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ARTICLES

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ONLINE LEARNING AND THE FUTURE OF LEGAL EDUCATION: SYMPOSIUM INTRODUCTION

Nina A. Kohn[†]

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INTRODUCTION

Around the country, law schools and law professors are exploring online teaching. Law schools are making specialty courses available online, and many have created online master's degree programs. A handful, including Syracuse University, are even bringing their J.D. programs online.[1] This new reality raises important questions and theoretical challenges for the legal education and the broader practice of law.

A key question is how online education will—or should—change the way law is taught. Some describe online education as an opportunity to reimagine legal education. Others caution that online education could undermine the rigor of traditional legal education, potentially to the disadvantage of both new lawyers and those they serve. Another key question is how online education will affect the practice of law. To what extent will online education affect the ability of the legal profession to meet client needs? Will it change the demographic composition, skill set, or ethos of the legal profession? Complicating matters is that the move toward online education is occurring during a period in which legal academy is

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1. As of the date of publication, Mitchell Hamline School of Law, Syracuse University College of Law, University of Dayton School of Law, Southwestern Law School, and New Hampshire School of Law had received variances from the American Bar Association (ABA) that permitted the schools to operate "hybrid J.D." programs that combine in-person classes with online coursework in excess of the amount otherwise permitted under ABA Standard 306. In addition, other law schools, including Touro College Law Center, Loyola University (Chicago) School of Law, Seton Hall Law School, and University of Denver College of Law, were operating hybrid J.D. programs designed to comply with ABA Standard 306.

confronting significant instability, with many schools struggling to maintain enrollments, and some even shuttering their doors.

While law schools are just beginning to explore online course offerings, online education has a strong foothold in many other areas of higher education. In the United States, more than a million students are enrolled in online graduate programs[2] and approximately one-third of students in institutions of higher education have taken an online course.[3] In fact, online education represents a substantial part of the market in certain professional fields. Indeed, in 2019, *U.S. News and World Report* ranked 301 online MBA programs (compared to 475 residential MBA programs).[4]

Similarly, while the literature on the impact of online education in law schools is limited,[5] with only a handful of articles published to date,[6] there is an ample body of research on the effectiveness and impact of online education in other fields.[7] Much has been written about the effectiveness of online teaching in higher education, and best practices for promoting rich learning and understanding.[8] Research examining effectiveness of online education in other professional fields of study has found that it can be an effective modality for teaching both concepts and skills.[9]

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2. *See* Julia E. Seaman et al., *Grade Increase: Tracking Distance Education in the United States* 1, 11 (2018), http://onlinelearningsurvey.com/reports/gradeincrease.pdf. *See id.* at 12 (reporting that approximately 1.1 million graduate students took at least one distance learning course in 2016).

3. *See id.* at 11.

4. *See Best Online MBA Programs*, U.S. NEWS & WORLD REP., https://www.us-news.com/education/online-education/mba/rankings (last visited Nov. 21, 2019); *Best Business Schools*, U.S. NEWS & WORLD REP., https://www.usnews.com/best-graduate-schools/top-business-schools/mba-rankings (last visited Nov. 21, 2019).

5. This is, of course, the predicable and natural consequence of ABA restrictions on online legal education. Indeed, this volume is the first law review volume devoted to exploring online legal education and this volume's articles represent a much-needed addition to the literature.

6. *See generally, e.g.,* Yvonne M. Dutton et al., *Assessing Online Learning in Law Schools: Students Say Online Classes Deliver,* 96 DENV. L. REV. 493 (2019) (studying the student experience with online *legal* education and providing support for the proposition that online courses can provide education of equal quality to residential courses and suggesting key attributes of high-quality online courses).

7. Studies of online learning outcomes and meta-analyses of those studies are rapidly proliferating, and entire journals (*e.g.*, *The Internet and Higher Education*, *Distance Education*, *The Online Learning Journal*) are devoted to the topic of online learning.

8. *See generally, e.g.,* Barbara Means et al., *Evaluation of Evidence-Based Practices in Online Learning: A Meta-Analysis and Review of Online Learning Studies* (2010), https://www2.ed.gov/rschstat/eval/tech/evidence-based-practices/finalreport.pdf (providing an important early meta-analysis of studies on the efficacy of online learning).

9. *See generally, e.g.,* Dina J. Wilke et al., *Can Clinical Skills Be Taught Online? Comparing Skill Development Between Online and F2F Students Using a Blinded Review*, 52 J. SOC. WORK EDUC. 484 (2016) (comparing clinical social work skills of students who took a clinical social work course in a residential classroom versus those who took the course

Research from other fields also indicates that online education increases the rate at which many historically disadvantaged populations participate in higher education. For example, students from rural communities[10] and members of the military[11] disproportionately enroll in online degree programs.

The scarcity of writing and research on online legal education is particularly unfortunate given the recent decision by the American Bar Association (ABA) to liberalize rules limiting online education. Prior to August 2018, the ABA prohibited ABA-accredited law schools from awarding any credit for "distance learning" courses during a J.D. student's first year of study and from awarding more than fifteen credits from such courses to any J.D. student.[12] Law schools could only exceed this threshold if they were granted a discretionary variance from Standard 306. By contrast, starting in August 2018, ABA-accredited law schools may permit a student to earn up to a third of the credits required for graduation in a "distance learning format,"[13] including ten during the first third of the student's legal education.[14] This change—and the possibility

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online); Sherry M. Cummings et al., *Comparative Analysis of an Online and a Traditional MSW Program: Educational Outcomes*, 51 J. Soc. Work Educ. 109 (2015) (comparing knowledge and skills-related learning outcomes for online and traditional social work students).

10. *See* David L. Clinefelter & Carol B. Aslanian, *Online College Students 2014: Comprehensive Data on Demands and Preferences*, The Learning House, Inc. 29 (June 2014), https://www.learninghouse.com/wp-content/uploads/2017/09/2014-Online-College-Students-Final.pdf.

11. *See* Alexandria Walton Radford et al., *After the Post-9/11 GI Bill: A Profile of Military Service Members and Veterans Enrolled in Undergraduate and Graduate Education*, U.S. Department of Education 17 (Aug. 2016), https://nces.ed.gov/pubs2016/2016435.pdf (noting that 37% of military graduates had participated in entirely online graduate degree programs, compared to 17% of nonmilitary grad students).

12. Notably, the definition of "distance learning" was carried over to the revised Standard 306. For that definition see *infra* note 13.

13. Under Standard 306:

> A distance education course is one in which students are separated from the faculty member or each other for more than one-third of the instruction and the instruction involves the use of technology to support regular and substantive interaction among students and between the students and the faculty member, either synchronously or asynchronously.

See ABA Standards and Rules of Procedure for Approval of Law Schools Standard 306(a) (2019–2020). This definition did not change with the 2018 amendments.

14. Certain, non-demanding limitations remain. Standard 306 requires accredited law schools to ensure that for-credit distance learning courses provide students with the opportunity for regular and substantive interaction with faculty, and requires that faculty monitor

that the ABA will further liberalize these rules in coming years[15]—have the effect of encouraging law schools to actively consider moving substantial portions of their curriculum online in a long-term way, and not simply as a short-term response to the coronavirus pandemic.

This symposium issue, based on a symposium held at Syracuse University College of Law in May 2019,[16] thus represents a timely and important step forward in advancing research into online education in law schools, and bringing legal academia into a larger conversation about online education in higher education. It brings together leading thinkers in legal education and educational design to explore the theoretical and practical opportunities and challenges posed by online education, to evaluate different learning models and consider best practices, and to explore the implications for the legal profession and access to justice more broadly.

This short article draws on the contributions to the symposium to distill three key predictions about the impact of online education on the future of legal education and the legal profession. It then builds on the work of this symposium by suggesting key topics for further research on the symposium's themes.

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student effort and "opportunity for communication about that effort" *See id.* In addition, accredited schools offering for-credit distance learning courses must possess the "technological capacity, staff, information resources, and facilities necessary to assure the educational quality of distance education." *Id.*

15. In March 2020, the Council of the Section of Legal Education and Admissions to the Bar approved for notice and comment proposed changes to the accreditation standards for law schools that would eliminate Standard 306 and most restrictions on online courses, but (1) would limit distance learning to 10 credits during the first third of a student's study, and (2) require a law school to receive acquiescence from the ABA before offering a program of JD education in which more than one-third of the credits required for graduation would be online. *See* Diane Bosse & Barrier A. Currier, Memorandum to Interested Persons re. ABA Standards and Rules of Procedure – Matters for Notice and Comment (Mar. 6, 2020), available at http://www.americanbar.org/groups/legal_education/resources/notice_and_comment. At the time of publication, it was an open question whether the ABA would adopt these changes.

16. This was a fitting setting for the conversation as the Syracuse College of Law community is acutely attuned to online education, and its potential to impact legal education, the legal profession, and the public more broadly. This is in large part because, in January 2019, the College of Law launched the JDinteractive, a hybrid J.D. program that combines online courses, skills-focused residential courses, and an externship opportunity. In this first-of-its-kind program, each online course consists of both a self-paced class session and a live class session in which faculty and students interact in real-time much as they would in a residential classroom. For a more detailed description of the JDinteractive program, *see generally* Nina A. Kohn, *JDinteractive: An Online Law Degree Program Designed to Expand Access to Justice*, 90 N.Y. STATE BAR ASSOC. J. 30 (Sept. 2018) (providing an overview of the program and its goals).

I. Predictions Supported by this Symposium

While it is impossible to predict the full impact that the move toward online education will have on legal education and the legal profession, the contributions to this symposium support three key predictions.

First, high quality legal education can be delivered online. Contributions to this symposium provide both empirical and theoretical support for the proposition that high quality learning and teaching can be achieved using many different teaching techniques, just as poor quality teaching and learning can occur in many different settings. That is, modality of education must not be conflated with quality of education. Thus, Michael Hunter Schwartz takes on the "pernicious myths" surrounding online teaching to show why excellent teaching is not "modality dependent."[17] He presents a compelling argument in favor of a modality-less model of law teaching excellence.[18] Building on his research on effective teaching in residential classrooms, Schwartz shows how the techniques excellent law teachers use are equally available—and can be equally effective—in the online space.[19] In addition, Victoria Sutton provides empirical evidence that supports the proposition that online legal education can be at least as effective and residential legal education by outcomes in her online course she taught with those in her parallel residential course.[20] Students' self-reported engagement and perceptions about online learning support the conclusion that online law classes can be engaging for students, and give students a strong sense of connection with faculty.

Several of the contributors provide concrete ideas for achieving excellence in online teaching. Noelle Sweaney shows how education psychology theory can inform how design of online law classes, and offers specific techniques that teachers can use to be effective in the online teaching space.[21] Perhaps most notably, she describes techniques educators can use to create a sense of community among online learners—even if learners enrolled in entirely asynchronous courses.[22] Margaret Ryznar and Yvonne Dutton similarly suggest concrete techniques that professors teaching asynchronous online courses can employ to motivate students

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17. Michael Hunter Schwartz, *Towards a Modality-Less Model for Excellence in Law School Teaching*, 70 Syracuse L. Rev. 115, 131 (2020).

18. *Id.*

19. *Id.*

20. *See generally* Victoria Sutton, *Asynchronous, E-Learning in Legal Education: A Comparative Study with the Traditional Classroom*, 70 Syracuse L. Rev. 143 (2020) (discussing her study and its results).

21. *See* Noelle Wall Sweany, *From Theory to Practice: Evidence-Based Strategies for Designing & Developing Engaging Online Courses*, 70 Syracuse L. Rev. 167 (2020).

22. *Id.*

and, in turn, increase the likelihood that students learn course content.[23]

Second, the contributions to this symposium suggest that the move toward online education will spark innovation. Online education provides an opportunity to fundamentally rethink how best to "do" legal education. For example, in this symposium, David Thomson, as self-described "futurist," provides his vision for how novel uses of online legal education could and should transform legal education by creating new paths for legal study and reducing the cost of law school attendance.[24] Similarly, Andrew Morriss and James McGrath suggest that online education, and the ample opportunities for assessment in asynchronous online courses, could facilitate a competency-based approach to J.D. education whereby students would be unable to move forward in their studies until they had mastered certain competencies.[25]

Third, the contributions to this symposium suggest that the ability for law students to earn their J.D. through primarily online study will increase access to justice. The contributions suggest that one way it will do this is by creating access to law school for populations who have lacked such access. For example, Eric Janus shows how William Mitchell's pioneering hybrid J.D. program made it possible for students to succeed in law school who otherwise would not have been able to attend law school, thus furthering its mission of expanding access to legal education.[26]

The contributions suggest that another way that online education will expand access to justice is by training lawyers in communities which are currently underserved by the legal profession. Indeed, Morriss and McGrath provide a compelling argument that online education can help bridge the justice gap between where legal service providers are needed, and where they are currently located.[27] Using Texas as a case study, they model the relationship between where prospective law students are located and where law schools are located.[28] Their model suggests that online education could substantially increase access to legal education to

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23. *See* Margaret Ryznar & Yvonne Dutton, *Lighting a Fire: The Power of Intrinsic Motivation in Online Teaching,* 70 SYRACUSE L. REV. 73 (2020).

24. *See* David I. C. Thomson, *How Online Learning Can Help Address Three Persistent Problems in Legal Education*, 70 SYRACUSE L. REV. 181 (2020).

25. *See* James McGrath and Andrew P. Morriss, *Online Legal Education and Access to Legal Education and the Legal System*, 70 SYRACUSE L. REV. 49 (2020).

26. *See* Eric S. Janus, *The "Worst Idea Ever!"—Lessons from One Law School's Pioneering Embrace of Online Learning Methods*, 70 SYRACUSE L. REV. 13 (2020).

27. *See* McGrath & Morriss, *supra* note 25 at 59.

28. *Id.* at 53.

prospective students who are not located in major urban areas—law students who are disproportionately in areas with unmet legal need.[29] Notably, this conclusion is also supported by research that shows that students living in rural areas disproportionately enroll in an online graduate programs.[30]

Thus, the contributions suggest that—even if only a subset of law schools offer online programs of J.D. study—such offerings could substantially address the structural mismatch between where lawyers are currently located and where they are currently needed and, in particular, the "rural lawyer gap."[31] This would be a positive and significant development. The need for lawyers in some rural areas of the nation is sufficiently great that some states and bar associations are investing substantial sums of money to encourage new lawyers to practice in rural communities.[32] By comparison, residential law schools—which tend to be located in major metropolitan areas and areas in which there are already ample legal services—are not well-suited to addressing the gap.[33]

II. AGENDA FOR FURTHER INQUIRY

The fact that good education *can* be delivered online does not mean that it *will* be delivered online. While the contributions to this symposium provide good reason to be optimistic about the potential for online education to produce high-quality student learning, they by no means suggest

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29. *Id.*

30. *See* Clinefelter & Aslanian, *supra* note 10 at 29.

31. *See, e.g.*, *Special Report: Access to Justice: The Rural Lawyer Gap*, LAW.COM (Jan. 15, 2015), https://www.law.com/dailyreportonline/almID/1202714351222; Ethan Bronner, *No Lawyer for Miles, So One Rural State Offers Pay*, N.Y. TIMES (Apr. 8, 2013), https://www.nytimes.com/2013/04/09/us/subsidy-seen-as-a-way-to-fill-a-need-for-rural-lawyers.html (discussing the predicament faced by rural South Dakota residents); Grant Gerlock, *Lawyer Shortage in Some Rural Areas Reaches Epic Proportions*, NAT'L PUB. RADIO (Dec. 26, 2016), https://www.npr.org/2016/12/26/506971630/nebraska-and-other-states-combat-rural-lawyer-shortage (focusing on the situation in Nebraska).

32. *See* Noel K. Gallagher, *Maine School Moves to Reverse Shortage of Rural Lawyers*, PORTLAND PRESS HERALD (Oct. 22, 2017), https://www.pressherald.com/2017/10/22/maine-school-moves-to-reverse-shortage-of-rural-lawyers/ (discussing Maine's program and similar programs in other states); *see also* Kathryn Hayes Tucker, *Bar Board Approves Rural Assistance Plan But Not Without a Fight*, DAILY REPORT (Jan. 11, 2015) (describing Georgia's approach); Gerlock, *supra* note 23 (describing Nebraska's approach); Bronner, *supra* note 23 (describing South Dakota's approach).

33. As I explained in an earlier article: "Even if students from marginalized communities are able to uproot themselves—and potentially their families—to earn a J.D. at a residential program, they may never return to that underserved community. Returning typically means graduates must uproot themselves again, leave behind connections to new people and places, and forgo cosmopolitan experiences and amenities to which they have grown accustomed." *See* Kohn, *supra* note 16, at 33.

that online education will produce such outcomes. Indeed, to the contrary, they suggest that the modality of education should not be conflated with the quality of online education. Good education can occur online, as can poor—just as good education can occur in a residential program, as can poor.

The key question is what specific practices are consistent with high quality legal education. At the program level, is there a particular mix of online elements, or a particular combination of online and residential elements, that is best suited to delivering high quality legal education? Conversely, are there particular approaches or combinations that are unlikely to deliver high quality legal education?

Two key program design variables deserve particular attention. The first is the manner and extent to which online education is combined with residential education. There is reason to believe that, as some of the contributors to this symposium speculate, a "hybrid model" that combines place-based (often called "in person") and online courses may be especially well suited to delivering legal education in a way that is robust and accessible. A 2010 meta-analysis commissioned by the U.S. Department of Education of then-existing research on effectiveness of online education found support for proposition that online education may have an advantage of residential education, and suggested that the advantage was greater when the online instruction was "blended" with residential instruction than when it was exclusively delivered online.[34]

A second program variable deserving attention is the manner and extent to which programs combine live and asynchronous online education. Today, "online education" is often assumed to be—and equated with—*asynchronous* online education. Indeed, the tendency is so pervasive that even authors to the symposium assume—without discussion—that online education will be asynchronous.[35] Yet online education can also be partially or fully synchronous, taking advantage of web conferencing software to conduct class in real time.

Synchronous online education can readily mirror the experience in a traditional residential classroom for both students and teachers. So long as the professor (or professors) and students simultaneously can see one and hear everyone in the virtual classroom, the experience of teaching and learning will generally mirror the experience of teaching and learning in a residential classroom.[36] Indeed, in my own teaching, I have found

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34. *See* Means et al., *supra* note 8, at 18–19.

35. *See*, *e.g.*, Ryznar & Dutton, *supra* note 23 (comparing "online courses" to "live courses").

36. Other approaches to synchronous earning, by comparison, may differ substantially

that not only the style of teaching in my synchronous online torts classes mirrors that of my residential torts courses, but that the student dynamics (both with one another and with me, their professor) also mirror those in my residential course.

By contrast, asynchronous online education represents a true departure from the traditional law school experience. In a traditional, residential law school classroom in which Socratic or modified Socratic dialogue is employed, students are called upon to "think on their feet" by responding to questions and ideas raised by the professor and by classmates, and to follow a conversation as it spontaneously and dynamically evolves. By contrast, in the asynchronous classroom, instruction is typically self-paced with professors and students interacting—to the extent they interact—sequentially and with delay. Even when interactive elements are added to asynchronous class sessions to encourage similar patterns of thinking, the pacing of the class is distinct from that in a live, residential classroom. In some cases this may be an advantage—the student will have the opportunity to reflect before responding.[37] In other cases, this may be a disadvantage—the student is not forced to practice the skill of answering on one's feet, and may feel less connected to peers and to the instructor, which may itself impede learning.[38] Either way, the experience is profoundly different than that in the traditional residential classroom.

Thus, the "radical" move in online education is not the move to teaching online but rather the move to teaching asynchronously. Accordingly, researchers wishing to understand the impact on online J.D. education, and those wishing to design effective online J.D. education programs, should focus substantial energy on understanding the relative advantages and disadvantages of these competing modes of online instruction, the most effective teaching practices in each, and how the combination of the two may affect key performance outcomes.

The difference between live and asynchronous teaching might affect

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from this engaged approach. For example, a live webinar where the instructor lectures in real time but does not see students, and students do not see one another, would be a substantial departure from the traditional law school education model.

37. *Cf.* Schwartz, *supra* note 17 at 126 (suggesting that asynchronous courses may improve learning because each student must respond, rather than relying on "vicarious" learning and because "[t]he extra thinking time increases the likelihood that what they contribute reflects deeper thought, and the modality means that students who have great insights but are not extroverts or who process less speedily than their peers can enjoy success.").

38. *See generally* Peter Shea & Temi Bidjerano, *Understanding Distinctions in Learning in Hybrid, and Online Environments: An empirical Investigation of the Community of Inquiry Framework*, 21 INTERACTIVE LEARNING ENV'TS 355 (2013) (finding that students' perceptions of social interaction in online courses was positively correlated with indicators of student learning).

everything from course design, to faculty selection and development, to the regulation of law schools. Of course, live instruction is less flexible in terms of schedule, and the larger the amount of live instruction, the less the online format may meet the needs of working adults. Thus, in assessing the advantages and disadvantages of the competing formats, some attention should be paid on the potential of each format to expand access to legal education and justice more broadly.[39]

Notably, this type of inquiry might lead to a conclusion that rather than regulating "online education" separately from other kinds of J.D. education, the ABA should regulate asynchronous education separately from other kinds of J.D. education.[40] Indeed, I would posit that the live online classroom has far more in common with the bricks-and-mortar classroom than it does with the asynchronous online classroom, and that regulatory approaches should reflect these real differences.

CONCLUSION

As the ABA's decision to liberalize Standard 306 recognizes, online education can be part of a high-quality J.D. education. The growth of online J.D. education can not only help the legal academy to reflect on and improve existing practices; it also has the potential to expand access to justice by opening the profession to talented students for whom residential J.D. education is unrealistic, and by expanding the number of attorneys in key underserved communities.

The question now is how can law schools best design and implement online education in a way that best takes advantage of this new modality's potential. This symposium has suggested some answers to that question. As more law schools move J.D. courses online in the coming years, it will be imperative that educators build upon the work of this symposium with further research on best practices with regard to online legal education. Law schools, law students, the legal profession, and those it serves all stand to benefit from research that considers whether outcomes for legal education (e.g., bar passage, and skills such as oral advocacy or client counseling) differ based on whether instruction is offered primarily online or with a substantial residential component, and whether it is offered primarily asynchronously or with a substantial live component.

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39. On the other hand, working adults are only one population for whom online education expands access. There are other populations who cannot realistically attend residential programs (e.g., those who are geographically mobile such as military spouses or individuals with mobility disabilities) for whom flexible timing may not be critical.

40. For example, it might suggest that the ABA should revisit the definition of distance education so that it distinguishes between live and asynchronous education.

As such research progresses, stakeholders should be encouraged to maintain high expectations for the quality of online J.D. education. Just as online legal education should not be held to a higher standard than residential legal education, so too should it not be held to a lower standard.

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THE "WORST IDEA *EVER*!"—LESSONS FROM ONE LAW SCHOOL'S PIONEERING EMBRACE OF ONLINE LEARNING METHODS

Eric S. Janus[†]

CONTENTS

INTRODUCTION

Should online instruction be a substantial, or even a core part, of Juris Doctor ("J.D.") programs? Is it the worst idea ever? A serious option that some law schools should consider? The inevitable future of legal education? In the overall universe of higher education, these are surprising questions to be asking in 2020. Compared to most other areas of higher education, legal education has been slow to adopt online pedagogies into its canon of acceptable instructional options.[1] The reluctance to adopt

1. *See* David A. Thomas, *American Legal Education: Moving from the Classroom Without Paper to Instruction Without the Classroom?*, 1 J. INFO. L. & TECH. (2001), https://warwick.ac.uk/fac/soc/law/elj/jilt/2001_1/thomas/ ("In American legal education, distance learning is moving very cautiously.").

these technological teaching options reflects a deep-seated, historic elitism in legal education, combined with a devotion to a particular pedagogical paradigm (the "Socratic Method") that is as strong emotionally as it is short on empirical grounding.[2] This essay explores one law school's contrarian and pioneering embrace of online education into the core of its J.D. program, a five-year journey undertaken by William Mitchell College of Law (now Mitchell Hamline School of Law).

This essay makes a simple point. Online pedagogy ought to be part of the palette of tools available for the design of J.D. programs. But placing it at the core of a J.D. program is not universally to be desired. Like any pedagogy, these online tools have their strengths and their weaknesses. The particular combination of tools and methods represents a question of design: of arranging resources to maximize strengths and minimize weaknesses[3]—within a set of constraints. And the key constraint ought to be the particular mission of each law school. Design in the absence of clarity of mission, and without the availability of the full gamut of instructional methods, is impoverished and suboptimal.

An openness to bringing online pedagogy into the core has this salutary effect: it invites, almost requires, intentional, mission-based design. It invites educators to think foundationally about what they seek to accomplish by their J.D. programs, and how that might best be accomplished. It exposes business-as-usual thinking, and forces one to question what seem to be quite foundational assumptions about how to educate lawyers. For this reason alone, online methodologies ought to be clearly and readily available to legal educators.

There are strong sentiments opposing substantial incorporation of online components in legal education, many of which I will explore below. Not the least has been the historic, robust embrace of face-to-face teaching by the American Bar Association (ABA).[4] As well, online pedagogy, especially if its adoption is part of a major re-design of the J.D. program, is not cheap and not easy. And the uncertainty surrounding many of the design constraints is high. All of this leads me to conclude that only one variety of law school mission is likely to support substantial

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2. *See* Stephen M. Johnson, *www.lawschool.edu: Legal Education in the Digital Age*, 2000 WIS. L. REV. 85, 87–89, 94 (2000).

3. Gerald F. Hess, *Blended Courses in Law School: The Best of Online and Face-to-Face Learning?*, 45 MCGEORGE L. REV. 51, 56, 59 (2013) ("Effective blended course design requires the teacher to integrate online and classroom instruction thoughtfully, seeking to maximize the advantages of both online and face-to-face learning.").

4. *Id.* at 52 ("The American Bar Association has built its accreditation standards around the face-to-face course model.").

online incorporation—that with the goal of expanding access to legal education.

This paper is not about the benefits of adopting technology at the *margins* in legal education. That is easy and relatively risk-free. The question posed here is whether, how, and—most importantly—why, a law school would or should place online education at the *center* of its program of education. The paper builds this thesis around the experience we lived at William Mitchell College of Law (now Mitchell Hamline School of Law) during the period 2010 through 2015—a period during which I was President and Dean of this independent law school—as we conceived of, debated, designed, and implemented the first ABA-approved J.D. program centered on a substantial component of online instruction. This narrative is followed by a necessarily preliminary and incomplete assessment of the operation of the programs of blended learning we adopted, and a summary of lessons to be learned from our experience.

I. THE BEGINNINGS: FROM "WORST IDEA EVER" TO ABA APPROVAL

In 2010, William Mitchell College of Law was a law school that had, for 110 years, set its own path.[5] With its beginnings as one of a handful of night law schools in Minneapolis and St. Paul, its soul from birth was providing access for people who needed to work or care for families, through a flexible program of day and night, full and part-time programs.[6] It had always been closely connected to the practice of law—"a lawyer's law school"[7]—and was a pioneer in the development of comprehensive writing and skills programs[8] and clinical education.[9] Key antecedents to the generalized shift in legal education towards teaching skills and values,

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5. *See* Nancy Crotti, *Fitting a Law Degree Around Your Life: Then and Now*, MITCHELL HAMLINE SCH. OF L. (Dec. 16, 2017), https://mitchellhamline.edu/news/2017/12/16/fitting-a-law-degree-around-you-your-life-then-and-now/.

6. *See* Douglas R. Heidenreich, *With Satisfaction and Honor: William Mitchell College of Law*, 1900–2000 1, 10–14 (1999).

7. Eric S. Janus, *Clinics and Contextual Integration: Helping Students Put the Pieces Back Together Again*, 16 WM. MITCHELL L. REV. 463, 464 n.4 (1990) (quoting SAINT PAUL COLLEGE OF LAW ANNOUNCEMENTS AND BULLETIN 1954–55, at 4).

8. *See* Deborah A. Schmedemann & Christina L. Kunz*, Dean James F. Hogg: A Decade of Developments in Performance-Based Legal Education*, 21 WM. MITCHELL L. REV. 673, 673–74 (1996).

9. *See* Roger S. Haydock*, Clinical Legal Education: The History and Development of a Law Clinic*, 9 WM. MITCHELL L. REV. 101, 104 (1983).

in addition to doctrine, can be traced to William Mitchell alumni and faculty such as Chief Justice Warren Burger[10] and Minnesota Associate Justice Rosalie Wahl.[11]

Sometime in 2009 or 2010 we had a visit from Barry Currier, arranged by our innovative faculty member Professor John Sonsteng. Mr. Currier would become the head of the ABA's law school accreditation operation, and was then Dean of Concord Law School, an online, well-established law school that lacked ABA approval, but was accredited by the State of California.[12] In the course of a wide-ranging conversation about innovations in legal education, Mr. Currier suggested that we think about seeking a variance from the ABA to offer a J.D. program that combined substantial online instruction with onsite, face-to-face portions of the program that were concentrated in several long weekends and a summer session.[13] We came to refer to this approach that blended online with onsite instruction as the hybrid model.[14]

This suggestion struck a chord with me for several reasons: access to legal education and innovation were two. As alluded to above, our school had a long history of innovative teaching. As well, our access mission as a night law school was in focus: enrollment in our part-time evening program had been slowly but steadily declining, yet we were aware that access to legal education was a widespread problem, especially in rural areas.

At about the same time as Mr. Currier's visit, the college had hosted a symposium on the shortages of lawyers in rural areas. Deeply involved in the effort to provide legal services throughout the state, Professor Peter Knapp observed that "parts of Greater Minnesota needed new strategies to get more people help… 'We have come a ways down the road,' he said. 'There is a long ways to go.'"[15] During a 2011 Mitchell event to promote rural practice, a rural Minnesota lawyer in his late 40s said he

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10. *See* Jeffrey B. Morris, *Warren E. Burger and Change in Legal Education*, 11 COLONIAL LAW. 1, 2 (1981).

11. *See* Rosalie Wahl, *Lest We Forget: Celebrating Thirty Years of Clinical Legal Education at William Mitchell College of Law*, 30 WM. MITCHELL L. REV. 5, 6 (2003); *see also* Ann Juergens, *Rosalie Wahl's Vision for Legal Education: Clinics at the Heart*, 30 WM. MITCHELL L. REV. 9, 14–16 (2003).

12. See Robert E. Oliphant, *Will Internet Driven Concord University Law School Revolutionize Traditional Law School Teaching?*, 27 WM. MITCHELL L. REV. 841, 847 (2000).

13. *See id.* at 867 n.105.

14. *See* Eric S. Janus, Gregory M. Duhl & Simon Canick, *William Mitchell College of Law's Hybrid Program for J.D. Study: Answering the Call for Innovation*, B. EXAMINER 28, 28 (2014).

15. Scott Russell, *Minnesota's Legal Safety Net: Many Hands Intertwined*, 66 BENCH & B. MINN. 22, 26 (2009).

was the youngest lawyer in his community.[16] Participants in the discussion included older lawyers who said, essentially, "I have a great career with lots of clients, and a humane lifestyle, but I'm going to retire soon and I don't have anyone to leave my practice to."[17] We theorized that there were college graduates in rural areas who would not, or could not, relocate to attend law school, but who would make great lawyers and fill an important need in their hometowns. This, and other aspects of our access mission, were to become central themes as we developed our plans.

As President and Dean, I decided that we would make a serious run at developing a hybrid program, and I asked our Library Director and Associate Dean, Simon Canick, to head up an effort to explore this idea. Dean Canick made an initial presentation to our Board of Trustees in February 2010, in which he traced the increasing spread of distance educational approaches in higher education and summarized the rather extensive use of online technologies at William Mitchell College of Law to that date.[18] Dean Canick's presentation put some emphasis on the availability of synchronous tools, such as Adobe Connect: "To be clear, videoconferencing isn't new. What's new is that we can afford to use it, and that we can adapt it to our style of teaching."[19] Describing one of our existing trial advocacy courses, his presentation emphasized the advantages of such synchronous pedagogy in teaching lawyering skills: "We use whiteboards just like in a classroom, and PowerPoint. … Students go home, videotape themselves with a webcam or some other recording device, then upload them to YouTube. [The t]eacher adds annotations to the video, or types written comments."[20] His presentation proposed adding online components to a variety of classes "to add flexibility" to our program.[21] His presentation also mentioned the idea of a "hybrid model" with "[f]ace-to-face classes one weekend a month during the regular academic year, plus an intensive two-week block over the summer."[22] He noted that "[t]his is as far as you can push the standards

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16. Email from Simon Canick, Assoc. Dean to Eric S. Janus, President and Dean, William Mitchell Coll. Of Law (Aug. 5, 2019) (on file with author).

17. *Id.*

18. Email from Simon Canick, Assoc. Dean to Eric S. Janus, President and Dean, William Mitchell Coll. of Law (Feb. 17, 2010, 12:48 CST) (on file with author).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

without violating ABA standards."[23] He concluded: "This isn't a proposal… just food for thought."[24]

By July of 2010, our thinking had evolved to fully embrace the "hybrid model."[25] In a document entitled "Transforming Delivery of Legal Education," Dean Canick laid out a plan:

> With the rapid growth of online, distance education, William Mitchell College of Law is implementing strategies for using this tool to increase access, improve learning, and help manage the costs of a law school education. Our plan at William Mitchell is to improve on our existing high quality of legal education and to use all the tools, including online technology, available to us. Central to our plans will be allegiance to our traditional mission: providing talented students with meaningful access to engaged, practical legal education.

> Our vision is to implement a new legal educational model—what we call the "hybrid model"—that will combine online with on-campus courses and practical, experiential learning. It will be part of an overall plan to provide the Mitchell brand of legal education in a way that delivers quality, experiential learning and value to our students—whether that education is delivered full-time, part-time or on a hybrid, online/on-campus basis.[26]

The document continued:

> [w]e may also seek a waiver to include a somewhat higher proportion of online teaching. The program model is likely to include several three-day weekends each semester during the academic year and an intensive two-week summer session. All other coursework will be online. Students will complete the J.D. in four years.[27]

The memo characterized the proposal as a "major reform that will be subject to approval by Mitchell's faculty."[28] The memo proposed an aggressive timeline for faculty and board consideration, and for the development of the design and curriculum for the hybrid program.[29] It contemplated a beginning date two years later, in fall 2012.[30]

It quickly became apparent that we did not have sufficient support

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23. Email from Simon Canick, Assoc. Dean to Eric S. Janus, President and Dean, William Mitchell Coll. of Law (Feb. 17, 2010, 12:48 CST) (on file with author).

24. *Id.*

25. *See* Memorandum from Simon Canick, Assoc. Dean to Eric S. Janus, President and Dean, William Mitchell Coll. of Law (July 2010) (on file with author).

26. *Id.* at 1.

27. *Id.* at 2.

28. *Id.*

29. *Id.* at 5.

30. Memorandum from Simon Canick, *supra* note 25.

from the faculty to proceed. Especially memorable was the comment at one of the "hybrid task force" meetings by one of our senior faculty members, concluding that this was "the worst idea ever." Recognizing that faculty support and participation were essential to building any new program, it made sense to take time to continue to build additional comfort and competence with distance education. In part, this was accomplished by encouraging and supporting individual faculty members in the development of courses—and components of courses—using online technology.

It bears emphasizing that our faculty had a long tradition of being open to innovation and change in legal education.[31] The lack of support for the hybrid proposal arose not from a generalized hostility to change, although that certainly gave rise to a small portion of the concern, but rather from more practical considerations. In that sense, our faculty differed from the received wisdom about law school faculties. The ABA Task Force on the Future of Legal Education reported that faculty cultures within law schools "tend to be stable and not easily changed," arguing that desired change "requires a reorientation of attitudes towards change, including market-driven change, by persons within the law school."[32]

Our 2011 self-study described faculty concerns.[33] The worries were not couched in a reverence for the traditional Socratic pedagogy.[34] Rather, our faculty had much more pragmatic concerns: "[s]ome task force members expressed concerns regarding the potential market for a hybrid J.D., whether we had adequate financial resources to develop and sustain such a program, the willingness of college faculty to design hybrid courses, and the effect of a hybrid J.D. on the college's reputation."[35] But the faculty expressed a desire to continue working on the idea of the hybrid model:

> In light of the goals and concerns discussed above, the Task Force made the following recommendations: (i) conduct market research to assess

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31. Mitchell Hamline Sch. of L., *History*, (last visited Aug. 20, 2019), https://mitchellhamline.edu/about/history/.

32. Am. Bar Ass'n Task Force on Future of Legal Educ., *Report and Recommendations*, 15–16 (2014), http://s3-ap-southeast-2.amazonaws.com/resources.farm1.mycms.me/centreforlegaleducation-edu-au/Resources/ABA%20Task%20Force%20Report.pdf [hereinafter Future of Legal Education Task Force Report]. The task force suggests, however, that successful adoption of its recommendations "requires a reorientation of attitudes toward change, including market-driven change, by persons within the law school." *Id.* at 16.

33. Ann Juergens et al., *William Mitchell College of Law Self Study* (Apr. 13, 2011) (unpublished study) (on file with author).

34. *Id.*

35. *Id.*

both the demand for a hybrid J.D. program and its reputational impact (if any) on William Mitchell; (ii) designate a small group (3–4 people) to develop a proposal, using the goals developed by the Task Force as parameters; (iii) continue to explore ways to teach effectively with technology and invest, to the extent possible, in showing faculty how to build blended or fully online courses.[36]

The Faculty Curriculum Committee adopted these recommendations, which were implemented beginning in spring 2011.

Some concerns continued into 2012 as we reported in a 2012 strategic planning document:

Although we believe the Hybrid J.D. would attract an audience, discussions with William Mitchell faculty members indicated reluctance to move quickly. As a result, our approach has been to encourage professors to develop fully online or blended courses, incorporating technology chosen to match their comfort level and learning objectives.

We continue to develop new courses, and will continue to seek a supportable, scalable model for delivering online education. Given our analysis that a market exists for [a] Hybrid [J.D.], we hope our strategy will strengthen our expertise in online pedagogy while generating faculty enthusiasm for a larger scale program.[37]

We moved to the next phase in 2013. In part, the impetus for the move was an approach from a national for-profit educational organization that expressed interest in a joint venture to develop the hybrid program. This approach pushed us to move forward for several reasons. The interest of this national group gave us confidence that the idea for the hybrid program was sound and marketable. And the company had both the financial and the technological resources we thought would be needed to get the program started. This spurred the appointment of internal groups to design the hybrid program, choose a learning management platform, and manage the process of seeking ABA approval.[38] In addition to Associate Dean Simon Canick, leaders in this effort were Associate Deans Nancy Ver Steegh, Mary Pat Byrn, and Mehmet Konar-Steenberg, and Professor Greg Duhl, who eventually had a major role in developing the

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36. *Id.*

37. Memorandum from Eric S. Janus, President and Dean, William Mitchell Coll. of Law to the Strategic Planning Comm. of William Mitchell Coll. of Law (July 10, 2012) (on file with author).

38. *See generally* Council of the ABA Section of Legal Educ. & Admissions to the Bar, *ABA Standards and Rules of Procedure for Approval of Law Schools 2019-2020*, Am. B. Ass'n 1, 3–6 (2019), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/2019-2020-aba-standards-and-rules-of-procedure.pdf (outlining the process for law schools to obtain ABA approval).

curricular structure for the program.[39]

From the beginning, the planning and design of the program were sharply focused on the school's two-pillar mission: access through flexible scheduling and experiential learning.[40] The program as designed would require a variance from the ABA to allow for fifty percent distance education and fifty percent face-to-face instruction in the foundational courses.[41]

Key structural features of the design were dictated by our mission. For example, we chose to schedule the face-to-face time in week-long sessions, rather than more frequent weekend sessions, because we felt the concentration of on-campus hours would advance both our access and experiential missions. The face-to-face instruction would be delivered in week-long, intensive sessions—an orientation week at the beginning of each of the first two years, and capstone weeks at the end of the first four semesters. The capstone weeks were designed to be largely experiential,[42] and to integrate content from all of the courses in which the students were enrolled that semester. Week-long sessions, rather than long weekend sessions, would reduce travel time and expense, facilitating participation of students from more distant homes, and would allow for a design of simulation activities that integrated all aspects of the semester's instruction, and thereby provide a more realistic learning experience. This notion of "integration" was central to the design. As explained in the

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39. Others involved included Professor Jim Hilbert; Karen Westwood, Assistant Director, Research and Instructional Services; Janelle Beitz, Research and Instructional Librarian; and Kevin Hill, Student Bar Association Designee and Curriculum Committee Representative, Kathy Panciera, Vice President of Finance; and Louise Copeland, Director of Marketing and Alumni Relations.

40. The school's mission statement was as follows:

We serve the law. We teach it, study it, practice it, and work to make it just. This is our mission. Our students come to William Mitchell with diverse traits, talents, and experiences, yet they have in common a desire to transform themselves into skilled and ethical legal professionals. They learn from us and from each other. We challenge and support them, and we are responsive to their family and career commitments. We study law and the legal profession as critical observers and active participants. Our legal education incorporates scholarship and practice, maintains a strong connection to the profession, is intellectually rigorous, and instills an ethic of service to clients and community.

See Irene Scharf & Vanessa Merton, *Table of Law School Mission Statements*, U. MASS. SCH. L.: SCHOLARSHIP REPOSITORY 1, 119 (2016) (providing a repository of law school mission statements).

41. *See* Janus, Duhl & Canick, *supra* note 14, at 28–29 (providing a more complete description of the then-current ABA rules).

42. This was later modified at the request of the faculty to allow for the inclusion of more traditional classroom activities.

school's variance application:

> The Mitchell faculty believe that doctrine, skills, and professional values are most effectively learned when woven into an experiential program that simulates or resides in the real world. This approach helps students to "connect the analytically separate pieces of their legal education together into a meaningful whole."[43]

To facilitate the integration of learning, we chose the course offerings for each semester so that they related to each other thematically.[44] The first two semesters, for example, were designated "legal foundations"; each included two doctrinal courses and a related skills course.[45] The second year's theme was litigation, and the third and fourth years' themes were to be transactions and public law, respectively.[46] Again, skills courses related to the theme were included in each semester.[47] Our intention was that the capstone weeks would provide a real-world opportunity to integrate the doctrinal courses through exercises designed around the skills courses.

Our ABA application put integration at the center of our design:

> The proposed curriculum integrates doctrine, skills, and professional attributes to develop students into skilled, ethical professionals. Our approach is informed by what we have learned through implementing our integrated and collaborative first-year curriculum: intentional course sequencing reinforces and enhances student learning; students learn best with coordinated instruction in doctrine, skills, and professionalism; and both a common framework and vocabulary for all classes increase the transference of student learning among first-year courses. The benefits of curricular integration are reflected in three features of this proposal: block scheduling, course sequencing, and faculty coordination of instruction and assessment.[48]

There was an additional reason for the choice of week-long sessions as opposed to a weekend format: our faculty had substantial experience in designing and delivering experiential courses in this concentrated format.[49] By 2013, we had been offering several of these extended simulation courses: The Deals and Disputes course, for example, comprised

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43. Eric S. Janus, William Mitchell Am. Bar Ass'n Variance Application 9 (Aug. 14, 2013) (on file with author) (quoting Eric S. Janus, *Clinical Teaching at William Mitchell College of Law: Values, Pedagogy, and Perspective*, 30 WM. MITCHELL L. REV. 73, 74 (2003)).

44. *See* Janus, Duhl & Canick, *supra* note 14, at 30.

45. *Id.* at 32.

46. *Id.* at 32–33.

47. *Id.*

48. Variance Application, *supra* note 43.

49. *Id.* at 10.

forty-two hours of instruction over five days.[50] Our Divorce Mediation course required forty-four hours of instruction over a five-day period, and our Advanced Advocacy course comprised three credits of skills instruction within a one-week period.[51]

Our mission also dictated a second major structural choice: the use of asynchronous instruction.[52] This critical design feature would allow students to matriculate no matter their time zone or work/family schedule.

By the time we submitted our application to the ABA for a variance in July 2013, there was widespread and enthusiastic support among the faculty and the Board of Trustees.[53] Building on a faculty that identified itself as pioneering in legal education,[54] the key to this widespread enthusiasm had been slow and steady development, early and frequent notice and discussion, and growing experience among faculty members with online technology and design. I think it is fair to say that both groups felt a sense of pride that the school would be a pioneer, and that we were taking some action in the face of the darkening clouds of legal education.[55]

The ABA approved the variance in December 2013, setting a cap of ninety-six students on annual enrollment, and we set out to recruit a class and finish the construction of the program.[56] Even with ABA approval,

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50. *Id.* at 21.

51. *Id.*

52. *See* Janus, Duhl & Canick, *supra* note 14, at 30.

53. Variance application, *supra* note *43*; Memorandum from Barry A. Currier, Managing Director of Accreditation and Legal Education to Deans of ABA-Approved Law Schools, et al. (Dec. 8, 2015).

54. Our ABA Variance Request described the faculty's recent pioneering work as follows:

> Energized by discussions based on the Carnegie Report, the College accelerated its curriculum reform efforts with a focus on further defining outcomes for graduates, curriculum mapping, incorporating "backward course design" principles, using multiple and varied assessments, and expanding teaching methods (including teaching with technology). [Footnotes omitted.]

Variance Application, *supra* note 43.

55. *See* Carrie Joan Menkel-Meadow, *Too Many Lawyers? Or Should Lawyers Be Doing Other Things?*, 19 INT'L J. LEGAL PROF. 147, 148, 150–51, 159, 163 (2013); Carrie Menkel-Meadow, *The State and Future of Legal Education: Crisis in Legal Education or the Other Things Law Students Should be Learning and Doing*, 45 MCGEORGE L. REV. 133, 133–34, 159–60 (2013); *see also* Paul D. Carrington, *The Price of Legal Education*, 127 HARV. L. REV. F. 54, 54–55 (2013); Editorial Board, *The Law School Debt Crisis*, N.Y. TIMES (Oct. 24, 2015), https://www.nytimes.com/2015/10/25/opinion/sunday/the-law-school-debt-crisis.html.

56. Victor Li, *Law School's Online-Hybrid Degree Program Gets First-Ever Approval*

we had no idea whether we could make a go of it. Among a myriad of uncertainties, we were a school with a regional reputation, and we did not know whether we could recruit in the national market our new format would appeal to. We developed go/no-go scenarios contemplating that we would need to matriculate between twelve and twenty-five students to make the hybrid program financially viable. As it happens, our initial enrollment efforts generated a level of response whose strength surprised and pleased us.[57] The applicant pool was as strong as our traditional brick and mortar pool in terms of quantitative credentials, and we were able to matriculate a class of eighty-five students whose profile was a bit stronger than our brick and mortar profile.[58]

II. OBJECTIONS TO PLACING DISTANCE EDUCATION AT THE CENTER OF A PROGRAM OF LEGAL EDUCATION

We embarked on this project with full awareness that distance education "correspondence courses" were held in low esteem in the legal profession and academy, but so was "night law school."[59] Our approach was similar to our approach for any major project, especially a controversial one. We did market research, consulted and informed stakeholders, and engaged in an intentional and disciplined announcement of the project.

Early market research, conducted in 2012 in connection with our strategic planning process, indicated that reputational concerns among prospective students might not be a major risk.[60] In an online survey of prospective students (with a rather paltry four percent return rate), only seventeen percent indicated that a hybrid program would negatively affect their opinion of the school, while thirty percent felt it would enhance

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from ABA, ABA J. (Dec. 19, 2013, 7:45 PM), http://www.abajournal.com/news/article/william_mitchell_online-hybrid_law_school_program.

57. *See generally* Josh Verges, *William Mitchell Hybrid Online Law Degree Program Nation's First*, ST. PAUL PIONEER PRESS (Jan. 14, 2015), https://www.twincities.com/2015/01/14/william-mitchell-hybrid-online-law-degree-program-nations-first/ (explaining that eighty-five students enrolled in the program).

58. *See id.* The inaugural class entered also with a wide breadth of experience. Students hailed from twenty-nine states other than Minnesota, including Canada, and ranged in age from twenty-two to sixty-seven. Additionally, there were a greater number of second-career students, including five medical doctors. *Id.*

59. Economist, *Making Law School Cheaper: For Many, Two Years is Plenty*, ECONOMIST (Aug. 31, 2013), https://www.economist.com/united-states/2013/08/31/for-many-two-years-is-plenty ("Elite universities set up legal departments for posh students; night schools catered to the sons of immigrants.").

60. Memorandum to the Strategic Planning Comm. of William Mitchell Coll. of Law, (July 10, 2012) (on file with author).

the school's reputation.[61] In contrast, a more negative reaction came from focus groups of current students:

> Current Mitchell students were negative, and protective of their existing law school experience. Partly because of the camaraderie/community that developed during their first year, participants assumed that deep relationships with professors and other students would be impossible in Hybrid. And students perceived Hybrid as an easier option, designed for people who would not make the same commitment and sacrifice that they made.[62]

Focus groups of prospective employers did not raise significant alarms:

> Negative: interviewees expressed concerns about the difficulty of trans-lating law school teaching methods to an online format. Other concerns included the loss of connection to the school and classmates, and the importance of learning face-to-face communication skills for practicing law.

> Interviewees were not especially concerned about the impact of this program on William Mitchell's reputation. They believed that because William Mitchell's brand is well-established, Hybrid was unlikely to hurt the school's reputation.[63]

Our subsequent more in-depth market research convinced us that there would be sufficient potential student interest in a hybrid program, a belief that was eventually vindicated by the strong numbers and qualifications of our inaugural hybrid class, discussed above. But a key word of caution from our marketing department was this: "Educating our alumni and prospective employers on the nuances of a hybrid J.D. program will be critical to protecting Mitchell's reputation among these audiences."[64] A more detailed report stated:

> Not surprisingly, respondents had both positive and negative reactions to the hybrid J.D. There will be some resistance and skepticism. And William Mitchell may risk a short-term impact on its reputation.

> When first asked to identify, in their own words, what were their pri-mary concerns with this new type of J.D. program, respondents' top unaided answers were: "lack of interaction with students and faculty," "perceived as less prestigious by the profession," and "low academic rigor." In successive questions, respondents' aided responses indicated

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61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*

that more than half of respondents would have more concerns employing graduates from a hybrid program than from a traditional program. And about half of respondents believe that graduates from a traditional J.D. would be better than those from the hybrid J.D. Finally, while six in ten respondents would not change or would improve their opinion of William Mitchell if it were to offer the new type of J.D., three in ten feel their opinion would worsen.[65]

As part of the roll-out of our new Hybrid program, I met with numerous stakeholders. Listening to these people helped me understand the ways in which distance legal education is viewed. What follows is a description of the most common objections. Later in this essay I circle back and assess the themes and values underlying these objections.

Concerns reflected two major themes: pedagogy and reputation. The first is that distance education cannot reproduce the academic learning produced by the face-to-face classroom experience. For example, over half of the lawyers we surveyed in our market research identified this sort of concern in response to open-ended questions asking for their "primary concerns."[66]

For some of the alums and others that I talked with, this objection was based on a perception that online instruction lacks the rigor of the traditional classroom. But the validity of this particular concern clearly depends on the particulars of an online program (and, of course, the often unspoken assumptions about the traditional program that serves as the baseline for comparison). My view is that rigor, or the lack thereof, is highly variable within legal education, but the proximity or distance between the student and teacher are not correlated with this variance.

The concern that more accurately reflects the nature of distance education addresses the lack of interaction, and, most directly, the absence of the Socratic Method. There was a persistent assertion that the Socratic classroom and cold-calling helps keep students accountable and helps them learn to "think on their feet." A strong concern was that students in a distance setting would not have the opportunity to learn about the interpersonal skills critical to being a lawyer, and, more broadly, would not be imparted with the professional norms that form the background—and hence, perhaps, the strongest lessons—of the face-to-face environment.[67]

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65. Memorandum from Louise M. Copeland, Dir. of Mktg. & Alumni Relations, William Mitchell Coll. of Law to Strategic Planning Comm., William Mitchell Coll. of Law (Dec. 4, 2013) (on file with author).

66. *Id.*

67. *See* Abigail Cahak, Note, *Beyond Brick-And-Mortar: How (Cautiously) Embracing Internet Law Schools Can Help Bridge the Legal Access Gap*, 2012 J. L. TECH. & POL'Y 495, 501, 513 (2012) (summarizing common criticisms of an online legal education); Katherine S.

A related concern was that students would miss out on the sense of community that grows among classmates in the face-to-face environment, and that the relationships developed in the classroom remain important as foundations for one's professional career.

The second axis for concern was directed to the reputational effect resulting from the adoption of an online program. Typical was this email that I received from a recent alum:

> I received your email about the online program last night…There is a universal belief among us that our degrees have been devalued, and that, frankly, we just became the laughing stock of the Twin Cities law schools. I think it will be very difficult to raise the reputation of our law school when jokes like "University of Phoenix Law School" are already making their way around the web. This hit to the school's reputation has real life consequences on the value of our degrees, which, in turn, affects our earning potential. Alumni trust their schools to maintain its hard-won reputation. I think the college has breached that trust today. I am very disappointed in your decision to proceed with this plan, and I hope you will reconsider.[68]

As noted above, this view was shared by a proportion of the lawyers whom we surveyed for our market research. [69] Twenty percent of the alums surveyed volunteered this as one of their "primary concerns" about the program.[70] Citing a mix of the two concerns of academic preparation and reputation, about sixty percent of prospective employers we surveyed endorsed the view that they would have "more concerns" hiring a graduate of the hybrid program than from the school's traditional J.D. program.[71]

Our approach to debriefing our shared governance bodies (faculty and Board) was to be straightforward about the reputational challenges, but to put those challenges in an historical context, comparing the critique of distance education to the intense criticism aimed at "night law schools"

Mangan, *Justice Ginsburg Questions Internet-Only Law School*, Chron. Higher Educ. (Sept. 24, 1999), http://chronicle.com/article/Justice-Ginsburg-Questions/31346 (discussing how Justice Ginsburg famously questioned the viability of internet-only law school training); *see generally* Johnson, *supra* note 2 (outlining potential disadvantages of online legal instruction); Thomas, *supra* note 1, at 6 (accepting the preference for live instruction).

68. E-mail from W.O., to Eric S. Janus, President and Dean, William Mitchell Coll. of Law (Dec. 18, 2013, 12:44 pm CST) (on file with author).

69. Survey by Anderson, Niebhur & Associates, *William Mitchell Coll. of Law: Perceptions of a New Type of J.D. Program* (Nov. 2013) (on file with author).

70. *Id.*

71. *Id.*

and their descendants.[72] This is from my memo to the Board in December 2013:

> As you will see when you review the market research, there is a sizable portion of our stakeholders—alums, the legal profession in general— who have their doubts about "online" education, just as there were many in the legal establishment who doubted, in 1900, that "night law school" could deliver a rigorous, highly valued legal education. As we have a chance to talk about our program, I am confident that most will come to understand that the hybrid program will have the same standards, the same rigor, and the same value, as our traditional "bricks and mortar" program.
>
> The launch of a new and innovative program will not be risk-free. We will need to invest dollars and time, bringing to bear our best efforts at organization and curriculum design. But there are risks in standing still, risks in doing business as usual. In my judgment, I would rather be moving and innovating than waiting and watching.[73]

My notes for my presentation to the faculty in the summer of 2013 addressed the reputational issue by putting it in the context of the long history of elite criticism of access-based night-law schools:[74]

> What about the effect on our reputation? Won't people think of this as being the 21st century equivalent to the "correspondence" schools that advertised on matchbook covers?
>
> This is an empirical question. We will seek to make our project high quality. It will have ABA accreditation (otherwise, we won't do it). William Mitchell Marketing Director [] is working…to implement market research specifically designed to answer these (among other) questions.
>
> Nonetheless, won't there be some people who think less of us because we are pioneers in the use of online technology to increase accessibility? Of course. But remember that "night law school" was (and for some, still is) synonymous with low quality.
>
> A digression. Recently, at an ABA Committee on Admissions to the Bar that I attended, when the subject was admission of the graduates of foreign law schools, one of the distinguished members of the committee (a practitioner from Alabama or Mississippi) warned that graduates of some foreign law schools could be "as bad as the graduates of night law schools."
>
> Our founders, as well as the founders of other night law schools, fought

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72. Memorandum from Eric S. Janus to the William Mitchell Coll. of Law Board of Trustees (Dec. 10, 2013) (on file with author).

73. *Id.*

74. Eric S. Janus, Address to William Mitchell Coll. of Law Faculty (June 27, 2013) (on file with author).

hard for the principle of access. They had to fight against a persistent exclusionary bias that identified "night law schools" with low quality.

In her thorough 1993 report on the history of law school accreditation, Susan K. Boyd writes that in the formative days of the ABA Section on Legal Education (in the late 1800s), when early attempts at setting accreditation standards were taking shape, "John Henry Wigmore of Northwestern recommended that law schools exclude outside work of any kind. He felt the schools should structure their programs to exclude night students by having only day lectures. Those who must work could not dedicate the necessary time to law school, Wigmore said, and therefore they should not aspire to a legal education."[75]

She records that in the early 1900s, "a frequent subject of concern was the burgeoning number of night law schools. Speakers at these meetings argued on both sides, some charging that a lack of ethics in the profession originated largely among graduates of these law schools. At this time, many of the part-time or night schools provided an education for immigrants, who lacked the time and the funds to attend a daytime law school …"[76]

She links the criticism of night and proprietary law schools to the "[b]igotry and prejudice [that] permeated the established bar and law school world" citing the "egregious discrimination against African-Americans, Jews, Catholics, and immigrants from places other than Northern Europe."[77] She concludes: "A great deal of the criticism of night and proprietary law schools stemmed from the fact that these institutions provided access for a vast section of the population."[78]

In a 2011 article *The New York Times* explored the history of the ABA and night law schools in the context of the current concerns about the cost of legal education. Referring to the period from 1890 to 1930 when the number of law schools tripled, and most of the increase came from night schools, the article states: "To say that these night schools and their graduates appalled the A.B.A.'s core membership hardly captures the horror. Thousands of new lawyers were suddenly flowing into the market, many of them poor immigrants….The dean of Yale described night schools as a 'rank weed' and urged their closure." [79]

In the end, I decided to take ownership of the reputational issue by describing our proposal—particularly to the school's older alumni—as

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75. Susan K. Boyd, *The ABA's First Section: Assuring a Qualified Bar* 14 (1993).

76. *Id.* at 16.

77. *Id.*

78. *Id.*

79. David Segal, *For Law Schools, A Price to Play the A.B.A.'s Way*, N.Y. TIMES (Dec. 17, 2011), http://www.nytimes.com/2011/12/18/business/for-law-schools-a-price-to-play-the-abas-way.html.

the "night law school for the twenty-first century."[80]

III. EVALUATING THE ADOPTION OF A BLENDED J.D. PROGRAM

A. How Should We Assess? Where is the Burden of Proof?

How should we assess whether the adoption of the Hybrid program was a wise decision? Whether a J.D. program with blended learning at its core is a good thing? What are the factors that ought to be taken into account? In an arena full of uncertainties, where should the burden of proof lie?

At the most basic level, the hybrid option has been a success. As this article goes to press (August 2019) we are welcoming our sixth cohort of hybrid students, and the fifth cohort at the ABA approved maximum of ninety-six students.[81] Our blended Executive J.D. program (similar to the hybrid, but designed so that it did not require an ABA variance) is matriculating eighty-six students.[82] The students in our blended-learning programs hail from thirty-eight states, including twenty-seven from Minnesota, sixteen from Texas, and ten each from Florida and Colorado.[83] There are also six different Native American tribes and Canadian Indigenous First Nations represented this year.[84] In contrast, our traditional (bricks and mortar) program's students are eighty percent from Minnesota.[85]

But we can dig deeper. Any assessment of a radical change in law school pedagogy ought to acknowledge that the baseline—the norm against which any change ought to be evaluated—is itself largely of unknown efficacy.[86] We know that law schools create many great lawyers—

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80. Memorandum from Eric S. Janus, *supra* note 74; *see also* Barbra L. Jones, *Mitchell to Offer 'Night School for the 21st Century,'* MINN. LAW. (Dec. 18, 2013), https://minnlawyer.com/2013/12/18/mitchell-to-offer-night-school-for-the-21st-century/.

81. E-mail from Ann Gemmell, Interim Dean of Admissions, Mitchell Hamline School of Law, to Faculty and Staff (Aug. 12, 2019 9:54 AM CDT) (on file with author).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *See* Stephen L. Chew, *Do We Know How to Judge Teaching?*, INSIDE HIGHER ED (July 27, 2015),
https://www.insidehighered.com/views/2015/07/27/essay-whether-academe-knows-how-judge-teaching (arguing current approaches to teaching are not focused enough on learning, and noting that the criteria institutions use to reward promotions and tenure to professors can have little to do with teaching skills); *see also* Erwin Chemerinsky, *Rethinking Legal Education*, 43 HARV. C.R-C.L L. REV. 595, 595 (2008) ("[T]he reality is that few law students graduate from law school ready to practice law.") Chemerinsky also states that a typical method of evaluation—one cumulative end-of-semester evaluation—"is impossible to justify from a

and as many mediocre ones.[87] We know little about what role the Socratic Method plays in producing these divergent results.[88]

A major, persistent, and passionately held view, particularly among lawyers who have been educated through this method and the teachers who employ it, is that nothing can truly replace that form of lawyer preparation.[89] But the superiority of traditional Socratic pedagogy is taken on faith, not on proof.[90] Derek Bok, former Dean of Harvard Law School and former President of Harvard University, is referenced in William Bowen's influential volume *Higher Education in the Digital Age* as someone who has been "for years remind[ing] everyone who will listen[] [that] the lack of careful studies of the learning effectiveness of various teaching methods is a long-standing problem."[91] Bowen, President Emeritus of Princeton University, quoted Professor William J. Baumol of New York University as observing that, "[i]n our teaching activity we proceed without really knowing what we are doing…. I am… utterly without evidence as to… the tools the students should learn to utilize."[92]

Even the ABA has acknowledged that the sacred Socratic Method might not be the only way to teach law.[93] The 2014 ABA Task Force on the Future of Legal Education brought this perspective to bear:

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pedagogical perspective." *Id.* at 597. One study implicated certain traditional teaching methods as contributing to students' poor mental health*. See* Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & L. 261, 262 (2004) ("Potential negative aspects of legal education include . . . teaching practices that are isolating or intimidating, and content that is excessively abstract or unrelated to the actual practice of law . . . ") (citations omitted).

87. *See* A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 2017 (2012) (arguing that present reforms in law school curricula are not resulting in improved law student "practice-readiness"); *see also* Jamie R. Abrams, *Reframing the Socratic Method*, 64 J. LEGAL EDUC. 562, 583 (2015) (arguing that Socratic dialogue does a disservice to law students in not preparing them for real-world client matters).

88. *See* Daniel J. Dye, *Debunking the Socratic Method*?: *Not So Fast*, *My Friend*!, 3 PHX. L. REV. 351, 351 (2010) (arguing that the Socratic Method's effectiveness depends on how it is used in a law school classroom); *see* Stephanie B. Goldberg, *Beyond the Socratic Method*, 36 STUDENT LAW. 18, 19 (2007) (claiming there lacks evidence that the Socratic Method is an effective teaching method).

89. *See* Abrams, *supra* note 87, at 563 (stating that the Socratic Method is an enduring part of law school education); *see also* Goldberg, *supra* note 88 (acknowledging that the Socratic Method is necessary because it prepares students for practicing law before judges).

90. *See* Abrams, *supra* note 87, at 566 (explaining that the Socratic Method's effectiveness is often questioned); *see also* Goldberg, *supra* note 89.

91. William G. Bowen, HIGHER EDUCATION IN THE DIGITAL AGE 47 (2013).

92. Janus, Duhl & Canick, *supra* note 14, at 32; s*ee generally* WILLIAM J. BAUMOL, THE COST DISEASE: WHY COMPUTERS GET CHEAPER AND HEALTH CARE DOESN'T (2012) (explaining the "cost problem" plaguing higher education).

93. *See* Future of Legal Education Task Force Report, *supra* note 32, at 24.

One can acknowledge the success of the prevailing model brought into being by the schools, the ABA, and the wider profession and still believe that it might not be the exclusive way of effectively preparing people to be good lawyers.

The system of legal education would be better with more room for different models.[94]

The baseline is that we do not know how effective traditional J.D. instructional methods in law really are.[95] The concerns about accountability and thinking on one's feet and especially inculcating the norms and values of the legal profession are largely intuitive and unempirical.[96] Consider the following passage from David Thomas in the *Journal of Information, Law and Technology*, which sets out a succinct statement of the comparative deficiencies of distance education:

The most cogent statement of distance learning's principal disadvantage is stated below:

The most obvious is the loss of proximity. When the instructor and the students are simultaneously physically present in the same room, the interaction has an immediacy and spontaneity that even the most sophisticated video conferencing systems cannot approach. The instructor and students are more readily responsive to each other, and group dynamics can lead both the instructor and students to insights that might not occur, or would occur less frequently, outside the group. Further, a teacher is not merely a conveyor of information; a teacher—a good one, at least—is also a model of intellectual and professional virtues such as responsibility, thoroughness, and tolerance. These virtues are most effectively on display when teacher and student are present in the same classroom.[97]

Thomas continues:

I accept the preference for live instruction. I also accept the wonderful opportunities proffered by distance education to extend instruction to persons and places where otherwise no instruction at all would be available. This leads me to conclude that distance learning should not be employed in place of already established live instruction programs, either actual or readily available. Instead, the best use of distance learning programs is to extend the instruction to situations where otherwise no

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94. *Id.*

95. *See* Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools,* 20 SEATTLE U. L. REV. 1, 1–2 (1996).

96. *See id.*

97. Thomas, *supra* note 1 (quoting Richard Warner, Stephen D. Sowle & Will Sadler, *Teaching Law with Computers*, 24 RUTGERS COMPUTER & TECH. L.J. 107, 164–65 (1998)).

instruction at all would be available.[98]

Note first that the advantages of live education are assumed, not proved. And there is good reason to be skeptical, in the absence of proof, that the assumed advantages are actually a characteristic of the Socratic Method, or of face-to-face teaching more generally.

Why is it the case that "responsibility, thoroughness, and tolerance" are "most effectively on display" when the student and teacher are "in the same classroom?" Do traditional classroom teachers identify and plan for these aspects of their teaching, articulating them as explicit teaching objectives of their courses? Is it also true that the live classroom can "most effectively" teach the wrong lessons, as well? What lessons do students learn from professors who begin—or end—class late? How about professors who express cynicism about their role as teachers ("Of course, teaching you is just the part of the job that we have to endure in order to do our real work, writing opaque and ignored law review articles.")? Or who deny that they care whether their students learn? Or who have no discernable teaching objectives? Does being face-to-face with these professors teach cynicism, disorganization, arrogance?

Relatedly, it is worth considering the lessons learned by law students from the implicit curriculum: the arrangements, structure, and choices their law school has made. There is strong evidence that these "background" messages—the medium which carries the foreground lessons of the curriculum—exert a strong influence on students.[99] If that is the case, then one must consider the values and professional role modeling inherent in choosing—or rejecting—online pedagogy. Do these choices teach students in particular about the value in their new profession of innovation, questioning orthodoxy, expanding access to legal education (and legal services)?[100] What are the messages inherent in defending rather than de-centering the Socratic Method, of regularizing formative evaluations, of being explicit about learning objectives and criteria for evaluation? Are these lessons we want to be teaching?

Does the Socratic Method really foster widespread preparation? Do students prepare because of the random, but small, chance of being called

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98. *Id.*

99. *See* Janus, *supra* note 43, at 85–86; *see generally* Eric S. Janus, *Clinics and "Contextual Integration": Helping Law Students Put the Pieces Back Together Again*, 16 WM. MITCHELL L. REV. 463 (1990) (arguing for a non-traditional, non-academic approach to teaching law).

100. Consider former Chief Justice Burger's belief that "[t]he operation of a law school is a stewardship. Like other fiduciaries, those running law schools ought to be accountable, in this case—to the public." Jeffrey B. Morris, *Warren E. Burger and Change in Legal Profession*, 11 COLONIAL LAW. 1, 1 (1981).

on? Does reciting three times a semester really teach students to "think on their feet"? How many students are fully engaged during the ninety-five percent of class time that other students are being called on? Which is a more important skill for a twenty first century lawyer: thinking on her feet, or writing a succinct, persuasive email? Which skill is more readily taught face to face? Online?

Can all professors in a face-to-face environment really sense the mood of the class, the subtle signals that the group is confused, or bored, or excited? And, if they can read these signals, how many have the skills to adjust their teaching on the fly, digging into the confusion and clarifying it, or recapturing student attention when boredom leads to distraction?

Many of the advantages of face-to-face instruction, then, are contingent on execution, not automatically generated by physical proximity.[101] Further, this article would be incomplete if it focused only on what is missing from online instruction. Distance education offers its own set of potential advantages, going well beyond accessibility. Many of these advantages are also available, at least theoretically, in a traditional classroom. Key examples are the intentionality of outcomes, the careful sequencing of instruction, and the regularity of writing and feedback. These provide real accountability and regular opportunity for the professor to assess the progress of her students. True, the assessments come in a form different from the body language and intangible signals in the live classroom. But who is to say that the online signals, the weekly discussions and comments, the quizzes, are less accurate at judging comprehension and skill development?

Here is the key: these tools can be used in a regular classroom. But in the online setting, they are the default, and the traditional classroom often needs modification to truly incorporate the intentionality and accountability of online methods.

Take another rather mundane example: is it best to divide up instruction into fifty-minute classes that meet three times per week? Is this the ideal for every single course? Every single topic? Might it be better to meet in class for twenty minutes, complete an exercise analyzing a problem, and then receive feedback? Then meet in class for another half hour? Online instructional modules can be tailored to serve their instructional ends. The logistics of classroom and student scheduling makes this impossible in the brick-and-mortar setting.

Adding online instruction to the permitted palette of pedagogies pro-

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101. *See* Hess, *supra* note 3, at 61.

vides legal educators a greater degree of choice in designing their programs. The "flipped classroom" concept, for example, posits that knowledge transfer can take place outside of the classroom, and experiential application of the learning occurs in class, under the face-to-face supervision of the teacher.[102] Our hybrid program adopted that approach on a macro scale: the weeks of online instruction provide the scaffolding for the intense capstone weeks that integrate each semester's learning in weeklong, face-to-face instruction, exercises, and simulations.[103]

This comparative articulation of advantages exposes the falsity of viewing pedagogical design as a forced choice between traditional and online approaches. In fact, blended approaches are possible. Opening up to online techniques poses the opportunity for—and perhaps actually insists on—intentional design.[104] It provides an opportunity to choose among the strengths of a wider variety of instructional techniques.[105] Program design can be guided by mission (what we want our students to learn) rather than method (how we want to teach them).[106]

B. Evaluating Blended Learning

Online and traditional approaches bring largely different sets of putative advantages and disadvantages.[107] At an impressionistic level, one might hypothesize that the blended approach, employing both traditional and online methods, designed to amplify the advantages of both and mute the disadvantages, might be the most effective approach.[108]

Substantial evidence shows that "blended" instruction is as good as or better than traditional face-to-face instruction.[109] A study conducted by

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102. *See* Janus, Duhl & Canick, *supra* note 14, at 32.

> The flipped classroom concept, one of four "blended" learning models developed by the Khan Academy, involves students rotating between online delivery of instruction from a remote location after school [usually at home] and face-to-face teacher-guided practice in class during the standard school day—with the primary delivery of content and instruction being online.

Id.

103. *See id.*
104. *See id.* at 31.
105. *See id.* at 30–31.
106. See Hess, *supra* note 3, at 79 ("Student learning outcomes, not technology, should drive the design of a blended course.") (citing JAY CAULFIELD, HOW TO DESIGN AND TEACH A HYBRID COURSE: ACHIEVING STUDENT-CENTERED LEARNING THROUGH BLENDED CLASSROOM, ONLINE, AND EXPERIENTIAL ACTIVITIES 199 (2011)).
107. *See id.* at 56.
108. *See id.* at 59.
109. *See id.* at 69.

the ITHAKA group—described as the "most rigorous assessment to date of the use of a sophisticated online course"[110]—comparing hybrid approaches with face-to-face statistics courses, found "no statistically significant differences in learning outcomes between students in the traditional and hybrid-format sections."[111] Former Princeton President Bowen says he began as a skeptic regarding the use of distance technology in higher education.[112] However, research, including the ITHAKA study, has since changed his mind: "I am today a convert. I have come to believe that now is the time."[113]

These findings agree with those of three other extensive and authoritative studies. The *ECAR Study of Undergraduate Students and Information Technology, 2013*, conducted by the EDUCAUSE Center for Analysis and Research, surveyed 113,000 respondents across thirteen countries on a variety of topics regarding technology in education.[114] The study concluded that "blended learning persists as the preferred modality" among respondents.[115] Furthermore, "[t]he majority of students across all regions and [types of institutions] report that they both *prefer* and *learn most* in blended learning environments…. These findings track with data regarding students' desire to communicate with instructors face-to-face as well as having anytime, anywhere access to course materials."[116]

Perhaps the most persuasive research is the 2010 meta-analysis published by the United States Department of Education titled *Evaluation of Evidence-Based Practices in Online Learning: A Meta-Analysis and Review of Online Learning Studies*.[117] The report's abstract describes its method and major findings:

A systematic search of the research literature from 1996 through July

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110. Bowen, *supra* note 91, at 48.

111. WILLIAM G. BOWEN ET AL., INTERACTIVE LEARNING ONLINE AT PUBLIC UNIVERSITIES: EVIDENCE FROM RANDOMIZED TRIALS 18 (2012). ITHAKA is a not-for-profit organization that helps the academic community take advantage of advances in new technologies and use them to advance research and teaching in sustainable ways. *See id.* at 1.

112. *See* Bowen, *supra* note 91, at 45.

113. *Id.*

114. *See* EDEN DAHLSTROM, J.D. WALKER & CHARLES DZIUBAN, ECAR STUDY OF UNDERGRADUATE STUDENTS AND INFORMATION TECHNOLOGY, 2013 4 (2013). ECAR provides research and analysis about information technology in higher education with the goal of understanding information technology's role in colleges and universities. *See id.* at 2.

115. *Id.* at 5.

116. *See* Janus, Duhl & Canick, *supra* note 14, at 33–34.

117. *See* U.S. DEP'T OF EDUC., EVALUATION OF EVIDENCE-BASED PRACTICES IN ONLINE LEARNING: A META-ANALYSIS AND REVIEW OF ONLINE LEARNING STUDIES ix (2010).

2008 identified more than a thousand empirical studies of online learn-
ing…. The meta-analysis found that, on average, students in online
learning conditions performed modestly better than those receiving
face-to-face instruction. The difference between student outcomes for
online and face-to-face classes… was larger in those studies contrasting
conditions that blended elements of online and face-to-face instruction
with conditions taught entirely face-to-face.[118]

Finally, a recent study published by ITHAKA S+R, in conjunction
with the University of Maryland, compared student performance in sev-
enteen courses at seven universities, conducting side-by-side compari-
sons "to evaluate outcomes of students in hybrid sections with those of
students in traditionally taught courses."[119] The authors of the study con-
cluded:

> Students in the hybrid sections did as well [as] or slightly better than
> students in the traditional sections in terms of pass rates and learning
> assessments, a finding that held across disciplines and subgroups of stu-
> dents. We found no evidence supporting the worry that disadvantaged
> or academically underprepared students were harmed by taking hybrid
> courses.[120]

C. Cost

One attraction of online methods has often been that they are as-
sumed to be more efficient and cheaper per student credit-hour than tra-
ditional methods of face-to-face instruction.[121] But those notions focus on
only one aspect of online education and ignore other aspects that actually
increase its cost.[122] Further, the comparison is useless unless it attempts
to hold quality—however that might be defined and measured—constant.
Both forms of education can be done well or poorly, with lavish or stingy
allocation of expensive resources.[123]

The one obvious way in which online education might be cheaper is
the absence of classroom-capacity as a ceiling on the number of students
who can be addressed by a single instructor's teaching.[124] Arguing that

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118. *Id.*

119. REBECCA GRIFFITHS ET AL., INTERACTIVE ONLINE LEARNING ON CAMPUS: TESTING
MOOCS AND OTHER PLATFORMS IN HYBRID FORMATS IN THE UNIVERSITY SYSTEM OF
MARYLAND 4 (2014). Ithaka S&R, a part of ITHAKA, is a research and consulting service
that helps the academic and other communities make the transition to the digital environment;
it pursues projects in this area critical to the advancement of the academic community. *Id.*

120. *Id.*

121. *See* Warner, Sowle & Sadler, *supra* note 97, at 146–54; *see also id.*

122. *See id.*

123. *See* GRIFFITHS ET AL., *supra* note 119.

124. *See* Warner, Sowle & Sadler, *supra* note 97, at 164.

distance education has the "potential to revolutionize legal instruction—for better or worse," Warner and colleagues explained: "The economic advantage is obvious. Suppose a faculty member teaches students in ten different schools, with each school contributing an appropriate fraction of the instructor's salary. A school could meet its curricular needs while reducing the number of faculty required and, of course, the amount spent on faculty salaries."[125]

But this sort of cost savings has not been a realistic possibility in our program. In part because of ABA restrictions, in part because of admissions reality, and in part by choice, we have kept blended sections to about the same enrollment as traditional sections. Thus, our per-credit-hour faculty-cost for our blended program is similar to the cost of our traditional program.

Other expenses for the blended programs have been substantial. While the ratio of full-time, tenure-track faculty to students is about the same as in the bricks-and-mortar program, the infrastructure for the blended programs is more extensive: instructional designers help professors understand the structure and characteristics of state-of-the art online instruction, and translate their materials into modules, videos, and exercises, with grading rubrics and posted schedules. Program managers tend to the rather complex logistics of bringing blended cohorts to campus for intensive workshops and capstone weeks. Adjuncts assist with the grading required by nearly weekly written assignments.

But here is a critical point: most of this extra work is a product of the pedagogical principles that have been incorporated into our blended programs. Similar additional work would be necessary if these same principles were incorporated into bricks-and-mortar instruction—for example, weekly writing assignments and grading rubrics. And, some of the coordination and intentionality of the intense capstone weeks—a cross-course focus on a particular issue—could be adopted by bricks-and-mortar programs, as well, bringing with it much of the same logistical complexity and expense.

Add to this the extra stipends that are paid to faculty for them to transform their courses into a blended format.[126] This, too, might cease to be an extra expense in a school in which blended learning principles are as ubiquitous as traditional, or in which the same kind of backward design

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125. *Id.*

126. *See* Hess, *supra* note 3, at 58 ("To design a blended course or to redesign a traditional course into a blended format requires significant effort.") (citing Joseph Rosenberg, *Confronting Clichés in Online Instruction: Using a Hybrid Model to Teach Lawyering Skills*, 12 SMU SCI. & TECH. L. REV. 19, 43 (2008)).

is expected in bricks-and-mortar teaching.[127]

D. The SRI Study: A Preliminary Assessment

About a year into the hybrid program, William Mitchell received a grant from the Access Group to perform an assessment of the performance of the program.[128] The evaluation was performed by the SRI International Group, and was designed to address the first two years of the program (approximately January 2015 through December 2016) with a report submitted in 2017.[129] The study used multiple sources of data, including administrative data, assessment scores, student surveys, and interviews.[130] SRI undertook statistical analyses to compare student outcomes in the hybrid program with part-time and full-time brick-and-mortar (BAM) students.[131] The analysis controlled for salient background characteristics such as undergraduate GPA, age, LSAT score, gender, and years of education.[132]

This preliminary assessment reported some key findings:
- In a voluntary survey, over half of the hybrid students who responded reported that but for this program, they would not have pursued a law degree. Two factors contributed to this response, a combination of geographic and scheduling convenience. Thus, of the students who said that the hybrid program provided them access they would not otherwise have had, over three-quarters said other J.D. programs were not compatible with work schedules or family schedules, while about a third said they were from areas with no other J.D. program available.[133]
- The withdrawal rates from the early hybrid cohorts were somewhat higher than comparable withdrawal rates from the

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127. Relatedly, the comparative expense of our blended learning options might decrease with time. As William G. Bowen noted, "A fundamental problem, cutting across all types of online offerings, is that contemporaneous comparisons of the costs of traditional modes of teaching and of newly instituted online pedagogies are nearly useless in projecting steady-state savings—or, worse yet, highly misleading. The reason is that the costs of doing almost anything for the first time are very different from the costs of doing the same thing numerous times." Bowen, *supra* note 91, at 51.

128. Rebecca Griffiths*, Mitchell Hamline Hybrid Law Program Evaluation Study by SRI International* (May 12, 2017) (unpublished study) (on file with author).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. Griffiths, *supra* note 128.

BAM programs, but when controlled for the varied back-
ground characteristics of the students in the three programs,
the differences were not statistically significant. In addition,
the hybrid withdrawal rates declined over the first three co-
horts.[134]

-   The report found students' academic outcomes (course
    grades, course assessment scores) "no less effective" than
    those of BAM students, though there was limited data to as-
    sess a comparative analysis.[135]

-   The assessment compared data from the Law School Survey
    of Student Experience (LSSSE), administered in spring
    2016. Using anonymized student ID numbers, student out-
    comes across the three formats (hybrid, full-time BAM,
    part-time BAM) were analyzed on three LSSSE measures.
    The comparisons found some differences among students in
    the three programs, but the hybrid scores were at least as fa-
    vorable as those of the BAM programs when relevant back-
    ground differences were controlled.[136]

    1. Thinking like a lawyer: marginally significant differ-
        ence, with hybrid students reporting higher scores for
        this indicator.

    2. Law school environment: no difference among the
        groups reported.

    3. Student-instructor relationship: no significant differ-
        ence among the groups in their rating of student-fac-
        ulty interaction.[137]

Clearly, comparative bar pass rates will be an important data point,
as will employment outcomes, when those data become available.[138]

E. Mission-Related Features

How has the hybrid program performed when measured against the

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134. *Id.*

135. The report found that hybrid students scored lower in Torts on the same final exam
administered to the BAM students, controlling for relevant background factors. The differ-
ence was small, but statistically significant. The report noted that the two Torts classes, though
taught by the same professor, "addressed different competencies, so differences in assessment
scores may reflect different emphases in the class focus." *Id.* at 16. Conversely, the report
found that hybrid students scored higher than BAM students on a writing skills exercise, but
that the difference was not statistically significant. *Id.*

136. *Id.*

137. Griffiths, *supra* note 128.

138. *Id.*

core mission pillars—access through flexible scheduling and experiential learning—that influenced its design? With respect to the expansion of access to legal education, the program has been a success.[139] As indicated above, more than half of the early-cohort students who responded to a voluntary survey indicated that they could not have gone to law school were it not for the online features of the hybrid program.[140] An additional measure is the geographic distribution of matriculants. Of the students in the first cohort, seventy percent hailed from outside of Minnesota, the inverse of our normal distribution in our brick-and-mortar program.[141]

The results considering the experiential mission pillar are more nuanced. Our original plan called for extended simulations in the capstone weeks, "in which students integrate and apply the doctrine, skills, and professional attributes they have learned over the course of the semester in experiential exercises and simulations."[142] This plan has been realized in its material aspects. The capstone sessions contain substantial segments of experiential work, and the doctrinal work is coordinated and integrated with the experiential work.[143] But experience has led us to include more direct instruction, in a traditional classroom setting, than we had originally contemplated.

As described above, a central intention of our design was the integration of learning.[144] From my perspective, the implementation of the program has fulfilled that goal. The structure of the face-to-face capstone sessions facilitates in-depth coordination and integration. Students are on campus and available for an extended period of time. There is a clear expectation that faculty in all of the courses will coordinate, and there is a staffing infrastructure that makes this coordination actually happen. The result has been a much more sophisticated and extended level of coordination and integration than we have ever been able to achieve in the traditional bricks-and-mortar setting.

As an example, consider our recently-held program for our fourth semester blended students. Our planning group for the session met regularly, and comprised both full-time faculty for the three courses (Constitutional Law: Powers; Advocacy; Professional Responsibility) and staff

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139. *Id.*
140. *Id.*
141. *Id.*
142. Variance Application, *supra* note 43.
143. *Id.*
144. *Id.*

(instructional designers, coordinators). We first chose a topic: the Watergate Scandal. The subject had clear topical relevance,[145] and also had a clear tie-in to the Constitutional Law class topics of executive power and privilege. The session began on Friday night with the showing of a documentary on the Watergate scandal. A two-and-a-half-hour discussion of executive power permitted a relatively in-depth and contextualized look at *United States v. Nixon*.[146] Discussion addressed the key role that Congress played in laying the groundwork for the appointment of Archibald Cox as special prosecutor, and in the independence of Leon Jaworski after the Saturday Night Massacre.[147] Videos and transcripts of the confirmation hearings for Elliot Richardson and William Saxbe for Attorney General graphically illustrated the separation of powers and Congressional oversight in operation, and had direct relevance to the recently completed hearings for now-current Attorney General William Barr.[148] In-class exercises focused on President Trump's recent declaration of a national emergency,[149] and the application of *Youngstown Sheet and Tube Co. v. Sawyer*.[150] The Advocacy classes focused on appellate oral argument, and took as their text the oral argument[151] in *Nixon*,[152] excerpts of which also played into the Constitutional Law discussion of the

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145. The news cycle in spring 2019 focused heavily on President Trump and special counsel Robert Mueller's impending report on the investigation into Russian interference in the 2016 presidential election. *See, e.g.*, British Broad. Corp., *Trump Russia Affair: Key Questions Answered*, BBC NEWS (July 24, 2019), https://www.bbc.com/news/world-us-canada-42493918. The echoes of Watergate were palpable. *See id.*

146. *See generally* 418 U.S. 683 (1974) (concluding that the president of the United States lacks an unqualified privilege of immunity from the judiciary).

147. *See generally* Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601 (1998) (discussing Archibald Cox's press conference and laying out the sequential facts of the Saturday Night Massacre.)

148. *See* Mikhaila Fogel, Quinta Jurecic & Benjamin Wittes, *Lessons from Watergate: What the Senate Judiciary Committee Should Ask Bill Barr*, LAWFARE (Jan. 14, 2019), https://www.lawfareblog.com/lessons-watergate-what-senate-judiciary-committee-should-ask-bill-barr.

149. *See* Emily Cochrane, *Senate Again Rejects Trump's Border Emergency, but Falls Short of a Veto-Proof Majority*, N.Y. TIMES (Sept., 25, 2019), https://www.nytimes.com/2019/09/25/us/politics/senate-vote-trump-national-emergency.html.

150. *See generally* 343 U.S. 579 (1952) (considering the constitutionality of an Executive Order given during the Korean War to seize and operate most steel mills, as pursuant to the President's military power as Commander in Chief, and as granted or implied by Article II of the Constitution).

151. Video Clip, *United States v. Nixon Oral Argument*, C-SPAN (Feb. 21, 2019), https://www.c-span.org/video/?c4781642/oral-arg-clip-1

152. *See generally* 418 U.S. at 692–95 (discussing the role of special prosecutors and their ability to investigate the use of executive privilege under Article II, Section Two of the Constitution).

case. The Professional Responsibility class focused on the role of government lawyers, and the evolution of professional ethics post-Watergate.[153] A panel of government lawyers brought real-world experiences to bear. The session ended with a panel discussion of three constitutional law professors about the future of executive power, with a focus on presidential power to act pursuant to an emergency declaration, the role of special or independent prosecutors, and executive privilege—all of which had contemporary salience.

F. Reputation

As reported above, a major concern expressed by a broad range of stakeholders was that the adoption of a distance education program would damage the reputation of the law school. The difficulty in measuring reputation is multiplied by any attempt to isolate the effects of one out of the many factors that form an institution's reputation. Further, one must ask "reputation for what, among whom, and where"? Reputation as an elite graduate school? As a "lawyers' law school"? As a regional law school with connections to the regional bench and bar? Among academics? Lawyers and judges? Prospective law students?

Despite those difficulties and complexities, we can make some observations about the reputational impact of the hybrid program on William Mitchell. We began seriously communicating to the outside world about the hybrid program early in 2014, soon after receiving ABA approval.[154] Our announcement received significant media coverage.[155] In September 2014, we specifically targeted *U.S. News* voters with postcards announcing the commencement of the program, to coincide with the *U.S. News* reputational survey.[156] And although attributing a decline in reputation to the preceding announcement of the hybrid program might

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153. *See* Beth Nolan, *Removing Conflicts from the Administration of Justice: Conflicts of Interest and Independent Counsels Under the Ethics in Government Act*, 79 GEO. L.J. 1, 2–14 (1990).

154. Am. Bar Ass'n, *Council Grants Variance to William Mitchell College of Law*, A.B.A. (2013), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/2013_william_mitchell_hybrid_variance_announcement.authcheckdam.pdf.

155. *See* Carl Straumsheim, *Law School Hybrid*, INSIDE HIGHER ED (Dec. 18, 2013), https://www.insidehighered.com/news/2013/12/18/american-bar-association-approves-experimental-hybrid-jd-program; Maura Lerner, *William Mitchell Welcomes its First Hybrid 'Online' Law School Class*, STARTRIBUNE (Jan. 12, 2015), http://www.startribune.com/william-mitchell-welcomes-its-first-hybrid-online-law-school-class/288350831/; Victor Li, *Law School's Online-Hybrid Degree Program Gets First-Ever Approval From ABA*, A.B.A. J. (Dec. 19, 2013), http://www.abajournal.com/news/article/william_mitchell_online-hybrid_law_school_program.

156. *See* Hybrid Reputational Marketing Plan v2. June 18, 2014 (on file with author).

be an example of the post-hoc-ergo-propter-hoc fallacy, the absence of a decline might refute the reputational-detriment hypothesis.

U.S. News rankings provide a set of reputational measures that are as readily adverted to as they are imperfect.[157] I examined three of those measures, comparing the scores from immediately before our announcement of the Hybrid (scores relating to 2012 and 2013), to the scores from the period immediately after the announcement (2014 and 2015).[158] As shown in the table, the scores showed no decline in the immediate aftermath of the announcement (2014); in fact, one of the measures improved that year, and one improved the following year. Taken together, these numbers suggest that the adoption of the hybrid program did not adversely affect these traditional reputational measures.

Data from fall:	Academic peers (larger number is better)	Lawyers and Judges (larger number is better)	Part-time program ranking (smaller number is better)
2012	1.8	2.3	40
2013	1.8	2.4	26
2014 (Hybrid announced)	1.8	2.4	21
2015	1.7	2.6	28

The launch of the hybrid program was positively reported in the media.[159] For a regional school like William Mitchell, national media attention, especially if it is positive, is relatively rare.[160] Notably, the hybrid program was mentioned in *The New York Times*, among other national

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157. Robert Morse, Kenneth Hines & Elizabeth Martin, *Methodology: 2020 Best Law School Rankings*, U.S.NEWS (Mar. 28, 2019), https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology.

158. The nomenclature used in the *U.S. News* rankings is confusing. For example, scores labeled "2016" and "2017" were published in 2015 and 2016, respectively, and were derived from surveys conducted in fall 2014 and 2015.

159. *See* Straumsheim, s*upra* note 155; Lerner s*upra* note 155; Li, s*upra* note 155.

160. *See* Don Macaulay, *First "Hybrid" Law Students Graduate From Mitchell Hamline*, NAT'L JURIST (Jan. 12, 2018, 1:58 PM), http://www.nationaljurist.com/national-jurist-magazine/first-%E2%80%9Chybrid%E2%80%9D-law-students-graduate-mitchell-hamline; *see also* Tim Post, *Hamline, William Mitchell Law Schools to Merge*, MPRNEWS (Feb. 13, 2015, 7:30 PM), https://www.mprnews.org/story/2015/02/13/hamline-william-mitchell-merger.

publications.[161] PreLaw called it one of the "10 Most Promising Innovations in Legal Education."[162] The *National Jurist* named me one of the twenty-five most influential people in legal education, apparently because of the school's launch of the hybrid program: "William Mitchell College of Law – under Dean Eric Janus – is the Indy race car of law schools."[163]

Perhaps the most persuasive evidence that the hybrid program did not damage the school's reputation is the number of law schools who are following in our footsteps. As of this date, we count eight law schools, with *U.S. News* rankings as high as sixty-three and eighty-eight, who have sought to offer true blended or hybrid J.D. programs.[164]

There is some contrary evidence. In market research the school conducted in 2018, concern among some of the school's stakeholders regarding the school's adoption of the hybrid program seems to remain. Of the 1,181 individuals surveyed (students, faculty/staff, alumni), using a five-point scale (five being the best), the mean rating for the traditional on campus program was a bit higher than for the hybrid program (3.76 vs. 3.66 on a scale of 1-5).[165] But broken down by stakeholder group, it was uniquely the alumni group who expressed the concern about the hybrid program.[166] Current students and faculty/staff rated the hybrid program more positively than the traditional program, whereas alumni rated it significantly lower.[167]

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161. *See* Elizabeth Olson, *Law Schools Are Going Online to Reach New Students*, N.Y. TIMES (June 22, 2016), https://www.nytimes.com/2016/06/23/education/law-schools-are-going-online-to-reach-new-students.html; Margaret Loftus, *Law Schools Innovate With Hands-On Learning*, U.S.NEWS (Mar. 30, 2016), https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2016-03-30/law-schools-innovate-with-hands-on-learning; Stephanie Landsman, *Digital Cracks the Final Frontier: Law School*, CNBC (Apr. 5, 2015, 12:00 PM), https://www.cnbc.com/2015/04/02/digital-cracks-the-final-frontier-law-school.html.

162. *See* Mike Stetz, *10 Most Promising Innovations in Legal Education*, 19 PRELAW 1, 32 (2015).

163. *See* Mike Stetz, *2014 Most Influential People in Legal Education*, 24 NAT'L JURIST 1, 23 (2015); *see also* Carl Straumsheim, *Law School Hybrid*, INSIDE HIGHER ED (Dec. 18, 2013), https://www.insidehighered.com/news/2013/12/18/american-bar-association-approves-experimental-hybrid-jd-program.

164. *See* Paul Caron, *Denver Is The Eighth Law School To Offer A Hybrid J.D.*, TAXPROF BLOG (Aug. 23, 2008), https://taxprof.typepad.com/taxprof_blog/2018/08/denver-is-eighth-law-school-to-offer-hybrid-jd.html; *see also Best Law Schools*, U.S.NEWS, https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings (last visited Sept. 3, 2019).

165. Survey by Chuck Reed, Senior Vice President, Client Services & Sally Olinger, Senior Research Analyst, Ind. Univ. Robert H. McKinney Sch. of Law (2018) (on file with author),   https://www.dropbox.com/s/lp8v12k0rsxrnw3/MH%20REPORT%209.14.18.pdf?dl=0.

166. *See id.*

167. *See id.* For example, students rated the hybrid program 3.76, faculty/staff 4.0, and

IV. Lessons to be drawn

Online pedagogy is a tool. Our experience has shown that it is not radioactive; it does not taint or spoil a program of legal education. It is not a less-than-useless, harmful agent that threatens to destroy legal education. In fact, online pedagogy offers a suite of benefits to providers of legal education. Sensible legal educators will understand that these pedagogical approaches belong in the palette of tools from which a program of legal education can be designed. But, as with all pedagogies, online tools have costs and weaknesses. Thoughtful designers will choose among the available tools with eyes open to the respective characteristics of each available approach.

From my perspective, the benefits offered by online tools fall into three categories. First, online tools allow for transfer of knowledge to be accomplished outside the classroom more flexibly. Teachers can include lectures in addition to readings in the out-of-classroom tool kit, thus potentially freeing more face-to-face time for working with that knowledge. In short, online tools allow for the "flipped classroom" approach. The length of each module of instruction can be tailored to the subject rather than dictated by invariable and uniform room schedules.

Second, the introduction of a new set of pedagogical possibilities naturally provides the opportunity, and the incentive, for redesign at a rather large scale. The state of the art in online education brings to the foreground a set of design practices—backwards design,[168] frequent assessments, and rubrics[169]—that are often ignored in traditional law school settings. The acceptance of online tools in the pedagogical palette can serve as an opportunity, and the incentive, to redesign the J.D. program using current best practices. But these best practices are not unique to online pedagogy, and can be adopted in traditional settings as well.

Finally, online delivery has one core unique feature: Online tools can radically—and uniquely—diminish the spatial and temporal barriers to accessing legal education.[170]

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alumni 3.56. *Id.*

168. *See* Hess, *supra* note 3, 70–71. ("Consequently, learning objectives play a central role in course design. To systematically design a course, teachers must first clearly articulate what students should learn. The learning objectives then should drive the subsequent decisions on teaching and learning methods, materials, feedback, and assessment."); *see also* Max Huffman, *Online Learning Grows Up—And Heads to Law School*, 49 IND. L. REV. 57, 64 (2015).

169. *See* Hess, *supra* note 3, at 75 (reviewing blended course design principles).

170. *See* Warner, Sowle & Sadler, *supra* note 97, at 164; *see also* Future of Legal Education Task Force Report, *supra* note 32, at 27 (calling for: "(a) a greater willingness of law schools and others entities which deliver legal education services to experiment and take thoughtful risks; and (b) support for the experiments and risk-taking by other participants in the legal education system"). The task force further recommended eliminating or substantially

All of these considerations point to the centrality of mission. By providing the opportunity, and the necessity, for major redesign, online pedagogy forces the question: to what end is our legal education addressed? Why are we doing this, why are we teaching this way, why are our classes fifty minutes long? With new teaching tools available, we cannot simply continue to do what we have always done; we must make choices, and those choices, like all design choices, involve combining components, and working within constraints. How to decide what combination, how to balance various costs and benefits? The clear answer lies in the mission: deciding why we are doing this and insisting that that purpose shape and inform the design.

There are significant costs associated with the introduction and operation of a blended program.[171] It requires abandoning, or diminishing, aspects of legal education that constitute the sacred and firmly held beliefs about what produces good, connected, ethical lawyers. Many of the apparent benefits of online education can be accessed without putting online at the core of the curriculum. Only one of the benefits of online education is truly unique to centering online pedagogy: the access mission.

So the answer to the questions posed at the outset of this essay lies in examining the particular mission of a law school. For William Mitchell, the century-long mission of providing access to a rigorous and practical legal education for working people and people with family obligations was the central, guiding mission.[172] It was that mission that pointed towards the capstone week format, and the emphasis on asynchronous delivery. The benefits to access are plain. Further, there are good reasons for thinking that the traditional academic outcomes in our blended program will be the equivalent of those in our traditional program. If so, then the clear answer is that it is worth the costs. But even if there are differences in educational outcomes, those might be outweighed by the individual benefit arising from increased opportunity to overcome geographic barriers to access legal education.

Though there remains uncertainty about the comparative efficacy of core-online programs, there is good research showing that blended methods are as good as traditional methods, and some evidence that the outcomes in our blended and traditional programs are similar. But the true measure is mission. It is the values incorporated into the mission that pro-

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altering the restrictiveness of Standard 306, relating to distance education. *See id.* at 31.

171. *See* Janus, Duhl. & Canick, *supra* note 14.

172. *See id.* at 31.

vide the yardstick for measuring costs and benefits, and the rules for decision when the facts are cloudy. In our world, against the backdrop of a mission to provide accessible, practical legal education, the burden of proof lies with the online-skeptics, and it has not been satisfied.

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

James McGrath[†] & Andrew P. Morriss[††]

CONTENTS

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

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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,

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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 anywheres. *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.

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

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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

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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.").

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

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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

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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.

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.

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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 educa-tion beyond the dominant model of in-person, synchronous legal educa-tion (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-

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.

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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 Present
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.

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

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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.

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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.

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

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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

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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).

twelve to twenty-seven subjects[40] 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

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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://ameribar.com/floridabarexamsubjects.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 my 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.

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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).

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.

<div align="center">CONCLUSION</div>

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

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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.

APPENDIX
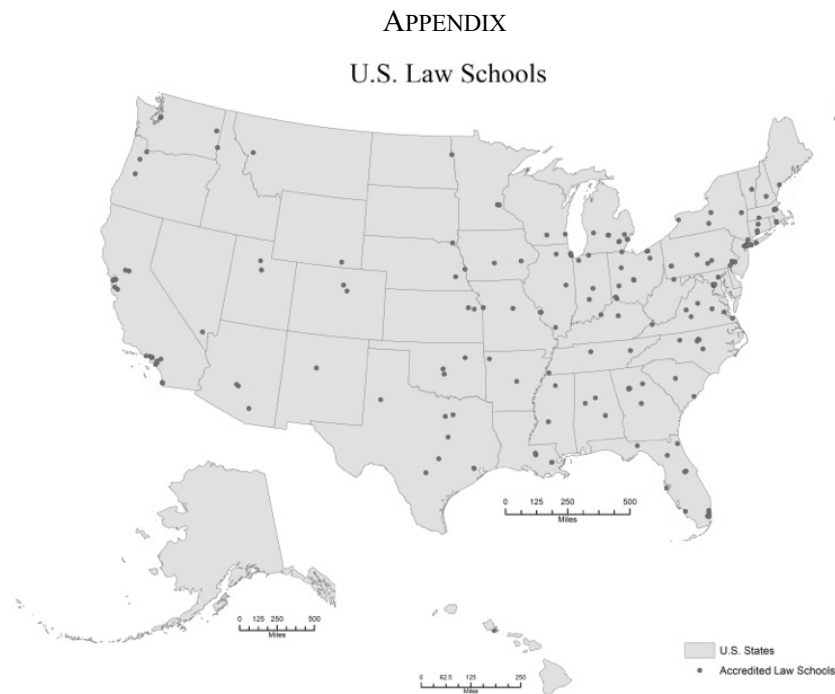
U.S. Law Schools

Figure 1 - US Law Schools[53]

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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).

U.S. Lawyers per Capita

Lawyers per Capita
0.0 - 0.00095
0.00096 - 0.0028
0.0029 - 0.0071
0.0072 - 0.021
0.022 - 0.049
No Data
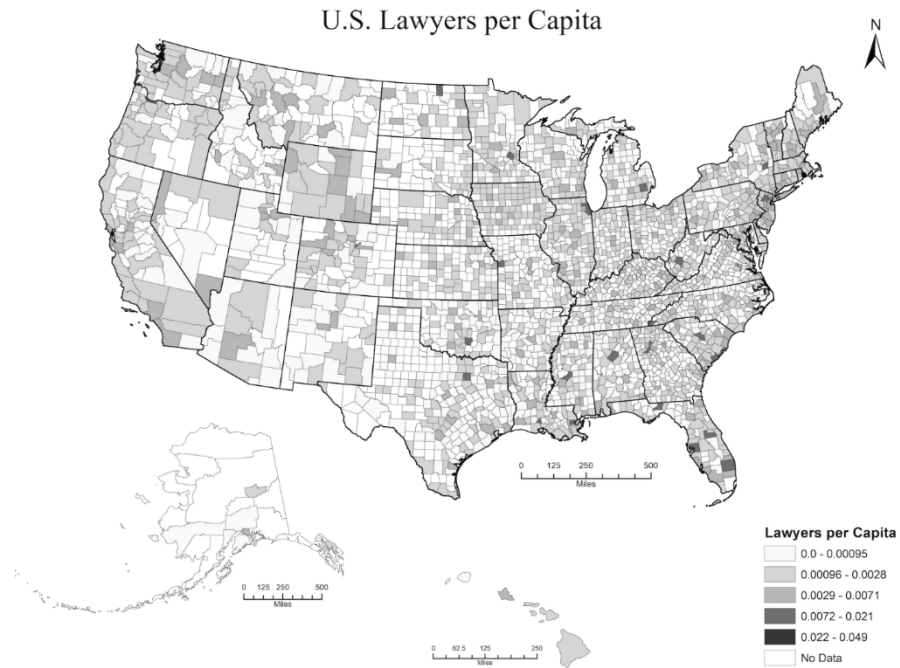
Figure 2 - Lawyers per capita by county[54]

    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.

Lawyers per Capita
Texas, USA

N

| | Texas Law Schools |

Lawyers per Capita

	0.0 - 0.00071
	0.00072 - 0.0012
	0.0013 - 0.0021
	0.0022 - 0.0040
	0.0041 - 0.0086

0   125   250   500
                    Miles
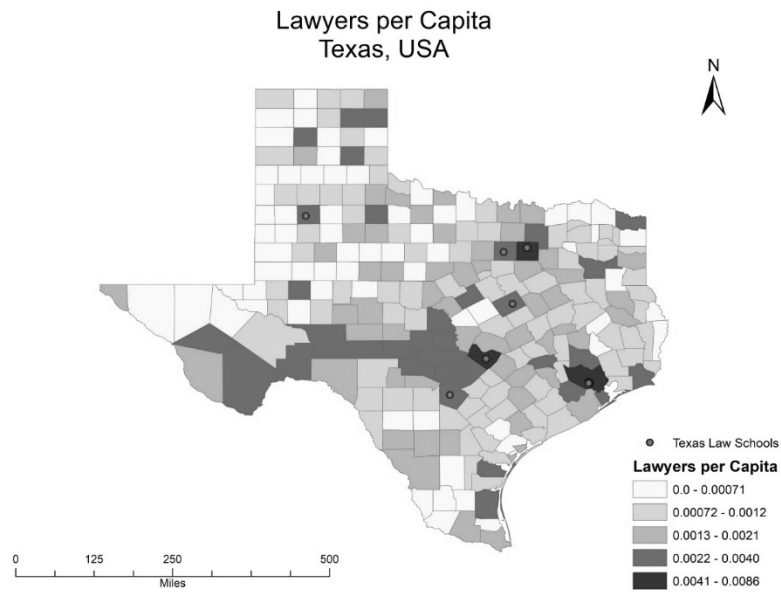
Figure 3 - Texas Lawyers per capita by county[55]

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    55. *See* STATE BAR OF TEX. DEP'T OF RESEARCH & ANALYSIS, ATTORNEY POPULATION
DENSITY BY METROPOLITAN STATISTICAL AREA 2018–2019 3–10 (2019).
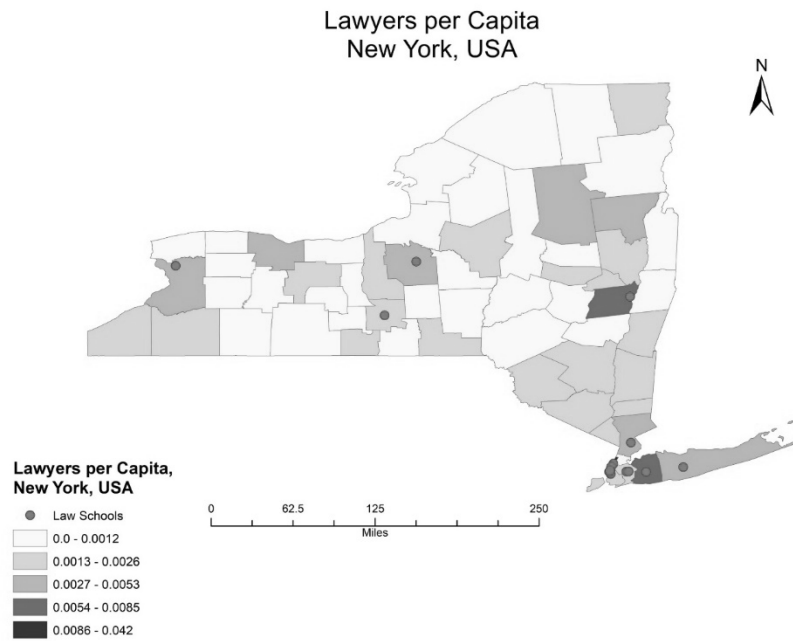
Figure 4 - New York lawyers per capita by county[56]

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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/.

U.S. Lawyers per Capita
Hispanic/Latino
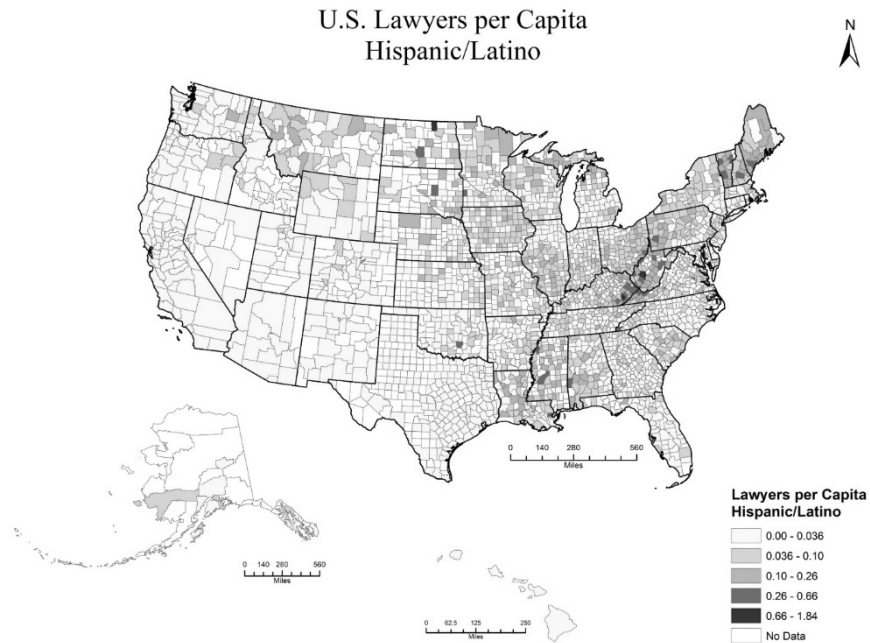
Figure 5 - Lawyers per capita for Hispanic population[57]

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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).
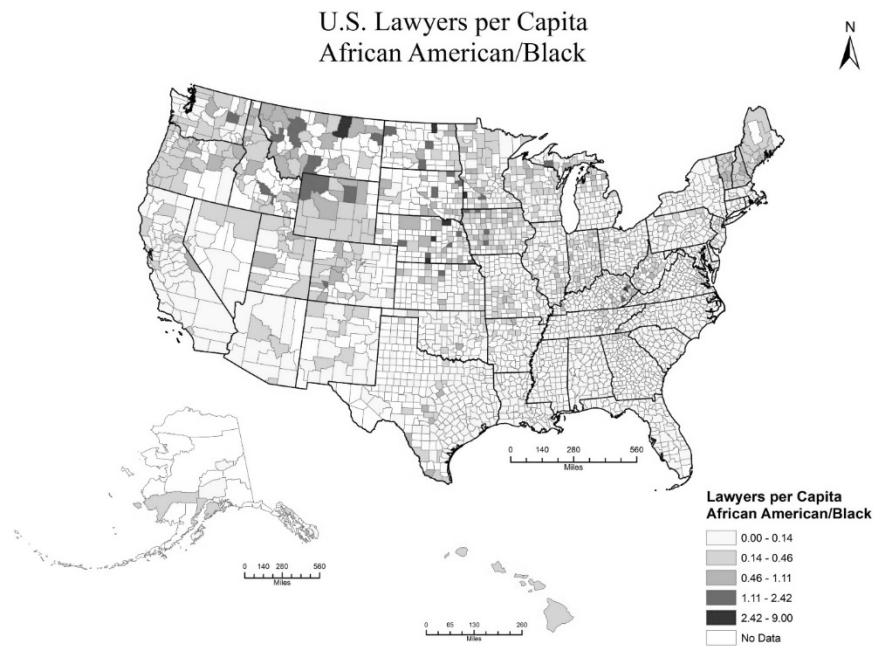
Figure 6 - Lawyers per capita for African American population[58]

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58.   *See id.*

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LIGHTING A FIRE: THE POWER OF
INTRINSIC MOTIVATION IN ONLINE TEACHING

Margaret Ryznar & Yvonne M. Dutton[†]

CONTENTS

INTRODUCTION

Motivating students in a live classroom has been the focus of scholarly attention for decades.[1] As online courses and distance learning become more common, attention must shift to ensuring that students are also motivated in their online courses.

A recent review of the websites of the top one hundred law schools revealed that at least thirty of them are offering online courses as part of their law school curriculum.[2] More schools may soon offer online courses given that the American Bar Association (ABA), the regulator of law schools in the United States, recently increased the number of permissible online course to one-third of the credit hours required for the juris doctor law degree.[3]

These developments in online education coincide with the recent ABA Standard 315, *Evaluation of Program of Legal Education, Learning Outcomes and Assessment Methods*. This standard requires the dean and the faculty of a law school to conduct evaluations of legal education and study the results to improve the curriculum.[4] Given that online learning in the law school context is relatively new, law faculty may have limited familiarity with what content and activities constitute pedagogical best practices.[5]

The scholarly literature also has not yet comprehensively addressed how to best motivate students in the online classroom, especially in law

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1. *See, e.g.*, Douglas A. Blaze, *Law Student Motivation, Satisfaction, and Well-Being: The Value of a Leadership and Professional Development Curriculum*, 58 Santa Clara L. Rev. 547 (2018); Cassandra L. Hill, *The Elephant in the Law School Assessment Room: The Role of Student Responsibility and Motivating Our Students to Learn*, 56 How. L.J. 447 (2013); James B. Levy, *The Cobbler Wears No Shoes: A Lesson for Research Instruction*, 51 J. Legal Educ. 39 (2001); Kory D. Staheli, *Motivating Law Students to Develop Competent Legal Research Skills: Combating the Negative Findings of the Howland and Lewis Survey (Abstract)*, 87 Law Libr. J. 576 (1995).

2. In July 2018, a research assistant searched and examined the website of each of the top 100 law schools ranked by *U.S. News and World Report*. Due to ties, this covered ranks one to ninety-nine. The assistant looked for information on online or hybrid offerings in course listings and program descriptions. A limitation of this approach is that not all law schools may mention their online offerings on their websites, and newly approved or planned online courses may not yet have been added to the websites. Survey by Yvonne Dutton, Professor of Law, Ind. Univ. Robert McKinney Sch. of Law; Jessica Dickinson, Research Assistant; & Sally Frazer, Research Assistant (Summer 2018) (on file with authors).

3. *See* Standards & Rules of Procedure for Approval of Law Schs. Standard 306(e) (Am. Bar Ass'n 2018) [hereinafter 2018 ABA Standards].

4. 2018 ABA Standards, *supra* note 3, Standard 315.

5. The earliest online law school courses were offered in the 1997–98 school year after the ABA's Accreditation Committee passed the Temporary Guidelines on Distance Learning, which first allowed law schools to offer online courses. *See* Laura N. Gasaway, *Distance Learning Survey*, Syllabus, Summer 1998, at 16.

school. With asynchronous online classes,[6] one challenge is that the professor and student do not meet and interact as they do in live classes. Instead, the professor must remotely capture the students' attention and encourage them to do the work. In live law school classes, students may find that the Socratic Method employed by many professors is sufficient to keep them motivated to learn material: they prepare so that they can correctly answer questions when called upon by the professor in front of their classmates.[7] The in-class Socratic Method is not available in asynchronous online classes, meaning that professors must find new and different ways to engage their students and ensure that they are learning the course material. Professors also must consider that students who take online classes may do so because they have other demands on their time: they have to work or care for a family, and they want the flexibility to do their classwork off campus.[8]

There are additional reasons to focus on the best ways to motivate students in online classes. First, studies suggest that people's attention spans may be decreasing.[9] Second, research indicates that students may

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6. This Article includes only asynchronous online classes in its discussion of online classes. In asynchronous online classes, learning is time-shifted so that the professor and student need not interact online at the same time. In synchronous online courses, meanwhile, the professor and students meet and interact online at the same time through a platform, such as Skype or Zoom. *See* Henry H. Perritt, Jr., *The Internet Is Changing the Face of American Law Schools*, 33 IND. L. REV. 253, 269 (1999) (defining "asynchronous" as time-shifted and "synchronous" as simultaneous).

7. *See* Michael Vitiello, *Professor Kingsfield: The Most Misunderstood Character in Literature*, 33 HOFSTRA L. REV. 955, 956 (2005) (explaining that a good Socratic dialogue forces students to prepare for class).

8. *See* Lawrence E. Singer, *Leadership in Online "Non-Traditional" Legal Education: Lessons Learned & Questions Raised*, 94 U. DET. MERCY L. REV. 43, 67 (2017). As one student stated in an anonymous mid-semester survey in Fall 2016 Online Trusts and Estates:

My schedule is hectic and I like the freedom to be able to take class when I have time, and when "I'm ready to learn." And by that I mean sometimes I will have 20 other things going on in other classes or from work, and when I walk into my 8:00AM class on monday and arent prepared or are just distracted, its almost a wasted class. But having online options lets me get all my stuff done during the week and on sunday when im chilled out and caught up I can sit down and knock out 1 or 2 of these classes and have a much better chance at retaining the material.

Fall 2016 Trusts and Estates Survey, *infra* note 62.

9. *See* Laura M. Padilla, Essay, *Whoosh—Declining Law School Applications and Entering Credentials: Responding with Pivot Pedagogy*, 39 U. LA VERNE L. REV. 1, 11 (2017) (quoting Leon Watson, *Humans Have Shorter Attention Span Than Goldfish, Thanks to Smartphones*, THE TELEGRAPH (May 15, 2015 8:30 AM), https://www.telegraph.co.uk/science/2016/03/12/humans-have-shorter-attention-span-than-goldfish-thanks-to-smart/. According to one study, people have an attention span shorter than that of a goldfish. Since 2000

be less motivated to complete online courses than live courses.[10] For instance, studies of Massive Open Online Courses (MOOCs), conclude that only approximately ten percent of those enrolled finish the course.[11] Third, some literature indicates that students in online classes may have trouble maintaining their motivation because they face social isolation and technical issues that can cause frustration.[12] Professors teaching online thus compete not only with the internet for students' attention, but also with a host of other distractions. Finally, with respect to law school in particular, students need to learn the material in their live and online courses to use it as practicing professionals.

This Article adds to the scant literature about how to best motivate students in the online environment. The aim is to motivate students not only to complete the online course, but also to learn and master the course material. However, not all motivation must come from within the online course itself. Students who are more self-regulated are also generally more motivated to learn regardless of the course content.[13] Self-regulat-

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alone, the human attention span has decreased thirty-three percent, from twelve seconds to eight seconds. It is no coincidence that the first smartphones appeared in the 2000's. *Id.*

10. *See* Elena Qureshi et al., *An Interesting Profile-University Students who Take Distance Education Courses Show Weaker Motivation Than On-Campus Students*, 5 ONLINE J. OF DISTANCE LEARNING ADMIN. 1, 8 (2002), https://pdfs.semanticscholar.org/16bc/46a160395e84ebd83330e00f6acf5780883a.pdf?_ga=2.106832835.1702420275.1565821838-604114391.1565821838.

11. *See* Philip G. Schrag, *MOOCS and Legal Education: Valuable Innovation or Looming Disaster?*, 59 VILL. L. REV. 83, 92 (2014).

12. *See* Glenda C. Rakes & Karee E. Dunn, *The Impact of Online Graduate Students' Motivation and Self-Regulation on Academic Procrastination*, 9 J. OF INTERACTIVE ONLINE LEARNING 78, 78–79 (2010), http://www.ncolr.org/jiol/issues/pdf/9.1.5.pdf.

13. *See id.* at 79 (explaining that students with more self-regulatory skills are more academically motivated than others). *See, e.g.,* Roger Azevedo et al., *Does Adaptive Scaffolding Facilitate Students' Ability to Regulate Their Learning with Hypermedia?*, 29 CONTEMP. EDUC. PSYCHOL. 344, 362 (2004) (finding that students who engaged in self-regulating processes and strategies in a hypermedia environment performed better than those who used less or no self-regulation); Cherng-Jyh Yen & Simon Liu, *Learner Autonomy as a Predictor of Course Success and Final Grades in Community College Online Courses*, 41 J. EDUC. COMPUTING RES. 347, 356 (2009) (finding that "[s]tudents with higher learner autonomy are more likely to complete a community college online course with higher final grades"); Richard Lynch & Myron Dembo, *The Relationship Between Self-Regulation and Online Learning in a Blended Learning Context*, 5 INT'L. REV. OF RES. IN OPEN & DISTANCE LEARNING 1, 10 (2004) (finding that "there is a significant and positive relationship . . . between self-efficacy and performance in online education"); Lucy Barnard et al., *Online Self-Regulatory Learning Behaviors as a Mediator in the Relationship Between Online Course Perceptions with Achievement*, 9 INT'L. REV. OF RES. IN OPEN & DISTANCE LEARNING 1, 8 (2008) (finding that "[o]nline self-regulatory learning behaviors were only weakly associated with better academic achievement by themselves" and that self-regulation works best when combined with online communication and collaboration).

ing behaviors include setting goals, managing time, structuring one's environment to maximize studying, and seeking out help with tasks. In other words, students can work to acquire skills and behaviors that make them motivated and help them learn. Research on the effects of self-regulating behavior shows how this can increase students' motivation in the classroom.[14] Professors, however, can also do their part in increasing students' motivation through various teaching and course design techniques.

This Article is situated within the literature showing that students with high levels of intrinsic motivation are more likely to learn the course material and master the skills that will aid them when they become lawyers. Yet, the literature also suggests that course instructors can create and enhance the motivation levels of their students. This Article makes an empirical contribution to this existing literature by showing how instructors can use their course design and teaching methods to create and sustain their students' motivation to engage in an online course.

Accordingly, Part I of this Article defines motivation and the different types of motivation, surveying what researchers have learned about motivating students. Part II explains the research design of our study. Part III shares the results of our study that assesses student motivation in asynchronous online classes in the law school context using student perception data from students who have taken online courses at the authors' law school, Indiana University Robert H. McKinney School of Law ("IU McKinney"). That data is from over 300 law students who responded to anonymous student surveys and who participated in focus groups. This data suggests that engaging course content, regular assessments, and consistent feedback motivate students to learn and master the course content and skills, which supports existing research. Part III also shares techniques, based on student input, for achieving these qualities in an online course.

This Article concludes that motivation to learn is moldable. Intrinsic motivation can be enhanced by the professor through both teaching techniques and course design, including facilitating student interaction and generating student belief in the value of the course tasks and in their ability to succeed in them. Our study shows that students crave these sorts of intrinsic motivators—and correctly so given the literature on the power and role of intrinsic motivation in learning. Without being told that this

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14. Paula Paulino et al., S*elf-Regulation of Motivation: Contributing to Students' Learning in Middle School*, 8 THE EUROPEAN PROC. OF SOC. & BEHAV. SCIS. 1, 4 (2016), https://www.futureacademy.org.uk/files/images/upload/1ic-csbs_3564_5722_fullText_1_26.pdf. *See also, e.g.*, Carol Sansone et al., *Self-Regulation of Motivation When Learning Online: The Importance of Who, Why and How,* 59 EDUC. TECH RES. & DEV. 199, 201, 209–10 (2011).

is a study of intrinsic motivation and what composes such motivation, students identified factors that build intrinsic motivation as those that enhanced their enjoyment and ability to learn in the asynchronous online environment. In other words, students instinctively recognize the value of intrinsic motivation, and its elements, to their educational experience. Professors should therefore craft their courses with intrinsic motivators, resulting in better teaching and learning.

I. MOTIVATION

Originating from the Latin term for "to move," motivation is fuel for action. "To be motivated means to be moved to do something."[15] One can think of motivation as the process through which one's needs and desires are set in motion. Often playing a role in success and satisfaction, motivation is central to learning, including in law school. Indeed, for educators, motivation is an important factor to address in improving student learning outcomes.[16]

Researchers, including prominent scholars Richard Ryan and Edward Deci, have identified two types of motivation: intrinsic motivation and extrinsic motivation.[17] In fact, motivation can be understood as a con-

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15. Richard M. Ryan & Edward L. Deci, *Intrinsic and Extrinsic Motivations: Classic Definitions and New Directions*, 25 CONTEMP. EDUC. PSYCHOL. 1, 54 (2000).

16. For more background on the concept of motivation, *see* Rakes & Dunn, *supra* note 12. For the impact of motivation on learning, *see* Eskja Vero & Edi Puka, *The Importance of Motivation in an Educational Environment*, 15 FORMAZIONE & INSEGNAMENTO 57, 58 (2017), https://pdfs.semanticscholar.org/6e3e/f5d1c5666f3cee72ae0ddca5ef096ada5277.pdf. "The educational equivalent to 'location, location, location' is likely to be 'motivation, motivation, motivation,' for motivation is probably the most important factor that educators can target in order to improve learning." *Id. See also* SUSAN HEADDEN & SARAH MCKAY, MOTIVATION MATTERS: HOW NEW RESEARCH CAN HELP TEACHERS BOOST STUDENT ENGAGEMENT 4 (2015), https://www.carnegiefoundation.org/wp-content/uploads/2015/07/Motivation_Matters_July_2015.pdf (identifying motivation as a major non-cognitive contributor to student success).

17. *See* Ryan & Deci, *supra* note 15, at 55. A related concept is self-regulation. "Self-regulated learning is defined as 'an active, constructive process whereby learners set goals for their learning and then attempt to monitor, regulate, and control their cognition.' The idea is that students who actively engage in the learning process and take responsibility for their own learning become 'metacognitively, motivationally, and behaviorally active participants in their own learning process.'" Elizabeth M. Bloom, *Teaching Law Students to Teach Themselves: Using Lessons from Educational Psychology to Shape Self-Regulated Learners*, 59 WAYNE L. REV. 311, 313 (2013). "Successful online students must learn *and* maintain motivation to learn. The Self-regulation of Motivation (SRM) model suggests two kinds of motivation are essential: Goals-defined (i.e., value and expectancy of learning), and experience-defined (i.e., whether interesting)." Sansone et al., *supra* note 14, at 199. There are several

tinuum from extrinsic to intrinsic motivation. Generally speaking, extrinsic motivators are direct and immediate rewards, such as money or grades. Intrinsic motivators, as the name suggests, are more internal in nature: one does something for its own sake—because of the desire to learn, for example.

Professors can both extrinsically and intrinsically motivate students to succeed in their courses and master the skills necessary to pass the bar exam and become a practicing lawyer. Yet, motivation is complicated. Motivating students is not just a straightforward formula of some particular combination of extrinsic and intrinsic motivation.

The following sections describe both extrinsic and intrinsic motivation in more detail. They also survey the literature on each.

A. Extrinsic Motivation

Extrinsic motivation is doing an activity in order to attain some separable outcome that is a relatively immediate and direct reward.[18] Examples of extrinsic motivators for law students include grades, money, fame, and status, which can motivate law students to apply themselves to their studies.

In law school, grades should particularly motivate students, given the current competitive environment for law jobs. More than in many other academic programs, grades matter in law school. They yield a ranking of students that is integral to rewards such as scholarships, law review positions, and judicial clerkships. Grades are also used to determine penalties such as academic probation. Therefore, law school grades serve as a strong extrinsic motivator, although one caveat is in order here. In many law schools, professors are required to adhere to a grading curve that often sets the class average grade at a "B," thereby limiting the number of "A's." Curve-based grading has shown to decrease student motivation in some cases.[19]

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phases of interest, which ebb and flow, such as triggered situational interest. "Triggered situational interest is interest that is stimulated by an individual's encounter with something in his or her environment that draws his or her attention. Triggered situational interest is superficial—the individual does not know much about the topic of interest, and the individual's interest may be short-lived." Emily Zimmerman, *An Interdisciplinary Framework for Understanding and Cultivating Law Student Enthusiasm*, 58 DEPAUL L. REV. 851, 859 (2009). "Motivation is a vital part of self-regulation." E. Scott Fruehwald, *Developing Law Students' Professional Identities*, 37 U. LA VERNE L. REV. 1, 13 (2015).

18. *See* Ryan & Deci, *supra* note 15, at 60.

19. *See* Douglas A. Henderson, *Uncivil Procedure: Ranking Law Students Among Their Peers*, 27 U. MICH. J.L. REFORM 399, 415 (1994); *but see* Joshua M. Silverstein, *In Defense*

In addition to grades, students in law school are extrinsically motivated to master the course material because they must pass the bar exam and then practice as lawyers. Many law school courses are bar courses, meaning that they are subjects that are tested on the bar exam. Most, if not all, law school courses aim to teach lawyerly skills—skills that would be transferrable even if the student does not intend to practice the subject of that particular course. For example, even if a student does not plan to be a Trusts and Estates lawyer, such a course would still teach the lawyerly skills of how to read statutes, interpret cases, apply the law, and convey analysis using written and oral communication.

Despite these extrinsic motivators present in all law courses, experience shows that not all students are equally motivated to succeed in their classes. Not every student comes to class every day, is prepared for class when called upon, puts in maximum effort to write the perfect paper, or studies sufficiently to understand the nuances of the course material. This suggests that the existing external motivators are insufficient to ensure that all students are engaged and mastering the course material.

Indeed, the literature suggests that professors should be wary of relying too heavily on extrinsic motivators. Students driven by extrinsic motivation might treat school like a consumer good, seeking certain outcomes but not fully engaging in the learning experiences that lead to necessary critical thinking skills that will serve them in their professions. Studies also show that individuals who are heavily driven by extrinsic motivators such as grades or money may suffer from greater degrees of unhappiness or dissatisfaction.[20] For instance, despite the high salary, being an associate attorney at a large firm is among the unhappiest jobs in the country due to work demands.[21] A law student who endures the challenge of being at the top of the class, and then ends up in a difficult work environment, sustains many years of stress.

Perhaps most problematic is that extrinsic motivation may even hurt intrinsic motivation.[22] This is counterproductive given that the literature

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of Mandatory Curves, 34 U. ARK. LITTLE ROCK L. REV. 253, 300–01 (2012) (arguing mandatory curves do not necessarily reduce motivation because curves do not exclude the opportunity for improvement).

20. *See, e.g.*, Tim Kasser & Aaron Ahuvia, *Materialistic Values and Well-Being in Business Students*, 32 EUR. J. SOC. PYSCHOL. 137, 142 (2002) ("[S]tudents who believed that money, possessions, image, and popularity are of a large importance also reported less self-actualization, vitality and happiness, and more anxiety, physical symptoms, and unhappiness").

21. *See* Sarah Cearley, *Lawyer Assistance Programs: Bridging the Gap*, 36 U. ARK. LITTLE ROCK L. REV. 453, 455 (2014).

22. Barbara Glesner Fines, *Fundamental Principles and Challenges of Humanizing Legal Education*, 47 WASHBURN L.J. 313, 321 (2008).

shows that extrinsic motivation is not as effective as intrinsic motivation in achieving set goals or outcomes.[23] Intrinsic motivation, discussed next, is also associated with greater satisfaction in learning. Professors should thus focus their efforts on helping students become intrinsically motivated.

B. Intrinsic Motivation

Intrinsic motivation is doing something for its inherent satisfaction rather than for any outside consequence.[24] In other words, it is doing an activity for its own sake—because the person likes it and wants to do it. Intrinsic motivation can be performing a task because it seems interesting, important, and meaningful. Studies suggest that curiosity, interest, and the desire to learn are all intrinsic motivators.[25] Autonomy also boosts intrinsic motivation. Examples of intrinsic motivation in law school include instances: 1) where the student is interested in a particular topic covered in a course; 2) where the student takes a course that provides an opportunity to serve underrepresented populations; 3) where the student sees the course as an opportunity to learn about the world; and 4) where the student simply desires to learn the skills that will facilitate becoming a good and ethical attorney. Intrinsic motivation in law school can include justice, fairness, equality, and balance, as well as curiosity, interest, and the desire to learn.

Evidence suggests that intrinsic motivation is the more important and effective of the two types of motivations. Researchers Sheldon and Biddle have highlighted the extensive literature that now documents the relative advantages of intrinsic motivation.[26] They observe that while "externally-motivated persons can demonstrate impressive feats of short-term, rote learning, intrinsically motivated learners retain such rote material longer, demonstrate a stronger understanding of both rote and more complex material, and demonstrate greater creativity and cognitive flexibility."[27] They credit intrinsic motivation with producing people who are "more wholly engaged and absorbed in their activities, bringing more of

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23. *See* Robin S. Wellford-Slocum, *The Law School Student-Faculty Conference: Towards a Transformative Learning Experience*, 45 S. TEX. L. REV. 255, 345 n.373 (2004) ("Extrinsic motivation never motivates students as well as intrinsic motivation.").

24. Ryan & Deci, *supra* note 15, at 56.

25. *See generally, e.g.*, Thomas W. Malone, *Toward a Theory of Intrinsically Motivating Instruction*, 4 COGNITIVE SCI. 333 (1981) (finding that challenge, fantasy, and curiosity make environments intrinsically motivating).

26. Kennon M. Sheldon & Bruce J. Biddle, *Standards, Accountability, and School Reform: Perils and Pitfalls*, 100 TCHRS. C. REC. 164, 166 (1998).

27. *Id.*

their previous knowledge and integrative capacities to bear in their pursuit of new understanding and mastery."[28] A 2015 report from the Carnegie Foundation for the Advancement of Teaching also concluded that intrinsic motivation is more ideal for learning than extrinsic motivation.[29]

Thus, while both extrinsic and intrinsic motivation can help learning, students perform better when their motivation is intrinsic. Furthermore, intrinsic motivation will lead to greater career success for students, building up their resilience to obstacles and facilitating productive attitudes. One study of students at the School of the Art Institute of Chicago found an inverse relationship between extrinsic motivation and later career success.[30] This is true for the legal field as well: "[P]eople motivated by intrinsic factors, such as the desire to be a good attorney, have a much greater rate of long-term success than students who are motivated by extrinsic factors, such as grades, fame, or money."[31]

Students, however, come to law school and particular courses with differing amounts of intrinsic motivation. First, some students may have a lot of intrinsic motivation to do well in school generally, while some may have little or none. Second, some students may have particular interest in a course because its material overlaps with a personal interest. They may have developed such an interest because of their undergraduate or other life experiences. Caring about a topic or the course content is a significant intrinsic motivator to learn the course material. Of course, law students cannot just take courses that coincide with their personal interests. They must also take required courses and perhaps those that help them pass the state bar exam.

For professors, the challenge is to create the conditions that lead to intrinsic motivation for all students in the course—even for those who are not generally motivated intrinsically to do well in school or who have little initial interest in the subject matter. How does a professor cultivate

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28. *Id.*

29. *See* HEADDEN & MCKAY, *supra* note 16, at 6.

30. Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U.L. REV. 623, 643 (2012) ("The less evidence there was of a person having extrinsic motivation during art school, the more professional success the person tended to have in an art career 20 years later."). *See also* Amy Wrzesniewski et al., *Multiple Types of Motives Don't Multiply the Motivation of West Point Cadets*, 111 PROC. OF THE NAT'L ACAD. OF SCI. OF THE U.S. 10897, 10990 (2014), https://www.pnas.org/content/pnas/111/30/10990.full.pdf (The authors assessed "the impact of the motives of over 10,000 West Point cadets over the period of a decade on whether they would become commissioned officers, extend their officer service beyond the minimum required period, and be selected for early career promotions. For each outcome, motivation internal to military service itself predicted positive outcomes . . .").

31. Susan D. Landrum, *Drawing Inspiration from the Flipped Classroom Model: An Integrated Approach to Academic Support for the Academically Underprepared Law Student*, 53 DUQ. L. REV. 245, 257 (2015).

this intrinsic motivation? The literature suggests that it is possible through course design and teaching methods. Specifically, the literature emphasizes the importance of: (1) interesting and engaging content that makes learning fun and draws students into the learning process; (2) opportunities for student assessment; and (3) positive performance feedback.[32]

First, studies suggest that intrinsic motivation increases with interesting and engaging content, such as when the course content is geared to engage students and draw them into a fun and creative, yet educational, learning process.[33] Creative content and activities intrinsically motivate students. An element of fantasy or curiosity also helps engage students. For example, studies show that intrinsic motivation increases when games are used to help with learning concepts and content.[34] Games can be fun, engaging, provide feedback to students, and create a sense of accomplishment when students perform well in the game.[35] Other course content can similarly be useful in motivating students in the law school setting. For instance, film clips, especially those from popular culture, can be engaging to students. Studies show that video lectures are more

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32. *See, e.g.*, Bruce J. Winick, *Using Therapeutic Jurisprudence in Teaching Lawyering Skills: Meeting the Challenge of the New ABA Standards*, 17 ST. THOMAS L. REV. 429, 437 n.22 (2005); Edward L. Deci & Michard M. Ryan, *The "What" and the "Why" of Goal Pursuits: Human Needs and the Self-Determination of Behavior*, 11 PSYCHOL. INQUIRY 227, 233–36 (2000); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 164 (2007) (discussing the importance of formative assessment to "support opportunities to improve learning").

33. *See* Myron Moskovitz, *On Writing a Casebook*, 23 SEATTLE U.L. REV. 1019, 1022–23 (2000) ("Having taught for many years, I've learned a thing or two about law students—what motivates them and how they learn . . . My main job as a casebook author is to make learning law as easy and fun for the students as the subject matter permits."). *See also* Winick, *supra* note 32, at 437, n.22 ("Deci's early work on intrinsic motivation showed that people engage in behavior because they find it to be interesting and enjoyable."); Deci & Ryan, *supra* note 32, at 235 (noting that intrinsic motivation involves active engagement with tasks that people find interesting); C.K. Gunsalus & J. Steven Beckett, *Playing Doctor, Playing Lawyer: Interdisciplinary Simulations*, 14 CLINICAL L. REV. 439, 462 (2008) ("[T]he key to intrinsic motivation is engagement.").

34. In the 1980's, Thomas Malone revived the use of games in learning by showing how they can provide intrinsic motivation. *See* Malone, *supra* note 25. Games have universal appeal and are among the first methods through which children learn. *See* Jennifer L. Rosato, *All I Ever Needed to Know About Teaching Law School I Learned Teaching Kindergarten: Introducing Gaming Techniques into the Law School Classroom*, 45 J. LEGAL EDUC. 568, 570–71 (1995).

35. "The motivational psychology literature contains decades of work with college students showing that higher confidence leads to increased academic effort and resiliency." Carol S. Sargent & Andrea A. Curcio, *Empirical Evidence that Formative Assessments Improve Final Exams*, 61 J. LEGAL EDUC. 379, 379 (2012).

engaging when they are short and chunked by topics, with lectures focused on one main topic.[36] Quizzes can be gamified simply by allowing students to accumulate points, or they can be built in a more sophisticated game structure, like Jeopardy. Multiple choice quizzes have been undervalued in legal education, but done right, are useful to students.[37]

Second, to the point about assessment, studies show that intrinsic motivation increases when students attribute educational results to internal factors that they can control.[38] Intrinsic motivation is further increased when students believe that they are capable of reaching desired goals.[39] Thus, a way to intrinsically motivate students is to provide them ungraded assessments, which strengthen metacognitive abilities and thereby help them self-regulate their learning.[40] Students also gain self-esteem if the assessments are of a manageable difficulty level while still being sufficiently challenging to intrinsically motivate them. Assessments in legal education have been receiving attention on a much broader scale. For example, the ABA has increased its emphasis on assessment.[41] Additionally, the *Carnegie Report* has noted the critiques of traditional law school

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36. *See, e.g.*, Philip Guo, *Optimal Video Length for Student Engagement*, EDX BLOG (Nov. 13, 2013), https://blog.edx.org/optimal-video-length-student-engagement ("The optimal video length is 6 minutes or shorter — students watched most of the way through these short videos . . . The take-home message for instructors is that, to maximize student engagement, they should work with instructional designers and video producers to break up their lectures into small, bite-sized pieces."). *But see* Karen Wilson & James H. Korn, *Attention During Lectures: Beyond Ten Minutes*, 34 TEACHING OF PSYCHOL. 85, 85 (2007), https://www.tandfonline.com/doi/abs/10.1080/00986280701291291#.UxdU5-ddXrU ("Many authors claim that students' attention declines approximately 10 to 15 min into lectures. To evaluate this claim, we reviewed several types of studies including studies of student note taking, observations of students during lectures, and self-reports of student attention, as well as studies using physiological measures of attention. We found that the research on which this estimate is based provides little support for the belief that students' attention declines after 10 to 15 min.").

37. *See generally* Susan M. Case & Beth E. Donahue, *Developing High-Quality Multiple-Choice Questions for Assessment in Legal Education*, 58 J. LEGAL EDUC. 372 (2008) (discussing how to construct multiple choice questions to ensure that they assess the intended competencies).

38. *See* Rakes & Dunn, *supra* note 12, at 79.

39. *Id.*

40. *See* SULLIVAN ET AL., *supra* note 32, at 173 (emphasizing the need to make students better self-regulated learners through the teaching of metacognitive skills).

41. *See* 2018 ABA STANDARDS, *supra* note 3, Standard 314 ("A law school shall utilize both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students."). *See also* Mary Crossley & Lu-in Wang, *Learning by Doing: An Experience with Outcomes Assessment*, 41 U. TOL. L. REV. 269, 271–73 (2010) (giving an overview of the American Bar Association's consideration of standards regarding assessment).

assessment.[42]

Third, regarding feedback, several early studies showed that positive performance feedback increased intrinsic motivation, while negative performance feedback decreased it.[43] Other studies showed that perceived competence offset these effects.[44] For feedback to intrinsically motivate and engage students, the literature notes that it should be constructed in a positive way[45] and be prompt.[46] Indeed, feedback can raise students' enthusiasm,[47] particularly if it includes some positive feedback. For these reasons, professors may find the sandwich feedback method effective, where they start and end with positive sentiments and highlight areas for improvement between them.[48] Finally, the connection that feedback builds between the student and professor provides intrinsic motivation to the student. Thus, a way to motivate students intrinsically is to provide them opportunities for feedback.

In sum, intrinsic motivation is an important element to academic

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42. SULLIVAN ET AL., *supra* note 32, at 169 (noting that the "conditions of testing on any given day, individual differences in test-taking skills, and peculiarities of different raters all introduce unreliability into the results, making them less precise than faculty may realize as valid and reliable indicators of knowledge and skill.").

43. *See* Ryan & Deci, *supra* note 15, at 59.

44. *Id.*

45. *See* Paula J. Manning, *Understanding the Impact of Inadequate Feedback: A Means to Reduce Law Student Psychological Distress, Increase Motivation, and Improve Learning Outcomes*, 43 CUMB. L. REV. 225, 241–42 (2012).

46. "At some point, delay is likely to become detrimental. It is certainly plausible that delaying feedback for too long will reduce a student's motivation to look at anything more than her grade. After too long a delay, it becomes unrealistic to think that reviewing an exam will assist a student in adjusting her approach based on a long-past performance." Ruth Colker et al., *Formative Assessments: A Law School Case Study*, 94 U. DET. MERCY L. REV. 387, 421 (2017).

47. "While law professors might be reluctant to give students a false sense of their abilities for the sake of cultivating students' enthusiasm, giving feedback to cultivate enthusiasm can be reconciled with giving legitimate feedback." Zimmerman, *supra* note 17, at 903. However, feedback through assessments can be stressful if not done thoughtfully:

> As beneficial as assessment can be for law students, if not done thoughtfully, it can also have negative consequences. Overuse of assessment can create more stress for students by taking up valuable time that otherwise is needed to study for their classes. Faculty members should coordinate their assessment efforts to ensure that students are not overwhelmed with assignments within a short time period. Furthermore, it is important that these assessments actually assess what we need to know about our students, particularly those underprepared students, such as the status of their legal analytical skills.

Landrum, *supra* note 31, at 268–69.

48. Catherine Gage O'Grady, *A Behavioral Approach to Lawyer Mistake and Apology*, 51 NEW ENG. L. REV. 7, 42 n. 125 (2016).

achievement that does not rely on the student's intellectual ability.[49] Instructors can create and enhance intrinsic motivation in their online courses by providing engaging content, regular assessments, and consistent feedback. These intrinsic motivators are the subject of our study, considered next.

II. RESEARCH DESIGN

This study on motivating online students draws on evidence from: (1) anonymous student survey responses in select online law courses; and (2) focus groups with students who engaged in broader online programming at the law school. In both cases, the students responding were currently-enrolled law students at IU McKinney. Our data comes from the online context and therefore holds lessons for distance education, which is timely given the increase by the ABA of permitted online credits in law programs.[50] However, the lessons apply to traditional live classes as well.

A. Anonymous Student Surveys

The first source of our data for this Article is the student responses to anonymous mid-semester surveys with open-ended questions, reproduced in Appendix A. These surveys were administered in two different asynchronous online courses at IU McKinney: Online Trusts and Estates and Online Comparative Law. The data from these mid-semester surveys was collected from all students enrolled in these courses in the Spring 2015, Spring 2016, and Fall 2016 semesters. These were unofficial surveys seeking anonymous student feedback in time for the professor to adjust the class delivery and content—the end-of-semester official surveys came too late to allow such adjustments. While students were not required to complete these unofficial surveys, nearly ninety percent of students did in the Online Trusts and Estates classes and approximately

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49. For this reason, intrinsic motivation is seen as a non-cognitive contributor to academic success. In other words, it helps students succeed regardless of their intellectual ability:

> Much of what we know about student motivation exists in a vast reservoir of research covering what's known collectively as "non-cognitive" contributors to student success, an umbrella term for skills, dispositions, and attributes that fall outside of intellectual ability and content knowledge. It is a broad field that incorporates everything from self-regulation, such as being on time for class, to study strategies, to so-called social-emotional skills, which include such capacities as cooperation and respect for others.

HEADDEN & MCKAY, *supra* note 16, at 4.

50. 2018 ABA STANDARDS, *supra* note 3, Standard 306(e).

sixty-seven percent of students did in the Online Comparative Law classes. In total, 323 second-year and third-year students responded to the surveys.

Professor Ryznar taught all of the Online Trusts and Estates classes, and Professor Dutton taught all of the Online Comparative Law classes. Both courses were organized into modules and included short recorded lectures by the professor and various activities to assess student understanding of the material. Some of those activities were similar across courses: both Professors Dutton and Ryznar required students to respond to discussion posts, which meant that students had to write a paragraph or two in response to a question posed by the professor. Furthermore, both Professors Dutton and Ryznar required students to complete quizzes using the online learning platform quite regularly.[51] The online learning platform automatically graded quizzes that contained multiple choice questions and offered students immediate feedback by revealing the correct answers and explanations upon the student's submission of the quiz. The professor, meanwhile, received a computer-generated report on class statistics as well as each student's performance on the quiz once it closed, allowing the professor to monitor students' efforts at mastering the course material and to provide additional feedback addressing the quiz results.

Some assignments, however, were only appropriate for certain types of classes. For example, in the final weeks of Professor Dutton's Online Comparative Law course, students had to write and submit comparative analysis memos. Meanwhile, Professor Ryznar used polls in her Online Trusts and Estates classes. With this polling technique, students took a side in a debate and explained their reasoning in written format. Professor Ryznar then addressed the poll results in course messages, comparing the poll results to the defaults selected by the probate and trust codes that intended to represent the public's preferences.

All of the assessments were ungraded, with course grades based solely on the final exam. In other words, these were formative assessments. Generally, there are two types of assessments: summative and formative. They differ in their purposes, with the goal of summative assessment being to grade or rank students. Formative assessments are instead intended to provide feedback to students and faculty on course performance so that students can develop their knowledge or skills and

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51. Quizzes are but one type of structured interim assessment that professors can use in their online courses. Quizzes can include various types of questions, such as multiple choice, true/false, fill-in the blank, and even short essay. Margaret Ryznar, *Upward! Higher: How a Law Faculty Stays Ahead of the Curve: Assessing Law Students*, 51 IND. L. REV. 447, 450 (2018).

teachers have information about student performance and the effectiveness of instructional techniques.

Nonetheless, in both courses, students were instructed that they had to submit assignments in order to demonstrate that they were participating in the class. Professor Ryznar and Professor Dutton also informed students that should they fail to complete a significant number of assignments, their grade would suffer, or they would be dropped from the course. However, students were also told that they were given assignments specifically so that they could practice course concepts and assess their own learning of the course material. Furthermore, Professor Dutton advised students in her Online Comparative Law class that although they would not be graded on discussion posts or written memos, the level of feedback that they received from the professor would be greater if the professor had more to work with in terms of the student product.

Professor Dutton used several methods to provide feedback on her students' discussion posts and memos. She provided individual feedback to students, sharing comments about substance as well as writing principles. For instance, she would explain that students needed to start a paragraph with a topic sentence that summarized the main idea of the paragraph. Professor Dutton also shared "sample" annotated discussion posts or memos where she would point out good topic sentences, good citations to evidence, or good counterarguments. Meanwhile, Professor Ryznar commented on several discussion posts directly in addition to responding to the whole class in a weekly message.

Thus, these assignments were course features designed to intrinsically motivate students because no grades were given.[52] Our data reveals that a few students did not like that the assignments were ungraded and wanted the extrinsic motivation of grades,[53] but the vast majority of students responded positively to the various assignments in the courses and

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52. It is true that mastering assignments could also aid students in doing well on the final exam, which is an extrinsic motivator. Although sometimes separating intrinsic from extrinsic motivation can be difficult, we view such assignments as more of an intrinsic motivator because students could still do well on a final exam without completing the assignments: they would just have to work in different ways to master the course content.

53. For example, one student in Spring 2016 Online Comparative Law said, "I would make the assignments count more, even if it is only 15-20% of the overall grade." Spring 2016 Comparative Law Survey, *infra* note 62. However, more students expressed a preference for ungraded assessments than graded assessments. For example, in Spring 2016 Online Trusts and Estates, students said, "I like the ungraded quizzes. No pressure-we get the answers" and "I enjoy the quizzes because they allow me to see my level of understanding without unnecessary pressure. Although I always try my best, it is helpful to know that the quizzes are ungraded. I am able to assess my understanding of the material without the pressure. If I miss a question, I know where I need to go to improve my understanding" and "My favorite type

did not mind that they were ungraded.

The mid-semester surveys included questions that were helpful to assessing whether the courses were designed in a way that intrinsically motivated students to engage with and master the course content. For example, the surveys asked students to generally explain what they did or did not think was working in the class. Another question focused on the assignments, asking students to explain which assignments they did and did not like and which they believed best enhanced their learning. One question specifically asked whether students would take future online courses, and why. In all cases, students were encouraged to explain their responses. As a result, we received answers that helped explain what motivated students to take the online course and to engage with the course material and learn the course content.

All of these mid-semester surveys were coded and analyzed. We present the data from the student responses to several of the survey questions below.[54] We provide not only data on the percentage of students who responded positively or negatively to the questions, but also share the main reasons why students reached the conclusions that they did.

We expect that the data in response to these survey questions is reflective of the perception of IU McKinney students more generally for several reasons. First, more than 300 students responded to the survey questions about their online course experience. Second, the data was collected over several different semesters, allowing us to see whether the perceptions hold over a period of time. Third, this study includes variation across courses, permitting us to reach some conclusions about whether certain findings hold across that variation. For example, this study includes two different courses, which are also very different in their "type"—Trusts and Estates is a "black letter law" bar course, while Comparative Law is more of a seminar.[55] Moreover, each of those courses were taught by different professors.

B. Focus Groups

The second source of data is the anonymized transcripts of focus

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of activity is the u[n]graded quizzes. They allow me to take them without looking at any information because I'm not worried about my grade. This allows me to actually see what I need to study." Fall 2016 Trusts and Estates Survey, *infra* note 62.

54. *See infra* Part III.A.

55. Trusts and Estates is an important course in the law school curriculum. Most state bars test the subject, it is a staple in solo practitioner work, and all law students should be literate in planning their own estates. Comparative Law is also useful for giving students a legal framework from other traditions.

groups on the topic of McKinney Law School online programming generally. These focus groups were all run by Dr. Douglas Jerolimov from the IUPUI Center for Teaching and Learning.[56] The first focus group was on April 11, 2018 at 3:00 p.m. with six students, the second was on April 12 at 12:45 p.m. with eight students, and the third was on April 12 at 4:30 p.m. with four students. Each session took place in a conference room at the law school and lasted between one and one and a half hours. Dr. Jerolimov videotaped each session, and the sessions were transcribed by an outside service.[57] In the focus group sessions, students were encouraged to interact with each other about their experiences in online classes, the goal being to obtain a much richer and detailed narrative than could be obtained through the mid-semester surveys.

A total of eighteen students voluntarily participated.[58] Students sought for the focus groups were any graduating student who had taken at least one asynchronous online course at IU McKinney. Professors Dutton and Ryznar targeted graduating students specifically because they expected that these students would feel most willing to speak freely given that they were graduating approximately one month after the focus groups.

Other measures also encouraged students to speak frankly during the focus group sessions. First, students were told that while the study was being conducted by Professors Dutton and Ryznar, neither would be privy to the identity of students participating in the focus groups. Students were recruited for the focus groups by graduating student, Kayleigh Long. The focus groups were facilitated by Dr. Jerolimov. Ms. Long and Dr. Jerolimov "scrubbed" the transcripts of the focus groups of any identifying student information before providing those transcripts to Professors Dutton and Ryznar. In addition, Dr. Jerolimov, who is trained and experienced in facilitating focus groups, advised students in the focus groups that they should keep confidential the identity of focus group participants and the information shared by those participants. Finally, Dr.

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56. Douglas Jerolimov, PhD, is an instructional design consultant at the Center for Teaching and Learning at IUPUI. He has conducted numerous focus group discussions for program evaluation and development efforts, as well as student focus groups for mid-term course evaluations. Dr. Jerolimov also serves as an IUPUI Campus Coordinator for the Quality Matters organization, a faculty-run international quality assurance organization for online teaching and learning.

57. The outside transcription service was Rev, available at https://www.rev.com/.

58. Students were offered no incentive to participate in the study, other than the opportunity to share their views about the current online programming and any suggestions for improvement. Students did not receive any payment for taking part in this study, but they were provided with a sandwich and beverage during the focus group session to help them save time and recognize their contribution to the project.

Jerolimov told focus group participants that to the extent they had any concerns about confidentiality, they did not need to mention specific professors or courses when commenting during the sessions.

During the focus group sessions, Dr. Jerolimov used a script containing suggested questions designed to learn more about student perceptions of asynchronous online classes at IU McKinney, reproduced in Appendix B. Some questions asked students to compare their experiences in online classes with their experiences in live classes, while other questions sought student input about the quality of online programming and how to improve it. Although student responses to these questions could provide some insight into whether students were intrinsically motivated to do the work in their online courses, one question directly addressed student motivation. This question was: "Students in online courses do the work on their own time. As students who have taken one or more online classes, how were you motivated to do the work? Were you self-motivated? Or did the course structure or activities motivate you to do the work and learn the course material?" The open-ended nature of this question allowed us to receive answers related to both extrinsic and intrinsic motivation, and this Article will confine itself only to student responses to this question.[59]

III. STUDY RESULTS AND DISCUSSION

In this section, we share data from the anonymous surveys and focus groups as it relates to student motivation as described in the literature.[60] The data suggests several ways to motivate students, reinforcing the literature on intrinsic motivation. In particular, the data shows that students are motivated to do the course work and master the course content when the online course is engaging, and they have opportunities for regular assessment and consistent feedback.

A. Anonymous Survey Results

The mid-semester surveys show that while many students are drawn

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59. We have addressed student responses to the other questions posed in the focus groups in a previous article. The focus of that article is more general in nature, looking at what students perceive makes a quality online course. *See* Yvonne M. Dutton et al., *Assessing Online Learning in Law Schools: Students Say Online Classes Delive*r, 96 DENVER L. REV. 493 (2019). Our previous article, unlike this one, did not address the mid-semester survey responses in any detail and did not specifically address student motivation.

60. We received approval from the Institutional Review Board to use the student responses in publications on online teaching. As part of the approval, we agreed to report them anonymously and to remove any identifying information.

to online classes because of the schedule flexibility that they offer,[61] flexibility alone would not cause them to take an online class or to learn the course material well. Specifically, about one-third of the students responding to the surveys indicated that one thing they enjoyed about their online course was the schedule flexibility that it offered, and about one-half said that one reason they would take another online class is this flexibility.[62] However, students made clear in their surveys that they would not take just any online class. For example, approximately sixteen percent of all Online Trusts and Estates students specified that they would take another online course if it were a well-organized course, while approximately five percent said that they would take another online course if it was a subject that interested them.[63]

In their mid-semester survey comments, students elaborated on the factors driving their decision to take online classes. Several students in Fall 2016 Online Trusts and Estates stated that they would take another online course if offered by the same professor, including one who explained, "I would take another online class from you because I like the way you have structured the class."[64] Another student stated, "Yes—I

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61. This is not surprising given that the literature on online programming highlights flexibility as a key advantage of asynchronous online classes. Nor should one be surprised that law students who work full-time or have families appreciate the ability to complete lectures and activities when they can. Instead of attending a live class during the day, students can also choose to accept an externship or internship where they can learn to practice law under the mentorship of lawyers in the field. The availability of online classes also means that students can take an increased diversity of courses since the time slots of live courses can conflict with each other. *See* Singer, *supra* note 8, at 48–49 (arguing that non-traditional programs are a more feasible option for students because they require less time).

62. *See* Survey by Margaret Ryznar, Professor of Law, Ind. Univ. Robert H. McKinney Sch. of Law (Spring 2015) (on file with authors) [hereinafter Spring 2015 Trusts and Estates Survey]; Survey by Margaret Ryznar, Professor of Law, Ind. Univ. Robert H. McKinney Sch. of Law (Spring 2016) (on file with authors) [hereinafter Spring 2016 Trusts and Estates Survey]; Survey by Yvonne Dutton, Professor of Law, Ind. Univ. Robert H. McKinney Sch. of Law (Spring 2016) (on file with authors) [hereinafter Spring 2016 Comparative Law Survey]; Survey by Margaret Ryznar, Professor of Law, Ind. Univ. Robert H. McKinney Sch. of Law (Fall 2016) (on file with authors) [hereinafter Fall 2016 Trusts and Estates Survey]; Survey by Yvonne Dutton, Professor of Law, Ind. Univ. Robert H. McKinney Sch. of Law (Fall 2016) (on file with authors) [hereinafter Fall 2016 Comparative Law Survey].

63. *See* Spring 2015 Trusts and Estates Survey, Fall 2016 Trusts and Estates Survey, Spring 2016 Trusts and Estates Survey, *supra* note 62.

64. Fall 2016 Trusts and Estates Survey, *supra* note 62. In response to whether they would take another online course, other students in Fall 2016 Online Trusts and Estates stated: "Yes, if it is set-up this way"; "I would definitely take another online course with this professor, because this particular course has, so far, been a great learning experience"; "I would definitely take another one of your online classes in the future. I appreciate the amount of time that you have put into organizing the course"; and "If they were set up like this, yes I would." *Id.* Students in Spring 2015 Online Trusts and Estates responded to the same question: "If

would take an online course as long as it is well-organized (as this course is!)."[65] Another student confirmed, "Yes, but only if it had the structure and ease of this course."[66]

Thus, while the flexibility of online classes is appealing to students, they still need to be motivated to do the work in an online class, just as they need to be motivated to do the work in a live class. The survey responses provide some insights as to what course features and content intrinsically motivate students to complete course tasks and master the material. Indeed, in response to the survey question about what they liked about their online course and what worked for them, student comments often described the intrinsic motivators of engaging course content, regular assessment, and consistent feedback.[67] Accordingly, professors can integrate these features into their online course design and teaching methods in order to better intrinsically motivate their students.

1. Engaging Content

An engaging course provides intrinsic motivation for students to keep learning and mastering the course material.[68] Engagement is possible through both course design and teaching methods.

In terms of course design, both Professors Dutton and Ryznar used

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they were structured as this class is, then yes. If it is merely a free-for-all with no structure, then no"; "It would have to be one that is similar both in substance and style because I do believe the substance of this particular class suites itself well to being taught online and likewise the laid back style of the lectures"; "I would take another online class in the future if it were set up like this course. I like the lecture videos. I love that the professor is so accessible and open to suggestions to continuously improve the quality of the course. I appreciate the variety of activities and the different ways the professor provides information to the class."; and "Yes, I would take another online class in the future if it's structured similar to Trusts and Estates. Online courses allow flexibility, and they also put a large part of the responsibility on the student to learn. The way Trusts and Estates is structured, I know I will only succeed if I take an active role in class. I like having ownership of my own learning." Spring 2015 Trusts and Estates Survey, *supra* note 62.

65. Fall 2016 Trusts and Estates Survey, *supra* note 62.

66. *Id.*

67. Out of 280 online Trusts and Estates students responding to the question of "What about this course is not working for you?", only ten students noted that they struggled with motivation and procrastination in the course. However, from the surveys, it is not always clear whether this is an individual personality trait or an observation about the nature of online classes. For example, in Spring 2016 Online Trusts and Estates, one student simply stated, "Sometimes I find it a little difficult to feel motivated to read the material." Spring 2016 Trusts and Estates Survey, *supra* note 62. Another student in that class explained, "The thing that's working the worst for me is. . . the flexibility! The temptation to procrastinate is much stronger, especially when there is nothing to turn in on a given assignment. Sometimes I will rush through things at the last minute and not absorb things as well as I should." *Id.*

68. As one student said, "The course seems to be interesting and keeps my attention throughout the reading." Fall 2016 Comparative Law Survey, *supra* note 62.

short lecture videos chunked by topic, based on the literature showing that students do not engage with long videos.[69] A number of students explained how the lecture videos were a key component in helping them learn and stay interested in the course material. For example, in response to the question about what was working well for students in Professor Ryznar's online course, over a quarter of all students pointed to the video content.[70] The comments in the mid-semester surveys often elaborated that it was the short, chunked nature of the video lectures that helped students stay focused and engaged with the video content. One Online Trusts and Estates student noted, "I like that the videos are not too long because after doing the readings and taking notes, having to watch long lecture videos is cumbersome."[71] Another student said, "I thought at first that it would be difficult to have the motivation to watch the videos on my own, but that has not been a problem. I typically read the textbook first, then listen to the online lectures."[72] Yet another student in the course mentioned, "I also really like the length of the lecture videos. I get more out of an eight-minute lecture video that gets to the point than an hour lecture that drags on."[73] In terms of what students liked best about Online Comparative Law, one student stated: "Your lectures are well done—not too long, but packed with information to help clarify the readings."[74] In response to a mid-semester survey question about which material in Online Comparative Law was presented most effectively, many students noted the short lecture videos. "I like the videos since they are concise and are packed full of information."[75] "I feel like I lea[r]n 5 times more in a 20 minute video than I do in 3 hours of reading," another student said.[76] Thus, the lecture videos often engaged students, particularly when concise and chunked by topic.

Students also highlighted the value of supplementary videos as a type of course content that helped them stay motivated and interested in learning. In response to the question about what material was presented

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69. *See supra* Part I.B.
70. *See* Spring 2015 Trusts and Estates Survey, Fall 2016 Trusts and Estates Survey, Spring 2016 Trusts and Estates Survey, *supra* note 62.
71. Fall 2016 Trusts and Estates Survey, *supra* note 62.
72. *Id.*
73. *Id.*
74. Fall 2016 Comparative Law Survey, *supra* note 62.
75. *Id.*
76. Spring 2016 Comparative Law Survey, *supra* note 62.

most effectively, a number of students in Professor Dutton's class refer-
enced her use of YouTube videos to illustrate certain concepts.[77] A stu-
dent observed that "I have thoroughly enjoyed the youtube videos you
have selected for the material because it adds color to the topic."[78] An-
other student noted that "I think your lectures are done well and the sup-
plemental video clips you provide have been very helpful in fleshing out
the readings and adding a 'real world' touch to what we are studying."[79]
Yet another student said that "the additional video clips beyond the lec-
tures have been fun to watch and have added another learning element
into the mix."[80] Other students concurred in Professor Ryznar's classes
regarding engaging supplementary videos: "The material is interesting
and so is the 'extra' information provided like the youtube videos."[81] One
Online Comparative Law student commented, "I did not expect, but en-
joy, the additional videos that supplement the lectures and reading."[82] As
students noticed, the relevant video clips help put the law in context and
help them see the relevance of the material they are studying beyond the
printed page. The fact that this supplementary content is different and
surprising engages students and thereby motivates an interest in learn-
ing.[83] These techniques also move legal education toward more integra-
tion of skills and doctrine as recommended by the *Carnegie Report*.[84]

Moreover, students appreciated practical exercises, which motivated
them to do assignments even though they were not graded. Students are
intrinsically motivated when the course content and activities have a prac-
tical component because it allows them to receive a glimpse into the law
work that they are training to do. Students also like to work on the skills
that they will need for law practice. For example, Professor Dutton's stu-
dents appreciated when she compared writing a discussion post to writing

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77. When the nature of the course warranted it, Professor Dutton added YouTube or other
video content. For example, in Online Comparative Law, Professor Dutton posted some vid-
eos describing how the criminal courts in England work. In her module on the European Un-
ion, she posted a variety of videos created by different EU branches explaining their inner
workings.

78. Fall 2016 Comparative Law Survey, *supra* note 62.

79. *Id.*

80. *Id.*

81. *Id.* In Online Trusts and Estates, Professor Ryznar occasionally posted videos that
supplemented the lecture videos, such as a YouTube news video about a Trusts and Estates
issue in the popular press.

82. *Id.*

83. *See supra* Part I.B.

84. *See* Leslie M. Rose, *Norm-Referenced Grading in the Age of Carnegie: Why Criteria-
Referenced Grading is More Consistent with Current Trends in Legal Education and How
Legal Writing Can Lead the Way*, 17 J. OF THE LEGAL WRITING INST. 123, 158 (2011).

an email to a partner or client. According to one student, "I like the activities because we are able to apply what we are reading and learning."[85] Another student said, "I thought that the research activity, though it took the most time and was the most difficult[,] was the best activity for enhancing my learning."[86] Another student liked doing "[r]esearch - although it's the most frustrating, it's also most applicable to my job as law librarian."[87] Similarly, a student liked "[t]he foreign law research assignment - I was most engaged in the activity since it required me to apply the information I found to a specific situation."[88] Another student added, "[t]he research was good and not too onerous—a good taste without being overwhelming."[89] Practical exercises in online courses therefore provide students intrinsic motivation.[90]

In sum, the anonymous mid-semester survey responses of over 300 online law students showed that students appreciated the flexibility that online classes afford them. However, it was engaging, concise, and practical course content that kept them in the course and wanting to learn.

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85. Fall 2016 Comparative Law Survey, *supra* note 62.

86. *Id.*

87. Spring 2016 Comparative Law Survey, *supra* note 62.

88. Fall 2016 Comparative Law Survey, *supra* note 62.

89. Spring 2016 Comparative Law Survey, *supra* note 62.

90. Practical exercises are also important to integrate in law courses for several reasons other than intrinsic motivation. First, law students increasingly face an employment environment where they must demonstrate that they have already practiced, if not mastered, some of the lawyering skills entailed by the job. *See, e.g.,* Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 483, 605 (2010) (discussing how increased economic pressures on law firms has led to greater demand for law graduates with practical skills and the ability to take on complex projects). Survey research supports this claim. *See, e.g.,* Robert R. Kuehn, *Measuring Clinical Legal Education's Employment Outcomes*, 2015 WIS. L. REV. 645, 661–63 (2015) (describing surveys in which legal employers rank practical skills as very important). Second, employers also want students to benefit from practicing legal skills in the relatively safe environment of a law school classroom where they can get feedback, but without the pressure of representing a "real" client. *See, e.g.,* Cynthia Batt, *A Practice Continuum: Integrating Experiential Education into the Curriculum*, 7 ELON L. REV. 119, 130–132 (2015); *see also* Hannah Hayes, *Recession Places Law School in the Eye of the Storm*, 18 PERSPECTIVES 1, 8 (2010). And by practicing legal skills, students will be better able to perform those skills when they are faced with a "real" client. *See generally id.* (discussing how law schools should work to integrate experiential and skills learning into doctrinal courses to help students become more practice-ready). Finally, law schools' primary accrediting agency, the ABA, has imposed on the curriculum requirements of practice readiness. *See* 2018 ABA Standards, *supra* note 3, Standard 301. Those requirements require innovation by all law schools. Recent scholarship suggests that the practice ready outcomes that the ABA seeks are natural fits with online pedagogical methods. *See, e.g.*, Max Huffman, *Online Learning Grows Up—And Heads to Law School*, 49 IND. L. REV. 57, 84 (2015).

2. Regular Formative Assessments

Both in Professor Dutton's Comparative Law and in Professor Ryznar's Trusts and Estates online courses, students were required to complete ungraded formative assessments on a weekly basis. These consisted of discussion boards, quizzes (often with a multiple-choice component), polls, or other written assignments. Both Professors Dutton and Ryznar monitored all of the completed assessments to track and respond to student progress in the courses.

The mid-semester survey responses indicate that many students felt that regular assessments helped them keep on track with the course material. While students in asynchronous online classes do not have class meetings to hold them accountable, regular assignments motivate them to stay engaged and learning. Indeed, several students responding in the Online Trusts and Estates course noted that the regular assessments motivated them.[91] As one student put it, "I like that there are weekly assignments for the online course so it keeps me honest and makes sure I am not backloading things for a few weeks at a time."[92]

While a few students did comment that they did not like the fact that the assessments required them to do work without the benefit of a grade, most students appreciated that the assignments were formative and aimed to help them track their progress. In other words, they appreciated being provided this intrinsic motivator to learn the material.[93] As one student noted, "Normally, I feel like these types of activities could be classified as busy work. But for the format of this course I find the quizzes to be very helpful in pointing ou[t] what is important in the readings. The discussion questions are very thought-provoking."[94]

To increase intrinsic motivation, the literature shows that it helps to make assessments engaging, fun, and gamified when possible.[95] Student responses to the mid-semester survey question about their favorite and least favorite course activities provide some insights about intrinsic motivation sources in terms of assessments. In response to a question in Professor Ryznar's courses regarding their favorite assessment, over half of

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91. *See* Spring 2015 Trusts and Estates Survey, Fall 2016 Trusts and Estates Survey, Spring 2016 Trusts and Estates Survey, *supra* note 62.

92. Spring 2015 Trusts and Estates Survey, *supra* note 62.

93. *See supra* note 53.

94. Spring 2016 Comparative Law Survey, *supra* note 62.

95. *See supra* Part I.B.

all students responded that it was quizzes.[96] Over half of Professor Dutton's online students also chose quizzes as their favorite activity.[97]

Student comments elaborate on this preference for quizzes. Specifically, students liked that this form of assessment gave them instant feedback generated by the online learning platform. As soon as they submitted their quiz, the Canvas platform graded it against the professor's answer key and revealed the professor's comments that were prepared beforehand. Students found this feedback rewarding, as the literature on intrinsic motivation would suggest. According to one student, "I find the quizzes to be my favorite activity for the reasons I mentioned above. Plus, I like the (somewhat) instant gratification of knowing if I was right or wrong in my answers."[98] Another student confirmed, "I like quizzes, because it's a quick way to make sure I understand the material."[99]

The quizzes also allow students to track their progress in the course, which is intrinsically motivating to learning. One student noted, "I also enjoy the quizzes as they are a good way to assess your knowledge on the material and help you understand what you might need to review."[100] Another student confirmed, "I can immediately see if I've misunderstood something or if I was correct."[101] Students are encouraged by feeling as if they are mastering the material, and so, "Quizzes. . . help[] me to gauge my knowledge and comprehension of the material."[102] Another student confirmed, "[T]he quizzes also serve as a good check on my learning."[103] Students can also find themselves engaged by the quizzes: "I think the. . .quizzes are most interesting and helpful."[104] Thus, assessments build intrinsic motivation in students, particularly if they are engaging, as the literature on intrinsic motivation suggests.[105]

On the other hand, students tended to rank discussion posts as one of their least favorite activities. For example, nearly half of Professor

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    96. *See* Spring 2015 Trusts and Estates Survey, Fall 2016 Trusts and Estates Survey, Spring 2016 Trusts and Estates Survey, *supra* note 62.

    97. *See* Fall 2016 Comparative Law Survey, Spring 2016 Comparative Law Survey, *supra* note 62.

    98. Fall 2016 Comparative Law Survey, *supra* note 62.

    99. Spring 2016 Trusts and Estates Survey, *supra* note 62.

    100. Spring 2015 Trusts and Estates Survey, *supra* note 62.

    101. Spring 2016 Comparative Law Survey, *supra* note 62.

    102. *Id.*

    103. *Id.*

    104. *Id.*

    105. *See supra* Part I.B.

Ryznar's online students said that discussion posts were their least favorite activity.[106] While Professor Dutton's students were not asked to rate their least favorite activity in their mid-semester surveys, quizzes received more favorable comments from them than discussion boards.[107] As Professors Ryznar and Dutton intended these posts to intrinsically motivate students to do the course work and to master the course content, it is important to evaluate why some students did not like discussion posts.

The student comments generally focused on the difficulty of being original on overcrowded discussion boards. Students disliked discussion boards because of this: "[D]iscussion boards are my least favorite because it is difficult to come up with something original after the best answer has been repeated a few times."[108] Another student shared the same sentiment: "I find the discussion boards very difficult. I often enter the conversation later in the week and struggle to find new thoughts or ideas to contribute."[109] One student explained, "Often with discussion boards, what I intend to say has already been said by a dozen other people, so it feels like I'm not adding much other than a +1."[110] Due to the challenge of being creative and original in overcrowded discussion boards, the literature on intrinsic motivation would predict the students' dislike of discussion boards for these reasons. Indeed, students found it difficult to add original work to the discussion board, harming their motivation.

While both Professors Dutton and Ryznar initially created discussion boards to encourage discussion and interaction among their online students, in response to such student feedback, they decided to structure their discussion boards differently. Instead of focusing on student interaction, they used the discussion posts as a way to allow students to practice making and supporting arguments. For example, in Professor Dutton's Online Comparative Law course, one discussion post question requires students to respond in no more than two paragraphs to the following prompt:

> Justice Scalia argues that U.S. judges should not cite to or rely on foreign law in making their decisions because of issues relating to 'selectivity' (cherry-picking) and 'comparability.' Professor Glendon similarly points to 'comprehension, comparability, and selectivity' as some

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106. *See* Spring 2015 Trusts and Estates Survey, Fall 2016 Trusts and Estates Survey, Spring 2016 Trusts and Estates Survey, *supra* note 62.

107. *See* Fall 2016 Comparative Law Survey, Spring 2016 Comparative Law Survey, *supra* note 62.

108. Fall 2016 Trusts and Estates Survey, *supra* note 62.

109. *Id.*

110. Spring 2015 Trusts and Estates Survey, *supra* note 62.

of the perils associated with the domestic judicial use of foreign authorities. Do you believe that such issues outweigh the benefits of the domestic judicial use of foreign authorities? Why or why not?

One student described these discussion questions as challenging in a productive way, as the intrinsic literature would recommend: "And you ask really hard questions—they are thought provoking a lot of the times and I've related them to some of my other courses. For example, in Law and Social Change, I thought about overhauling the U.S. legal system and functioning more like the EU."[111]

Assessments like this provide intrinsic motivation when they have an appropriate level of challenge to encourage students to keep learning. Indeed, as one Online Comparative Law student explained, in the online course "the discussions and quizzes are both challenging enough that I know I need to learn the material in order to answer the questions."[112]

To increase the students' sense of originality in their discussion posts as the literature on intrinsic motivation suggests, Professor Dutton also locked down the discussion board from student viewing until a student posted to the board, thereby eliminating the need to interact. Thus, the students could not see any other posts until they posted themselves. As one student of Professor Dutton explained, "I like the discussion boards, because they force me to think about the material instead of just repeating information from the text."[113]

Alternatively, professors can subdivide the discussion into smaller sections so there is less overlap in responses. One Online Comparative Law student noted, "I think it is nice being in the smaller 'sub groups' for our discussions."[114] Another student agreed: "I think it helps that we have been divided into smaller groups so I do actually go through and read what my classmates have posted."[115]

Finally, students mentioned liking discussion questions that received feedback from the professor: "I like the discussion questions with the feedback."[116] This focus on feedback is also consistent with the literature showing how regular feedback motivates students to continue progress in a course.

In sum, students liked the discussion boards that made the conver-

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111. Spring 2016 Comparative Law Survey, *supra* note 62.
112. Fall 2016 Comparative Law Survey, *supra* note 62.
113. Spring 2016 Comparative Law Survey, *supra* note 62.
114. *Id.*
115. Fall 2016 Comparative Law Survey, *supra* note 62.
116. *Id.*

sation less repetitive and more original. While students feel less motivation and interest if they have nothing new to add to the discussion board, their motivation and interest increase if they can think their own original thoughts. When done in a certain way, discussion boards are able to engage students and motivate them to learn and master the course content.

Finally, several students described the polls in Online Trusts and Estates as a "fun" assessment.[117] According to one student, "I suppose it's the vanity in me, but I also like polls – it's fun to offer my opinion and sometimes surprising to see everyone else's thoughts."[118] "Obviously, the polls are my favorite. It is not over burdensome and I enjoy seeing how other students stand on particular topics. The Professor still asks us to support our vote which requires us to think through our argument, but it's done in a fun and interesting way."[119] Another student said, "The polls are fun and interesting, but not as informative."[120]

In short, formative assessments can intrinsically motivate students by reinforcing the course material in a fun and engaging way. To do so, the assessments should be engaging and fun, but also challenging so that students feel that they are adding value and learning through the assignments.

3. Consistent Feedback

The responses to the mid-semester surveys showed how students view professor feedback as an intrinsic motivator to complete the coursework and master the course content. These responses are consistent with the literature that highlights feedback as a key to intrinsic motivation.[121]

In response to the mid-semester survey question on what they liked best about their online course, many students noted that they found the professor's feedback very helpful to their learning process. One student confirmed to the professor that "[y]our feedback has been very helpful. Your response time is amazing and I feel very comfortable asking questions."[122] Yet another student in the same class also listed the best feature of the Online Comparative Law course as "the amount of feedback we get and the timeliness of that feedback."[123] Similarly, a student stated, "I

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117. For example, a poll might ask whether an adulterous spouse should be able to inherit under state intestacy law. A student would have to vote "yes" or "no," and then offer written support for the vote.

118. Spring 2016 Trusts and Estates Survey, *supra* note 62.

119. Spring 2015 Trusts and Estates Survey, *supra* note 62.

120. Fall 2016 Trusts and Estates Survey, *supra* note 62.

121. *See supra* Part I.B.

122. Fall 2016 Comparative Law Survey, *supra* note 62.

123. *Id.*

also appreciate the consistent feedback on the work I am submitting."[124] Indeed, students often explained that they liked quizzes because they received immediate feedback from the professor that way: "My favorite online activity is the quizzes because I like checking my knowledge of the information with immediate feedback."[125] As one student summed it up, "The polls, discussion questions and weekly feedback are very helpful in keeping you engaged with classmates and the material."[126]

Feedback is particularly intrinsically motivating to online students when it includes substantive assistance with the material and direct responses to their questions. One student noted, "I especially appreciate receiving feedback, and prompt answers to questions."[127] Another student in the same course reported that "the professor has been very quick to answer questions and provide feedback."[128] Thus, when students do not meet with the professor in a live classroom, they appreciate feedback that also contains answers to their substantive questions. Without it, they would not be able to obtain a feeling of competence over the material that builds their intrinsic motivation.

Finally, feedback builds the personal relationship between the student and professor that provides intrinsic motivation to progress in the course. For example, approximately half of the Online Comparative Law students mentioned the professor's feedback as contributing to their sense of connection to the professor.[129] One student explained, "I feel connected to the instructor since I always get individual feedback."[130] Another student said, "I feel more connected to you than to some of my in-person professors."[131] This aligns with the literature showing that performance feedback increases intrinsic motivation.

Thus, feedback is an important intrinsic motivator for online students. It allows them to engage with the material, gain a sense of competency, and build a connection with the professor, which all contribute to intrinsic motivation.

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124. *Id.*
125. *Id.*
126. *Id.*
127. Spring 2016 Comparative Law Survey, *supra* note 62.
128. *Id.*
129. *See* Fall 2016 Comparative Law Survey, Spring 2016 Comparative Law Survey, *supra* note 62.
130. Fall 2016 Comparative Law Survey, *supra* note 62.
131. *Id.*

B. Focus Group Results

To supplement and add depth to the data obtained from the anonymous surveys, this study also includes data from focus group sessions designed to learn more about motivating students, and what the students believe does and does not motivate them to engage and learn. Fewer students participated in the focus groups than in the mid-semester surveys. However, the focus groups included a direct question on motivation, reprinted in Appendix B.[132] In the focus groups, student responses echo much of what we learned from the student responses to the survey questions.

As one might expect, in response to the question about what motivated them in their online courses, some students referenced the classic extrinsic motivators—grades, flexibility, and fear of failing.[133] Other students said that they were not sure that the professor could do anything to motivate chronic procrastinators, noting that students who do not read for live classes also do not read and stay on top of online classes.[134]

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132. The question on motivation was: "Students in online courses do the work on their own time. As students who have taken one or more online classes, how were you motivated to do the work? Were you self-motivated? Or did the course structure or activities motivate you to do the work and learn the course material?" *See* Appendix B. In our other article published in the *Denver Law Review*, we share student responses to the other focus group questions. *See* Dutton et al., *supra* note 59, at 30.

133. One student noted, "For me, the motivation to do any of the online things isn't any different from the in-class stuff. I don't wanna have the anxiety at the end of the semester, like I haven't read for kind of weeks, and I'm gonna fail the class and drop out of law school and go live in a shoebox somewhere." Yvonne M. Dutton & Margaret Ryznar, Focus Group 3, (Apr. 12, 2018, 4:30 PM) (on file with authors) (Student 2). Another student stated, "My first online course that I took was right after 1L year, so you're highly motivated anyways, because still kind of a 1L. You're like, 'I still wanna do well, I want to accomplish certain things in law school, gonna acquire a certain GPA.'" Yvonne M. Dutton & Margaret Ryznar, Focus Group 3, (Apr. 12, 2018, 4:30 PM) (on file with authors) (Student 4). When the facilitator asked what motivated another student to learn and how, the student simply responded, "Fear of terrible grades." *Id.*

134. "I don't think it really matters online versus in-class, because the same people that wait til the last minute to probably turn in the module are the same people that are sitting in class on casebriefs.org or whatever the website is, just in case they get called on because they haven't read anything, so I think it's gonna be the same people, generally speaking, so if you're motivated to read before class, you're gonna be motivated to get your online stuff done." Yvonne M. Dutton & Margaret Ryznar, Focus Group 2, (Apr. 12, 2018, 12:45 PM) (on file with authors) (Student 7). The same student concluded, "If you don't read before class, I seriously doubt you're gonna do things in a timely manner in an online class either. I don't really think . . . that there's any sort of difference between the two." *Id.* Another student concurred, "I would second that. I know plenty in-[person] classes where students don't read like most of the semester, and they won't read it if it's online, because you don't really get cold-called online. You just figure out what I can do for the assignment. People who aren't gonna read aren't gonna read no matter what. It's just whether or not they do some sort of

However, as in the mid-semester surveys, the students in the focus groups also unequivocally stated that the professor can play a significant role in intrinsically motivating students to do the work in their online courses. Specifically, the focus group comments provide evidence of all the various factors that the literature says are intrinsic motivators—and that students like them and attribute their success to them. These factors confirm the findings from the mid-semester surveys and include engaging content, regular assessments, and consistent feedback. As with the survey results, students again made clear that such intrinsic motivators were important to whether they would do the work and master the course content.

1. Engaging Content

As students did in the mid-semester survey responses, the focus group students emphasized the motivating nature of engaging, interesting, and creative course content. For example, students discussed being engaged while applying the material. Practical material in online courses that is timely provides students intrinsic motivation not only by engaging them, but also by providing a glimpse into the career path that they are pursuing and excited to see. As one student stated, "the [online] class that I took, it was all about relevant pieces and pulling articles from the news that were current events."[135]

Mimicking the literature on intrinsic motivation, students also said that they are motivated to engage with the course when the professor designs the course to include creative and interesting materials, such as YouTube videos and video-recorded skits by the professor.[136] According to one student, "[T]he more that the instructor can put that kind of spin on things, the more motivated I was to log in and learn because I thought it was creative and I thought it was fun time spent for me."[137] Another student concurred, "When you take a class where you can tell where the professor's put time and energy into pulling together materials to teach you something, then we become motivated to engage with that and learn

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project to turn in the middle of the semester." Yvonne M. Dutton & Margaret Ryznar, Focus Group 2, (Apr. 12, 2018, 12:45 PM) (on file with authors) (Student 3). Another student described having a personality that facilitated intrinsic motivation, regardless of whether in online or live courses: "I guess the other motivating factor for me is I prefer things in my rear view mirror than in front of me, so . . . it's just how I'm wired, whether it's my job or anything else, it's just to get [to] something as soon as I get it." Yvonne M. Dutton & Margaret Ryznar, Focus Group 2, (Apr. 12, 2018, 12:45 PM) (on file with authors) (Student 7).

    135. Yvonne M. Dutton & Margaret Ryznar, Focus Group 3, (Apr. 12, 2018, 4:30 PM) (on file with authors) (Student 3).

    136. *See supra* Part I.B.

    137. Yvonne M. Dutton & Margaret Ryznar, Focus Group 3, (Apr. 12, 2018, 4:30 PM) (on file with authors) (Student 3).

that material."[138] One student explained taking an online course specifi-
cally for the bar exam, but "was surprised in how much I liked the subject
and I think it was because of the creativity the instructor put into it. So I
was like, 'Yes! I'm in the right class,' because I liked that."[139] The same
lessons hold for live courses. According to one student,

> I would say the same thing for live classes. Because again, live classes
> are what you make of them, so if someone is reading PowerPoints to
> you, that's probably not as effective as someone who is [a] very engag-
> ing speaker. It kind of keeps you on your toes throughout the entire
> class.[140]

The structure of a course, as any other course design feature, can
provide intrinsic motivation by engaging students. In other words, the
course content organization motivates students to do the work. One such
decision for the professor teaching an online course is how long to keep
the content open to students to foster their engagement and flow while
also keeping students moving through the material.[141] Indeed, students
identified a predetermined schedule of online modules locking and un-
locking as motivation to complete their work by a deadline. One student
noted being "self-motivated to watch the lectures at an earlier date," but
ultimately "having that hard deadline every week helped motivate me to
say, 'Okay, I really need to get working on this class.'"[142] Another student
concurred, "[I]n terms of what motivates me [to] push through it [at] a
certain pace, it's the deadlines, I'm sure."[143] Another student said nothing
would get done without deadlines: "The deadlines make me do things,
because I wouldn't normally be doing them, because I don't do them for

138. Yvonne M. Dutton & Margaret Ryznar, Focus Group 3, (Apr. 12, 2018, 4:30 PM) (on
file with authors) (Student 4).

139. Yvonne M. Dutton & Margaret Ryznar, Focus Group 3, (Apr. 12, 2018, 4:30 PM) (on
file with authors) (Student 3).

140. *Id.*

141. "Mihaly Csikszentmihalyi, a pioneer in the field of positive psychology, . . . is cred-
ited with discovering that people find genuine satisfaction during a state of consciousness he
called 'flow.' While in this state, people are completely absorbed in an activity, and feel
'strong, alert, in effortless control, unselfconscious, and at the peak of their abilities.' . . .
[F]low states are generated by activities in which a person feels challenged, but not to the
point of being stressed or bored (i.e., it's a good 'fit')." Scott E. Friedman, Andrea H. HusVar,
& Eliza P. Friedman, *Advising Family Businesses in the Twenty-First Century: An Introduc-
tion to Stage 4 Planning™ Strategies*, 65 BUFF. L. REV. 425, 484 (2017).

142. Yvonne M. Dutton & Margaret Ryznar, Focus Group 1, (Apr. 11, 2018, 3:00 PM) (on
file with authors) (Student 4).

143. Yvonne M. Dutton & Margaret Ryznar, Focus Group 2, (Apr. 12, 2018, 12:45 PM)
(on file with authors) (Student 2).

my other classes."[144] "To what extent where you motivated to learn the material and how? When it closes at midnight on Sunday," another student said.[145]

In Online Trusts and Estates, the modules were each open for one week before locking. Based on student feedback, later versions of the course extended this period to ten days in order to include two weekends. In Online Comparative Law, meanwhile, the modules were open for two weeks before assignments were due, incentivizing some students to work on schedule instead of procrastinate. Others who were not procrastinators typically liked the structure of having two weeks open because it allowed them more time to learn and engage with the materials on a timeline that fit their schedule. A student who self-identified as already intrinsically motivated noted not needing a strict schedule of modules locking and unlocking. Instead, this student appreciated having modules open early for the opportunity to engage on the student's own terms: "I am not necessarily motivated by the structure or the deadline. I am intrinsically motivated, so having the ability to just start working and work as far as I worked."[146] This student therefore preferred longer periods of modules being open, rather than having them open and close on a strict weekly schedule.[147] Other students agreed that this helped learning, noting that "[h]aving a two week period to do it really was pretty nice and conducive

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144. Yvonne M. Dutton & Margaret Ryznar, Focus Group 2, (Apr. 12, 2018, 12:45 PM) (on file with authors) (Student 6).

145. *See* Yvonne M. Dutton & Margaret Ryznar, Focus Group 3, (Apr. 12, 2018, 4:30 PM) (on file with authors) (Student 1). *See also* Yvonne M. Dutton & Margaret Ryznar, Focus Group 2, (Apr. 12, 2018, 12:45 PM) (on file with authors) (Student 2) ("I think deadlines add more pressure to me to finish my work at a certain time.").

146. Yvonne M. Dutton & Margaret Ryznar, Focus Group 1, (Apr. 11, 2018, 3:00 PM) (on file with authors) (Student 2).

147. Another student agreed:

If you can see more modules and then schedule your time out over a two or three week period versus, like the class we've been talking about, where it's Monday start, Sunday end. Well, like you were saying, some of those projects we spent two or three hours on. Others took thirty minutes. You can't schedule your time. Okay, it's Monday and it opens up. Let's see this project. Well, I'm out of town this . . . Oh, boy, now I've got to completely redo my week because I just now am seeing, as the week is starting, what my workload is going to be for that week.

Yvonne M. Dutton & Margaret Ryznar, Focus Group 1, (Apr. 11, 2018, 3:00 PM) (on file with authors) (Student 5).

to learning."[148] A longer period of open modules also gave students further autonomy over their schedules, boosting their intrinsic motivation. Thus, professors must balance between instating deadlines in an online course and allowing students the space to lose themselves in the material.

2. Regular Formative Assessments

Students in the focus groups were also similar to the students responding to the mid-semester surveys in noting how regular formative assessments helped them stay motivated to learn and master the course content. As one student said, "I'm more motivated when I know that there's something I need to turn in, or I even have to do."[149] Another stated, "I don't . . . I just, I'm much more inclined to read and do the work if I know . . . to submit a quiz by Friday."[150] According to another: "But, definitely the weekly assessments that you have to do give a little bit of a bump if you're just not feeling it that week."[151] Another student observed, "If I knew that my project was going to be based on a lot of the reading, then I would focus on the reading for that class."[152]

Students further explained how assessments were a motivating feature of their online classes. For example, according to one student:

> I don't really read for [live] class, but I do read for my online classes, mostly because there are quizzes that are graded or something that's due, where I know my grade is gonna be dependent on me being able to synthesize information that I wasn't really necessarily taught the way that I'm taught that information in class.[153]

Others linked doing the assessments to making progress in the course. For example, one student stated, "my motivation was just [that] I was afraid I was going to miss a whole week and forget about it and then

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148. Yvonne M. Dutton & Margaret Ryznar, Focus Group 1, (Apr. 11, 2018, 3:00 PM) (on file with authors) (Student 4). *See also* Yvonne M. Dutton & Margaret Ryznar, Focus Group 1, (Apr. 11, 2018, 3:00 PM) (on file with authors) (Student 5).

149. Yvonne M. Dutton & Margaret Ryznar, Focus Group 2, (Apr. 12, 2018, 12:45 PM) (on file with authors) (Student 8).

150. Yvonne M. Dutton & Margaret Ryznar, Focus Group 2, (Apr. 12, 2018, 12:45 PM) (on file with authors), (Student 6).

151. Yvonne M. Dutton & Margaret Ryznar, Focus Group 3, (Apr. 12, 2018, 4:30 PM) (on file with authors) (Student 2).

152. Yvonne M. Dutton & Margaret Ryznar, Focus Group 1, (Apr. 11, 2018, 3:00 PM) (on file with authors) (Student 1). The same student continued, "If I knew that the five question quiz was just going to be from whatever the lecture talked about[,] but was so general and so basic that it wasn't actually very easy to pick up if I googled it, then I didn't put the time in for that." *Id.*

153. Yvonne M. Dutton & Margaret Ryznar, Focus Group 2, (Apr. 12, 2018, 12:45 PM) (on file with authors) (Student 6).

have this gaping hole in my progress."[154] To the extent that live classes use regular assessments, students noted that they motivate engagement and learning too: "I have a couple of in-person classes where I have to do weekly summaries of the reading, and those are the ones whose reading gets done first. And then maybe I get [to] the other classes, maybe I don't. But it depends."[155]

3. Consistent Feedback

As did the students in the mid-semester survey responses, students in the focus groups stressed how consistent feedback was a component in motivating them to stay engaged in the course and to learn course concepts. Indeed, students made clear that professor feedback provided them with a sense of engagement and made for a better learning experience.[156] Students, in fact, found professor feedback infectious. For example, one student stated:

> I had a class where we had discussions, well discussions posts. It's a class where you had to answer the questions. Our professor, he responded to every single one of us separately, and I know that that took a lot of time. Handclaps to him. It was really helpful and he would respond to each of us on our personal little form thing. . . . And so, I felt that that class, the subject matter was hard, but the way that he was engaged, I think helped a lot.[157]

This student added that the professor was providing original feedback crafted directly in response to individual students:

> And it wasn't that he had done that three years ago, he had went through and read all of our responses and I'm sure he had the correct response he wanted, but he was saying, "You guys put this, and I would understand why you would put that, but it was actually this . . ."[158]

In sum, the focus group facilitator asked the students one specific question on motivation. Responses identified the themes of engaging content, regular assessments, and consistent feedback. These responses

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154. Yvonne M. Dutton & Margaret Ryznar, Focus Group 3, (Apr. 12, 2018, 4:30 PM) (on file with authors) (Student 4).

155. Yvonne M. Dutton & Margaret Ryznar, Focus Group 2, (Apr. 12, 2018, 12:45 PM) (on file with authors) (Student 8).

156. *See* Yvonne M. Dutton & Margaret Ryznar, Focus Group 3, (Apr. 12, 2018, 4:30 PM) (on file with authors) (Student 1).

157. *Id.*

158. *Id.*

aligned with the themes in the literature on how professors can intrinsically motivate their students.[159] They also reflected the same student sentiments expressed in other parts of the focus group discussion and the anonymous survey responses.[160]

CONCLUSION

In online teaching especially, course design and teaching methods are a core part of the teaching endeavor because the professor must motivate the student remotely. This fact alone means that professors must use teaching tools in addition to and different from those they use to motivate students in a live classroom setting. To aid consideration of this problem, this Article has presented empirical data on how professors can design online courses to motivate their students. This empirical data suggests various ways to amplify students' motivation.[161]

Professors should aim to cultivate intrinsic motivation in particular. This is because extrinsic motivation already exists for many students by virtue of the structure of law school—the focus group responses show that many students are already motivated by the final exam and the bar exam. However, students appreciate when professors provide, through the course content, other motivations to learn. The mid-semester surveys also confirm that while students may take online classes for their flexibility, they learn for more complex reasons stemming from intrinsic motivation. Although intrinsic motivation is more elusive than extrinsic motivation, it is more helpful to student performance and satisfaction.

In reflecting on their law school online programming at IU McKinney, students emphasized several factors that provide them intrinsic motivation to complete and learn in the course. These include engaging content, regular assessments, and consistent feedback.[162] Such conclusions

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159. *See supra* Part I.B.

160. *See supra* Part III.A.

161. "[E]ducators must employ a variety of methods to engage student learners." Jason S. Palmer, *"The Millennials Are Coming!": Improving Self-Efficacy in Law Students Through Universal Design in Learning*, 63 CLEV. ST. L. REV. 675, 702 (201). For example, visual materials have been well received by students and have the benefits of better presenting some information for students with visual learning styles and exemplifying the use of visual materials in legal practice. *See, e.g.*, Eric A. DeGroff, *Training Tomorrow's Lawyers: What Empirical Research Can Tell Us About the Effect of Law School Pedagogy on Law Student Learning Styles*, 36 S. ILL. U. L.J. 251, 264 (2012); M.H. Sam Jacobson, *A Primer on Learning Styles: Reaching Every Student*, 25 SEATTLE U. L. REV. 139, 151–54 (2001); *see generally* Fred Galves, *Will Video Kill the Radio Star? Visual Learning and the Use of Display Technology in the Law School Classroom*, 2004 U. ILL. J.L. TECH. & POL'Y 195 (2004) (discussing the advantages and disadvantages of using display technology to teach law).

162. *See supra* Part III.

by the students parallel those of the literature on intrinsic motivation, showing that students want intrinsic motivators in their courses.[163] These findings also confirm that professors can intrinsically motivate their students through course design and teaching methods.[164] As the students underscored in their responses, these issues are largely the same in both live and online courses.

In sum, the study of motivation in online programming is important given its central role in learning. Empirical work helps advance the understanding of motivation. Thus, this Article has presented data and analysis about motivating law students to learn, particularly in the online setting. Future research should continue exploring how to build law students' intrinsic motivation, especially in online courses.

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163. *See supra* Part I.B.

164. "Instructors should design their courses to promote students' motivation to engage in the course activities productively." John Lande et al., *Principles for Designing Negotiation Instruction*, 33 HAMLINE J. PUB. L. & POL'Y 299, 305 (2012).

Online Comparative Law—Mid-Semester Survey Questions

1. Are you learning what you expected to learn in this class?

2. What do you like best about the course? Please explain.

3. In general, is there anything about the course that you think needs improvement? How would you improve it?

4. Which material did you feel was presented most effectively? Why? Please describe any particular techniques you found effective.

5. Do you have any specific recommendations for how the course can be improved for the remainder of the semester or next time I teach it? If so, please describe in detail your suggestions.

6. Regarding the online nature of the course specifically, do you feel the activities enhance your learning of the material? Please explain.

7. What is your "favorite" type of online activity – discussion boards, quizzes, research? Please explain.

8. Do you feel connected to your instructor? Do you feel connected to your classmates? Please explain.

9. Have you had any technical difficulties accessing materials? Do you have any recommendations regarding how to explain technical requirements or avoid any technical challenges in the future?

10. Would you take another "online" class in the future? Why or why not?

Online Trusts and Estates—Mid-Semester Survey Questions

1. What about this course is working well for you?

2. What about this course is not working well for you?

3. What is your most AND least favorite type of online activity – discussion boards, quizzes, polls, or sample essays & answers? Please explain.

4. Would you take another online class in the future? Why or why not?

APPENDIX B—FOCUS GROUP GUIDE: ASSESSING STUDENT ENGAGEMENT AND LEARNING IN LAW SCHOOL ONLINE COURSES

Preliminary Comments

Mr. Jerolimov will introduce himself and Ms[.] Long. He will provide potential subjects with the informed consent document. He will provide time to read the document and ask questions. He will answer any questions. He will collect all signed consent forms before beginning the FG [focus group] session. Any student not wishing to participate after reading the consent form will be excused.

After consent forms have been collected and any potential subjects excused, Mr. Jerolimov will briefly explain the mechanics of the FG session. Namely, he will serve as the moderator posing questions that should be used to prompt conversation among the FG participants. This is not an interview; the goal is to stimulate interaction and thinking among the participants.

Mr. Jerolimov will also remind participants that he and Ms. Long will keep their identities and comments during the session confidential. He will also ask that participants not share information that occurred during the session with others so that everyone can feel confident in speaking freely.

Introductions of FG Participants

Mr. Jerolimov will explain that participants will not be identified in any publications based on this research, nor be identified to Professors Dutton and Ryznar. Nevertheless, Mr. Jerolimov will ask participants to identify themselves by name so that Mr. Jerolimov and Ms. Long may keep records of the session. To ensure that participants meet the criteria for the study, he will also ask participants to state how many online courses they have taken at IU McKinney and when they took those courses.

What is your name?

How many online courses have you taken at IU McKinney?

During what year or years did you take online courses at IU McKinney?

Online Versus Live for Student Engagement and Learning: Launch Questions to Stimulate Conversation and Interaction

Before posing specific questions, Mr. Jerolimov will remind participants that the research does not require them to name particular professors and courses and that their comments can be more general in nature.

He will also inform participants that their responses are neither right nor wrong; participants can also disagree with views expressed by other participants.

You have all taken at least one online class at IU McKinney and many live classes. How do you compare the online experience to the live experience in terms of **student engagement** – being engaged in learning the course material? Be specific. (Again, there is no need to mention names or courses. You could mention types of activities in online or live classes that you feel do or do not enhance student engagement with the material instead.)

You have all taken at least one online class at IU McKinney and many live classes. How do you compare the online experience to the live experience in terms of **student learning** – actually learning the course material? Do you feel students learn more or less in one environment or the other? Be specific about what learning was (or was not) improved, and why you think it was (or was not) improved. (Again, there is no need to mention names or courses. You could mention types of activities in online or live classes that you feel do or do not enhance student engagement with the material instead.)

As students who have taken one or more online classes at IU McKinney, do you have any views about whether the school's online classes are more or less rigorous (however you wish to define that term) than the live classes at IU McKinney?

As students who have taken one or more online classes at IU McKinney, do you have any views about whether particular types of students benefit more or less from online or live classes in terms of student engagement or learning?

Online Programming Generally: Launch Questions to Stimulate Conversation and Interaction

As students who have taken one or more online classes at IU McKinney, do you have views as to the primary reasons why law students at this school may wish to take a class online – as opposed to live?

As students who have taken one or more online classes at IU McKinney, would you recommend that students take online classes at the law school? Why or why not? Be specific.

Strengthening Online Programming Generally: Launch Questions to Stimulate Conversation and Interaction

As students who have taken one or more online classes at IU McKinney, what advice would you share to help make that programming as strong as possible in terms of engaging students and enhancing student learning of material? In particular, are there any specific activities or teaching methods that you believe are particularly helpful to student engagement and learning in the online learning environment?

As students who have taken one or more online classes at IU McKinney, do you believe law students could benefit from more online programming? Why or why not? Be specific.

Students in online courses do the work on their own time. As students who have taken one or more online classes, how were you moti-

vated to do the work? Were you self-motivated? Or did the course structure or activities motivate you to do the work and learn the course material?

Overall Conclusion About IU McKinney Online Programming: Launch Questions to Stimulate Conversation and Interaction

Overall, what is your assessment of the quality of IU McKinney's online programming? Give reasons why you conclude as you do.

Open-Ended

Anything else you would like to share about IU McKinney's online programming as regards student engagement and learning?

Any other recommendations about the online programming at IU McKinney? (E.g., more courses online? More of some types of courses online? More courses during the summer or not? Why?)

TOWARDS A MODALITY-LESS MODEL FOR EXCELLENCE IN LAW SCHOOL TEACHING

Michael Hunter Schwartz†

CONTENTS

INTRODUCTION

Online legal education is really in its infancy. Even as undergraduate, graduate, and professional programs increasingly innovate and enjoy success with online teaching that rivals and even exceeds brick and mortar results,[1] legal education remains stuck in an outdated image of online teaching while continuing to champion a rose-colored image of what happens when students and their professors are in the same rooms.

Our image of online teaching is pretty grim. We tend to imagine online professors recording lengthy, mind-numbingly unstimulating lectures via video or voice over slides with instructional goals no more ambitious than the hope that the lectures magically pour knowledge into the brains of students. We imagine the students isolated in their homes, dressed in their pajamas, lacking connection or inspiration. And we assume that hordes of online students are hiring experts to take their exams for them.

Likewise, we continue to elevate in-person teaching as if the elegantly constructed, carefully sequenced, engaging, crystal clear Socratic questioning, characteristic of each of our best law professors (as we remember them), is the overwhelming majority rule. We envision each student deeply prepared for class, actively engaged during class, and, by the end of the class, joyfully inspired to study more so they can better understand. And we assume they come to the final exam feeling well prepared

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1. Jamie Littlefield, *What Does Research Say About Online Learning? Online Learning Studies and Statistics*, THOUGHTCO, https://www.thoughtco.com/what-research-says-about-online-learning-1098012 (reporting the results of meta-studies) (last visited Nov. 2, 2019).

for a great intellectual challenge.

Neither image reflects reality. In this essay, I take on these myths in an effort to contribute to a maturation of our thinking about online and in person teaching that I am hoping this symposium, as a whole, will further.

In Part I of this essay, I explore the myths of in-person law teaching and suggest the ways in which in-person teaching falls short. In Part II, I do the same for the myths about online teaching, suggesting concrete examples of how excellence is achieved in online law school classes. In Part III, I have a short discussion of why the inaccuracy of both sets of myths is problematic. Finally, in Part IV, based on learning theory and the four-year study of great law teaching reflected in *What the Best Law Teachers Do*,[2] I offer a modality-less model of law teaching excellence and suggest how it can be and is achieved both in person and online.

I. IN-PERSON TEACHING MYTHS DEBUNKED

The ideal, best championed in Karl Llewellyn's legendary lectures collected together in *The Bramble Bush*, involves the use of carefully constructed hypothetical questions to reveal the indeterminacy of legal doctrine and factual claims while also illuminating the analytical and argumentation tools of the legal trade.[3] The professor calls on a student, asks the student to recite and explain a case and then reveals factual and legal indeterminacies by asking the student hypothetical questions that push at the outside boundaries of the court's doctrinal assertions and holding.[4]

In the abstract, this image of legal education is an exciting one, and I have no doubt that, in many law school class sessions, the student who is called on and questioned has a rigorous, intensive learning experience. I share the view, expressed in *Best Practices for Legal Education*[5] and *Educating Lawyers*,[6] that such questioning is the signature andragogy of legal education; I am less confident about the efficacy of this model. As I previously have argued, law school Socratic-style questioning is ultimately a vicarious learning, self-teaching educational model.[7]

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2. MICHAEL HUNTER SCHWARTZ, GERALD F. HESS & SOPHIE M. SPARROW, WHAT THE BEST LAW TEACHERS DO 1–4 (2013).

3. *See* KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 53 (1960) (demonstrating, through a collection of lectures, the intricacies of teaching and learning the law).

4. *See id.* at 62–63, 76–77.

5. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 19, 22, 24 (2007).

6. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PRACTICE OF LAW 50–51 (2007).

7. Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 247, 351–

The learning is vicarious because, aside from the student(s) whom the professor calls on, the rest of the students in the room only realize a benefit to the extent they answer the professor's questions in their heads. The other students must follow the professor and the called-on student into the bramble bush, craft their own answers to the professor's questions, and evaluate their answers by comparing them to the chosen student's answers as refined by their interpretation of the professor's reaction.

Of course, the students must understand they should be playing along and must choose to play along instead of reading ahead (just in case the professor calls on them next), checking their social media or email, reading the latest news, or confirming their latest e-commerce transaction. For years, when I have conducted teaching workshops at other law schools, I have surveyed the attendees to get a sense of the professors' sense of the percentage of the non-speaking students who answer their professors' questions in their heads. Most faculty believe that about half of their students play along; some professors estimate as few as one quarter.

The method involves self-teaching because, for the most part, law professors do not teach students how to perform the skills the students are supposed to be learning.[8] Few law professors transparently code their questions based on their learning goals. Moreover, even assuming the students are playing along, students will only learn something from attending to the dialogue if the students accurately decode the professor/called-on-student dialogue. The students must be able to sift through their peer's responses to the professor's questions, separating the gems from the colored glass. Some professors help by communicating an evaluation of the called-on student's response; others just ask more questions. Almost none offer explicit explanations of how even the best student responses demonstrate the required excellence.[9]

The interpretation process is harder than we might imagine. If the professor adds a new fact to a hypothetical after a student has analyzed it, is that a signal the student's analysis was insightful or is the professor trying to show that the student failed to consider a larger implication of the facts or doctrine? If the professor calls on another student, is that a sign that the student's analysis was impeccable or has the professor concluded that the student's analysis is so hopelessly flawed that the professor decided to give up on that student?

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53 (2001).

8. *See id.* at 352.

9. *See id.*

Of equal and maybe greater concern is the frequency with which classroom teaching by law professors falls far short of the ideal. Having visited many law school classrooms, I have seen both extraordinary, astoundingly great law teaching and teaching that falls far short of that standard. In preparing to write this paper, I asked law faculty friends and colleagues to identify and characterize their weakest law teachers. After sifting their responses and my own experiences as a teaching consultant, I have been able to identify seven archetypes of the bad in-person law teacher. While this discussion may seem to be (and is intended to be) a bit tongue-in-cheek, it also reflects classes I have observed.

A. Archetype 1: The Pretend Socratic Questioner

Most law teachers have gotten the message that questioning is our signature andragogy. The Pretend Socratic Questioner definitely asks questions, but no observer would argue that s/he is using our signature andragogy. This professor exclusively or almost exclusively asks closed-ended, informational and arguably even simplistic questions (e.g., What were the facts in . . . ? Who was the plaintiff? What was occurring historically at the time this case was decided?). Once the professor receives a correct answer, s/he treats the response as a launching pad for a ten or even twenty-minute lecture. In this way, the professor seems to be using questions to teach, but s/he is actually a lecturer. Many such lecturers do ask hypothetical questions, but, too often, they answer their questions themselves after the first student struggles to analyze the hypothetical or if no student volunteers to answer the question.

There is nothing inherently wrong with lecture as *a* technique of teaching.[10] The problem here is that lecture is really *the* more or less sole teaching technique. The students are likely to vote with their engagement and class preparation. They quickly discover that they do not need to devote much effort to class preparation, and they come to count on the fact that, if they delay their response to a harder question, the professor will rescue them.

B. Archetype 2: The PowerPoint (or Lecture Notes) Murderer

Some law professors go even further than pretend Socratic and, for the most part, just lecture at their students. The most painful version of this approach to teaching combines the lectures with word-heavy Power-Point slides so that the professor is doing little more than reading the

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10. MICHAEL HUNTER SCHWARTZ, SOPHIE M. SPARROW & GERALD F. HESS, TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM 108 (Carolina Academic Press, ed., 2nd ed. 2017).

slides to the students. Of course, as noted above, lecturing is a legitimate teaching tool, and visuals delivered via PowerPoint can enhance learning.[11]

The problematic choice, as also noted above, is making lecture the predominant teaching method. A professor who lectures all the time communicates a lack of respect for the students' ability to contribute to each other's learning and signals to the students that the educational experience involves simply the transmission of knowledge. I worry that, at least for some students, the final examination reveals, too late, that the professor wanted the students to learn both doctrinal knowledge and analytical skills.

C. Archetype 3: The Human Proof that the Goal of the Third Year of Law School Really Is to Bore Third-Year Law Students to Death

Even if we were to assume that every law professor were to use optimal Socratic questioning, we would still not want third-year classes to be taught the same way first-year classes are taught. At the very least, the questions should become progressively more challenging over the course of students' three years of law school. By the third year of law school, students are capable of much more than simply briefing the cases and reciting the facts, procedural histories, issues, rules, holdings, and the reasoning of cases, yet some law teachers ask their third year students the exact same types of questions they ask their first-year students.[12] It's no wonder that the students feel bored,[13] and that, for nearly fifty years, there have been calls for eliminating the third year of law school. [14]

There are many legitimate alternatives to Socratic Questioning that already are used at law schools all over the country. Problem-based teaching method skips case recitals altogether in favor of having students apply the doctrine and, even better, develop litigation strategy or draft documents against a backdrop of the doctrine they learned from reading the assigned cases and statutes.[15] For example, students taking an insurance law class would learn more from reading a policy and explaining it to a hypothetical client than from rushing through every last drop of insurance

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11. *See id.* at 113–14.

12. *See generally* Schwartz, *supra* note 7 (discussing the traditional model of teaching in law school and the impacts on student learning).

13. *See* Mitu Gulati et al., *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. LEGAL EDUC. 235, 236, 240 (2001).

14. *See id.* at 235–36.

15.   *See* SCHWARTZ, SPARROW & HESS, *supra* note 10, at 127–28.

law doctrine. Likewise, administrative law students learn more from creating an administrative code and labor law students learn more from creating and getting a union certified than they would learn from reading more administrative law or labor law cases.

D. Archetype 4: The Wing-It Wonder

While the most effective law teachers prepare for class extensively, re-reading the cases they teach and overhauling their teaching notes,[16] other law teachers choose to ad-lib a lot of their teaching, recognizing that, at the very least, they know more than their students. Others re-use timeworn teaching notes to such a degree that their students, who have received passed-down class notes from the students who preceded them, even know the jokes and stories their professors will tell.[17] Somehow, only the students feel embarrassed when Wing-It Wonders reveal their lack of preparation expressly by confessing that they were otherwise occupied by working on their latest scholarly projects or by revealing their surprise that a case has been replaced or a problem has been reworked in the latest edition of the casebook they are using.

E. Archetype 5: The Helium Hands Surrenderer

Under the guise of using the "gentle Socratic method," some law teachers make it a point to call only on students who raise their hands. As a result, the students who enjoy speaking in class receive twice as much, three times as much, or even infinitely more individualized feedback than their quieter peers, including those who choose not to volunteer because they have different cultural norms, lack confidence, or simply have less need for attention or professorial affirmation. If Socratic-style questioning really is legal education's signature andragogy, it is hard to justify this choice.

The goal of implementing a "gentle Socratic method" is a salutary one. There is reason to believe that, for at least some students, fear of humiliation impedes learning rather than supporting it. However, there are many ways to implement questioning teaching methods without adopting the abusive version of the technique that is ubiquitous in media depictions of legal education.[18] Many law professors have found that they

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16. *See* SCHWARTZ, HESS & SPARROW, *supra* note 2, at 151–52.

17. Perhaps because I write about teaching and learning, students have always shared such class notes with me and asked me to "fix" the problem with their professors.

18. *See, e.g.*, LEGALLY BLONDE (Type A Films, Marc Platt Productions & Metro-Goldwyn-Mayer 2001), THE PAPER CHASE (Rodrick Paul & Robert C. Thompson 1973), HOW TO GET AWAY WITH MURDER (American Broadcasting Company 2014), MOM (MAD Films & Third Eye Pictures 2017).

can reduce the intensity of their questioning interactions by some combination of the following:

(1) disclosing, before class, all or at least some of the professors' most complex hypothetical questions,

(2) reframing the interactive process as one in which the goal is to get the called-on students to deliver significant insights and then celebrating the students' accomplishment when they do so,

(3) giving students a minute or two to think about the professors' most complex hypothetical questions before starting to call on students, and

(4) encouraging students to discuss (with their peers) the professors' most complex hypothetical questions for a minute or two before starting to call on students.

F. Archetype 6: The Supercilious Professor (aka I'm Smarter than You Are, & I Use Questioning to Prove It)

Law students are particularly frustrated by Socratic-questioning in which the usually implicit but sometimes explicit message seems to be that the professor regards her/his students as impossibly dimwitted.[19] Some professors directly insult their students' intelligence; others publicly make fun of their students in words or with exaggerated eye rolls and the like; a few choose to obscurely reference theorists with which the students are likely to be unfamiliar; and a final group of professors simply ignore students whose classroom comments miss the mark. Most disturbingly, when students have the temerity to disagree or to point out errors these professors have made, some of these professors respond by finding ways to embarrass the students.

This approach to teaching proves to be destructive for all but a small subset of the law student population. The research shows that all students respond more positively and learn better in a setting where the professor communicates respect for the students.[20] In fact, manifested respect for students was a common quality of all the teachers featured in *What the Best Law Teachers Do*.[21]

G. Archetype 7: The Exam Hazer

A significant number (perhaps the majority) of professors cling to

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19. *See* SCHWARTZ, HESS & SPARROW, *supra* note 2, at 27–28.

20. *See* Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 87 (2002).

21. *See* SCHWARTZ, HESS & SPARROW, *supra* note 2, at 81–86.

the final exam-only model of law school assessment. This approach favors students who have greater exposure to law school expectations, who happen to have a good day on the final exam, and who are more similar culturally to their professors. The approach also decreases the accuracy of grade conclusions because the professor has a smaller sample size of performance data. This choice also conflicts with the new American Bar Association (ABA) standard that communicates an expectation that law professors implement multiple formative and summative assessments.[22] More significantly, multiple assessments have been shown to improve law student learning,[23] and, most significantly, multiple assessments have helped Florida International University School of Law, ranked by *U.S. News* considerably lower than Florida State's and the University of Florida's law schools, to enjoy the state's highest bar pass rate on seven of the last eight Florida bar exams.[24]

H. Online Teaching Myths Debunked

The earliest distance courses were correspondence courses, and the earliest online classes were actually telecourses, in which a teacher delivered lectures each week via a videotaped recording.[25] Even today, in at least some online courses, students' most common instructional experience involves accessing voice over slides or videotaped lectures posted on a course management system. In these courses, there is little semblance of active learning. Instead, scalability trumps engagement. Assessments tend to be online, multiple-choice tests graded by software. Cheating is assumed to be rampant as students violate both prescriptions

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22.   AM. BAR. ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 23 (2019–2020).

23.   *See* Daniel Schwarcz & Dion Farganis, *The Impact of Individualized Feedback on Law Student Performance*, 67 J. LEGAL EDUC. 139, 140–41 (2017); Carol Springer Sargent & Andrea A. Curcio, *Empirical Evidence that Formative Assessments Improve Final Exams*, 61 J. LEGAL EDUC. 379, 379 (2012).

24.   *See* Louis N. Schulze Jr., *Using Science to Build Better Learners: One School's Successful Efforts to Raise Its Bar Passage Rates in an Era of Decline*, 68 J. LEGAL EDUC. (2017) (argues that frequent self-testing substantially improves students' knowledge and performance); *FIU Law Graduates Excel on February 2019 Bar Exam*, FLA. INT'L U. L., https://law.fiu.edu/fiu-law-graduates-earn-highest-florida-bar-passage-rate-for-fourth-time-in-a-row/ (last visited Sept. 21, 2019) ("FIU College of Law graduates once again exceeded the state average for bar passage in Florida. With a passage rate of 80% on the February 2019 Florida Bar Exam, FIU Law surpassed the statewide average passage rate of 57.3% by 22.7 percentage points and finished first in the state for the seventh time in the last eight examinations."), *Best Law Schools*, U.S. NEWS, https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings?location=florida, (last visited Oct. 4, 2019).

25.   Bill Anderson & Mary Simpson, *History and Heritage in Distance Education*, 16 J. OPEN FLEXIBLE & DISTANCE LEARNING 1, 3–4 (2012).

against using their books and class notes and, in some presumed in-stances, find peers or even paid contractors to take the tests for them. Students, who are accessing instruction from their homes, have almost no accountability for preparing for class and no real connection to their peers or their professors. The large class sizes maximize enrollees and, there-fore, the reach of and (often) the profits to the institution. These stereo-types tend to dominate our thinking about online law school classes, and they explain legal education's glacial progress (in comparison to our peers in higher education) in developing and offering high quality online courses.

It is a myth, however, that even the majority of law school online classes have any of the characteristics outlined above. In fact, it is no more rational to assume that online classes inherently have the qualities described above than it is to assume that in person classes achieve Karl Llewellyn's ideal. Well-designed online classes, as I explain in depth be-low, engage students in deep learning and promote substantial professor-student and student-student interaction. Assessments include multiple-choice tests, but also include exams, papers, and drafting projects and, in many online courses, assessments occur more often than in brick-and-mortar classes.

Given my interest in excellence in law teaching,[26] I have long wanted to see for myself the adaptiveness of the online course medium to the active learning and engagement for which I have advocated since I started writing about improving law school teaching back in 2001.[27] Con-sequently, in spring 2019, I decided to create and teach an online course for McGeorge's Doctor of Juridical Science (JSD) students that focuses on law teaching itself. To debunk legal education's perceptions of online classes, the discussion in the remainder of this Section draws on both my experiences in teaching my class on law teaching and, more generally, my research on teaching and learning. I will focus on debunking four key

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26. *See generally* SCHWARTZ, HESS & SPARROW, *supra* note 2 (conducting a rigorous study of excellent law teaching); SCHWARTZ, SPARROW & HESS, *supra* note 10 (dedicating chapter to effective learning and teaching); Schwartz*, supra* note 7; Gerald F. Hess, Michael Hunter Schwartz & Nancy Levit, *Fifty Ways to Promote Teaching and Learning*, 67 J. LEGAL EDUC. 696 (2018) (critiquing common law teaching techniques and suggests ways in which legal education can be improved); Michael Hunter Schwartz, *50 More Years of CLEO Schol-ars: The Past, the Present, and a Vision for the Future*, 48 VAL. U.L. REV. 621, 622 (2014) (focusing on improving legal education for law students of color); Michael H. Schwartz, *Im-proving Legal Education by Improving Casebooks: Fourteen Things Casebooks Can Do Dif-ferently to Produce Better and More Learning*, 3 ELON L. REV. 27, 33 (2011) (discussing im-proving legal education by improving casebooks); SOPHIE SPARROW, STEVE FRIEDLAND, MICHAEL HUNTER SCHWARTZ & GERRY HESS, TECHNIQUES FOR TEACHING LAW II (2011).

27. *See* SCHWARTZ, SPARROW & HESS, *supra* note 10.

myths:

(1) Online teaching prevents the use of legal education's signature teaching method, Socratic-Style Questioning.
(2) Even if a professor teaching an online class delivers only short voice-over-slides or videotaped mini-lectures, her online students receive an inferior and inherently passive learning experience.
(3) Assessments in online courses are inferior to assessments in brick-and-mortar classes.
(4) Online courses cheat students of the community and peer interactions characteristic of brick-and-mortar legal education.

I. Debunking Myth One: Online Teaching Requires Sacrifice of the Benefits of Socratic Questioning

Online classes can replicate most if not all the benefits of the Socratic questioning model. For example, online teaching tools allow professors to teach synchronous class sessions in which they call on students to answer questions, and students immediately respond with answers.[28] The professor can probe the students' answers just as she would in a brick-and-mortar class. The technology actually makes it easier to track and balance student participation. Students also can signal when they have questions and can be placed in pairs or small groups, each of which can be monitored by the professor.[29]

Even an asynchronous class can import many of the benefits of Socratic-style questioning. In an asynchronous class, the professor can assign each student one of the questions she would have asked in class and require the students to both respond to their assigned questions and to write a response to a peer's answer to a Socratic-style question.[30] In fact, the thinking time (between the moment when the professor asks her question and when the student must answer) is inherently much greater in an asynchronous online class. As a result, students' responses are more likely to be thoughtful and clearly expressed.

An asynchronous professor can ask follow-up questions, even alter her hypotheticals to make them progressively more complex, or can provide feedback—both to the students assigned to respond and to the students who commented on their peers' responses.

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28. *See* Janet R. Buelow, Thomas Barry & Leigh E. Rich, *Supporting Learning Engagement with Online Students*, 22 ONLINE LEARNING J. 313, 330 (2018).

29. *See id.* at 328.

30. *See* Martin A. Andresen, *Asynchronous Discussion Forums: Success Factors, Outcomes, Assessments, and Limitations*, 12 J. EDUC. TECH. & SOC'Y 249, 249–50 (2009).

In fact, there is reason to hypothesize that students in an asynchronous class experience have a *better* learning experience than their peers in brick-and-mortar classes. The extra thinking time increases the likelihood that what they contribute reflects deeper thought, and the modality means that students who have great insights but are not extroverts or who process less speedily than their peers can enjoy success. At the very least, online students can experience less vicarious learning than their peers in brick-and-mortar legal education. By requiring each student to: (1) answer two or three of the questions the law teacher would have asked in her/his in-person class, and (2) respond to at least one of their peers' answers to the professor's questions, most students can learn non-vicariously in each class session.[31]

In the law teaching class I taught in spring 2019, which I taught entirely asynchronously, I implemented this tactic. For most class sessions (but not all),[32] all my students answered at least one of my questions, on their own and without the benefit of peer input. As a result, all my planned questions were answered each week, all students participated actively in each class session, and each student both received peer feedback and provided peer feedback. And, in contrast to my in-person classes, no student in my online class had an entirely vicarious learning experience even during a single class session.

J. Debunking Myth 2: Even If a Professor Teaching an Online Class Delivers Only Short Voice-Over-Slides or Videotaped Mini-Lectures, Her Online Students Receive an Inferior & Inherently Passive Learning Experience

It is particularly tempting to assume that students in online classes experience what I would call bad telecourses. We imagine the students watching one or two hour videos (at best supplemented by PowerPoint slides) that are the epitome of passive education. Even assuming, as I do, that some professors who teach brick-and-mortar classes rely exclusively on lecture or are really "pretend Socratic teachers," such voice-over-slide

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31. *See* Buelow, Barry & Rich, *supra* note 28, at 322. It is easy to prevent students from simply reiterating their peers' answers to questions. Most course management systems can restrict students' access to their peers' answers until all the assigned students have posted their own answers. Alternatively, students can be directed to respond only to questions their peers have not answered and to respond to a peer to whom their peers have not yet responded.

32. For some class sessions, the students completed projects instead. For example, for one class session, the students posted a YouTube video of a teacher in action and critiqued the teaching in light of the teaching principles they had learned that week. Each student then provided feedback on a peer's critique based on those teaching principles and on a lesson I created in providing best practices feedback.

or video lectures would be even worse. I seriously doubt that a video lecture can replicate the dynamism and inspiration possible in an excellent in-person lecture. A video is inherently static, unable to adapt to students' reactions; a live human can do so.

It is important to note, as a foundational matter, that best practices counsel limiting voice-over-slides lectures to seven to ten minutes.[33] Visuals and animation also can help, and best practices also counsel authenticity,[34] which, of course, is an important facet of effective teaching in brick-and-mortar classes.[35]

In addition, there are tools online teachers can and do use to minimize the passivity of video and voice-over-slide lectures. This discussion will address four such tactics. First, it is very common for online teachers to pair online quizzes with their reading and voice-over-slide lectures. If the combination of reading assignments and lectures are well designed, students will not be able to correctly answer the questions unless they both have completed the reading and watched and listened to the voice-over-slide lectures.

Second, professors can require students to complete note-taking guides and partially-completed graphic organizers as they listen to the voice-over-slide lectures. A note-taking guide has headings that indicate sub-topics within a doctrinal area being addressed in a class session but includes blank space for students to write in the key points.[36] For example, a note-taking guide for a class session on express conditions might include sub-headings such as: effect of an express condition; creation of an express condition; interpretation of ambiguous language in alleged express conditions; and excuse of express conditions, and excuse might include sub-topics such as waiver; estoppel; extreme forfeiture; etc. A partially-completed graphic organizer for consideration might include space for students to write in the general definition of consideration and blank boxes in which students would write the names of all the more specific rules, including illusory promise, the pre-existing duty rule, moral consideration, etc., and the rules for each.

Finally, professors can imbed games into their voice-over-slide lectures. For example, in the online law teaching class I taught, one session

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33.   *See* Simuelle Myers, *6 Tips for Creating Engaging Video Lectures That Students Will Actually Watch*, Temple U., https://teaching.temple.edu/edvice-exchange/2016/03/6-tips-creating-engaging-video-lectures-students-will-actually-watch (last visited Aug. 11, 2019).

34.   *See id.*

35.   *See* Schwartz, Sparrow & Hess, *supra* note 10, at 22 (quoting a student as saying "I want to learn from a human being, a fellow human being.").

36.   *Guided Notes*, Tchr. Toolkit, http://www.theteachertoolkit.com/index.php/tool/guided-notes (last visited Sept. 18, 2019).

consisted entirely of a Jeopardy-style game board. I had each student submit her answers (of course, in the form of questions) to each item in the game board after listening to the voice-over-slides. With hindsight, I should have structured things so that students would submit their answers before I shared the correct responses.

K. Debunking Myth Three: Assessments in Online Courses are Inferior to Assessments in Brick-and-Mortar Classes

The presumed inferiority of assessments in online courses, as noted above, takes two forms. First, a common assumption is that assessments in online courses are overly simplistic, multiple-choice assessments that focus on remembering knowledge rather than applying concepts.[37] Second, even assuming assessments in online courses could be made to focus on analytical tasks, it is common to assume that there are no mechanisms available to prevent cheating; the person submitting the exam answer may be the student or may be a peer or paid expert.[38]

There really is no basis for the assumption that assessments in online classes cannot be as robust, challenging and deeply analytical as assessments in brick-and-mortar-based classes. It certainly is common to administer online multiple-choice tests, and I not only did so in my online teaching class but also have done so in my brick-and-mortar-based contracts classes for years. In both contexts, I have chosen to make these tests low stakes. I assign only a small portion of the course grade to these quizzes, and I allow students to take the tests over and over until they score 100% on them. I use these tests to lock down student understanding of key concepts and to provide practice and feedback in dealing with bar exam-style multiple choice questions.

Arguably, assessments in online courses are superior to those in brick-and-mortar classes because the technology allows the professor to increase the frequency of the practice and feedback she provides without using up precious classroom time.

My primary and weightiest assessments, in both online and brick-and-mortar classes, look the same. My final exams in an online and a brick-and-mortar version of the same class would be identical, and, in both versions, I always include multiple assessments (typically, four to six) and a variety of types of assessments. For example, in my contracts classes, in addition to a final exam that has a mix of essay and multiple-

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37. *See* Kemi Jona, *Rethinking the Design of Online Courses*, *in* LEARNING TO CHOOSE: CHOOSING TO LEARN (R. Sims, M. O'Reilly & S. Sawkins eds., 2000).

38. *See, e.g.*, Heather E. Campbell, *Cheating, Public Administration Education, and Online Courses: An Essay and Call to Arms,* 12 J. PUB. AFF. EDUC. 33, 33 (2006).

choice questions, students draft contract clauses and emails to clients, and, separately, they author a paper in which they identify all the concepts we have learned in a specific contract they have chosen from the real world. In my teaching class, students drafted, among other things, a syllabus for a course they would like to teach, teaching notes for two class sessions, a final exam with both essay and multiple-choice questions and model answers, and a paper describing their vision for a study they would like to conduct about learning in their class.

For a midterm or the final exam in an online class, there are many tools professors can use to ensure that the person submitting the exam is the person enrolled in the class. Some online classes require students to come to a testing center where their identity can be verified by a testing site monitor.[39] Others use web cameras.[40] To take an online-proctored exam, students must use a computer with an external web camera.[41] Videoconferencing tools allow proctors to ensure that the right person is taking the test and is not using any prohibited materials.[42]

However, in both brick-and-mortar and online classes, there are not many ways to ensure that a non-exam student paper was actually authored by that student. In both contexts, the professor only sees the student's final work product and not the process by which the student created that final product. Cheating almost certainly occurs in both contexts, but there is no reason to believe it would occur more frequently in online classes. In my small online class, the students were writing multiple submissions every week, including notes in their note-taking guides, analyses of the concepts we were learning as applied to the classes in which they were enrolled, and responses to my questions. Because my class was small, I would have noticed if the students' later submissions used inconsistent diction and analytical skills.

Thus, while cheating is a concern, cheating prevention tools allow online classes to reduce the risk to a level comparable to brick-and-mortar classes.

L. Debunking Myth Four: Online Courses Lack the Sense of Community & Connection Characteristic of Brick-and-Mortar Classes

Creating a sense of connection and community in online classes is

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39. *See id.* at 43.

40. *See Cheating in Online Education: Myth vs. Reality,* ONLINE EDUC., https://www.onlineeducation.com/features/cheating-in-online-education (last visited Sept. 17, 2019).

41. *See id.*

42. *See id.*

harder than in brick-and-mortar classes. In brick-and-mortar classes, students walk into and out of class together, ideally exchanging ideas about what they read the night before and heard in class. They can be assigned to work together on in-class and after-class projects. At the very least, if students are struggling with a concept or hypothetical in a law school class, the professor teaching a brick-and-mortar class can have students discuss the concept or hypothetical with a peer before calling on students. This approach can enhance the quality of students' responses. Outside of the class, students can study together in the law library or their dorms. Students also can come to recognize each other as they travel throughout campus and attend events. These experiences cannot easily be replicated in online classes.

However, to some degree, the assumption that it is hard to build relationships reflects the age of the author; our students are much more comfortable than we are at building relationships using digital tools. A number of our students have friends all over the world whom they have never met in person, and they experience those connections as meaningful.

Nevertheless, professors teaching online classes need to develop and, in fact, have developed tools for connecting with their students and building community. For example, just as a brick-and-mortar professor might introduce herself to the class and tell a humanizing anecdote, an online professor might record a video self-introduction. In recording such a video for my online class on law teaching, I thought it best to include multiple facets of my experience and life, probably more than I would have included in a brick-and-mortar class. I also asked each student to introduce herself or himself to the class and to respond to a peer's self-introduction. In my brick-and-mortar classes, while I have had students fill out index cards to introduce themselves to me, I have never asked my brick-and-mortar students to introduce themselves to the class as a whole (and therefore never have asked them to respond to a peer's self-introduction). Thus, in this way, my students became more connected to each other.

Online classes also can replicate the in-class and after class small group projects; in fact, in synchronous classes, videoconferencing tools allow the professor to place students in small working groups and "visit" their group discussions in real time.[43] Required peer feedback on learning management system discussion boards and on draft projects can further promote peer-to-peer interactions.

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43.   Jenna Gillett-Swan, *The Challenges of Online Learning Supporting and Engaging the Isolated Learner*, 10 J. LEARNING DESIGN 2, 23 (2017).

In short, professors teaching online classes have tools available to them to create community and connection.

II. WHY THE INACCURACY OF BOTH SETS OF MYTHS IS PERNICIOUS

Both sets of myths already have had pernicious effects. As evidenced by the need for this symposium in 2019, almost thirty-five years since Nova Southeastern established the first accredited online graduate program in 1985,[44] the myths about online teaching already have slowed the growth of online law school teaching, which almost certainly also has slowed the development of the kind of research into best practices[45] that would move the field forward.

Likewise, the myths about in-person teaching have likely chilled introspection and inhibited growth and innovation. As a result, too few students experience high quality in-person law teaching that reflects insights from modern brain science. Moreover, anecdotal reports suggest that teaching online classes can enhance in-person teaching.[46] For example, the greater emphasis on frequent assessment characteristic of online classes can inspire professors to alter their assessments for their in-person classes or, at least, have their in-person students take the assessments they created for their online students.

Finally, as I argued in 2001, the ideal model for in-person classes should probably be hybrid—have an in-person experience for those instructional activities for which an in-person teacher would be most effective and move online those aspects of instruction that can best be delivered online or, at least, for which online instruction would be equally effective.[47]

III. A MODALITY-LESS MODEL OF TEACHING EXCELLENCE: WHAT LEARNING THEORY, INSTRUCTIONAL DESIGN, & TEACHING RESEARCH CAN TEACH US ABOUT EFFECTIVE TEACHING IN ALL MODALITIES

In this section, I draw on learning theory, instruction design, and

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44. *See* David Ferrer, *History of Online Education,* QUAD, https://thebest-schools.org/magazine/online-education-history/ (last visited Aug. 18, 2019).

45. Needed studies arguably include: (1) comparisons of student learning in the two modalities, after controlling for entrance credentials; (2) assessments of the various online active learning teaching techniques, many of which are referenced in this article; (3) studies of how best to use the data generated by online platforms to serve law student learning; and (4) evaluations by students of their learning experience.

46. See Michael L. Rodgers & Mary Harriet Talbut, *Can Online Teaching Improve Face to Face Instruction*? TOMORROW'S PROFESSOR, https://tomprof.stanford.edu/posting/1321 (last visited Sept. 2, 2019).

47. *See* Schwartz*, supra* note 7, at 424–25.

teaching theory and research, especially the key lessons from *What the Best Law Teachers Do*, to articulate an all-modalities modal of excellence in law teaching. I will address five key facets of excellence in teaching: (1) designing courses and preparing for class sessions; (2) building connections with students; (3) developing and articulating high expectations; (4) engaging students; and (5) providing assessment and feedback. I also make an effort to explain how law professors can implement all five principles in both online and in-person classes. This discussion is not intended to be exhaustive but, rather, a beginning of an effort to articulate principles.

A. Designing Courses and Preparing for Class Sessions

1. Designing Courses

Courses are effectively designed if the teaching, assessments, reading and other assignments, and learning objectives are congruent with each other,[48] and if the delivery of instruction is efficient, effective, and appealing.[49] Students should complete assignments designed to help prepare them to learn what they are supposed to learn, professors should choose teaching methods most likely to help them learn it, and assessments should assess whether the students have, in fact, learned it. Congruence increases the likelihood that the instruction is effective. Given the limited time we have with students, the goal of efficiency increases the likelihood that we will actually achieve all our objectives; sometimes, we have to forego sharing a wonderful insight that we professors, who love the law, are enamored with and preference what the students need to be learning. Finally, the goal of making instruction appealing, while surprising to some professors, is a core teaching ethic of the professors we studied in *What the Best Law Teachers Do*; each of them thinks deeply and frequently about how to inspire their students to work hard, love their subjects, and learn.[50]

Designing courses of all types begins by focusing on what the professor has determined that students should know, believe, and be able to do by the end of the course. Some scholars have referred to this process as "backwards design,"[51] but instructional designers simply refer to the idea of starting with learning objectives as part of the regular and optimal

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48.   *See id.* at 383–84.

49.   *See id.* at 355.

50.   *See* SCHWARTZ, HESS & SPARROW, *supra* note 2, at 71–75.

51.   *See*, e.g., Wallace J. Mlyniec, *Where to Begin? Training New Teachers in the Art of Clinical Pedagogy*, 18 CLINICAL L. REV. 505, 559 (2012).

"instructional design" process.[52] Learning objectives allow both in person and online teachers to allocate their limited classroom/online time with their students and plan students' reading and other assignments, select teaching methods, design assessments, and evaluate both student work and the success of the course.[53] The learning objectives for a course should be the same regardless of whether the course happens to be delivered online or in person.[54]

Having decided what students will learn, it is important to determine what students know already. In Civil Procedure, for example, if students do not know how cases move through our legal system, it is hard for them to understand the cases and the Federal Rules of Civil Procedure. In Contracts, because many foundational cases involve construction contacts, students who do not understand the basics of how construction projects happen, i.e., the roles of owners, general contractors, and subcontractors, they will not understand those cases. Finally, in a small business clinic, if students have never drafted a single contract provision and, possibly, never seen a contract (even in their Contracts class), they will struggle to complete their drafting assignments. In other words, knowing what students know and do not know helps professors plan their courses.

The learning objectives also allow the professor to take on the next step: planning their assessments.[55] The fact that instructional designers recommend planning assessments even before a course starts is counter-intuitive (or at least counter-common practices) for most law professors; nearly all of my colleagues at the five different law schools where I have taught have planned, drafted, edited, and administered their exams in the last week or two before their final exams.

My colleagues have expressed concern that they might otherwise "teach to the test," and I respect their concerns even if I do not share them. Teaching to the test, if that term refers to revealing the sub-topics within a doctrinal subject that will be tested on the exam, would be a problem because it may prevent the professor from assessing students' ability to spot issues, a skill we try to teach and that is critical to success on the bar exam and in practice. However, assuming we are administering traditional law school exams for the sake of discussion, if teaching to the test refers to helping students learn to perform well on our exams, i.e., how to: (1) sift facts and identify issues; (2) learn the relevant law and policy

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52. *See* Schwartz, *supra* note 7, at 392; *see also* SCHWARTZ, SPARROW & HESS, *supra* note 10, at 34.

53. *See* SCHWARTZ, SPARROW & HESS, *supra* note 10, at 34.

54. *See* AM. BAR ASS'N, *supra* note 22, at 19 (regarding Distance Education Courses).

55. *See* SCHWARTZ, SPARROW & HESS, *supra* note 10, at 39.

and how to articulate it; and (3) to analyze a legal problem from the perspectives of all parties and predict outcomes, we should all be teaching to the test.

Planning assessments before starting a course allows a professor to make sure that the time she interacts with students, either in person or online, is focused on learning experiences that achieve the course objectives. Instruction should increase the likelihood students will be prepared to achieve the learning objectives; by doing so, we avoid a common error made by in person professors that occurs much less frequently in online classes: having to rush-lecture the last week or so of class to "cover" the end-of-syllabus course material. To me, cramming two weeks of course material into one-three hours of lecture *is* teaching to the test—and in the worst way. This error occurs less frequently in online classes because the common (and best) practice in online classes is to plan, before the course even starts, the entire course and create all the class sessions.[56]

Identifying learning objectives and planning assessments increases the likelihood that the professor will select an appropriate text, which is the next step. [57] To be clear, at least when I was a new professor, I selected my texts before I did anything else, used the syllabus in the Teacher's Manual or from a colleague who had used the text, and never even considered the possibility that I might have learning objectives. I tended to choose texts for the wrong reason—because the texts intrigued me and not according to best practices for choosing a casebook, such as the congruence with my learning objectives, the selection of cases, the number and variety of problems, the quality of the teaching materials in the Teacher's Manual, etc.[58]

Having selected a text congruent with identified learning objectives, the next step, design of the course, is considerably easier.[59] Well-designed online and in person courses, in addition to having the qualities described below, have the following characteristics:

(1) They become progressively more challenging over the course of the semester.

(2) They engage all the students in the class and not just a select few.

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56. *See* Martin Pritikin, *Online Law School Course Development: 4 Takeaways for Success,* CONCORD L. SCH. (Apr. 4, 2019), https://www.concordlawschool.edu/blog/news/online-law-school-course-development-4-takeaways/.

57. *See* SCHWARTZ, SPARROW & HESS, *supra* note 10, at 41.

58. *See id.* at 41–42. *See also*, Michael H. Schwartz, *Improving Legal Education by Improving Casebooks: Fourteen Things Casebooks Can Do Differently to Move Legal Education Forward*, 3 ELON L. REV. 27, 36 (2011).

59. *See* SCHWARTZ, SPARROW & HESS, *supra* note 10, at 43.

(3) They empower students to self-regulate their learning.
(4) They prioritize the most important learning objectives.[60]

While most, if not all, the professors we studied for *What the Best Law Teachers Do* were not familiar with formal instructional design principles, all of them designed their courses as if they were experts in the field. Students lauded the fact that these professors carefully tailored their reading assignments,[61] focused laser-like on their core learning objectives,[62] and prepared the students as well as possible for their very challenging examinations,[63] yet found time to allow students to ask questions[64] and to share unique insights, such as the results of the professor's interviews of the lawyers who handled key cases,[65] and creative learning experiences, such as structuring a labor law class to allow the students to form a union and have it certified by the National Labor Relations Board.[66] While none of the professors we studied taught online courses, all of these practices would work equally well in an online course.

2. Preparing for Class Sessions

At its core, preparing for class according to best practices involves hard work, a quality characteristic of each of the faculty featured in *What the Best Law Teachers Do*. For example, even though he wrote the casebook he used in his teaching, Andy Taslitz used to rewrite his teaching notes every year from scratch,[67] and Ingrid Hillinger, on the days when she teaches at 1:00 p.m., arrives at the law school to begin preparing for class at 4:00 a.m. [68] Ruthann Robson and Roberta Corrada re-read every case they assign three times, once as a student, once as a professor, and once as a practicing attorney,[69] and, for his Constitutional Law class, Phillip J. Prygoski used to read not only the cases he assigned but also all the cases that cited the cases he assigned.[70] Finally, Nancy Levit memorizes the names and faces of all the students in her eighty student Torts class *before the first day of class*, and she writes a personalized email to each

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60. *See id.* at 43–47.
61. *See* SCHWARTZ, HESS & SPARROW, *supra* note 2, at 143.
62. *See id.* at 159–60.
63. *See id.* at 276–77.
64. *See id.* at 190–91.
65. *See id.* at 172.
66. *See* SCHWARTZ, HESS & SPARROW, *supra* note 2, at 214.
67. *See id.* at 154.
68. *See id.* at 152.
69. *See id.* at 153–54.
70. *See id.* at 154.

student in her classes in which she responds to the students' disclosures of why they are taking her class and what they want her to know about them.[71]

Unquestionably, these practices would be extraordinary in either an in-person class or an online class. However, at least based on my experience teaching an online class in spring 2019, I believe an online class, especially one that is asynchronous, requires even more hard work than an in-person class. If the professor will not be holding any synchronous class sessions, she will need to meet the requirements of ABA Standard 310(b), which requires "not less than one hour of classroom or direct faculty instruction and two hours of out-of-class student work per week for fifteen weeks, or the equivalent amount of work over a different amount of time."[72] Thus, for a three-credit-hour asynchronous online course, the professor needs to create learning experiences (including reading assignments, videos, voice-over-slides, postings to the course webpage, projects, and quizzes) totaling at least 127 hours, i.e., roughly nine hours per week.[73] The planning required to ensure these learning experiences are engaging and are likely to result in students meeting the learning objectives is considerable.

B. Connecting with Students

While subject matter expertise is essential to student learning[74] and characteristic of the people we featured in *What the Best Law Teachers Do*,[75] creating an atmosphere where students feel respected, cared about, and supported may be even more important.[76] The students of the people we studied for *What the Best Law Teachers Do* repeatedly told us that their professors' manifestations of respect and caring were a distinct and critical factor in their learning.[77] When students feel like their professors see them as colleagues, as fellow and equal humans, as by and large trying to do their best in and out of class, they thrive.[78]

What does this factor look like in face-to-face and online classes? In the face-to-face classes we observed for *What the Best Law Teachers Do*, we noted a variety of actions that manifest this quality. For example,

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71. *See* SCHWARTZ, HESS & SPARROW, *supra* note 2, at 76–77.
72. AM. BAR ASS'N, *supra* note 22, at 21.
73. *See id.*
74. *See* SCHWARTZ, SPARROW & HESS, *supra* note 10, at 11.
75. *See* SCHWARTZ, HESS & SPARROW, *supra* note 2, at 66–67.
76. *See* SCHWARTZ, SPARROW & HESS, *supra* note 10, at 12.
77. *See* SCHWARTZ, HESS & SPARROW, *supra* note 2, at 84–86.
78. *See* SCHWARTZ, SPARROW & HESS, *supra* note 10, at 22.

Heather Gerken is known for responding to insightful student points by suggesting that she and the student write a paper together to develop that idea.[79] Several of the other professors we studied for the book made it a point to reference good student insights throughout every class session, e.g., "As Ms. Johnson explained, . . ." A former student of Meredith Duncan told me a wonderful story of bumping into Professor Duncan in the hallway during his third year of law school. (He had been a student in her first-year torts class.). The student was struck by the fact that Professor Duncan not only recognized him and remembered his name but also remembered that he liked to hunt and asked him if he had been hunting recently; this episode was all the more stunning to the student because he knew Professor Duncan was not a fan of guns. Most simply, students want us to know their names.[80]

While a synchronous online class allows for similar interactions, an asynchronous class poses some challenges to building supportive relationships with students. By and large, the professor's comments in response to student postings can be as laudatory as anything she might say in a face-to-face class so it is easy to replicate some of the interpersonal aspects of a face-to-face class. In an effort to humanize themselves, some professors teaching online classes (including me) film welcome videos in which they introduce themselves, express enthusiasm for the course, and share something about themselves;[81] I did so and shared my great skill in doing girls' hairstyles, a skill I developed because I was the parent who was responsible for getting my daughters ready for school every day. While an online teacher is able to see students' names on her screen whenever she is interacting with her students, she can make an effort to learn personal facts about her students and remember and use those facts. It is common for online professors to ask students to use their phones to film self-introductions or ask students to post written self-introductions to the professors' course webpages.

C. Developing and Articulating High Expectations

High expectations are highly correlated with student learning.[82] Ideally, professors should set challenging but realistic expectations and communicate that the students can live up to those expectations.[83] The people

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79. *See* SCHWARTZ, HESS & SPARROW, *supra* note 2, at 190–91.

80. *See* SCHWARTZ, SPARROW & HESS, *supra* note 10, at 22, 24.

81. *See* Sharon O'Malley, *Professors Share Ideas for Building Community in Online Courses*, INSIDE HIGHER ED, (July 26, 2017) https://www.insidehighered.com/digital-learning/article/2017/07/26/ideas-building-online-community.

82. *See* SCHWARTZ, SPARROW & HESS, *supra* note 10, at 13.

83. *See id.* at 13–14.

we studied for *What the Best Law Teachers Do* overwhelming had rigorous expectations for student class preparation,[84] demanded excellent student responses to the challenging questions they asked in their classes and deep class discussions,[85] and were known for the difficulty of their assessments.[86] In fact, students of the people we studied reported that they received their worst grades in law school from the people we studied and that the Best Law Teachers' exams were "the hardest exams in the (law) school."[87]

The people we studied are also known for communicating, to each student, that the student is capable of excellence in the class.[88] They are known for being tough on students[89] yet knowing what each student needs,[90] and their students develop confidence in themselves that they attribute to their professors' belief in them.[91]

These principles apply regardless of the instructional modality. There is no reason that questions in the online modality should be any less challenging or that expectations for depth of reading and analysis should be lower. In fact, the ABA Standards require that, for online classes, law schools must ensure:

(1) there is opportunity for regular and substantive interaction between faculty member and student and among students;

(2) there is regular monitoring of student effort by the faculty member and opportunity for communication about that effort; and

(3) the learning outcomes for the course are consistent with Standard 302.[92]

In addition, while the standards do not require identical experiences for students in different programs (day vs. night, online vs. in-person), the standards do provide

> A law school providing more than one enrollment or scheduling option shall ensure that all students have reasonably comparable opportunities for access to the law school's program of legal education, courses taught by full-time faculty, student services, co-curricular programs, and other

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84. *See* SCHWARTZ, HESS & SPARROW, *supra* note 2, at 142–43.
85. *See id.* at 144.
86. *See id.* at 276–77.
87. *See id.*
88. *See id.* at 131.
89. *See* SCHWARTZ, HESS & SPARROW, *supra* note 2, at 132.
90. *See id.*
91. *See id.* at 134.
92. AM. BAR ASS'N, *supra* note 22, at 19.

educational benefits. Identical opportunities are not required.[93]

Presumably, a law school that had lower expectations for its online students or online classes would be in violation of these standards.

D. Engaging Students

While many factors are critical to engaging students, this discussion will focus on three. As noted above, law school Socratic-style questioning is certainly engaging for the student whom the professor calls on, and, if the students are playing along in their heads, it can be engaging for many students. However, because half or more of the students do not answer their professors' questions in their heads, Socratic-style questioning is not included in this discussion.

First, teacher passion for the subject and for student learning and achievement inspires students to work harder, pay greater attention, and engage themselves.[94] This excitement is manifested by express love for the area of law and communicating joy in student learning.[95] The people we studied for *What the Best Law Teachers Do* express great joy in teaching, using words and phrases like "lucky," "love," "best job in the world,"[96] and their students notice and appreciate that enthusiasm and are inspired by it.[97]

Second, it is important to see student engagement as an end in itself. In *Teaching Law by Design II*, my co-authors and I recommend that professors teach with two questions in mind: (1) "Who in the room is acting like a lawyer," and (2) Who is doing most of the [talking or writing] in class?"[98] We express this concept as trying to be less of a "sage on the stage" and more of a "learning coach."[99] Another term often used to communicate a key to student engagement is "active learning."[100] Active learning experiences require students to be engaged because they are, among other things, writing, speaking, listening, reflecting and demonstrating.[101] These learning experiences include small group discussions, think-pair share, writing answers to short hypotheticals before discussing

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93. *Id.* at 22–23.

94. *See* SCHWARTZ, SPARROW & HESS, *supra* note 10, at 81.

95. *See id.*

96. SCHWARTZ, HESS & SPARROW, *supra* note 2, at 48–49.

97. *Id.* at 49–52. Reading what the students have to say about their professors in the pages cited in this footnote is, itself, uplifting and inspiring.

98. SCHWARTZ, SPARROW & HESS, *supra* note 10, at 99, 106.

99. *Id.* at 100.

100. *Id.* at 82, 105–06.

101. *See id.* at 106.

them in class, and point-counterpoint discussions.[102] The people we studied for *What the Best Law Teachers Do* embrace active learning teaching methods. Their students work problems, complete writing exercises, engage in peer grading, write on the whiteboard, and ask lots of questions.[103]

Third, authentic learning experiences, i.e., placing students in role-plays as attorneys, is a particularly effective way to engage students. Having students participate in mock oral arguments, draft contract provisions, prepare pleadings, even in first-year courses, motivates students to do their best work.[104] Many of the people we studied for *What the Best Law Teachers Do* use role-plays as a key teaching technique.[105] Roberto Corrada takes the authentic learning goal further than most; he creates whole-class simulations. In his labor law class, students organize into a union to negotiate the terms of the class.[106]

The first factor, passion for the subject and for student learning, is easier to achieve in brick-and-mortar classes, moderately harder in synchronous classes and hardest in asynchronous classes. Passion is harder to read on a face in a video or a voice over the Internet, even in the synchronous online setting, and many of my colleagues who teach online have told me that they miss the energy of a live classroom. However, in well-designed asynchronous online classes, the professor provides more individualized feedback, making it more likely that more students will have their best work celebrated by the professor.

While the second and third factors, student engagement and authentic learning experiences, may look a bit different in online classes, both are easily visible when students collaborate in online small groups on projects, answer a hypothetical, provide peer feedback on a peer's answer to a hypothetical, draft legal documents, record and post an oral argument to a course webpage, and create their own hypotheticals to test their own understandings.

E. Providing Assessment and Feedback

Finally, administering multiple assessments, ideally in a variety of forms, and providing high-quality feedback are critical to student learning.[107] Multiple assessments allow teachers to assess a wider variety of skills and knowledge, allow students to develop their skills and

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102. *See id.* at 105.

103. *See* SCHWARTZ, HESS & SPARROW, *supra* note 2, at 211–15.

104. *See* SCHWARTZ, SPARROW & HESS, *supra* note 10, at 6, 83.

105. *See* SCHWARTZ, HESS & SPARROW, *supra* note 2, at 212–15.

106. *See id.* at 172.

107. *See* SCHWARTZ, SPARROW & HESS, *supra* note 10, at 157.

knowledge over time, and increase the likelihood that the professor's conclusions about student learning are accurate.[108] Professors, optimally, provide grading criteria in advance of each assessment and use rubrics to grade written work products to ensure consistency and accuracy.[109] Feedback should be specific, positive, corrective, and prompt;[110] students should understand what they did well and what they did poorly and should receive guidance on how to improve.[111] The people we studied for *What the Best Law Teachers Do* see the assessment as "another learning opportunity,"[112] and the professors see their students' performance on their assessments as a reflection on their effectiveness as teachers.[113] They believe in frequent assessment,[114] and they provide detailed feedback.[115]

Other than the tendency of professors in online classes to provide more and more individualized feedback and to administer more assessments, these practices should be and are indistinguishable in the brick-and-mortar and online modalities. Online classes have the benefit of online multiple-choice quizzes, but brick-and-mortar professors also have access to this quizzing software.[116]

CONCLUSION

Our myths about in person and online teaching have distorted our thinking. Unquestionably, many in person law school classes meet and even exceed our preconceptions about optimal in person classes. Many fall short, and a significant number fall far short of the ideal. Likewise, online classes can be excellent, mediocre, and poor. The modality, however, plays an insignificant role. Rather, factors including professors' course and class session design, class preparation, connection with their students, communication of high expectations, engagement of students, and assessment and feedback practices are much more significant to student learning.

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108. *See id.* at 177.
109. *See id.* at 177–78.
110. *See id.* at 162, 183.
111. *See id.* at 165.
112. *See* SCHWARTZ, HESS & SPARROW*, supra* note 2, at 260.
113. *See id.* at 261.
114. *See id.* at 261, 263–65.
115. *See id.* at 267, 269, 271–72.

116. *See* Charles B. Sheppard, *The Grading Process: Taking a Multidimensional, "Non-Curved" Approach to the Measurement of a First-Year Law Student's Level of Proficiency*, 30 W. ST. U. L. REV. 177, 196 (2003) (discussing the use of online quizzes in traditional law school classes).

The ideal would be to teach in person those subjects best taught in a brick-and-mortar setting and teach online those subjects for which a live teacher is not essential.

ASYNCHRONOUS, E-LEARNING IN LEGAL EDUCATION:

A COMPARATIVE STUDY WITH THE TRADITIONAL CLASSROOM

Victoria Sutton, MPA, PhD, JD[†]

CONTENTS

BACKGROUND

A 2015 survey from Wolters Kluwer[1] showed that only 14% of re-spondents on behalf of law schools were aggressively planning for online

1. Wolters Kluwer published a report, "The Leading Edge Report," which they describe as "intended to succinctly summarize many of the key areas of focus for law schools today

legal education, while 19% did not plan to ever offer online education.[2] The rest of the responses fell into the proceeding-with-caution category.[3] The authors attribute two major factors to this state of affairs—first, the limited number of hours allowed for online courses by the American Bar Association (ABA); and second, the technological difficulties and the reluctance of professors to learn the technology   necessary to offer online courses.[4] In addition, what the report calls a "greater barrier over time" was the general "wide-scale perception that online education is worth less than on-campus education."[5] Online offerings in law schools have increased significantly in the last four years since the Wolters Kluwer survey.[6] By February 2018, ABA had accredited three hybrid, online J.D. programs,[7] and ABA responded with more than doubling the amount of online credit that could be earned in a Juris Doctorate degree (J.D.), revising the ABA Standard in August 2018.[8]

The question of whether online, or e-learning, education is "worth less" than the traditional classroom experience had not been empirically tested, before this study; and the idea that online education was "worth less" was being passed along as a kind of folk psychology among legal educators.[9] This study was designed to produce evidence-based answers

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seeking to evolve their teaching model to meet the challenges and opportunities of 21st century legal education." *Legal Education Leading Edge Report, 2015 Edition*, WOLTERS KLUWER,   http://www.wklegaledu.com/supplements/id-9781454875307/Legal_Education_Leading_Edge_Report_2015_Edition (last visited Sept. 28, 2019).

  2.   Leading Edge Rep. (Wolters Kluwer) 19 (2015) [hereinafter Leading Edge].

  3.   *Id.* at 19 fig.4.

  Response to the question: "Many law schools are considering expanding the number of online course options their students have access to. Such online courses would involve students meeting faculty 'virtually' at specified times for discussions of study materials, accessing pre-recorded lectures, and downloading assignments and papers online. Which statement best describes your law school's plans for including online courses in its curriculum?" The survey was conducted in May 2014 and was completed by 40 respondents. Of these, 36 answered this question.

Id. Where 19% answered "[w]e do not plan to offer"; 67% the majority, answered, "[w]e plan to move cautiously"; and only 14% responded, "[w]e plan to be aggressive." *Id.*

  4.   *Id.* at 18–19.

  5.   *Id.*

  6.   Yvonne M. Dutton, Margaret Ryznar & Kayleigh Long, *Assessing Online Learning in Law Schools: Students Say Online Classes Deliver,* 96 DENV. L. REV. 493, 494 (2019).

  7.   Henry Kronk, *The Ice is Melting for Hybrid J.D. Programs*, ELEARNING INSIDE (Feb. 22, 2018), https://news.elearninginside.com/the-ice-is-melting-for-hybrid-j-d-programs/.

  8.   Barry A. Currier, *Adoption and Implementation of Revised ABA Standards and Rules of Procedure for Approval of Law Schools*, 2018 A.B.A. SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR.

  9.   Leading Edge, *supra* note 3, at 18–19.

to these questions.

Research was lacking; however, there is good reason for the lack of research data—there are just a very small number of asynchronous law e-learning courses available to study, and there is additional work required to do it properly.[10] So in deciding whether to plunge into the asynchronous law teaching domain, without such evidence, it seemed inevitable that I should develop a comparative study and make a contribution to this need for the legal academy.

Returning to the Wolters-Kluwer survey, perhaps the right question to be asked next, is not whether online legal education is better or worse; but how does it compare to traditional law course experiences? Saying an apple is better than an orange is not that useful, anyway. But describing whether an orange is more difficult to peel than an apple, for example, could provide more useful information in making decisions about how to go about engaging with oranges and apples. The same can be said about asynchronous courses and traditional law courses.

So in Fall 2015, when I designed and taught my law school's first completely asynchronous doctrinal course, I decided to try to begin to fill the gap of empirical knowledge on e-learning in law schools and to formally conduct an experiment to determine how the asynchronous, e-learning model in legal education compared to "traditional" law courses.[11] It would be the first such study.

The term, traditional law courses, would include courses using the methods prescribed by Langdell, and the tradition of law school courses for more than one hundred years.[12] This comparative data is particularly valuable given the growing criticism of this long-established law teaching method for failing to meet the creative needs to prepare students to be practicing lawyers of today and tomorrow.[13] Some have also noted resistance to changing that method, or simply that nothing has successfully

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10. Victoria Sutton, Asynchronous E-Learning in Legal Education: A Comparative Study 1 (Aug. 6. 2016) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2819034.

11. *Id.* at 2.

12. Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 515–16, 532 (2007).

13. *Id.* at 515–16.

Many reformers agree that the prevailing law school model developed in the nineteenth century does not adequately prepare students to become effective twenty-first century lawyers. Langdell's case method, designed around private domestic law, appellate cases, and the Socratic method, increasingly fails to teach students "how to think like a lawyer" in the world students will occupy. The curriculum over-empha-

replaced it, writing that "[s]ince Langdell, there has been no systematic effort to realign the theory of law and the concept of the profession with the basic design of the law school as an institution."[14] Given this summary of the state of legal education, an empirical study of e-learning as a platform for legal education seemed a gaping hole in information necessary to make decisions about e-learning.

I. DESIGNING THE DOCTRINAL LAW COURSE FOR ASYNCHRONOUS,
ONLINE DELIVERY

There is a paucity of literature on designing asynchronous law courses, as well as empirical data about them.[15] One source proved that the literature does exist, a brief, seventy-four page book by Jennifer Camero, *Teaching Law Online*.[16] Advice ranged from cautionary tales to how to discussion of the common Blackboard® platform for e-learning.[17] Much of the information was drawn from non-law courses, but was very helpful as a starting point.[18]

My objective in designing this course was to develop an online experience for students that was noticeably different from a traditional law class, which might make the   experience at least comparable to a traditional course, when factoring in the "tradeoffs" that are inevitable.[19] For example, producing video-lectures utilizing editing and cuts to relevant visuals could be used to break the monotony of the "talking head" video.[20] Another goal toward that objective was to develop more points of contact

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sizes adjudication and discounts many of the important global, transactional, and facilitative dimensions of legal practice. Law school has too little to do with what lawyers actually do and develops too little of the institutional, interpersonal, and investigative capacities that good lawyering requires. The Socratic method in the large classroom, though valuable as a way to teach sharp analytic skills, is ill-suited to fostering "legal imagination," which is what lawyers need most to become effective advocates, institutional designers, transaction engineers, and leaders. It also contributes to law student disengagement, particularly for women and people of color.

Id.

14. *Id.* at 549.

15. Sutton, *supra* note 10, at 2.

16. *See generally* JENNIFER CAMERO, TEACHING LAW ONLINE (2015) (discussing the transition from classroom to cyberspace).

17. *See generally id.* (discussing the ABCs of developing an online course).

18. *See id.* at 43–51 (listing non-law related resources that the author relied upon in her writing).

19. Sutton, *supra* note 10, at 2.

20. Bill Golden, *Why You Need to Rethink the Talking-Head Video: 4 Tips to Improve Video Engagement*, TENDO (Oct. 22, 2018), https://tendocom.com/blog/why-you-need-to-rethink-the-talking-head-web-video/.

with the student through e-methods, to replace the traditional, two or three times a week face-to-face meetings in a classroom.[21] A third goal toward my objective for the course was to simulate the Socratic method by giving frequent feedback to the student using technology to facilitate that process at a much greater rate and volume using automatic grading on objective tests, which provides faster feedback than one could do using traditional methods of paper or even "scantron" grading.[22] Further, I wanted to test as many of the ABA Standards for online education[23] as possible with this course as part of the experiment's comparative assessment.[24]

II. Relevant Guidance, Rules & Regulations for the Design & Administration of an Online Course

There are four documents for compliance and conformance purposes that necessarily had to be consulted in designing and administering a course: (1) ABA Standard 306; (2) University e-learning standards; (3) Working Group for Distance Learning for Legal Education (WGDLLE) draft guidance on best practices in online education, the law professors ad hoc Working Group for online law teaching best practices; and (4) individual law school faculty rules for e-learning.[25] This task requires continual review to ensure all required syllabi language, all rubrics and all standards are met at every point.[26] In some cases, the standards for e-learning were more restrictive than for a traditional course.[27]

For example, where the take-home exam has been a staple of law school testing for decades, ABA Standard 306(f) (previously 306(g)) requires that for an e-learning course a law school, "shall establish an effective process for verifying the identity of students taking distance education courses."[28] This is a challenge for all disciplines and universities which are hiring costly proctor programs that literally watch students on their laptop camera (some using video for later viewing) while each of them takes the exam.[29] Some simply give up on the idea of asynchronous

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21. Sutton, *supra* note 10, at 2.

22. *Id.* at 2–3.

23. Standards and Rules of Procedure for Approval of Law Schs. § 306 at 19 (Am. Bar Ass'n 2019).

24. Sutton, *supra* note 10, at 3.

25. *Id.*

26. *Id.*

27. *Id.*

28. Standards and Rules of Procedure for Approval of Law Schs. § 306 at 19 (Am. Bar Ass'n 2019).

29. *See* Anne Eisenberg, *Keeping an Eye On Online Test-Takers*, N.Y. Times, Mar. 2, 2013 at 4.

learning for the examination and they require students take a final exam in the traditional way, by coming to a controlled, proctored classroom at the appointed time.[30] However, in this course, another goal was to achieve compliance with ABA Standard 306(g) (now 306(f)) while still keeping the course asynchronous.[31]

Each university, with a law school, has standards for language for the syllabus that includes such issues as items to be purchased by the student, like a laptop camera.[32] These best practices rules may also require that students write a computer emergency plan for participating in the course.[33] In addition, every state where online education is offered has its own regulatory approval process, which is important if you are recruiting students for e-learning, nationwide.[34] In addition, compliance issues with the Americans with Disabilities Act specific to e-learning are also part of the university guidance.[35] There are potentially other requirements which e-learning must comply with, including the Digital Millennium Copyright Act.[36]

The law school ad hoc working group, Work Group for Distance Learning for Legal Education (WGDLLE), worked from 2011-2015 to establish the first "best practices" document which is immensely helpful in designing a law course and the online tools that can be utilized.[37] For example, the report recommends lectures being divided into five to seven minute sessions.[38] Technology has made some of its conclusions obsolete, like the lack of interactivity with online pre-recorded lectures.[39] Newer technology has made interactivity with pre-recorded lectures possible.[40]

Finally, your own law school faculty rules may not yet have rules for

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30. *Id.*

31. Sutton, *supra* note 10, at 3.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *See* Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

37. *Best Prac. Recommendations of Distance Learning for Legal Educ. 2.0*, WORK GROUP OF DISTANCE LEARNING FOR LEGAL EDUCATION, at 2, http://www.wgdlle.org/files/2015/03/BestPracticeRecommendationsforDistanceLearning-forLegalEducation-2015.pdf (last visited Sept. 28, 2019) [hereinafter *Best Prac.*].

38. *Id.* at 14.

39. *Id.* at 21.

40. *Id.* at 28. An example of a relatively new platform that allows inserting questions into a pre-recorded video to make it interactive during the lecture is edpuzzle. *See Make any video your lesson*, EDPUZZLE, http://edpuzzle.com (last visited Sept. 28, 2019).

e-learning courses, but if they do, it may include important information about teaching load credit for e-learning courses, minutes of video-lecture and allowable or disallowed practices.[41] Another important issue with the ABA Standards is the requirement for a specific number of lecture minutes, as well as your own law school rules for how many minutes constitute the ABA "credit hour."[42] For example, ABA Standard 310 (b) specifies that

> A "credit hour" is an amount of work that reasonably approximates: (1) not less than one hour of classroom or direct faculty instruction . . . or (2) at least an equivalent amount of work as required in subparagraph (1) of this definition for other academic activities as established by the institution, including simulation, field placement, clinical, co-curricular, and other academic work leading to the award of credit hours.[43]

To comply, the number of minutes for lecturing must make up the credit hour; for example, fifty minutes of lecture can be defined as your school's credit hour.[44] However, the list of "other academic activities" should include online activities like discussion board, quizzes and other online activities.[45] The rule allows "other academic activities as established by the institution," which would require a law school rule to at least list the kinds or scope of activities used in online courses to comply with this standard.[46] One broad definition for a law school rule might be that academic activities not unlike activities you might do in a face-to-face class would cover quizzes, discussion board and many of the online tools.

Since teaching online differs significantly from the traditional exchange of ideas in a classroom, a fifty-minute video lecture can result in potentially much more information being covered in a video-lecture with no student discussion (which would be typical of a law school class).[47] This can result in covering more material than should be covered in a three-hour course, for example.[48] Instead, considering time for discussion boards, quizzes, e-journal writing, and additional video clips should be included in the definition of class minutes, particularly because these are

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41. Sutton, *supra* note 10, at 3.

42. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. § 310 at 21 (AM. BAR ASS'N 2019).

43. *Id.* at § 310(b)(2).

44. *See id. at* § 310. ABA Standard 310, Interpretation 310-1 "[f]or purposes of this Standard, fifty minutes suffices for one hour of classroom or direct faculty instruction." *Id.*

45. *Id.* at § 310(b) at 21.

46. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. § 310(b)(2) at 21 (AM. BAR ASS'N 2019).

47. Sutton, *supra* note 10, at 3.

48. *Id.* at 3–4.

activities that tend to replace the Socratic exchange of ideas in a class-room.[49] Using the fifty-minute lecture option in ABA Standard 310(b)(1), from my own anecdotal observation, will inevitably result in the equivalent of a four-hour course, rather than a three-hour course.[50] Thus, the use of ABA Standard 310(b)(2) as adopted to your own law school standards fits the needs of online courses much better than the ABA Standard 310(b)(1) requirement.[51]

III. DESIGNING THE ONLINE COURSE

One of the objectives in designing this course was to create an interactive or modified Socratic method online. A standard approach that could be repeated each week was also important to allow students to focus on the substance of the course, rather than navigating an unpredictable weekly format.

With those design objectives in mind, the design of the course had a weekly, repeating routine of assignments.[52] The basic work for the week looked like Figure 1.[53] Figure 2 shows the cyclical weekly pattern of assignments with additional assessments.[54]
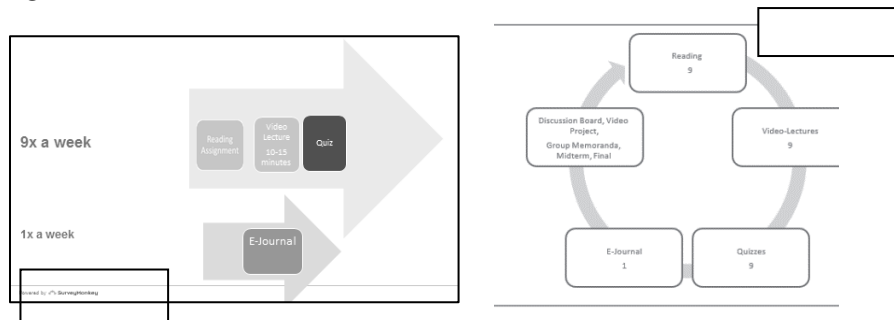
The ABA Standard 314 requires assessment methods for all courses, including formative and summative assessments, but does not require that all of them be used in every course.[55] This relatively new standard requires additional assessment beyond the one final exam, which has been

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49. *Id.* at 4.

50. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. § 310(b)(1) at 21.

51. *Id.* at § 310(b) at 21.

52. Sutton, *supra* note 10, at 4.

53. *Id.*

54. *Id.*

55. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. § 314 at 23 (AM. BAR ASS'N 2019).

the traditional legal teaching assessment method for decades.[56] E-learning is organically designed to meet this criteria because continuing assessment of students is important in an asynchronous course.[57] For purposes of this research several assessment methods were used that were not traditional.[58] The video-project was probably the least traditional of all the assessment methods, followed by the more standard Discussion Board, and a weekly E-Journal for recording observations about the week's lectures, reading, or assignments.[59] The Discussion Board allowed sharing thoughts with the entire class while the E-Journal allowed sharing only between the student and the professor.[60] There were several writing assignments including one group, memorandum writing assignment.[61] The traditional mid-term and final examination were also included as assessment tools.[62] During the course of the semester, lectures were ten to fifteen minutes long each followed by a short, five question multiple choice quiz, timed for twenty minutes.[63] Each quiz was to be taken at the end of each corresponding video-lecture.[64] A numbered, indexing system was used to match the quizzes with the video-lectures.[65]

The organization of the materials on the Blackboard® platform utilized this numbered index system to organize video-lecture, reading, and quizzes.[66] Each reading assignment, video-lecture, and quiz all shared the same index number, developed for the course to keep the vast amount of material organized on the online platform for the students as well as for the professor.[67] The index system worked as follows. An index number was designed based on a three-hour course that would meet three times a week for fifty minutes.[68] The week would be designated by the first number (one to fifteen weeks for the semester).[69] The second number would

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56. *See* Jacob Wentzel, *New ABA Requirements Bring Changes to Law School Classrooms, Creating Opportunity, and Chaos*, NULR OF NOTE (Dec. 1, 2017), blog.northwesternlaw.review/?p=214.

57. *Best Prac.*, *supra* note 38, at 26–27.

58. Sutton, *supra* note 10, at 4.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. Sutton, *supra* note 10, at 4.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Sutton, *supra* note 10, at 4.

69. *Id.*

designate the day of the week (1, 2, or 3).[70] The "day" was divided into three parts so the third number designated what part of the class day (1, 2, or 3).[71] Here is an example of the three parts of one equivalent class period: the second week, second day of the three day class week, and the first part of that day would be indexed as 2.2.1; the second part of that day would be 2.2.2 and then, the last third of that class day would be 2.2.3.[72] Each of these parts would identify a folder that contained three items: reading, video-lecture, and quiz.[73]

The distribution for course credit was divided as follows: Quizzes (30%); E-Journal (10%); Class and group exercises (10%); Midterm (10%) and Final examination (25%); and the Video project (15%).[74] The objective for this division of credit was to include a number of different assessment methods,[75] compare them to a traditional course and to ensure that no one assessment method would dominate the points available for the course, like a traditional law course where all or most of the credit is based on a final examination or a final paper.[76]

IV. DESIGNING A SURVEY TO ANSWER THE COMPARATIVE QUESTIONS

Online courses are typically in three categories: synchronous, asynchronous, or hybrid.[77] These terms are not defined in the ABA Standards and hybrid does not appear at all.[78] First, the design of the course was asynchronous, making the video-lectures available on-demand, throughout the course.[79] The quizzes that correspond with the video-lectures were open only one week at a time.[80] This is essential to keep the class at the same point in the course in order to participate meaningfully in discuss boards and group exercises. It also ensures that students do not fall behind in an online course. This process was administered by opening the week at midnight each week, on Sunday, and closing the last week's work assignments at the same time.[81] This ensured that no one would fall behind,

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70. *Id.*

71. *Id.*

72. *Id.*

73. Sutton, *supra* note 11, at 4.

74. *Id.* at 5.

75. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. § 314 at 23 (AM. BAR ASS'N 2019).

76. Sutton, *supra* note 11, at 5.

77. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. § 306 at 19 (AM. BAR ASS'N 2019).

78. *Id.*

79. Sutton, *supra* note 11, at 5.

80. *Id.*

81. *Id.*

and discussion board exercises could be done where everyone had completed the same work during the week.[82] Second, the course was designed for students located anywhere, so no face-to-face sessions or even online, interactive sessions were conducted during the course.[83] This absence of face-to-face contact with the professor was intentionally designed into the study to test the comparative aspects of a course with absolutely no face-to-face contact with the professor compared to the traditional, in class experience.[84] So no meetings were held in-person with students for purposes of this research.[85]

V. PROCESS OF CONDUCTING THE RESEARCH

The survey was approved for human subject testing by my University's Institutional Review Board.[86] Students were asked to complete the survey after the course work had been completed for the course.[87] They were offered a link to another free, online course, if they completed the survey.[88] Three follow-up reminders were sent to non-respondents, and at the end of the survey period of four days, 100% of those surveyed, responded.[89] Not all surveys were completed, with only thirty to thirty-two respondents completing almost all of the questions, resulting in 75% substantial completion.[90] Because the cohort was so small (thirty to thirty-two), primary data and qualitative measurements were collected to indicate trends rather than conclusive findings of their perceptions.[91]

The survey methods used ranking on a scale of one to five, one being the lowest; and five being the highest when asked comparative questions about traditional courses compared to this asynchronous e-learning course.[92] Questions were asked about format, time spent learning, comprehension, learning styles, assessment methods, feedback to the learner, convenience, and learning habits.[93] In addition, demographic questions as well as indirect interest questions about course interests were used to

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82. *Id.*
83. *Id.*
84. Sutton, *supra* note 11, at 5.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. Sutton, *supra* note 11, at 5.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*

identify any biases in self-selection for the e-learning course.[94]

VI. THE FINDINGS OF THE STUDY

A. Demographics

Demographically, the students were in their second and third years of law school, all were in the first semester of each of those years, since we have a traditional program and it was the fall semester (2015).[95] There were also four graduate engineering students in the course.[96] There was a relatively equal balance in gender with 49.7% female and 51.3% male, which reflects law school enrollment.[97] The age distribution was typical of law school and graduate school.[98] There were 38.7% in the eighteen to twenty-four age category; 58.06% in the twenty-five to thirty-four age category; and 3.23% in the forty-five to fifty-four age category.[99] Only thirty-one of the forty-two respondents completed the age question.[100] This was the first time any of the students had taken an online, asynchronous course in law school.[101] I retested the students in the course in fall 2016, and only a year later, 16.7% had previously taken an online course in law school.

B. Comparisons to a Traditional Law Course

The students were asked a series of comparative questions: "How would you rank this course in comparison to other law courses you have taken? Answer with one being the least or lowest and five being more or most. If the comparison is the same, then you would rank it, three."[102]

For most of the responses, there was a close to normal distribution, bell-curve, from one to five.[103] The following comparisons elicited responses with a normal distribution: Level of difficulty; time required to do the quizzes; time to prepare for class; your percentage of "attendance"; and your understanding of the material.[104] This indicated for these factors, most students found no significant difference between the e-learning

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94. Sutton, *supra* note 11 at 5.
95. *Id.* at 6.
96. *Id.*
97. *Id.*
98. *Id.*
99. Sutton, *supra* note 11 at 6.
100. *Id.*
101. *Id.*
102. Sutton, *supra* note 11 at 6.
103. *Id.*
104. *Id.*

course and the traditional course.[105]

There were two questions designed with a predicted distribution skewed to the low end, but the results for this comparison were surprising: "How regular was the interaction with the professor compared to other courses?"[106] Considering the students did not once meet with the professor, it was predictable that this would result in a distribution solidly on the one to two end of the distribution, but it was surprisingly distributed with almost half of the respondents ranking this response with a three to five.[107] One of the tradeoffs with an e-learning course is frequent e-contact through the E-Journal with a weekly response from the professor in addition to graded written assignments, and responses to other assignments.[108] Also, email contact was available "24/7" with a promised response within twenty-four hours.[109] At least half of the respondents found "regular interaction with the professor" to be equivalent, and this may have been one of the most surprising findings, given they were never face-to-face with the professor.[110] This suggests students consider online contact to be equivalent to face-to-face contact at least in defining "interaction."

The second question, which follows the first, "[h]ow was the quality of the interaction with your professor compared to other courses?" also yielded a surprising result, where 56% of the students ranked this question between three to five.[111] This was a surprisingly high ranking of the quality of the "interaction with your professor compared to other law courses" considering that the interaction was completely online.[112] This may also reflect a shift in student perception of interaction finding online interaction to be equivalent to face-to-face interaction.[113]

Predictably, when asked about the, "[c]onvenience compared to other law courses?" 94% ranked this question between three to five.[114] This was not surprising, since the flexibility and asynchronous aspects of the course are designed to make it as convenient as possible in ways that traditional courses cannot be.[115]

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105. *Id.*
106. *Id.*
107. Sutton, *supra* note 11 at 6.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. Sutton, *supra* note 11 at 6.
113. *Id.*
114. *Id.*
115. *Id.*

A question which was designed to reflect the exact wording of ABA Standard 306(d)(2)[116], "[h]ow well do you feel regular monitoring of student effort and communication about that effort was achieved in this course compared to other law courses?" was a measure of whether this standard was met in this course format.[117] The result was a skewed distribution to the upper end (36.7% ranking this question four; and 73% ranking this question three to five).[118] Technologically, it is possible for professors to follow the progress of students, get instantaneous feedback on quiz performance and monitor when and for how long they view the video-lectures.[119] Also, if a student did not achieve a minimal score on a quiz, they were blocked from going to the next one without contacting the professor to discuss the reasons for the low score.[120] The skewed positive distribution could be attributed to this technologically increased monitoring and contact.[121]

The question, "[h]ow satisfied were you with this course compared to other law courses", surprisingly resulted in a normal distribution, suggesting that the respondents were just as satisfied with this course as they were with any traditional law course.[122]

C. Study Behaviors with Asynchronous Law E-Learning

The next series of questions explore the comparative learning behaviors with asynchronous, e-learning in law with that of studying in traditional courses.[123] The questions were as follows: how they studied, where they studied, whether they studied alone or with others, and whether they studied with noise or with quiet, and what devices did they use to access the course as well as self-assessment of their learning styles.[124]

When asked where they studied (Figure 3)[125], the choices were: in complete silence with no one around and no interruptions; in a relatively quiet place with some interruptions; in a noisy place, like a coffee shop; while babysitting my children or others' children; in the library; with

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116. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. § 306(d)(2) at 19 (AM. BAR ASS'N 2019). ABA Standard 306(d) is still equivalent to the language used in this survey. *See id.*

117. Sutton, *supra* note 11 at 7.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. Sutton, *supra* note 11 at 7.

123. *Id.*

124. *Id.*

125. *Id.*

headphones, earbuds, etc.[126] The students were asked to identify where they studied based on a continuum of always, sometimes or rarely.[127] The surprising result was that 90% studied in complete silence with no one around and no interruptions, always or sometimes; and 80% responded that they studied in a relatively quiet place with some interruptions, always or sometimes.[128] The most surprising result from this set of questions was that 93% said they rarely study in a noisy place, like a coffeeshop.[129] It is notable that 13.8% sometimes do coursework *while babysitting*.[130]

This raises other possibilities: Could the use of the library for study be declining, with 56% saying they rarely do their coursework in the library?[131] Yet, 40% responded that they *sometimes* did their coursework in the library.[132]

ow would you describe your usual way of completing the weekly, work for the course?

	Always	Sometimes	Rarely	Total	W Av
complete silence with no one around and no erruptions	32.26% 10	58.06% 18	9.68% 3	31	
a relatively quiet place with some erruptions	40.63% 13	40.63% 13	18.75% 6	32	
a noisy place, like a coffeeshop	0.00% 0	6.90% 2	93.10% 27	29	
hile babysitting/monitoring my children or hers' children	3.45% 1	13.79% 4	82.76% 24	29	
the library	3.33% 1	40.00% 12	56.67% 17	30	
th headphones/earbuds, etc.	37.93% 11	48.28% 14	13.79% 4	29	

In designing the course, the recommended process for completing the week's work, for each of the nine, weekly video-lectures is as follows: first, read the assignment; second, watch the video-lecture; and third, take the quiz.[133] Repeat for all nine video-lectures.[134] This order was merely recommended, and there was no technological way to force this order,

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126. *Id.*

127. Sutton, *supra* note 11, at 7.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. Sutton, *supra* note 11, at 7.

133. *Id.* at 8.

134. *Id.*

given the limitations of the Blackboard® platform.[135] So after receiving some indications from the data reflecting their online activity, that students were watching the video-lectures while at the same time, answering the quiz questions, a question was formulated, with some surprising results.[136] Self-reporting, 70% of students said that they "watched the video lecture while taking the quiz."[137] While this is was not exactly the design plan for the course, it did result in active watching and listening to the video-lectures.[138] Here is the resulting table in Figure 4.[139]

Q8: Now I want to ask you about the quizzes and how you approached these assessments. Pick the response that is closest to how you completed the quizzes. None of these answers are wrong or contrary to any required instructions for completing the work.

Answer Choices	Responses	
I watched the video-lecture and then took the quiz without returning to the video.	26.67%	8
I watched the video-lecture while taking the quiz.	70.00%	21
I watched the video-lectures and took the quizzes more than an hour after watching the video-lectures.	3.33%	1
I read the material and took the quizzes, before watching the video-lectures.	0.00%	0
Total		30

Whether they studied alone or with others was also a study behavior explored in this survey.[140] When asked if they had ever worked together with another person in this course, 43% said never; 43% said once and 13% said twice, while no one said more than twice.[141] The question included the caveat that none of these answers were wrong or contrary to any course instructions.[142]

There is also folk psychology that suggests students do their work on their phone or tablet, which this survey sought to prove or disprove.[143] The question asked what device they used.[144] The result showed that 93.7% used a laptop to complete their coursework in this course. Only 3% used

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135. *Id.*
136. *Id.*
137. Sutton, *supra* note 11, at 8.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. Sutton, *supra* note 11, at 8.
143. *Id.*
144. *Id.*

a smartpad, and 3% used "other".[145] This may be due to the fact that Black-board® did not yet have quizzes available to be taken on a smartphone. There were some anecdotal remarks that some students "mirrored" their device on a larger television screen to watch the video-lectures.[146] Indirect data was also collected from the use of YouTube viewing with regard to the device used to watch the video-lectures collected from YouTube and was consistent with this self-report.[147]

Further study behavior data was collected from indirect measurements from group video-lecture watching.[148] The average time for watching a video-lecture for courses in all disciplines is six minutes.[149] The average time for watching video-lectures in this course was nine minutes.[150] Indications from this data show that only one student (not specifically identified) turned on closed-captioning most of the time.[151]

Another notable observation with the video-lecture watching was a spike in watching, creating a peak time for watching pattern.[152] Each week, the course material changed at 11:59 p.m., each Sunday, at midnight, and all the previous week's material closing and the next week's material would become available.[153] The peak work time was always on Sunday, several hours before the deadline for the week.[154] This underscores the importance of requiring short periods of time, e.g., a week, for completion of the week's work to avoid situations where students might otherwise fall behind and try to catch up with an entire course in the last days of the semester, which is simply technically impossible to do. This constraint, designed into the course, on a week by week basis, ensures that a student is never more than seven days behind the rest of the class, at most.[155] The video-lecture viewing minutes timeline screenshot, shown in Figure 5,[156] demonstrates the consistent peaks of activity each Sunday before the deadline for the first four weeks of the semester, which continued in the same pattern throughout the course.[157]

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145. *Id.*
146. *Id.*
147. Sutton, *supra* note 11, at 8.
148. *Id.* at 9.
149. *Id.*
150. *Id.*
151. *Id.*
152. Sutton, *supra* note 11, at 9.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. Sutton, *supra* note 11, at 9.
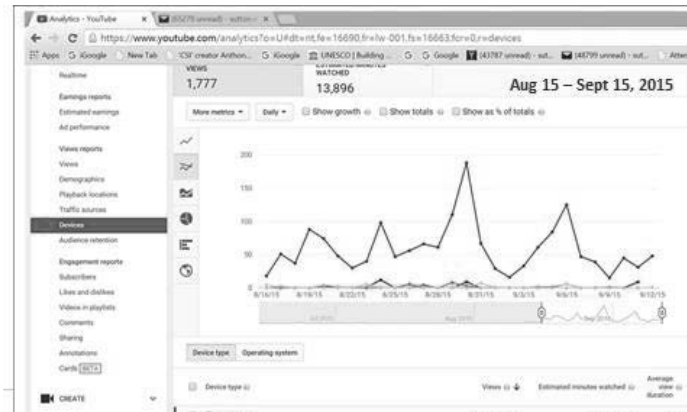
Figure 5

Finally, a combination of indirect data and self-reported data was used to examine whether there was an expected correlation between minutes watching the video-lectures with scores on the quizzes.[158] The prediction was that the number of minutes watched will correlate posi- tively with the quiz score.[159] The indirect data showed only whether the video had been opened (not the number of minutes watched), but correlat- ing that data with the average quiz score data through "eye-balling" the graphic (not a statistically significant correlation) below shows there is a correlation with at least opening the video and the score on the quiz.[160] Without better data on number of minutes watched, this is only an indi- cation that this hypothesis warrants further testing.
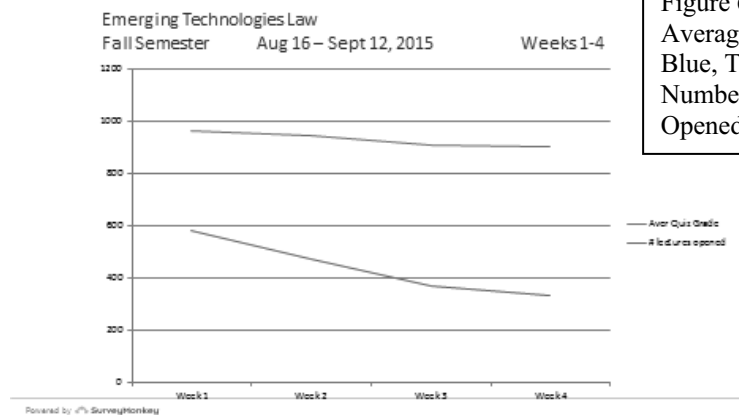
Figure 6
Average Quiz Score-
Blue, Top Line
Number of Lectures
Opened- Red, Bottom

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158. *See* fig.6. *Id.* at 10.
159. *Id.*
160. *Id.*

Finally, in another self-report question, when asked to describe whether they had learning styles that were auditory, visual or kinesthetic, the results were that 56.25% said they were visual learners; 21.88% said they were auditory learners and 21.88% said they were kinesthetic learners.[161] This might encourage the use of resources for all of these learning styles, which can all be done with an e-learning, asynchronous format.

D. Evaluating Assessment Methods

As previously stated, one of the goals of this course was to use many assessment methods in order to evaluate as many as possible for e-learning.[162] The use of several forms of assessments is also required to meet the ABA Standard 314 for using formative assessment methods, as well as summative assessment methods.[163]

In this series of questions, students were asked which assessment methods they found the most useful in this course.[164] They were asked to rank their usefulness on a continuum, with five different values: useless (1), had some use (2), acceptably useful (3), very useful (4), extremely useful (5).[165] Predictably, there was a normal distribution around most of the assessment methods, and each discussion board, each project was specifically named in the survey.[166] Figure 7 shows how similarly they rated the assessment methods, but there were some notable differences.[167]

Interestingly, the 115 quizzes throughout the course, received a weighted average of 3.00, a higher score than I had predicted.[168] The E-Journal was the lowest weighted average of 2.00, which I had not predicted.[169] I later learned that feedback for the E-Journal was hidden in a way that made it difficult for students to see it, and thus many students did not receive feedback. This may have attributed to the lower score for the E-Journal. The video-project scored the highest weighted average at 3.16.[170]

The video-project was an interactive tool for developing an idea

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161. *Id.*

162. Sutton, *supra* note 11, at 10.

163. Standards and Rules of Procedure for Approval of Law Schs. § 314 at 23 (Am. Bar Ass'n 2019).

164. *See* fig,7. Sutton, *supra* note 11, at 10.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. Sutton, *supra* note 11, at 10–11.

170. Sutton, *supra* note 11, at 11.

throughout the semester and then making a six-minute video of the student explaining legal issues around the student's self-selected (but approved) topic.[171] The assignment was to select an emerging technology in the first weeks of the course and apply areas of law covered in the course throughout the semester, culminating in a video analysis.[172] This is comparable to the traditional oral presentation or legal topic in-class presentation. The other part of the project is that once the videos are all posted, every student watches and comments on the video presentation of each student in the class. [173] The watching time for forty-two student-videos was equivalent to about one week of class time. Although only by a small amount, the video-project was ranked as the most valuable assessment tool by the students.[174]

Overall, as demonstrated in Figure 7, the differences between the[75]
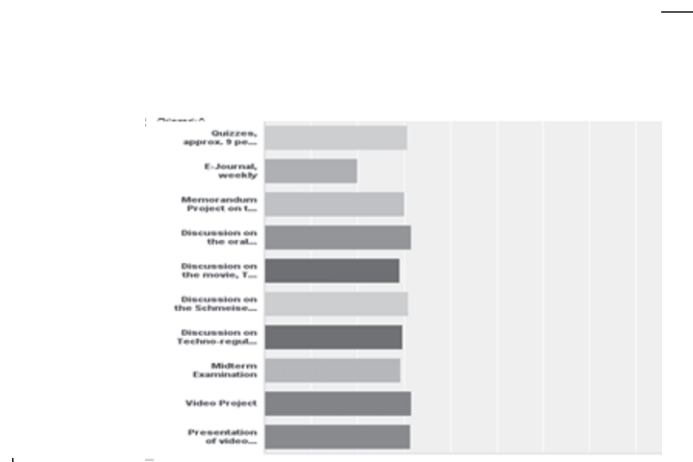
Figure 7

E. Anecdotal Observations

One opportunity for purely anecdotal observation was where students sought technical support from the research librarian faculty.[176] In my discussions with the research librarian faculty who assisted these students, they reported that a recurring comment was that their perception was that an online course would be easier than a traditional course, but the

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171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. Sutton, *supra* note 11, at 11.
176. *Id.*

work was as much or more than a traditional course.[177] The survey elicited a normal distribution for the "Level of Difficulty" question compared to other law courses.[178] One possible explanation might be that the anecdotal responses indicate the students needing technical support may have found it more difficult simply because of the technology.

F. Biases

Demographically, the near equal gender distribution should avoid any gender bias.[179] By self-selection of this course, Emerging Technologies Law, it is possible that only the students with an interest in technology or skilled in the use of online technologies, might have biased the positive responses to the course.[180] To answer that question, the survey included a question that was designed to determine if the students were interested in primarily technology type courses or was there a mix of students who were not particularly interested in technology law courses.[181] The question that was asked was whether the respondent had an interest in any of the other technology-related courses, without identifying the instructor, whether it was online or traditional, time it was taught, or any other information that would alter their response to anything other than the subject matter indicated by the course title.[182] They were asked, "[a]re you interested in taking any of these emerging technology courses, as traditional or e-learning courses? Check all that apply."[183] The choices were: Law and Biotechnology; Nanotechnology Law and Policy; Cybersecurity Law and Policy; Space Law; Intellectual Property Law; Patent Law; and Global Biosecurity Law.[184] The highest response was 57% on any one course, and all courses fell between 33–57% responding that they would be interested.[185]

This suggests that not more than half of the class was generally interested in technology and law courses; in fact, it probably represents a normal distribution, and so technology-savvy or technology-interested students were not over-represented, so no bias is indicated for this factor.

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177. *Id.*
178. *Id.* at 11–12.
179. *Id.* at 12.
180. Sutton, *supra* note 11, at 12.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. Sutton, *supra* note 11, at 12.

CONCLUSION

The need for data in this area of teaching law in an asynchronous, e-learning format is great, given the interest in all disciplines and among all universities to make more teaching content available online. Despite the overwhelming majority of law schools still cautiously watching, but with a trend toward increasing online learning, more data could accelerate the development of this activity for law schools, if there was empirical data regarding the efficacy of the methods in comparison to traditional law courses.[186] I wrote in 2016, that I hoped that this study can be the start of opening inquiry in this field and exploring more questions as well as those that have been raised by this study.[187] I am pleased to report that another study is forthcoming regarding online learning for law students.[188]

The findings in this study are promising for asynchronous law e-learning, and should replace folk psychology regarding some of the findings. Compliance with the ABA Standards tested here, 314 and 306 were found to have been met with this asynchronous, e-learning platform. Positive aspects of asynchronous, law e-learning, tested here showed that understanding the material, preparation time, level of difficulty; and surprisingly, contact with the professor and meaningful contact with the professor were only slightly skewed toward less than the traditional course, but close to a normal distribution for "comparable" to traditional courses.[189] Convenience, compared to traditional courses was strongly indicated as "more so" by 94% in the comparison to traditional courses.[190]

Methods of working on coursework yielded some surprising results that crack the myth that students are working on smartpads and smartphones, finding that 90% of the students used their laptop for coursework.[191] Further, perhaps surprisingly, 90% of students "almost always" and "sometimes" study in quiet places with no interruptions, as opposed to noisy places like coffee shops where a smaller percentage of the students responded that they rarely used these places to do coursework.[192] The majority of students "rarely" used the library, perhaps indicating a need to reconfigure libraries for private e-learning spaces.[193]

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186. *Id.*

187. *Id.*

188. Yvonne M. Dutton, Margaret Ryznar & Kayleigh Long, *Assessing Online Learning in Law Schools:*
Students Say Online Classes Deliver, DENVER L. REV. (forthcoming 2019).

189. Sutton, *supra* note 10, at 12–13.

190. *Id.* at 13.

191. *Id.*

192. *Id.*

193. *Id.*

In terms of the value students placed on various assessment methods in the course, the students most enjoyed the interactive assessment methods, like the video project which they created and then watched and then commented on other student videos, online.[194] The discussion board topics were also favored with a slightly higher ranking.[195]

With regard to learning styles, they self-identified approximately two to one, as visual learners; whereas the remainder were equally split as self-identified auditory or kinesthetic learners.[196] This is useful in planning a combination of assessment methods throughout the course.

A. Hybrid Courses Compared to Asynchronous Courses

There is a great interest in hybrid courses, and one of the questions I received about this research when it was first made available was from a law school interested in hybrid courses and how they compare to asynchronous courses. Based on this question, I used the small sample of students who had taken both an asynchronous course followed by a hybrid course. The three students took the same asynchronous course and the same hybrid course. These questions were asked in the Spring 2016 semester, and because of the small sample size, are purely anecdotal but contain some interesting insights that are useful.

Demographically, three students identified as male and one student identified as female. Three out of four of the students preferred the hybrid course format. Those that liked the hybrid form more cited more collaboration, accountability, contact with the professor, and discussion time as the reasons for their preference.

They were asked questions comparing the workload and the experience. Here are a few of the comments:

> I like cyber security because you see the professor and you are held accountable.

> If you do not know the material, people will know.

> Much more student collaboration and application of material.

> There was more interaction with the professor in Cybersecurity Law [hybrid], since we were able to meet with her weekly. . . . Online students often expect the professor to be available much more often via email and to provide quick feedback/answers, as they lack the face-to-face classes and interaction.

> This was my favorite thing about cybersecurity [hybrid course]. We got

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194. Sutton, *supra* note 10, at 13.
195. *Id.*
196. *Id.*

to listen to the lectures and get a full understanding of the law at a time that fit within our schedule. Then we got to go to class and apply that law and hear other people's view on how they would apply the law. For me, the hybrid e-learning classes are basically the best of both worlds. I got the flexibility of the asynchronous course without sacrificing the discussion and interaction that you get with a face-to-face course.

The hybrid e-learning course, may offer the best of all worlds, and the combination of online lectures with face-to-face discussions may indicate this is the optimum way to use e-learning in law schools. The recent approval of the hybrid J.D. degree in a growing number of law schools could offer that combination that is the best of both worlds. More study is needed for the hybrid courses and the hybrid J.D. degree.

B. Recommendations

For future asynchronous, law e-learning courses, which are planned, this research yields the first empirical insights that might be used in the design of these courses for optimum benefit to the student, as well as satisfaction with meeting the learning objectives and compliance with ABA Standards.

For assessment tools, incorporating more interactive assessment tools like the video-project which scored highest as a valuable assessment tool is another recommendation for course design. Finding new and creative ways to add more interactive elements to the course design, is another possible indication.

The hybrid e-course is also emerging as a favored form of teaching law, and data collected in this study of asynchronous course design and teaching can also be equally useful in the design of the hybrid course.

Finally, the course used in this study was designed to be tested as an asynchronous, law e-learning course with no face-to-face contact with the students, only online contact, asynchronously. But for communication, the use of synchronous meetings online, could provide an opportunity for resolution of any questions, while making the rest of the course asynchronous. While this 100% asynchronous law, e-learning course, proved to be comparable to a traditional course, overall; for future courses that are predominately asynchronous, it might make for a better transition for faculty and students into the world of asynchrony, to use synchronous online meetings, perhaps monthly or bi-weekly, to ensure broader opportunities to include synchronous communication with students. But as more students become accustomed to online learning, the face-to-face meeting or synchronous meeting may become unnecessary.

FROM THEORY TO PRACTICE: EVIDENCE-BASED STRATEGIES FOR DESIGNING AND DEVELOPING ENGAGING ONLINE COURSES

Noelle Wall Sweany, Ph.D.†

CONTENTS

Think back for a minute on your time as an undergraduate or even a law student. Some of you may remember rushing to your nine o'clock seminar in a classroom or lecture hall with a whiteboard or maybe even a projector. Or hustling to meet your professor in her office hours for fear of missing out on a chance to review a difficult assignment. Do you remember hoarding quarters or filling up a copier card to make personal copies of a sought-after journal article that you found in the card catalog? How about circling the parking lot trying to find a spot for your afternoon class?

I can certainly relate. I was finishing my undergraduate degree in computer science when I got my first email address; and while I was working on my graduate degree in educational psychology, my classes began to take advantage of something called the World Wide Web. But even as I was studying about the effective uses of technology in education, it was difficult to imagine it happening outside of the classroom with

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ten or more other graduate students. Certainly, I could not have understood what it truly meant to work with a public school teacher in the Rio Grande Valley, a member of the Coast Guard who was deployed to a remote part of the globe, or an educator who continued her studies while living through Hurricane Maria in Puerto Rico. But twenty years later, that is an exact sample of the students I teach from my office in Texas.

The fact that online learning in higher education is exploding at a rapid pace isn't a surprise. Recent numbers indicate that more than 30% of students (6,359,121 students nationwide) are enrolled in at least one distance course, an increase of 5% over the previous year, and nearly 15% of students take courses exclusively at a distance.[1] Colleges and universities are offering more online courses to meet the needs of their students as well as increase reach and revenue opportunities.[2] It's been long touted that technology has the potential to transform education just as it has revolutionized every aspect of our professional and personal lives.[3] The way we collaborate on projects, conduct research, pay our taxes, get a ride, or order lunch has been changed forever by online technologies.

But the same revolution has yet to happen in education.[4] Too many of our online instructional practices hearken back to the day when I was hoarding quarters for the copier machine (for example, long pre-recorded lectures and multiple-choice quizzes).[5] As a result, students in online courses often feel isolated and lack the built-in community of traditional, face-to-face courses.[6] This can impact student satisfaction, learning outcomes and completion rates.[7] Such disengagement poses a great chal-

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1. JULIA E. SEAMAN, I. ELAINE ALLEN & JEFF SEAMAN, GRADE INCREASE: TRACKING DISTANCE EDUCATION IN THE UNITED STATES 11–12 †2018).

2. *See* Mark G. Angolia & Leslie R. Pagliari, *Factors for Successful Evolution and Sustainability of Quality Distance Education*, 19 ONLINE J. DISTANCE LEARNING ADMIN. (2016).

3. *See id.*

4. *See* GEORGE SIEMENS, DRAGAN GASEVIC & SHANE DAWSON., PREPARING FOR THE DIGITAL UNIVERSITY: A REVIEW OF THE HISTORY AND CURRENT STATE OF DISTANCE, BLENDED, AND ONLINE LEARNING 12 (2015); *see also* Francoise Blin & Morag Munro, *Why Hasn't Technology Disrupted Academics' Teaching Practices? Understanding Resistance to Change Through The Lens of Activity Theory*, 50 COMPUTERS & EDUC. 475, 476 (2018).

5. *See* SIEMENS, GASEVIC & DAWSON, *supra* note 4, at 15–16.

6. *See* Jenna Gillet-Swan, *The Challenges of Online Learning Supporting and Engaging the Isolated Learner*, 10 J. LEARNING DESIGN 20, 21–22 (2017).

7. *See id.* at 22; Andrew William Cole & Kristine M. Nicolini, *Student Predisposition to Instructor Feedback and Perceptions of Teaching Presence Predict Motivation Toward Online Courses*, 21 ONLINE LEARNING J. 245, 255 (2017); Jennifer C. Richardson & Karen Swan, *Examining Social Presence in Online Courses in Relation to Students' Perceived Learning and Satisfaction*, 7 J. ASYNCHRONOUS LEARNING NETWORKS 68, 68–69 (2003); Tracy Russo & Spencer Benson, *Learning with Invisible Others: Perceptions of Online Presence and their Relationship to Cognitive and Affective Learning*, 8 EDUC. TECH. & SOC'Y 54,

lenge for online educators. As instructors, how can we help students succeed in the online environment? The way we approach the design of instruction as well as the facilitation of the course can have a huge impact on students' satisfaction and performance.[8] The key is applying what we have learned from decades of research that was refined in traditional classroom instruction and implementing the techniques in a way that acknowledges the constraints and capitalizes on the features of the online environment.

I. THEORETICAL APPROACHES TO LEARNING

So what have educational psychology researchers determined about how people learn? What do we know about this complex process? Understanding the foundations of how learning processes take place helps us determine and select the most effective instructional strategies.[9] Let's start with a quick overview of the major theoretical approaches to learning:

A. Behaviorism

Behaviorism views learning as "changes in either the form or frequency of observable performance."[10] The focus is on the stimulus-response connection.[11] Present a particular stimulus and the appropriate response should be demonstrated.[12] A classic example is the use of flashcards to learn math equations.[13] If a child has *learned* the appropriate information, when she is shown "2 + 4 =" her immediate response should be "6."[14] Our goal as educators is to strengthen the stimulus-response connection using appropriate reinforcement.[15] Instructional strategies based on the behaviorist approach include using pre-assessments to determine students' current skill level, lectures, drill-and-practice activities, and immediate feedback.[16] Behaviorism views the learner as more of a passive recipient of information, as opposed to an active participant in the

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54 (2005).

8. Russo & Benson, *supra* note 7, at 55, 58–59.

9. Peggy A. Ertmer & Timothy J. Newby, *Behaviorism, Cognitivism, Constructivism: Comparing Critical Features from an Instructional Design Perspective*, 6 PERFORMANCE IMPROVEMENT Q. 50, 50–51 (1993).

10. *Id.* at 55.

11. *Id.*

12. *Id.*

13. *Id.*

14. Ertmer & Newby, *supra* note 9, at 55.

15. *See id.*

16. *See id.* at 56.

process.[17] The behaviorist approach to learning is most useful for teaching basic, foundational concepts.[18]

B. Cognitivism

In contrast, the cognitive approach to learning emphasizes the internal processes that take place, in addition to the observable output.[19] The focus is on "problem solving" and "information-processing."[20] Learners are viewed as active participants in the process and the prior knowledge they bring to a situation, their experiences, and what they do with the new information will affect how they learn the new information.[21] So one of the overarching goals of cognitive theory is to *link* new information to the learner's prior knowledge.[22] Cognitivism asserts that our short-term or working memory is limited and we need to move the information to long-term memory.[23] Knowledge structures stored in long-term memory are organized through meaningful connections.[24] Stronger connections exist among more closely related pieces of information.[25] The more connections you have, the more pathways you have to retrieve that information.[26] Our goal as educators is to help students move the information into long-term memory and to strengthen the connections among information.[27] Students should be encouraged to use appropriate learning strategies, such as organizing the information, and evaluating information in order to develop knowledge.[28]

In contrast to behaviorism, students' beliefs, attitudes, and values also play a significant role in the learning process.[29] Instructional strategies should help the learners structure and assimilate the new information by using techniques such as advance organizers, connecting the new information to students' prior knowledge, providing real-world examples, giving explanatory feedback, assisting students in self-monitoring of their

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17. See *id.* at 55.
18. See *id.* at 56.
19. *See* Ertmer & Newby, *supra* note 9, at 58.
20. *Id.* at 59.
21. *See id.* at 58.
22. *See id.* at 60–61.
23. *See* Nelson Cowan, *Working Memory Underpins Cognitive Development, Learning, and Education*, 26 EDUC. PSYCHOL. REV. 197, 197 (2014).
24. *See id.* at 212.
25. *See* Ertmer & Newby, *supra* note 9, at 60.
26. *See id.* at 60–61.
27. *See id.* at 60.
28. *See id.* at 59.
29. *See id.*

learning process, etc.[30]

C. Constructivism

The constructivist approach to learning proposes that individuals create their own knowledge through experience.[31] The context of where the learning takes place is key, so the goal is to strive for authentic settings and real-world contexts.[32] The emphasis is not on information retrieval, but rather on constructing a "novel" solution to a problem by assembling various pieces of information.[33] Instructional strategies that grew out of this approach include modeling, coaching, collaborative learning, questioning strategies, problem-based learning, guided discovery, reflective exercises, apprenticeships, internships, etc.[34]

You will notice that the various approaches to learning—behaviorism, cognitivism, and constructivism—shift the role of the learner from passive to active and shift the role of the instructor from more of a lecturer to a facilitator.[35] It is important to note, however, that one perspective is not necessarily "better" than another. Rather, each of these theories can be effective and appropriate depending on your instructional objectives.[36] Behavioral strategies are useful for foundational concepts, while cognitive and constructivist approaches are helpful to teach more advanced concepts.[37]

II. DESIGNING FOR ONLINE LEARNING

These same principles of learning hold true in online environments as well, though the specific instructional techniques typically must be adjusted and refined.[38] The key is determining what your instructional objectives are (i.e., what do you want your students to be able to do after participating in the instruction?) and choosing appropriate instructional

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30. *See generally* Ertmer & Newby, *supra* note 9; *see also* SCOTT MCQUIGGAN ET AL., MOBILE LEARNING: A HANDBOOK FOR DEVELOPERS, EDUCATORS, AND LEARNERS (2015).

31. *Bednar, A. Cunningham, D., Duffy, T., & Perry, J.*, Theory into practice: How do we link?, *in* INSTRUCTIONAL TECHNOLOGY: PAST, PRESENT, AND FUTURE (G.J Anglin, ed., 1st ed. 1991).

32. *See id.* at 68.

33. *See* Ertmer & Newby, *supra* note 9, at 65.

34. *See id.*

35. *See id.* at 66.

36. *Id.*

37. *Id.*

38. *See* Janet R. Buelow, Thomas Barry & Leigh E. Rich, *Supporting Learning Engagement with Online Students*, 22 ONLINE LEARNING J. 313, 330–31 (2018).

strategies targeting each of the objectives.[39] For example, quizzing students over historical facts (a behaviorist approach) is fairly simple to implement online while providing a well-designed collaborative group activity (a constructivist approach) may take a bit more time. The goal is to design efficient and engaging courses without losing creativity and hands-on learning within the classroom . . . even the online classroom.

A. Building Community Online

Building community is especially important in the online environment. When I meet with faculty members who have never taught online, one of their main concerns is not feeling "connected" to their students.[40] Students also seek "connection" in online learning environments—connection with other students, the instructor, and the content.[41] As an instructor, creating activities that encourage the learner to interact with peers can stimulate active learning and help build community among students.[42] I am fortunate to teach at a university that is well-known for its sense of community and tradition. When we developed our fully online graduate program, one of our goals was to replicate this sense of community online. Most of our students travel to campus and meet each other face-to-face for the first time at graduation. Seeing their excitement as they greet the faculty and each other with hugs is a testament to the ability to connect with your students online.

The Community of Inquiry ("CoI") framework is a popular model for examining online learning and is useful for selecting and implementing strategies specifically designed to promote community in online environments.[43] The framework assumes that learning takes places through the interaction of three core elements within the online community—social presence, teaching presence, and cognitive presence.[44]

The theory of social presence can be traced back to Short, Williams, and Christie who defined the term as "the degree of salience of the other person in the interaction and the consequent salience of the interpersonal

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39. MARGARET D. ROBYLYER, INTRODUCTION TO SYSTEMATIC INSTRUCTIONAL DESIGN FOR TRADITIONAL, ONLINE, AND BLENDED ENVIRONMENTS (Pearson ed., 2014).

40. *See* Buelow, Barry & Rich, *supra* note 38, at 315.

41. *See id.*

42. *See id.* at 327.

43. *See* D. Randy Garrison, Terry Anderson & Walter Archer, *Critical Inquiry in a Text-Based Environment: Computer Conferencing in Higher Education*, 2 INTERNET & HIGHER EDUC. 87, 88 (2000) [hereinafter Garrison, Anderson & Archer, *Critical Inquiry*]; *see also* D. Randy Garrison, Terry Anderson & Walter Archer, *The First Decade of the Community of Inquiry Framework: A Retrospective*, 13 INTERNET & HIGHER EDUC. 5, 6 (2010) [hereinafter Garrison, Anderson & Archer*, The First Decade*].

44. *See* Garrison, Anderson & Archer, *Critical Inquiry*, *supra* note 43.

relationships."[45] Garrison, Anderson, and Archer defined it as the students' ability to "project their personal characteristics into the community, thereby presenting themselves to the other participants as 'real people.'"[46] In other words, social presence is the "feeling [of being] emotionally connected to another intellectual entity through computer-mediated communication."[47]

1. Example Strategies for Enhancing Social Presence:

Beginning of course:
- Creating icebreaker activity that encourages students to get to know a bit about each other
- Responding to all introductions and finding common connections
- Addressing students by name

During course:
- Using collaboration tools in peer-to-peer learning groups
- Giving timely and personal feedback
- Using screen casting software to provide personalized audio and video feedback
- Using media tools to enhance online discussions

End of Course:
- Providing opportunity for students to say goodbye, provide reflections, and discuss future plans

The second element in the framework—teaching presence—includes the design of the learning activities and assessments as well as the facilitation of the course.[48] Teaching presence "support[s] and enhance[s] social and cognitive presence for the purpose of realizing educational outcomes."[49] Characteristics of teaching presence include clearly communicating course expectations and effectively guiding and facilitating student discussions.[50]

2. Example Strategies for Enhancing Teaching Presence:

Beginning of course:

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45. JOHN SHORT, EDERYN WILLIAMS & BRUCE CHRISTIE, THE SOCIAL PSYCHOLOGY OF TELECOMMUNICATIONS 65 (1976).

46. Garrison, Anderson & Archer, *Critical Inquiry*, *supra* note 43, at 89.

47. Eunmo Sung & Richard E. Mayer, *Five Facets of Social Presence in Online Distance Education*, 28 COMPUTERS HUM. BEHAV. 1738, 1738–39 (2012).

48. *See* Garrison, Anderson & Archer, *Critical Inquiry*, *supra* note 43, at 90.

49. *Id.*

50. *See id.* at 89.

- Sending welcome email to students outlining course start date, required materials, and how to access online course
- Giving overview video(s) of Learning Management System (LMS) interface, syllabus, and course expectations
- Giving ample time for introductions and learning course navigation

During course:

- Designing weekly activities that require interaction
- Providing a variety of activities week-to-week
- Providing weekly wrap-up of activities and/or discussion

Finally, the third element in the framework, cognitive presence, refers to the ability to "construct meaning through sustained communication."[51] This element focuses on critical thinking and practical inquiry beyond individual learning outcomes.[52] The critical thinking perspective includes creativity, problem solving, and reflection.[53]

3. Example Strategies for Enhancing Cognitive Presence:

- Offering opportunities for debate, defending arguments, providing support for ideas
- Developing meaningful assessments
- Providing a variety of sources and activities
- Modeling consideration for alternative viewpoints
- Modeling critical thinking & reflection

You will notice that each of the recommended strategies for enhancing social presence, teaching presence, and cognitive presence falls on the continuum ranging from a behaviorist approach to a constructivist approach.[54] Each of the elements overlap and interact to support the online educational experience. Keeping social presence, teaching presence, and cognitive presence in mind as you design an online course should improve learning outcomes as well as student satisfaction.[55]

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51. *Id.*

52. *See id.*

53. *See* D. Randy Garrison, Terry Anderson & Walter Archer, *Critical Thinking, Cognitive Presence, and Computer Conferencing in Distance Education*, 15 AM. J. DISTANCE EDUC. 7, 8 (2001).

54. *See generally* Ertmer & Newby, *supra* note 9, at 55–63 (explaining the various approaches and discussing their differences).

55. *See* Richardson & Swan, *supra* note 7, at 73; Garrison, Anderson & Archer, *Critical Inquiry*, *supra* note 44.

III. Designing for Active Learning

While we have discussed general strategies related to structuring a course and communicating within the course, what specific techniques can we use to support active learning in online environments? Designing an online course to require interactive engagement from all students supports all three elements of the CoI model.[56] When a faculty member is first asked to move a course online, often times his initial thought is to record his lectures and post the videos and slide presentations online. This rather passive approach to the learning process tends to lead to the cited drawbacks of online learning, including feelings of isolation, boredom, and high dropout rates.[57] Active learning strategies require the learner to *do* something beyond reading, writing, and answering.[58] We want students to think creatively—generate new ideas, combine existing concepts in a new way, create something new, etc.[59] These outcomes can be accomplished at the individual or group level.[60]

How might you accomplish this in a traditional face-to-face classroom? You might use problem-based activities, case studies, debates, or have the students create a project.[61] With appropriate attention to design, you can accomplish the same goals in an online course. It often helps to simply break the full class into smaller groups for more individual participation.[62] Instructors can use the Groups function in the LMS or assign groups or partners directly in the main discussion forum. Assigning specific roles to students is useful for debates or case study activities. For example, you might assign one member the role of asking questions or another member to play the "devil's advocate" in the discussion. You may also choose to include peer-reviewed activities. When assigning students to review the work of other students, it is helpful to provide feedback guidelines (or what elements you as the instructor would be looking

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56. *See* Tracy Russo & Spencer Benson, *Learning with Invisible Others: Perceptions of Online Presence and their Relationship to Cognitive and Affective Learning*, 8 Educ. Tech. & Soc'y 54, 59 (2005).

57. *See* Michele T. Cole, Daniel J. Shelley & Louis B. Swartz, *Online Instruction, E-Learning, and Student Satisfaction: A Three Year Study*, 15 Int'l Rev. Res. Open & Distance Learning 111, 123–24 (2014); Richardson & Swan, *supra* note 7, at 69; Russo & Benson, *supra* note 57, at 54.

58. *See* Buelow, Barry & Rich, *supra* note 38, at 322–23.

59. *See id.*

60. *See generally* R. Keith Sawyer, Explaining Creativity: The Science of Human Innovation (2d ed. 2012) (discussing cognitive neuroscience studies through, among other means, a psychological approach).

61. *See* Ertmer & Newby, *supra* note 9, at 60.

62. *See* Jenna Gillett-Swan, *The Challenges of Online Learning: Supporting and Engaging the Isolated Learner,* 10 J. Learning Design 20, 23 (2017).

for if you assessed the assignment).[63]

To create more engagement, discussion activities should go beyond eliciting opinions.[64] The activities should connect to real-world experiences and require the learners to apply the information.[65] For example, in an Emerging Technologies course that I teach, the students read case studies describing the implementation of technology solutions in various contexts. The students are asked to connect one of the "Lessons Learned" with their own experiences. When we discuss the rise of micro-credentialing in higher education, the students are assigned to take one of the lessons from their own work and "gamify" it using a badging approach. Redesigning discussion activities in this way requires no additional technology or setup time but usually results in a higher degree of learner engagement.

Students also tend to be more engaged when they have some choice in the assignment or the product produced.[66] This technique can range from the very simple—providing several discussion prompts and allowing the student to pick one—to more complex, such as allowing the students to choose the type of deliverable that will be produced.[67] In addition to traditional papers, I have had students submit assignments as videos, interviews, infographics, slide presentations—even an original recorded song! When it is appropriate to allow this level of freedom, it taps into the students' creativity and their own skillset—not to mention allows them to explore the technology at their fingertips. There are a variety of free, easy-to-use technology tools that both instructors and students can use to add interactivity—integrating one or more can add variety to text-heavy discussions and enhance social, teaching, and cognitive presence.[68]

Online productivity tools, such as G Suite (formerly Google Apps), support group collaboration.[69] Tools such as VoiceThread are useful for having debates or discussions around particular pieces of media.[70] This particular tool allows students to record and leave video and audio com-

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63. *See* Peggy A. Ertmer et al., *Using Peer Feedback to Enhance the Quality of Student Online Postings: An Exploratory Study*, 12 J. COMPUTER-MEDIATED COMM. 412, 429 (2007).

64. *See* Buelow, Barry & Rich, *supra* note 38, at 329.

65. *See* Sung & Mayer, *supra* note 47, at 1746.

66. *See* Buelow, Barry & Rich, *supra* note 38, at 327.

67. *See id.* at 327–28.

68. *See* Appendix.

69. *See* G-Suite, *Features*, GOOGLE (last visited Aug. 24, 2019), https://gsuite.google.com/features/.

70. *See Features*, VOICETHREAD (last visited Aug. 24, 2019), https://voicethread.com/about/features/.

ments so it gives a bit more personalization beyond the text-based discussions.[71] Easy-to-use tools such as Padlet and Popplet are concept mapping apps that allow students to organize information and brainstorm new ideas, individually and collaboratively.[72] Social bookmarking tools such as Diigo and Evernote allow students to curate, annotate, and combine web-based resources for a particular purpose.[73] Tools like Adobe Spark and Canva are easy-to-use graphic design tools that allow students to create professionally designed videos, web pages, and infographics.[74] Flipgrid allows students to post video reflections and peer comments using their mobile devices.[75] Each of these student-created products can be shared and discussed within the LMS discussion forums.

These technology tools can be used in a variety of ways to support active learning. For example, instructors might use the technology to:

- Provide introduction/summary of material
- Implement formative/summative assessments

Or you might ask students to create a product to:

- Demonstrate understanding of content
- Illustrate how concepts apply to professional work
- Teach others about a topic
- Reflect on the content[76]

Within an individual course, an instructor has multiple opportunities to integrate active learning strategies for the benefit of the class. To increase teaching effectiveness and student responsiveness, a variety of instructional technology tools and techniques can be implemented to achieve the desired outcome.

CONCLUSION

Given the explosive growth of online learning over the last two decades, it is tempting to wonder what the next decade will bring as countless

71. *See id.*

72. *See Features*, PADLET (last visited Aug. 24, 2019), https://padlet.com/features; POPPLET, http://popplet.com/ (last visited Aug. 24, 2019).

73. *See About*, DIIGO (last visited Aug. 24, 2019), https://www.diigo.com/about; *Web Clipper Features*, EVERNOTE (last visited Sept. 3, 2019), https://evernote.com/features/webclipper.

74. *See Features*, ADOBE SPARK (last visited Aug. 24, 2019), https://spark.adobe.com/features; *see also Features*, CANVA (last visited Aug. 24, 2019), https://www.canva.com/features/.

75. *See* FLIPGRID, https://info.flipgrid.com/ (last visited Aug. 24, 2019).

76. *See* Patrick R. Lowenthal & Joanna C. Dunlap, *From Pixel on a Screen to Real Person in Your Students' Lives: Establishing Social Presence Using Digital Storytelling*, 13 INTERNET & HIGHER EDUC. 70, 70–71 (2010).

new technologies continue to be developed. One might even imagine a time when online learning will be considered the "traditional form of learning."[77] But for now we must acknowledge two interconnected truths—first, that online learning will continue to play an increasingly important role in education and the lives of our students,[78] and second, that as a result, it is our responsibility as educators to create the most effective and compelling online instruction we can for the benefit of those students. To this end, professors can rely on decades of educational psychology research to ensure that the well-established best practices for instruction transfer to the online classroom. There is no need to sacrifice standards for access or rigor for convenience. By embracing the core principles of effective instruction, and translating them to the technology of the moment, we can deliver for all of our students—and be ready for whatever new development is right around the corner.

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77. *See* Huay Lit Woo, *The Design of Online Learning Environments from the Perspective of Interaction,* 53 EDUC. TECH. 34, 35 (2013).

78. *See* SEAMAN, ALLEN & SEAMAN, *supra* note 1, at 14–17.

Free & Low-Cost Technology Tools for Enhancing Student Engagement in Online Courses

Image Editing
Canva
GIMP
TechSmith Jing
TechSmith SnagIt
Thinglink (interactive images)

Video Creation & Screencasting
TechSmith Camtasia
Adobe Spark
Microsoft Sway
Animoto
Apple iMovie
TechSmith Jing
Screencast-o-matic
edPuzzle (create interactive lessons from any video)

Brainstorming Tools
Padlet
Popplet
LucidChart
MindMeister
Coggle

Discussion Tools
Flipgrid (video discussion responses)
VoiceThread (audio or video conversations surrounding a piece of media)

Stock Images and Audio
Creative Commons
Pixabay
Unsplash
FreeSound

Animated Character Videos
Powtoon
Plotagon
Voki

Content Curation
Diigo
Evernote
Symbaloo
Pearltrees
Pinterest
Feedly

Audio Editing
Apple GarageBand
Audacity
TechSmith Camtasia

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

David I. C. Thomson[†]

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.[1] 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.[2] 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. 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,[3] 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[4] and survived?[5] 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.[6] 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.

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

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.[10] But the dystopian visions of the "Robot Lawyer" overseeing a vastly restructured legal landscape, are, in the view of this author, likely overblown.[11] 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.[12]

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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. 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.

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.

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.[13]

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.[14] 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[15]—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/.

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.[16]

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;[17]

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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 I legal education, including experiental 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;[18] and

3) the embarrassingly low levels of diversity in the upper ranks of the legal profession.[19]

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,[20] numerous conferences on these questions,[21] 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.

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 (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.

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,[22] 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.[23]

This fact seems completely at odds with the long-known non-consumption of legal services problem.[24] 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; *Increasing Diversity in the Legal Profession Conference*, BAR ASS'N OF SAN FRANCISCO (Mar. 22, 2013), http://www.sfbar.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. *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.

24. ABA COMMISS'N ON THE FUTURE OF LEGAL SERVS., *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.

in excess of $130,000 in debt.[25] 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.[26] Today, there are looming concerns that some of these loan repayment opportunities may soon be limited in the United States,[27] which may further depress applications to law schools.

As for the diversity problem, while political appointments to judgeships in the United States have become more diverse in the last two decades,[28] minority representation in medium to large law firms has persistently lagged our increasingly diverse population.[29] An instructive

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 (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,

example can be found in a recent issue of the Law Week Colorado,[30] 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.[31] 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.[32] 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.[33]

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https://www.americanbar.org/content/dam/aba/administrative/market_research/national-law-yer-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.[34] 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.[35]

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,[36] 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.[37] 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).

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.[38] The ABA Standard 306 makes it impossible for a law school that wants to receive or retain its ABA Accreditation.[39] Until August of 2018, there was a fifteen credit limitation for online instruction in all of law school,[40] and a limitation that no law student may take an online course during the *first year* of law school.[41] 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.[42] 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.[43] 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/.

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.[44] 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[45]—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.[46] 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## (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.[47]

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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, Virgina & 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; 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; *Licensed Paralegal Practitioner Program*, UTAH STATE B., https://www.utahbar.org/licensed-paralegal-practitioner/ (last visited Nov. 22, 2019).

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,[48] 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).

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.[49] 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.[50] 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.[51] 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)[52] 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,[53] 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.[54] 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.[55] 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.[56] 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

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.

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."[57] 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,[58] so it seems the trend is both confirmed to exist, and getting worse over time.[59] 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.[60]

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.[61] 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.[62] 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.[63] 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[64]—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.[65] 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[66] 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.[67] 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).

there are Educational, Examination, and Experience requirements.[68]

In Washington, an LLLT may only provide services if the client's issue lies within a prescribed practice area.[69] 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.[70]

There are currently approximately thirty-five licensed LLLTs in Washington.[71] 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.[72] This proposed area will cover topics such as special education, hearings, and unemployment compensation.[73]

There are several other states that are considering or actively moving toward adopting an LLLT model.[74] Among them are Oregon, which is considering a similar program for the same reasons: inadequate legal aid for low-income households.[75] Utah has recently approved a type of LLLT certification, after the Supreme Court of Utah supported a Licensed Paralegal Practitioners program.[76] 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.

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

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,[80] 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 (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.

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.

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