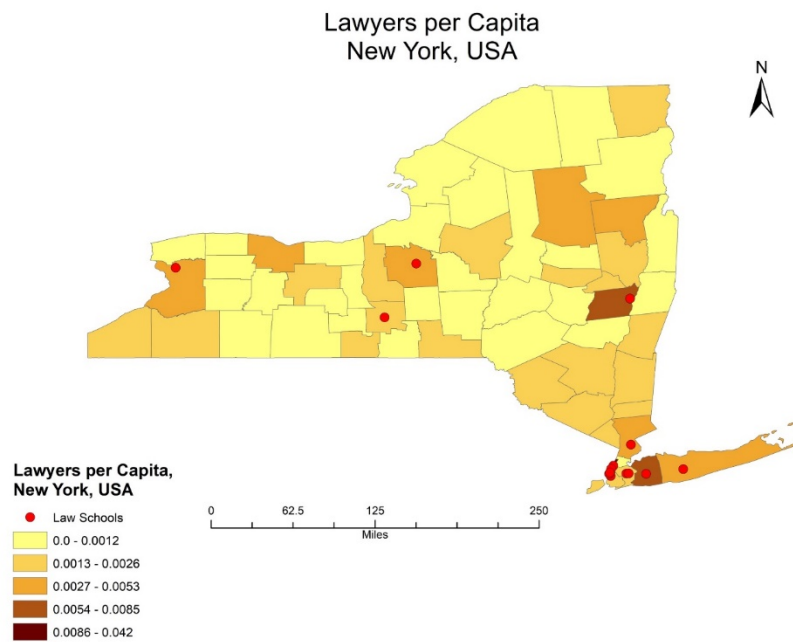


Figure 4 - New York lawyers per capita by county⁵⁶

56. See PressConnects, *New York Lawyer Report: How Many Lawyers Per Resident in Each County in New York State?* (May 14, 2018, 2:39 PM), <https://www.pressconnects.com/story/news/local/2018/05/14/new-york-lawyer-report-how-many-lawyers-per-resident-each-county-new-york-state/545197002/>.

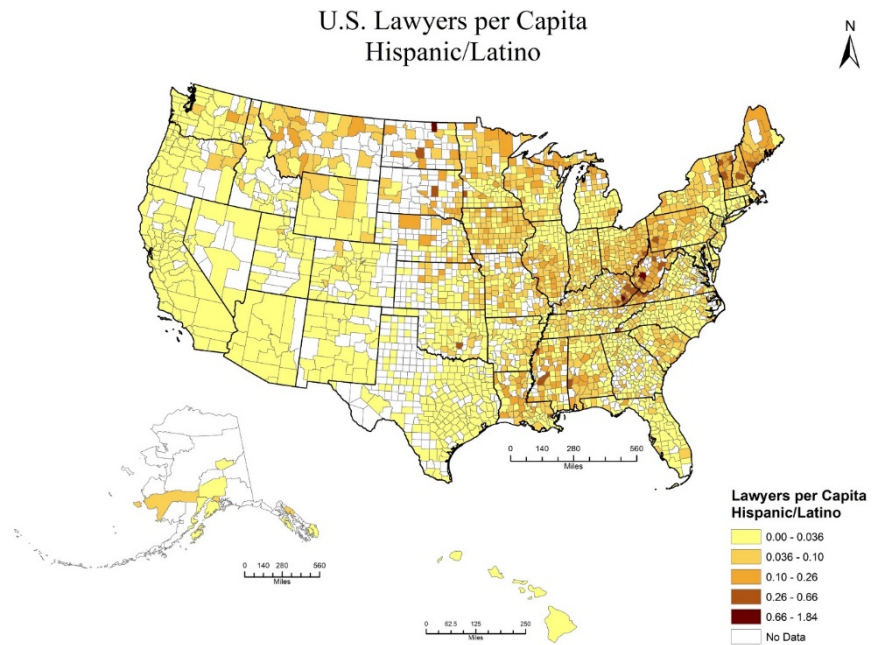


Figure 5 - Lawyers per capita for Hispanic population⁵⁷

57. See AM. BAR ASS'N, ABA NATIONAL LAWYER POPULATION SURVEY: 10-YEAR TREND IN LAWYER DEMOGRAPHICS (2019), https://americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-demographics-2009-2019.pdf (last visited September 22, 2019).

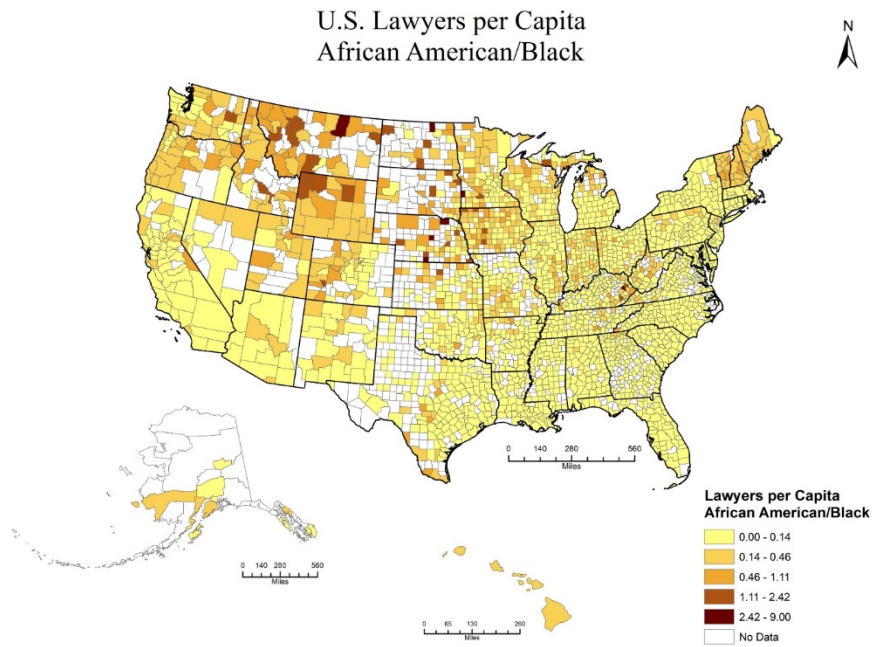


Figure 6 - Lawyers per capita for African American population⁵⁸

58. *See id.*