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# The Virtual Law School, 2.0

A. Michael Froomkin

Just over twenty years ago I gave a talk to the AALS called *The Virtual Law School? Or, How the Internet Will De-skill the Professoriate, and Turn Your Law School Into a Conference Center*.<sup>1</sup> I came to the subject because I had been working on internet law, learning about virtual worlds and e-commerce, and about the power of one-to-many communications, and it struck me that a lot of what I had learned applied to education in general and to legal education in particular.<sup>2</sup>

It didn't happen. Or at least, it has not happened yet. In this essay I want to revisit my predictions from twenty years ago in order to see why so little has changed (so far). The massive convulsion forced on law teaching because of the social distancing required to prevent COVID-19 transmission provided an occasion for us all to rethink how we deliver law teaching. After discussing why my predictions failed to manifest before 2020, I will argue that unless the pandemic can be controlled, the market for legal education may force some radical changes on us—whether we like them or not—and that in the main my earlier predictions were not wrong, just premature.

## I. That Was Then (Virtual Law School 1.0)

Back in 2000, I started my talk with hard truths that are no longer controversial but perhaps were not entirely fit for polite company when the legal academy remained in thrall to a go-go growth mentality: First, as we know now all too well, law teaching is a business and as such it cannot escape worries about the

**A. Michael Froomkin**, Laurie Silvers & Mitchell Rubenstein Distinguished Professor of Law, University of Miami, Fellow Yale Information Society Project, Yale University, Member Miami Center for Computational Science. Thank you to Phillip J. Arencibia for research assistance, Robin Schard for library assistance, and Josh Blackman, Caroline Bradley, Kathleen Claussen, Andrew Dawson, David Froomkin, James Grimmelmann, Peter Lederer, Lili Levi, Dennis Lynch, Jon Mills, Nell Jessup Newton, Scott Norberg, Adam Shostack, Janet Stearns, and Wendy Grossman for helpful comments. Unless otherwise noted, this article attempts to reflect legal and technical developments up to Jan. 1, 2022.

1. Association of American Law Schools, Mini-Workshop on the Impact of Technology on Law and Legal Culture, Plenary Session: The Intersection of Law and Technology, *The Virtual Law School*, Washington, D.C., Jan. 6, 2000.
2. I never wrote them up formally, but just posted what now seem like some rather cringeworthy and low-tech slides online. A. Michael Froomkin, *The Virtual Law School?* <http://osaka.law.miami.edu/~froomkin/articles/aals/sldoor.htm> (last visited 7/27/2022). The Chronicle of Higher Education did a short summary of the talk. Wendy R. Leibowitz, *Law Professors Told to Expect Competition from Virtual Learning*, CHRON. HIGHER ED. (Jan. 21, 2000), <https://www.chronicle.com/article/law-professors-told-to-expect-competition-from-virtual-learning>.

bottom line. Second, at least at a private law school—which is where I found and still find myself—law is just one of many “product lines” for a private university. Third, at least from the university’s point of view, the law school is a “profit center.”<sup>3</sup> And, fourth, as businesses go, law schools were a business with great structural problems.

Even in 2000 it was obvious that costs were rising dangerously. Law school tuition was going up every year.<sup>4</sup> Students were beginning to experience sticker shock and were graduating with ever higher levels of debt.<sup>5</sup> Indeed, for the first time law schools began to experience some customer resistance on price, and this was leading to discounting competition among law schools, primarily in the form of merit scholarships and other financial aid.<sup>6</sup> Meanwhile, student attitudes toward educational institutions were changing, leading to the rise of what became called the “consumer mentality” in place of the “student mentality.”<sup>7</sup>

3. The collapse in law school applications that started in 2011 and lasted until circa 2015 called that last assertion very much into question, a change that was traumatic for both law schools and universities. On applicant numbers see *Archive: 2000–2015 ABA End-of-Year Summaries—Applicants, Admitted Applicants & Applications*, LSAC <https://www.lsat.org/archive-2000-2015-aba-end-year-summaries-applicants-admitted-applicants-applications> (last visited June 23, 2020) (showing a decline in ABA applicants of 10.7% in 2011, 13.5% in 2012, and 12.4% in 2013); Ethan Bronner, *Law Schools’ Applications Fall as Costs Rise and Jobs Are Cut*, N.Y. TIMES (Jan. 30, 2013), <https://www.nytimes.com/2013/01/31/education/law-schools-applications-fall-as-costs-rise-and-jobs-are-cut.html> (noting that in 2013 “[l]aw school applications [were] headed for a 30-year low”).

For an argument contemporary with the enrollment crash that the decline in applications to law schools could or should encourage the growth of online alternatives enjoying economies of scale, see David R. Barnhizer, *Redesigning the American Law School*, 2010 MICH. ST. L. REV. 249, 295–302 (2010).

4. *Data from the 2013 Annual Questionnaire ABA Approved Law School Tuition History Data* (2013), <http://online.wsj.com/public/resources/documents/abatuition.pdf> (showing that average in-state public law school tuition (excluding living and other costs) rose from \$2,006 to \$7,790 between 1985 and 2000; meanwhile average non-resident public law school tuition rose from \$4,724 to \$15,683; and average private law school tuition rose from \$7,526 to \$21,790). These increases all vastly exceeded the rate of inflation, which was sixty percent in that period).
5. John A. Sebert, *The Cost and Financing of Legal Education*, 52 J. LEGAL. EDUC. 516, 521–22 (2002) (showing that “[b]etween 1990–91 and 1999–2000 there was a dramatic increase in the annual amount of borrowing by law students”).
6. *Id.* at 524 (stating that dramatic increase in law school expenditures over the 1990s was “due to competition by law schools for students”). Data on discounting from 2001 going forward can be found at Matt Leichter, *Law School Cost Data (1996–)*, LAST GEN X AMERICAN, <https://lawschooltuitionbubble.wordpress.com/original-research-updated/the-1stb-data/> (Oct. 30, 2015, 8:33 PM). Although discounting increased in the decade after 2000, it was already substantial.
7. Joanna Williams, *Constructing Consumption: What Media Representations Reveal About Today’s Students*, in *THE MARKETISATION OF HIGHER EDUCATION AND THE STUDENT AS CONSUMER* 171–72 (Mike Molesworth et al. eds., 2010) (noting that since the 1950s the “instrumental purpose of economic utility . . . has come to dominate [higher education]” and that, “[a]s a result, the aim for many students becomes obtaining the outcome, a degree, rather than a full engagement with the learning process”); Elizabeth Adamo Usman, *Nurturing the Law Student’s Soul: Why Law Schools Are Still Struggling to Teach Professionalism and How to Do Better in an Age of Consumerism*, 99 MARQ. L. REV. 1021, 1038–40 (2016) (observing that the generation born between 1981 and 1995 “has

And students from Harvard on down began to complain about the perceived hostility and unfriendliness of many law schools, leading law schools to implement changes to make the student experience more pleasant.<sup>8</sup>

Law schools were also feeling pressure on the other end, from legal employers. The publication of the *MacCrate Report* in 1992 inaugurated a new era of employer and clinician focus on skills training as opposed to traditional doctrinal courses.<sup>9</sup> Whatever its merits, one thing was clear about most skills training—it was more expensive and required a higher instructor-to-student ratio than ordinary teaching. So as students chafed at costs, the market was driving expenses upward.

Distance learning seemed to be an answer. William Sprague started the first U.S. commercial correspondence law course in 1889,<sup>10</sup> and the technology had not changed much until well past the mid-twentieth century: “The first generation of distance education was print-based correspondence study, and print continued to be the predominant delivery medium for distance education until the beginning of the 1970s.”<sup>11</sup> London University offered law degrees by distance learning starting in the late nineteenth century;<sup>12</sup> by 1985, law was its most popular “external” subject.<sup>13</sup>

By the year 2000 distance learning via tape, CD, DVD, TV and even internet was increasingly widely used in higher education. The Open University in the United Kingdom had started teaching law via videocassette in 1998.<sup>14</sup> In the

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been described as ‘born consumers’” and discussing the manifestation of this mentality in the law school setting). Today that mindset is basically a given; see, e.g., Debra Moss Vollweiler, *Law School as a Consumer Product: Beat ‘em or Join ‘em?*, 40 PACE L. REV. 1 (2020).

8. See Kevin K. Washburn, *Elena Kagan and the Miracle at Harvard*, 61 J. LEGAL EDUC. 67, 69 (2011) (describing how Harvard law Dean Kagan achieved a “fundamental transformation of Harvard culture” by making the school a “healthy and constructive academic community”).
9. ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO BAR, STATEMENT OF FUNDAMENTAL LAWYERING SKILLS AND PROFESSIONAL VALUES (1992) [hereinafter *MacCrate Report*]; Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109, 123 (2001) (describing the *MacCrate Report*’s impact, specifically stating that “[b]y the spring of 1993, most Deans responding to a AALS survey ‘reported that their faculties had already discussed the report or were planning to do so in connection with a review of their curricula’”).
10. For a high-spirited account see Bernard Hibbitts, *Missionary Man: William Sprague and the Correspondence Law School*, LEGAL HISTORY BLOG (Feb. 26, 2014, 7:00 AM), <https://legalhistoryblog.blogspot.com/2014/02/missionary-man-william-sprague-and.html>.
11. Monica W. Tracey & Rita C. Richey, *The Evolution of Distance Education*, 2 DISTANCE LEARNING 17, 17 (2005).
12. Stephen A. Hunt, *A History of Higher and Professional Correspondence Education in the UK*, 49 J. HIST. ED. SOC. 344, 347 (2020) (noting that all University of London subjects were available via correspondence by the late nineteenth century); George W. Keeton, *University College, London, and the Law*, 51 JURIDICAL REV. 118, 132 (1939).
13. W. L. Twining, *Laws, in UNIVERSITY OF LONDON AND THE WORLD OF LEARNING*, 1836–1986, at 81, 102–03 (F.M.L. Thompson ed., 1990).
14. *20 Years of Teaching Law at The Open University*, OPEN UNIV. L. SCH., <http://law-school.open.ac.uk/overview/about-school/celebrating-20-years> (last visited July 24, 2020).

United States, many undergraduate education programs offered some distance-learning courses, and the Western Governors University was marketing itself as “Virtual U.”<sup>15</sup> New York University’s school of continuing education unveiled what it called a “virtual college.”<sup>16</sup> And Concord University School of Law, created by Kaplan, Inc., was in fact offering law degrees only online, although with far from a full selection of courses, and without ABA accreditation.<sup>17</sup>

Few accredited law schools had gone anywhere near so far, but many were availing themselves of online resources to enhance their programs, whether posting online syllabi, using e-mail and chat rooms as an extension of the classroom, or linking extension campuses to the main campuses for remote participation. And of course I and others were teaching classes about the internet.

Some law school pioneers were taking things further, such as by offering the same course to several schools at once. Peter Martin taught the same course at four law schools simultaneously.<sup>18</sup> But early attempts to share curricular offerings ran into a number of problems. For example, law schools use different calendars and employ different grading practices, making it harder to produce uniform methods of evaluation.

Despite these early problems, the movement toward online teaching struck me as destined to accelerate. One needed, I thought, to make only two assumptions: first, that the technology would continue to improve quickly (which indeed the hardware did, if not so much the software), and second, that the ABA would not be able to stand in the way—at least not for long.

There were a number of reasons to doubt the ABA’s ability to hold back the tide of distance learning. The ABA’s accreditation rules, which for roughly a century prohibited correspondence-course-based law schools,<sup>19</sup> were beginning

15. DOUGLAS JOHNSTONE, *THE RISE OF WESTERN GOVERNORS UNIVERSITY 1996-2006*, at 19 (2006) (describing how the Western Governors’ Association members “envisioned a virtual university designed specifically for students to succeed in the workforce”); Rachel F. Moran, *Diversity, Distance, and the Delivery of Higher Education*, 59 OHIO ST. L.J. 775, 782 (1998) (describing how the founders of Western Governors University “hoped that this ‘Virtual U’ would provide a low-cost means of meeting the burgeoning demand for higher education”).
16. *History*, NYU SCHOOL OF PROFESSIONAL STUDIES, <https://www.sps.nyu.edu/homepage/about-us/history.html> (last visited June 17, 2020), (describing how, in the 1990s, NYU’s School of Continuing Education “continue[d] to lead in the exploration of virtual and internet-based learning with the creation of The Virtual College”).
17. *About Concord Law School at Purdue University Global*, CONCORD LAW SCHOOL, <https://www.concordlawschool.edu/about/> (“Founded in 1998, Concord was the first U.S. law school to offer students a traditional law school program online”) (last visited June 6, 2020). For a very optimistic look at Concord’s efforts, see Robert E. Oliphant, *Will Internet Driven Concord University Law School Revolutionize Traditional Law School Teaching?*, 27 WM. MITCHELL L. REV. 841 (2000).
18. Peter W. Martin, *Distance Learning—The LIP’s Experience and Future Plans*, CORNELL LAW SCHOOL (Dec. 1999), <https://www.law.cornell.edu/background/distance/liidistance.htm> (discussing how Cornell professor Peter Martin taught “a distance learning course to students enrolled at four participating schools” in the late 1990s).
19. See, e.g., ABA, *Standards for Approval of Law Schools* §304(g) (2001), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/standardsarchive/2001\\_2002\\_](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/2001_2002_)

to change.<sup>20</sup> Nor should one overlook that an original impetus for the ABA's campaign against correspondence courses was to keep the unwashed masses—Jews and immigrants—out of the profession:

[I]n the early to mid-twentieth century, the ABA's efforts to control accreditation and its insistence on continually raising standards were, indeed, rooted in its desire to exclude "Jew boys," immigrants, children of immigrants, and the lower class. The record relating to discussions of law school standards and accreditation during that period is replete with unabashed comments from bar leaders about their desire to keep the legal profession a bastion of privileged "old-American" families.<sup>21</sup>

In contrast, at the turn of the twentieth century the internet appeared ready to open access to everything. ABA accreditation rules, still elitist even if no longer bigoted,<sup>22</sup> now had an uncanny resemblance to an antitrust violation.<sup>23</sup> Going forward, it seemed possible to envision a radically different law teaching model. Perhaps law teaching could be rethought internet-style? ABA approval of degree-granting institutions, which took responsibility for the bulk of teaching and for setting degree requirements, might be supplemented or even supplanted by law schools that did little or no teaching of their own but instead had students mix and match courses delivered by more traditionally accredited schools. The degree-granting body would set the number of credits students required for a J.D. and perhaps set some distribution requirements and rules about which courses, or which school's courses, would count. Students would assemble their own course lists, picking from the best on offer nationwide.

Depending on the national model, grading might be the job of the course-providing institution or remain the job of the degree-granting institution. Either

standards.pdf ("A law school shall not grant credit for study by correspondence." [hereinafter ABA 2002 Standards]). Cf. Catherine Arcabascio, *The Use of Video-Conferencing Technology in Legal Education: A Practical Guide*, 6 VA. J.L. & TECH. (2001) ("[I]t has not been a smooth ride for supporters of distance education. The problems encountered are due in large part to the original correspondence course format . . . A debate about the value and integrity of distance education in its asynchronous form has raged for over thirty years.").

20. Arcabascio, *supra* note 19, at ¶¶ 19–20 (discussing how the "[t]he ABA [was] doing its best to keep up with changing technology landscapes" by implementing special guidelines "for schools wishing to 'experiment' with new methods of distance education").
21. Marina Lao, *Discrediting Accreditation?: Antitrust and Legal Education*, 79 WASH. UNIV. L.Q. 1035, 1088–89 (2001).
22. *Id.* at 1097–98.
23. See *United States v. ABA*, 934 F. Supp. 435 (D.D.C. 1996); Press Release, Dep't Justice, Justice Department and American Bar Association Resolve Charges that the ABA's Process for Accrediting Law Schools Was Misused, (June 27, 1995) (discussing how the Department of Justice's Antitrust Division filed a lawsuit, what was then settled, "alleging that the ABA used its power as the law school accrediting agency to protect law faculties' economic interests and working conditions"); Denise Rothbardt, Note, *ABA Accreditation: Educational Standards and Its Focus on Output Requirements*, 2 J. GENDER RACE & JUST. 461, 465 (1999) (arguing that "the ABA should have been reprimanded for violating antitrust laws").

scenario offered room for gamesmanship. “Legal Ed R Us” might compete by offering easy grading. “Quality U” might stress its rigorous standards. The race to the top or to the bottom, or both simultaneously, would be a sight to see and could keep researchers busy for years.

I mentioned the prospect of pick-and-mix education mostly in case I needed to scare the AALS audience back to wakefulness. That said, the idea did fit with what seemed to be the emerging economics of virtual education generally. But I thought it clear at the time that neither the ABA nor any part of the legal establishment had any appetite for something that libertarian. (Interestingly, modern legal entrepreneurs are moving slowly in that direction.<sup>24</sup>)

Instead, the real issue looked to be how legal educators (not limited to law schools) might deliver education with new technology. The key economic and practical distinction was whether the class would be synchronous—that is, live—or asynchronous, i.e., on disk (the internet being too slow for mass distribution of video in those days). Synchronous classes (also called distance learning) were, it seemed, far from revolutionary. There was value to making rarer courses—say, on federal procurement law—available to particularly interested students nationwide. But while course-sharing could increase student satisfaction, and might also involve some income transfer toward schools with bigger course lists, online specialty courses hardly seemed transformative.

The big savings, and potentially dramatic changes, for both law schools and students, would materialize only if all courses, or at least many courses, or at least a substantial fraction of many courses, could be recorded and reused, ideally for more than one academic year, which is what I called the Virtual Law School. At that point, law teaching would begin to enter the territory of software economics.<sup>25</sup> To make it happen, I thought, would require radically new courseware, something much more than just the same old lectures on a disk. Similarly, enhancing casebooks with hyperlinks to the full text of cases and materials, while handy, didn’t seem particularly transformative either.

I argued that since this new quality courseware basically didn’t exist, someone would need to experiment to create it. As a result, the fixed costs of putting together a good asynchronous class were much higher than most neophytes probably expected. Just as TV is not radio with pictures, a virtual law class is not simply a normal class taught online. Nevertheless, once the courseware was in hand, then the marginal costs of providing three or four credits of legal education to a law student might suddenly become very low indeed.

24. See *infra* text accompanying notes 164–167 (describing iLaw); see also Mihnea Moldoveanu, *How Our Response to COVID-19 Will Remake Higher Ed*, HARV. BUS. PUBL’G. EDUC. (July 2, 2020), <https://hbsp.harvard.edu/inspiring-minds/how-our-response-to-covid-19-will-remake-higher-ed> (describing digital higher education “certification trust”).

25. Cf. J. Bradford DeLong & A. Michael Froomkin, *Speculative Microeconomics for Tomorrow’s Economy* in INTERNET PUBLISHING AND BEYOND: THE ECONOMICS OF DIGITAL INFORMATION AND INTELLECTUAL PROPERTY 6 (Brian Kahin & Hal Varian eds., 2000).

But, at least in 2000, to focus on the potential of ultralow marginal cost was to miss the very large condition precedent. Virtual education could succeed only if it delivered an attractive product. Production values would matter. So too might first-mover advantages. In many software and online industries, an early entrant able to establish a position of some prominence was often able to leverage it into dominance by both setting technical standards and by taking advantage of network effects. The downside of being early, however, was that it costs. And while firms such as Microsoft or Adobe (and, more recently, Uber) were willing and able to raise large sums from investors and spend lavishly to buy market share, that option didn't seem likely to be available to law schools. Not only was the profit potential much more bounded, but that just isn't how law schools are wired.<sup>26</sup>

Furthermore, the low-marginal-cost objective was itself highly sensitive to how one imagined structuring a course. The more the course would be set up as one-to-many—which in law teaching would mean predominantly lectures, not seminars or Socratic teaching—the more the cost savings would seem attainable. Indeed, to the extent courses could be cloned or recycled, legal education providers could hope to save not just on costs of marginal students but on the marginal cost of professors as well.

Historically, however, one of the features and, I would argue, strengths of law school has been student participation in the classroom, both willing and sometimes less willing. If the creators of a Virtual Law School wished to reproduce the Socratic method, or even the iterative working through of fixed problems and exercises, something more than one-to-many lectures would be required.

One possibility would be to have the students work with one another. To a provider, the cost of student-to-student chat, whether in pairs or any number, was essentially zero. But it is far from obvious that this is good pedagogy, particularly if the group as a whole suffers from some misunderstanding perhaps created by an infelicitous turn in the prepackaged content. Perhaps discussion followed by unveiling of the “right” answer might occasionally help students figure out what they did wrong and why, but in my experience the number of ways in which law students can twist a legal hypothetical vastly exceeds one's ability to anticipate all the twists and turns they may take.

The answer seemed obvious, although it undermined the zero-marginal-cost objective: What a law class on disk would need was . . . local TAs. The result would be something like mass undergraduate teaching where in large courses the professor delivers lectures and graduate students or instructors lead breakout sections. The difference, however, would be that, rather than providing both the professor and the discussion leaders, legal education providers in the Virtual Law School era might offer students classes that were a mix of brand-name courseware designed elsewhere—say, Yale or Harvard—with local talent running discussion sections, and leading exercises, and grading exams.

26. The effort still required to change that thinking is evident from the discussions at the *Legal Evolution* blog, <https://www.legalevolution.org/>.



Indeed, Harvard Law School had already shown what this future might look like. In December 1998, seven members of the Harvard Law School faculty unveiled “the development of a new, computer-based set of instructional materials, designed (primarily) for teaching first-year law student[s]”<sup>27</sup> and sponsored by Lexis-Nexis. The authors of the materials, called “The Bridge,” promised that “[u]ntil at least December 31, 1999, there will be no charge for access to any of the modules.”<sup>28</sup>

Several implications of this courseware-plus-TA model deserve emphasis. The first is that it undermines the zero-marginal-cost goal, since total TA contact hours will necessarily vary with the number of students, and also sections might not be effective unless their size is capped at some number—although exactly what that number might be could spark an interesting debate.

The second implication is that, once the legal education provider chooses a particular piece of courseware (in 2000 I offered “Arthur Miller on a disk” for civil procedure as an example)<sup>29</sup>, many of the key intellectual choices about how to teach the course would likely be out of the hands of the local faculty. Perhaps local faculty could choose among competing courses; perhaps that choice might become a decanal or a committee decision. In either case, the persons filling the TA role would have a much-diminished role in setting the intellectual agenda as compared with today’s law school professor, who commonly enjoys total academic freedom to structure a law course as she wishes, subject only perhaps in a few subjects to gentle and far-distant constraints imposed by the bar exam. It is always possible to “teach against the book,” but it is hard work and often does not end well. And, to the extent that the TAs would become, in time, true TAs, economic pressure would tend to push in the direction of hiring nontenured contract employees for the role—less expensive and less likely to complain about the content of the courseware. Thus, in time, institutions in this imagined future would de-skill their professoriate.

But not all the implications were grim. The more that legal education was provided via electronic means, the more that legal education providers could offer their services without constraints imposed by geography. Foreign students and practitioners, for example, would be able to attend from their home countries, saving on travel and other costs, and would find that their virtual educational experience more closely resembled that of local law students.

More radically, if courseware-based teaching really took off, then many aspects of law school organization would be ripe for rethinking. For example,

27. Quoted in Michael S. Ariens, *Law School Branding and the Future of Legal Education*, 34 ST. MARY’S L.J. 301, 305 (2003).

28. *Id.*

29. At the time Arthur Miller had recently offered to tape his lectures for all-online Concord Law School—without asking permission from Harvard. See Leibowitz, *supra* note 2. Professor Miller argued that since he was just taping lectures, he was not actually “teaching” at another law school. Harvard quickly changed its rules to prohibit similar behavior in the future. Daniel C. Powell, *Five Recommendations to Law Schools Offering Legal Instruction Over the Internet*, 11 J. TECH L. & POL’Y 285, 287 (2006).

if the marginal cost of another student is low (or zero!), then why not admit a lot more students? Similarly, why not offer all law courses for CLE—another dozen lawyer-subscribers won't cause much of a ripple. Indeed, why limit courses to admitted law students? Why not invite interested members of the public to follow along too? Legal education could, perhaps, become radically democratized. Of course, lowering or eliminating admissions standards would put a lot more weight on exams as a filtering and credentialing mechanism and might also require modernization of the bar exam. But if we were dreaming, why dream small?

Armed with this scenario, I made a few modest predictions:

- There will be a rush to establish new brand names for new courseware and for suites of courses (e.g., integrated first-year classes designed to work together, or a package of law- and economics-themed offerings). This prediction proved to be among my most accurate, as discussed below.<sup>30</sup>
- The rush to establish early-mover advantages will create a star system in which some professors will be heavily promoted by their law school, or their law school's virtual education subsidiary or partner, both to attract more adoptions and to scare off competitors. Because of the high fixed initial costs, which include new courseware and trained staff to run it,<sup>31</sup> the supply side for courseware will not work like the casebook market in which the writing side consumes the time of professors and perhaps student assistants, but production uses established editors and technology, whether printing or PDF; instead, first-movers will need initially expensive and sometimes experimental hardware, software, and trained people to manage them and instruct others in their use.
- Conversely, lawyers (and others?) without law school appointments will find it easier to teach, whether by issuing their own freelance courseware or by serving as TAs for established packages.
- Tenured and tenure-track faculty will be caught in the middle: Demand for their services will decrease (see “deskilling” above).
- Common courses, notably first-year courses, will become more commoditized.
- Law teaching services generally will become more like a national, disaggregated market, with students shopping for courses from a wide catalog rather than being tethered to the offerings of a single law school.<sup>32</sup> Every

30. See *infra* text at notes 182–189.

31. See *infra* text between notes 32 and 33.

32. Note that this is more modest than the idea of a radically decentralized system composed solely of credentialing institutions—Degree Granting Bodies (DGBs)—which did no teaching of their own but just credentialed and packaged teaching provided by others. In that scenario, DGBs would naturalize courses created by other schools in some fashion, or the DGBs would treat the other schools' credits as transferred credits. See *infra* text at note 36.

student in every law school that adapts to virtuality will be able to take a wide variety of specialist courses, even if no one is familiar with the topic locally.

- Branding of virtual courseware will have further consequences: MIT, which has reputational advantages in engineering, was then considering whether to market its virtual offerings to “a large number” of rejected applicants. Otherwise, it feared it might have to compete with other engineering schools on price, especially for introductory courses. If this takes off in engineering, I predicted, the same dynamic would eventually appear in law schools. Suppose, for example, that Harvard Law School manages to publish a popular suite of virtual courses. Why should Harvard allow other law schools to offer those virtual courses to rejected Harvard students, when Harvard could set up a virtual extension campus and handle their education itself?
- Foreign and comparative law will be taught by experts living abroad. Given the dangers of intercultural misunderstandings between teachers and students, U.S.-trained practitioners living abroad might have a particular advantage in this market segment.
- That said, the number of foreign LL.M.s wishing to study in the United States might not decrease, even as the demand for virtual U.S. law training increases. Living abroad has its attractions, and the experience of living in a culture teaches you much more than any set of virtual courses ever could.

Thus, I told a room now full of somewhat anxious law professors in 2000, the “big question” was: “As new technologies spread into society, how much of what law schools do, or *should* do, will continue to require law school in the traditional sense of bricks, mortar, a quadrangle, and an ivy-covered faculty?”

And, I added, the “REALLY big question” was: “What will this do to my law school?”

Well, I had some predictions for that, too. I thought the answer would vary with the type of law school. Basically, I argued that law schools could be divided into four groups: (1) elite schools; (2) state schools; (3) low-cost providers; and (4) losers.

Elite, brand-name institutions would, I argued, be big winners. They had the money to develop new courseware and to market it to everyone else. What is more, buoyed in part by this new revenue stream, they would not even need to use the courseware on their own students. Instead, their campuses would become ever-more-elite preserves of privilege. Some intrepid institutions might open extension campuses in far-flung locations. These outposts would admit second-tier students and use their courseware combined with brief on-campus sessions based on the executive education model. Each student attending these elite extension campuses would be unavailable for other law schools, increasing the competition for the dwindling pool of students.

I also argued that some upstarts would be winners. They would be low-cost providers with minimal campuses and operate entirely on the executive education model. They would have minimal permanent staff and no tenure, and they would rely on adjuncts and others to provide any human feedback required.

With slightly less confidence, I also predicted that state schools would do well in this new reality. It seemed to me that because they received the lion's share of their income from the legislature, public law schools would be relatively insulated from the financial effects of at least the first round of the restructuring of law teaching.<sup>33</sup> On the downside, the straitjacket of their funding source would also hinder public law schools seeking funding for venture capital-style branding activities required to create and market new courseware. In time state schools would feel pressure to compete on price with the low-cost providers, and I was uncertain how that would play out in the long run. One scenario, I suggested, is that state schools might explore the creation of for-profit subsidiaries to enter the courseware creation market on a more level playing field.

But there was also a fourth group, the losers. The losers, I predicted, would be private law schools in the middle of the prestige distribution. Midranked private law schools would see their market threatened from three directions at once. From above, elite law schools would compete for students by running executive education extension campuses. Some students might prefer a (perhaps less costly) Harvard extension campus degree—even if it came with an asterisk—to a more expensive degree from a full-service midranked school. From below, midranked private law schools would face competition from ultralow-cost, very-low-service providers who did little more than organize other schools' courseware and confer degrees. Worse, the midranked private law schools would face competition in their own curriculum, as students might seek to get credit for taking brand-name courses from brand-name professors. Each time a midranked private law school felt obligated to make one of these options available to its students, if only to avoid claims that the schools were holding their tuition-paying customers captive, payment for the bought-in courseware would represent not just a revenue loss to the degree-granting school, but an actual revenue transfer to the software-creating institution.<sup>34</sup>

In terms of personnel, the winners would include the brand-name academics in front of the cameras, and perhaps also a new class of super adjuncts and star practitioners who would create their own practice-oriented series of courseware. Other winners would be the technical people who designed and ran the software, plus the adjunct graders who did any grading of exams or papers that still required a human review. Of note, the graders could live anywhere; they need

33. As discussed in Part III below, things look rather different today.

34. With the benefit of twenty years' hindsight, I now see some problems with this claim. It assumed a very simplistic pricing model in which schools or students paid by the seat. In fact, one can imagine many other scenarios. To pick just one example, a school might lease a course from the provider for a fixed price per year, in which case adding matriculated students to a leased course might not have a significant marginal cost.

have no geographic connection to the law school; on balance this would work to some advantage for law schools situated in out-of-the-way places.

Were these transformations to take place, what would they do to students? Here, unfortunately, the picture seemed much more complex and equivocal. In the plus column, the Virtual Law School would at the very least place a brake on spiraling tuition – except, perhaps, at the most elite institutions, which might still benefit from such a seller’s market as to be able to charge what they liked. Other schools would face new competitive constraints and might even find themselves in a very cutthroat price war. Students, presumably, would benefit from the resulting lower tuition.

Similarly, students around the country might benefit from access to teaching by the brand-name educators starring in the new courseware. But the emphasis here was on *might*. Not all famous scholars are good teachers. Not all great in-person teaching would inevitably translate well to the new format. For example, a great Socratic-style teacher needs a Glaucon, and while a live class could be recorded, that likely would not be exciting viewing for someone who did not have a chance to attend in person. Whatever the quality implications, however, students would at least have access to a much wider set of upper-class specialist courses than could be offered by any but the very largest urban law school with an army of practitioner adjuncts.

Because learning styles differ, virtual classes likely would benefit some learners and disadvantage others. How that would break down was impossible to say without having actual courses to experiment with. Similarly, if classes were fully virtual, then students might be able to control how they presented themselves. Instead of using live video or a real photo, they could adopt a generic anonymous avatar, or select an iconic one (Tom Cruise? Julia Roberts? Mork?). The ability to construct and control an identity might benefit and embolden the timorous and uncertain student, but the prospect of teaching to an audience of Mickey Mouses was not one I personally relished.

One thing that was clear, however, is that the more legal education moved away from “ivy-covered professors in ivy-covered halls,”<sup>35</sup> the more that the student experience would be changed and, I thought then, not for the better. Law school is, or ought to be, far more than classes. A rich experience includes working in groups, whether on law reviews, moot court, clinics, or the myriad other projects that students take up in law school. And, to be frank, friendships and acquaintances made in law school can also pay meaningful professional dividends over the course of a legal career. All these things threaten to get lost in an all-virtual environment, and in these regards the executive education model is not much of an improvement.

The bottom line, therefore, was that students at other than elite schools might pay less, but they’d also get quite a lot less.

35. Tom Lehrer, *Bright College Days* (More of Tom Lehrer 1959).

That left one final constituency to consider: the faculty. Other than the few winners who would feature in the courseware, faculties, I argued, would in general be big losers in this scenario. Where once they had been masters of small academic fiefdoms with the pedagogic autonomy protected by academic freedom for better or worse, now they would be relegated to being in effect TAs for the courseware they—or, more likely, given that money would be changing hands, someone else—would select.

Lest the audience then (or readers now) think I was being extreme, I reminded them that what I was describing was actually a more moderate scenario than what a truly free market in law teaching might produce. If law teaching went truly virtual, then there would be no need for a campus or a faculty at all. Instead, credentialing and degree-granting bodies (DGB) would certify that the successful completion of various mixes of approved virtual courses sufficed to qualify for a degree. Perhaps the DGB would administer the exams, or perhaps that service would be part of the package provided by the courseware provider. This more libertarian scenario was of course off the table so long as the ABA enforced its long-standing rule against correspondence courses.<sup>36</sup> If not for that prohibition, practically part of the ABA's DNA, law schools would be in danger of being reduced to little more than brokers, with "central credentialing and distal teaching."<sup>37</sup>

I concluded by suggesting that there were four reasons even the tamer version of the Virtual Law School might not come to pass.

One obvious impediment was that one or more of my assumptions would prove to be wrong. Perhaps, for example, the ABA would flex its muscles and decide not to permit an accredited law school to rely on distance or virtual learning to become the dominant mode of teaching. That seemed, I said then, to be the one thing most likely to stem the tide although, as we will see, King ABA could hold back the tide for only so long.<sup>38</sup> Or perhaps no one would be willing to take the financial risk of going first to design quality courseware; or maybe first-movers did a poor job and their unattractive products so discouraged adoption as to tar the entire genre.

A second plausible obstacle to Virtual Law School, I noted, was that software economics just wouldn't work for law teaching. Ironically, the best argument I could envision of this kind relied on an increasingly unfashionable teaching method. While progressive scholars had long been dwelling on the evils of the so-called Socratic method in law teaching,<sup>39</sup> it was that hoary teaching strategy

36. ABA 2002 Standards, *supra* note 19, § 304(g). Cf. Arcabascio, *supra* note 19, at ¶ 12.

37. "The history of the external degree, with its central credentialing but distal teaching, suggests that other configurations are possible." John Seely Brown & Paul Duguid, *Universities in the Digital Age*, in *THE INFORMATION AGE: AN ANTHOLOGY ON ITS IMPACT AND CONSEQUENCES* 158 (David S. Alberts & Daniel S. Papp eds., 1997).

38. See *infra* text at notes 111–115 (ABA changes to standards) and 116–129 (law school reactions).

39. See, e.g., DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY* (1983).

that would be most difficult to replicate in a prerecorded environment. Socratic teaching in a live virtual environment need not, perhaps, be very different from its use in a classroom, but since the important cost savings from distance learning come from lowering marginal costs, live virtual teaching would offer few economic advantages. It would be ironic if it were Socratic teaching that saved law schools as we knew them.

A third argument relied on the idea that the law school experience is not just about credentialing, but also about building contacts for a future career. If it really was “not what you know, but who you know,” then participants in an all-virtual experience could be at a severe disadvantage. Relatedly, one could quite plausibly argue that some of the most important learning experiences happened outside the traditional classroom, on law reviews and in clinics, moot court, advocacy organizations, and the many other affinity and professional groups that characterize most law schools.

Last, but not least, was the claim that a one-person, one-computer environment simply is not suited for real thinking and learning. As then UPenn Provost Stanley Chodorow said, “Intellectual work is social work . . . humans cannot thrive in a bodiless, frownless, smileless, ecology, and our intellectual society cannot be complete without physical interaction.”<sup>40</sup>

Against that powerful claim, albeit offered by someone who clearly was not an introvert, there was the view of noted futurist Peter Drucker: “Thirty years from now the big university campuses will be relics. Universities won’t survive. It’s as large a change as when we got the printed book . . . Today’s buildings are hopelessly unsuited and totally unneeded.”<sup>41</sup>

More than thirty years after Drucker’s prediction, some twenty years after mine, the Virtual Law School had yet to appear. What happened, or failed to happen?

## II. Barriers to Virtual Law Schools

Twenty years after I addressed the AALS—just before the “new normal” of COVID-19, which I will address in Part III below—few of the predictions I made in January 2000 had come true for J.D. education in U.S. law schools. A variety of law schools had dabbled with distance education, but there was little truly “virtual”—that is, asynchronous—teaching, going on. In contrast, a number of LL.M. programs took fuller advantage of synchronous distance education, occasionally with some asynchronous elements also. Meanwhile, however, there had been a huge, well-publicized, but not brilliantly successful period of ferment, experimentation, and often squandered investment in asynchronous teaching at the undergraduate level.

40. Quoted in Thomas J. DeLoughry, *Will Higher Education Thrive or Wither in Cyberspace*, CHRON. HIGHER EDUC., Jan. 27, 1995, at A22.

41. *Seeing Things as They Really Are*, FORBES, Mar. 10, 1997, <https://www.forbes.com/forbes/1997/0310/5905122a.html> (quoting Drucker).

Law school J.D. education stuck largely to its traditional teaching model despite increases in most if not all of the pressure points that I had identified as pushing toward virtual education. Law school costs went up as students/consumers demanded (or were thought to demand) new facilities outfitted with the latest technology.<sup>42</sup> Meanwhile, pressure from influential parts of both the profession and the academy pushed law schools into greater investment in skills training generally and clinical education in particular—activities that usually require closer supervision than lecture-based instruction and thus demand a higher (and more expensive) teacher-student ratio.<sup>43</sup> For these and other reasons, law school sticker prices rose much more quickly than inflation,<sup>44</sup> although that number may be misleading, since law school discounting via grants and scholarships also rose.<sup>45</sup>

The law school student debt problem only got bigger, in part because of increased debt incurred for undergraduate education;<sup>46</sup> meanwhile, law graduate employment prospects shrank—or at least became more erratic—especially in

42. See Richard W. Bourne, *The Coming Crash in Legal Education: How We Got Here, and Where We Go Now*, 45 CREIGHTON L. REV. 651, 660–61 (2012) (discussing how “[t]he increase in size of American law schools was accompanied by an increase in resources devoted to them” and how some of the resources were devoted to “much improved technology that has transformed the information retention and retrieval systems and teaching tools of modern law schools”).
43. Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law Schools*, 122 DICK. L. REV. 551, 567–80 (providing detailed discussion about how “[t]he march from first mentioning professional skills as part of the law school curriculum to requiring experiential education was a long journey, and came after critical examinations of legal education both at a number of law schools and by the legal profession”); John H. Garvey, *The Business of Running a Law School*, 33 UNIV. TOL. L. REV. 37, 38–39 (2001) (mentioning that a contribution to increased law school expenditure was the rapid growth of clinical courses, which changed the faculty composition “because clinical and legal writing faculty teach smaller classes, on average, than traditional faculty”). That said, many skills education and clinical supervisor positions could be filled by practitioner adjuncts, or by nontenure-track staff lawyers who might be less costly than traditional tenured/tenure-track staff.
44. See *Tuition*, LAW SCHOOL TRANSPARENCY (last visited June 24, 2020), <https://data.lawschooltransparency.com/costs/tuition/?y1=2000&y2=2019> (database showing that after adjusting for inflation “private law school was 1.53 times as expensive in 2019 as it was in 2000” and “public school was 2.44 times as expensive in 2019 as it was in 2000”).
45. See, e.g., *Net Tuition*, LAW SCHOOL TRANSPARENCY (last visited June 24, 2020), <https://data.lawschooltransparency.com/costs/net-tuition/> (“Since 2012, the average net tuition at public law schools has declined, despite nominal tuition increasing on average. This is due to increased discounting.”).
46. NAT’L CTR. FOR EDUC. STATISTICS, TRENDS IN STUDENT LOAN DEBT FOR GRADUATE SCHOOL COMPLETERS 7 (2018), [https://nces.ed.gov/programs/coe/pdf/coe\\_tub.pdf](https://nces.ed.gov/programs/coe/pdf/coe_tub.pdf) (showing that the average cumulative amount borrowed for law students increased from \$82,400 to \$145,500 between 1999 and 2016); Emma Kerr & Sarah Wood, *See 10 Years of Average Total Student Loan Debt*, U.S. NEWS & WORLD REP. (Sept. 14, 2021, 9:00 AM), <https://www.usnews.com/education/best-colleges/paying-for-college/articles/see-how-student-loan-borrowing-has-risen-in-10-years> (noting that in 2021 “Average student loan debt has been on the rise in the last decade as families try to keep up with soaring college costs” while college tuition and fees have “more than doubled” over the last 20 years).



the competition for the highest-paying jobs that would satisfy the demands of loan repayment.<sup>47</sup> Adding to law schools' problems, The New York Times and other media widely publicized claims that a law degree was a bad investment,<sup>48</sup> causing declines and changes in the law school applicant pool.<sup>49</sup>

Yet despite all these pressures, law schools as a group did little more than dip a virtual toe into the virtual waters.

Law schools did expand their synchronous—distance learning—offerings. And some more entrepreneurial and adventurous schools and teachers tried to make the most of the new technologies. In 2004 CALI created a “Consortium for Distance Education” (CODEC). Cornell’s LII marketed Peter Martin’s course<sup>50</sup> to other law schools, for which purchasing law schools paid a per-student fee.

The growth in distance education likely led to some improvement in course offerings and in the available student pool, but neither was close to game-changing, because synchronous distance learning does not in the main save money. Indeed, to the extent it requires expensive IT and video equipment, it at least requires some considerable initial capital expenditure.

Thus, for two decades, only two ABA-accredited law schools made a serious effort to realize the big savings or extra tuition income they might have enjoyed by moving to virtual instruction, and those two efforts came only in the mid-2010s.<sup>51</sup> Given the financial and other pressures on law schools in this period, more than a resistance to change was likely at work. Indeed, I can think of five possible reasons for law schools’ decisions to stick to traditional teaching,

47. Bourne, *supra* note 42, at 654–59 (discussing studies showing “unprecedented weakening of the lawyer employment market, particularly at the top”); for extensive data on law graduate earnings see Scott F. Norberg, *J.D.s and Jobs: The Case for an ABA Accreditation Standard on Employment Outcomes*, 67 J. LEGAL EDUC. 1035 (2018).
48. See, e.g., Ethan Bronner, *Law Schools’ Applications Fall as Costs Rise and Jobs Are Cut*, N.Y. TIMES (Jan. 30, 2013), <https://www.nytimes.com/2013/01/31/education/law-schools-applications-fall-as-costs-rise-and-jobs-are-cut.html> (“Law school applications are headed for a 30-year low, reflecting increased concern over soaring tuition, crushing student debt and diminishing prospects of lucrative employment upon graduation.”). To what extent there was a true lawyer employment crisis, or whether many law schools had just presented employment data in a misleading, rosy manner, occasioned great controversy. There seems little doubt that hiring for law jobs with six-figure starting salaries stalled or shrank—see Bourne *supra* note 42—but that alone did not mean a law degree was a bad investment, just not the easy route to riches that it seemed many students had counted on as they racked up increasing debt. See generally Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 J. LEGAL STUD. 249 (2014) (arguing that the lifetime value of a law degree exceeded its cost “by hundreds of thousands of dollars” even at the 25th).
49. See, e.g., Scott F. Norberg & Stephanie J. Garcia, *Reducing Debt and Increasing Access to the Profession: An Empirical Study of Graduate Debt at U.S. Law Schools*, 69 J. LEGAL EDUC. 720, 751 (2020) (“As a law school’s cost of attendance increases, a greater proportion of applicants who cannot afford to attend (a private school) without borrowing choose to enroll elsewhere (more likely a public law school) or not to go to law school”).
50. See *supra* note 18 and accompanying text.
51. The schools are Syracuse and Mitchell Hamline. See *infra* text at notes 88–89.

leavened with some distance learning, any one or two of which would probably have sufficed to determine the outcome:

1. ABA rules slowly increased the allowed online course credits that students could apply toward graduation but continued to require that most legal education remain live and in person.
2. Law schools avoided bad software—and there was no good software available.
3. Legal educators had a genuine—and perhaps justified—belief that pedagogy would suffer without live interaction with a law teacher, and that in-person law schools offered other valuable benefits including extracurriculars and networking which would be hard to replicate online.
4. The concept of online education quickly became tainted by association with the University of Phoenix and especially Concord Law School. Conversely, no brand leaders took the potentially expensive commitment to pioneer virtual legal education, making other schools with fewer resources even more wary of taking the expensive leap.
5. Law deans and others concluded that it would be difficult or impossible to justify charging current prices for a purely or even largely virtual education.

I will expand on each of these five factors below. But the key point for present purposes is that for most law schools, at least before COVID-19 struck, the decision to stick largely to status quo teaching methods likely seemed overdetermined.

#### *A. ABA Rules*

The ABA was the single most visible obstacle to the growth of the Virtual Law School, or even of the distance-learning-based law school. In 2000, ABA Accreditation Standard 304(g) specifically stated that “a law school shall not grant credit for study by correspondence,”<sup>52</sup> a rule that was understood to apply to distance learning, not to mention asynchronous lectures.

In 2002 the ABA revised Standard 306 to allow accredited law schools to make a limited use of distance education, defined as “an educational process characterized by the separation, in time or place, between instructor and student.”<sup>53</sup> But the revised standard was far from allowing a fully distance-learning curriculum,

52. ABA, STANDARDS FOR APPROVAL OF LAW SCHOOLS § 304(g) (2000), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/standardsarchive/2000\\_standards.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/2000_standards.pdf).

53. ABA, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS: RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, POLICIES OF THE COUNCIL OF THE SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR AND OF THE ACCREDITATION COMMITTEE: 2002–2003 § 306(b) (2002), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/standardsarchive/2002\\_standards.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/2002_standards.pdf).

much less a Virtual Law School: Before being eligible for distance-learning credits, students would first have to take at least twenty-eight traditional in-class credits.<sup>54</sup> After passing that hurdle, students could take a maximum of twelve distance credits, and no more than four per semester.

To qualify distance courses, however, law schools had to ensure that there was “ample interaction with the instructor and other students both inside and outside the formal structure of the course throughout its duration.”<sup>55</sup> Furthermore, “opportunities to interact with instructors” would have to “equal or exceed” the opportunities offered in “a traditional classroom setting”<sup>56</sup>—arguably a low bar in some cases.

An Interpretation to Standard 306 defined “distance education” as comprising courses in which at least one-third of the class time was not taught in person. There thus was no limit on courses in which instruction was less than one-third distance education.<sup>57</sup> More importantly, ABA rules did not shut the door on unlimited distance education for LL.M. students and other graduate education.<sup>58</sup> In 2014 the ABA amended Standard 306 to incorporate the two-thirds-live interpretation of Interpretation 306-3 into the text itself.<sup>59</sup> It also raised the credit limit for distance education from twelve to fifteen<sup>60</sup> out of the at least eighty-three required to graduate, but left in place the requirement that a student have twenty-eight credits of traditional in-person education—essentially the 1L year—before a law school could offer any distance-learning credits.<sup>61</sup>

Most recently, in the 2019 Standards, the ABA raised the number of allowed distance-learning credits to allow a full one-third of required credits to be taught online. The ABA also removed the bar on distance learning in the first year, allowing 1Ls up to ten credits of online education.<sup>62</sup>

54. *Id.* at § 306(c).

55. *Id.* at § 306(c).

56. *Id.* at § 306, Interpretation 306-4.

57. *See id.* at § 306, Interpretation 306-3.

58. Standard 306 mentioned only J.D. education. Standards for other degrees, such as Standard 308, made no mention of a distance-learning limitation. Thus, a law school planning an online LL.M. had only to notify the ABA. ABA acquiescence—which is common—sufficed to go forward, rather than having to get the ABA to approve a program in advance, as in the case of online J.D. programs, which is much more difficult.

59. *See* ABA, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 306(a) (2014), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2014\\_2015\\_aba\\_standards\\_and\\_rules\\_of\\_procedure\\_for\\_approval\\_of\\_law\\_schools\\_bookmarked.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_bookmarked.pdf).

60. *Id.* at § 306(c).

61. *Id.* at § 306(f).

62. *See* ABA, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS: 2019-2020 §306(c) (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](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).

Given this history, any established law school that embarked on a radical plan to offer a Virtual Law School, or even a distance-learning-oriented J.D.—especially before the revised 2019 Standards—would be taking an enormous risk that its product would be prohibited by the ABA. Combined with the financial risks of an ambitious technological initiative, even those deans who considered the question chose to wait and see.

Nevertheless, I suspect that the ABA might have changed its rules if there had been sufficient pressure from law schools and law students to do so. And if the ABA had refused, it would have left itself wide open to an antitrust claim.<sup>63</sup> The requisite pressure never materialized, because law schools in the main had no appetite for moving to virtual education and only a small appetite for increased distance learning. The ABA's 2002 revision of the distance-learning rule sufficed to satisfy a great deal of that demand, and its allowance of "experiments" took care of much of the rest. Meanwhile, several other factors combined to make virtual education appear unattractive to law schools.

### *B. Bad Software*

If I had to pick one reason above all others that we spent twenty years teaching in classrooms instead of cyber-something, I would not blame the ABA; rather, I'd say it was the absence of a killer app.

MOOCs - massively open online courses - were supposed to be that killer app, at least for asynchronous undergraduate education, and yet their success was in fact very limited in that realm. Armed with millions of dollars in startup capital, competing entities such as Coursera (founded by two Stanford professors), Udacity (founded by a different Stanford professor), and edX (a joint venture of Harvard and MIT) announced that they planned to revolutionize education for the masses. Although details differed, the basic model involved taped lectures on streaming video, combined with online texts, and (sometimes optional) discussion groups. Students could take many courses free of charge, and if they paid a fee could enroll for college credit.

Ragging on MOOCs for their deficiencies was once a popular sport. James Grimmelmann's short and pungent takedown in *The Merchants of MOOCs* is surely the exemplar of the genre.<sup>64</sup> Grimmelmann identifies claims of virtue commonly advanced by MOOC enthusiasts and demonstrates that they either are nothing new—or that the MOOCs don't in fact deliver on their claims.

63. For an argument that online-only law school graduates would have a First Amendment claim against states that refused to allow them to take the bar exam, see Nick Dranias, *Past the Pall of Orthodoxy: Why the First Amendment Virtually Guarantees Online Law School Graduates Will Breach the ABA Accreditation Barrier*, 111 PENN ST. L. REV. 863 (2007).
64. James Grimmelmann, *The Merchants of MOOCs*, 44 SETON HALL L. REV. 1035 (2014). Other examples include Philip G. Schrag, *MOOCs and Legal Education: Valuable Innovation or Looming Disaster?*, 59 VILL. L. REV. 83 (2014); Jeffrey A. Van Detta, *The Law School of the Future: How the Synergies of Convergence Will Transform the Very Notion of "Law Schools" During the 21st Century From "Places" to "Platforms,"* 37 U. LA VERNE L. REV. 103 (2015).

Are MOOCs a revolution in the democratization of access to education in general, or to great professors in particular? Neither: embracing the MOOC-enthusiasts claims would require one to ignore long-running precedents running from The Open University in the United Kingdom<sup>65</sup> to the “The Great Courses,” available—albeit not for course credit—in a packet of videos.<sup>66</sup> Early MOOCs also suffered from issues with production values.<sup>67</sup>

MOOC proponents also touted them as a way of stimulating interactive learning. Rather than entirely replace a course, the canned lectures would become the static part of a “flipped” classroom in which local talent would run discussion sections. The core idea behind a flipped classroom is that lectures are prerecorded and class time is reserved for application, problem-solving, and discussion. If you have a great teacher then, the theory goes, students get the most benefit from the interactive sessions. But if the great teacher is only providing the lectures, and local talent is reduced to what above I called the TA model of virtual education, then students are not getting the benefit of “flipping” the great teacher. Grimmelmann’s critique was that the TA approach robbed the flipped classroom of its virtue. By hypothesis the locals are not as good as the star, and it is the locals with whom the students interact.<sup>68</sup>

Nor do MOOCs solve the scale problem. Yes, a taped lecture is infinitely reusable at low marginal cost, but lectures, especially introductory ones, were not the most expensive part of quality education.<sup>69</sup> Discussions are expensive if one wants to have them in seminar-sized classes; grading is expensive, and more or less linear with the number of students—unless one resorts to multiple-choice exams, often considered a poor method of examination for most law school subjects.<sup>70</sup> Tellingly, when in 2013 Harvard’s JusticeX MOOC offered philosophy

65. Niall Sclater, *Large-Scale Open Source E-Learning Systems at the Open University UK*, 2008 EDUCAUSE CTR. FOR APPLIED RES. 1, 2 (2008) (“The Open University was founded in 1970 as the United Kingdom’s first major distance learning provider. Since then it has become Europe’s largest university, with 180,000 students.”). To be fair, prior to 2000 the United Kingdom’s Open University model, which relied primarily first on TV courses, then on video, before moving to online streaming, also involved a one-week period of campus residence. Alan Tait, *From Place to Virtual Space: Reconfiguring Student Support for Distance and E-Learning in the Digital Age*, 6 OPEN PRACTICE 5, 9 (2014) (discussing how in the early 1970s The Open University implemented “[c]ompulsory one-week residential schools on many modules, including all first year modules”). However, The Open University moved away from the residential requirements in the early 2000s. See *id.*, at 10 (noting that after 2000 The Open University implemented a “[s]harp decline in the residential school requirements, with most degree pathways no longer having any”).

66. Grimmelmann, *supra* note 64, at 1037.

67. *Id.* at 1038–1040.

68. *Id.*

69. *Id.* at 1041.

70. For an example of the case against multiple-choice exams, see Kenney F. Hegland, *On Essay Exams*, 56 J. LEGAL EDUC. 140 (2006); in contrast, for an example of the case against essay exams, see Linda R. Crane, *Grading Law School Examinations: Making a Case for Objective Exams to Cure What Ails “Objectified” Exams*, 34 NEW ENG. L. REV. 785, 805–808 (2000).

professors at San Jose State the chance to be the local part of a course based on acclaimed lectures by Harvard's Michael Sandel, they demurred, noting that the proposal reduced them to "glorified teaching assistant[s]."<sup>71</sup>

In sum, the lessons of the undergraduate MOOC experience did not commend the platform to law school administrations, nor to faculties.

It is true that as late as 2014, one commentator could still suggest that "the MOOCs are coming" to legal education even if they would "likely dilute the education offered" to future lawyers and possibly "hasten the demise of many traditional law schools"<sup>72</sup> or even create a scenario in which "a few elite law schools will survive, but most law schools will disappear."<sup>73</sup> But in fact, MOOCs did not replace law schools. The MOOC—designed to be massive, online, potentially free and if not free then cheap—was not what law schools were looking for in J.D. teaching even it did have applications to teaching basic law to nonlawyers.<sup>74</sup>

### C. Concerns About Bad Pedagogy and Lost Opportunities for Skills Training and Networking

The case for going virtual invoked the mantra of "disruption"—practices that had long endured ought to be reexamined, and likely replaced by something sleeker and more modern.<sup>75</sup> Surely teaching, in which one person lectures to others, was ripe for change. That teaching had not changed much for a few millennia—or at least decades if you worshipped at the altar of Langdell—suggested to techno-optimists that teaching was ripe for a dose of technological improvement.

It is not surprising that the majority of academics, a notoriously conservative bunch in most things relating to their working conditions, might resist the argument that what they were doing was outmoded, especially if the proposed innovations in teaching methods might require new skills. On the other hand, by the turn of the century most law professors were eagerly, or at least comfortably, using computers to create, edit, and share manuscripts, to do their own legal research at least on Lexis and Westlaw, and to argue with one another online. It would be hard, therefore, to paint law teachers as a class as being technophobes.

71. Grimmelmann, *supra* note 64, at 1042.

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

73. *Id.* at 84.

74. See, e.g., Esther Barron & Stephen F. Reed, *A Closer Look at Distance Learning: The Law and The Entrepreneur MOOC*, 19 LEWIS & CLARK L. REV. 395 (2015) (describing creation of introduction to legal issues course for would-be entrepreneurs). A few law schools also explored alternate VR options such as Second Life. See Ross McKerlich & Terry Anderson, *Community of Inquiry and Learning in Immersive Environments*, 11 ONLINE LEARNING J. 35 (2019). Active usership in Second Life peaked in 2011, and virtually all colleges and universities that had tried Second Life eventually abandoned the platform. Rama Ramaswami, *Is There a Second Life for Virtual Worlds?*, CAMPUS TECH. (Sept. 1, 2011), <https://campustechnology.com/articles/2011/09/01/is-there-a-second-life-for-virtual-worlds.aspx>.

75. Cf. Grimmelmann, *supra* note 64, at 1047–49.

Yet the argument that teaching should be human and in person rather than human and distanced or, worse, recorded (inhuman!) and distanced, had powerful advocates. Speaking in 1999, Ruth Bader Ginsburg said that legal education is a “shared enterprise, a genuine interactive endeavor” that “inevitably loses something vital when students learn in isolation, even if they can engage in virtual interaction with peers and teachers.”<sup>76</sup> Many others pointed to the importance of learning to work in groups, and the difficulty of organizing group work remotely, not to mention the obstacles to students self-organizing study groups if their contacts were online.

Teaching methods like lecturing, or even “soft Socratic,” might not be new, but that meant they were time-tested: The methods, it could be argued, had endured not simply out of inertia, but because they had actual value. Plus, the software on offer was bad, and so were too many of the (undergraduate, at least) courses. Not to mention that the retention rate for open MOOCs was very low,<sup>77</sup> although whether that would be an issue in the context of more structured law school programs, presumably with admissions and graduation requirements, was certainly debatable.<sup>78</sup>

In reply, the advocates of virtual education could plead teething problems:

MOOCs today . . . are often mediocre and occasionally terrible. This is sometimes taken as a proof that they are no serious threat to higher education, or as providing sufficient reason to oppose them. These claims miss a basic point about disruptive innovations, which are consistently worse in the near term than the older systems they disrupt. It is precisely this fact that keeps incumbents from embracing the innovation; if MOOCs today really were clearly better than classroom instruction, we would not be having this conversation. This does not mean MOOCs will stay worse, it does not mean they will get better. It just means that to criticize MOOCs is not to refute them.<sup>79</sup>

Meanwhile, however, law schools that incorporated computer-mediated education tended to choose live distance learning, not asynchronous teaching. Thus, for example, in 2006 Daniel Powell recommended synchronous teaching “like videoconferencing,” because it lets “students have an opportunity to have

76. Quoted in Powell, *supra* note 29, at 286 (noting Justice Ginsburg’s remark came as part of her critique of the all-online model adopted by Concord University School of Law).

77. See Justin Reich & José A. RUIPÉREZ-VALIENTE, *The MOOC Pivot*, 363 SCIENCE 130, 130 (2019) (finding that the “vast majority of MOOC learners never return after their first year . . . and the bane of MOOCs—low completion rates—has not improved over 6 years”).

78. Cf. Justin Reich, *MOOC Completion and Retention in the Context of Student Intent*, EDUCAUSE REV. (Dec. 8, 2014), <https://er.educause.edu/articles/2014/12/mooc-completion-and-retention-in-the-context-of-student-intent> (reported low completion rates of 2% to 10% should be understood in context of student intentions; of students who said they plan to complete, 22% actually did).

79. Grimmelman, *supra* note 64, at 1047 (footnotes omitted).

their questions answered immediately.”<sup>80</sup> Indeed, Powell argued that current web-based synchronous technologies were not good enough, and videoconferencing “most closely approximates [the] interactive law school experience.”<sup>81</sup> This advice comported with what was known about student preferences: Early studies showed that students resisted asynchronous teaching as the main mode of instruction,<sup>82</sup> although they liked the ability to replay classes and also liked having online support media such as web pages and chat boards.<sup>83</sup>

Some more recent scholarship challenges the claim that law students dislike online learning.<sup>84</sup> It could be, perhaps, that what law students say they like depends on what is seen as customary—and how good the online instruction proves to be. Law professors are likely to get better at online instruction, and law students will become more accustomed to it, but widespread acceptance, if it comes, remains in the future.

In addition to disputes over how best to deliver in-class education, the case against moving online gained traction as law schools—responding both to the MacCrate Report and general pressure from the bar—began to focus more on clinics and skills training. While some skills training might migrate relatively easily online, the conventional wisdom was that much of it, and almost all clinical teaching, would be difficult to replicate online. Client interviews, for example, are very different if the interviewer is on a screen than if the lawyer and client are in the same room.<sup>85</sup>

Last, but far from least, for many students law school is an opportunity to network with peers, with tenured and perhaps especially adjunct professors, and often with members of the local bar. Peer networking takes many forms, but at its best it creates not just friendships but justified trust (or even justified mistrust) that can last a career. For many students, extracurricular activities ranging from law reviews to moot court to community legal aid projects play an important, some might even say leading, role in legal education. Law schools hope that both in-class and other interactions with instructors and lawyers will model and teach professionalism.

Both students and faculty feared that all of these activities would be different, and many unlikely, without an in-person component to encourage interpersonal relationships. (Not to mention the lost opportunities for students to socialize in person, also a significant part of many legal educations.)

80. Powell, *supra* note 29, at 295, 297.

81. *Id.* at 298.

82. *Id.* at 303.

83. *Id.*

84. See e.g., Yvonne M. Dutton et al., *Assessing Online Learning in Law Schools: Students Say Online Classes Deliver*, 96 *DENV. L. REV.* 493 (2019); see also *infra* notes 155–156 and accompanying text.

85. *But see infra* note 172 and accompanying text (discussing need to train law students in virtual client interviews if social distancing becomes the norm).



#### D. Reputational and Branding Concerns

Between 2000 and the onset of the pandemic, a significant number of accredited law schools experimented with distance-learning options—perhaps thirty percent or more of the top hundred schools, according to one count.<sup>86</sup> However, very few law schools, and none of the ones thought best, embraced an all-online option for their J.D. offerings. One major reason was undoubtedly that the ABA rules continued to limit or forbid it, a topic discussed above.<sup>87</sup> But even if the ABA rules had been more lenient, there are reasons to believe that reputational and branding concerns would have kept all but the most prestigious, courageous, or desperate law schools from going virtual.

The idea of a truly virtual, all-online law school was seriously tarnished by its early adopters. The most famous was the Concord Law School, but there were other non-ABA-approved schools in California that also provided purely virtual offerings. Collectively, they gave purely online law degrees a rather generic and undistinguished patina. For a law school to be willing to enter the market—even if the ABA blessed the experiment—the school would have to believe that its brand had sufficient power to withstand any undermining effect of inferiority by association. A top school like Harvard or Stanford could undoubtedly pull this off, but it is unclear how far down the U.S. News curve of perceived prestige one could go without risking watering the brand.

Two law schools, however, eventually took the plunge. Syracuse and Mitchell Hamline secured the ABA’s permission to offer a “hybrid” J.D. program with only one-third of the teaching on campus.<sup>88</sup> Notably, neither of these schools is in the top 100 in the U.S. News rankings.<sup>89</sup> Higher-ranked law schools either chose to avoid the first-mover risk or decided that the low profit potential was not worth it.

#### E. Bad Economics

Until the pandemic, the economic case for virtual teaching must have looked rocky on both the production and sales sides.

As we have seen, law schools were understandably wary of the MOOC model. Sorting out intellectual property rights presented yet another problem. As law schools, and universities more generally, contemplated investing in the

86. Dutton et al., *supra* note 84, at 494.

87. See *supra* § II.A.

88. See MITCHELL HAMLINE SCHOOL OF LAW, *Blended Learning at Mitchell Hamline*, <https://mitchell-hamline.edu/academics/j-d-enrollment-options/blended-learning-at-mitchell-hamline/>. For information about the Syracuse program, see JDINTERACTIVE, <https://jdinteractive.syr.edu/> (“The program combines real-time, live online class sessions with self-paced instruction, on-campus courses, and experiential learning opportunities.”).

89. In 2022, Syracuse ranked 103. *2023 Best Law Schools*, U.S. NEWS AND WORLD REPORT, <https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings?name=Syracuse>, and Mitchell Hamline ranked below 147, <https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings?name=Mitchell%20Hamline%20School%20of%20Law>.

creation of fancy courseware, or even just fairly straightforward taped lectures, intellectual property rights gained salience.<sup>90</sup> Professors normally own their own lectures and keep the copyright to their books. Were that pattern to persist into the realm of canned lectures, whatever their form, then universities would have to negotiate and pay royalties every time they reused the material. The prospect of distance learning, and especially the prospect of asynchronous teaching, raised the copyright stakes by making the lectures and materials potentially more valuable.<sup>91</sup>

Copyright law had not been thought to distinguish between ownership of live and recorded academic lectures and their related materials.<sup>92</sup> But in the early 2000s, a number of academic articles argued that, despite copyright law's traditional "teacher exception" to the work-for-hire doctrine giving professors rights over materials they authored,<sup>93</sup> copyright law had not answered the question of whether universities or their faculty owned the right to academic works.<sup>94</sup> Rather than leave this issue up to the courts, most academic institutions developed comprehensive copyright policies defining each party's rights in relation to increasingly valuable online class materials.<sup>95</sup>

90. Roberta Rosenthal Kwall, *Copyright Issues in Online Courses: Ownership, Authorship and Conflict*, 18 SANTA CLARA COMPUT. & HIGH TECH. L.J. 1, 1-2 (2001) (observing that "[a]s the twenty-first century dawns . . . , university interest in copyright ownership of works created by academics is intensifying, largely as a result of the potential financial windfalls associated with distance education").
91. *Id.* at 2.
92. *Id.* at 34 (stating that online course materials "should be treated much the same as any other academic work product" for purposes of copyright law); AM. ASS'N OF UNIV. PROFS., STATEMENT ON COPYRIGHT (1999), <https://www.aaup.org/report/statement-copyright> (stating that professors' materials are treated the same "regardless of the physical medium in which these 'traditional academic works' appear," including when they take the form of "courseware for use in programs of distance education").
93. *See Hays v. Sony Corp. of Am.*, 847 F.2d 412, 416 (7th Cir. 1988) (Posner, J.) (noting that "authority for this conclusion was in fact scanty . . . not because the merit of the exception was doubted, but because, on the contrary, virtually no one questioned that the academic author was entitled to copyright his writings"); *see generally* Elizabeth Townsend, *Legal and Policy Responses to the Disappearing "Teacher Exception," or Copyright Ownership in the 21st Century University*, 4 MINN. INTELL. PROP. REV. 209 (2003) (providing an in-depth description and analysis of the teacher exception to copyright law's work-for-hire doctrine).
94. Jacob H. Rooksby, *Copyright in Higher Education: A Review of Modern Scholarship*, 54 DUQ. L. REV. 197, 204 (2016) (noting that "[b]y the early 2000s, a cautious consensus seemed to have emerged that faculty ownership of scholarly materials should not be assumed"); Nathaniel S. Strauss, *Anything but Academic: How Copyright's Work-for-Hire Doctrine Affects Professors, Graduate Students, and K-12 Teachers in the Information Age*, 18 RICH. J.L. & TECH. at ¶ 2 (2011) (warning that "despite the widespread belief that the work belongs to the professor who creates it, the law is far from clear in this area").
95. Ashley Packard, *Copyright or Copy Wrong: An Analysis of University Claims to Faculty Work*, 7 COMMUN L. & POL'Y 275, 293-308 (2002) (providing a detailed analysis of seventy different universities' copyright policies).

Unsurprisingly, administrations took the view that since they were not only providing the hardware and the staff to create and package the content, but also doing the marketing and collecting the fees, professors ought to be happy with a one-time payment at most—if indeed the university couldn't just assign someone the job and then invoke the work-for-hire doctrine.<sup>96</sup>

Work for hire, or a small one-time bonus, might have been a possible model for introductory “commodity” undergraduate classes, especially those in STEM fields which lent themselves to “objective” testing via multiple choice or problem sets. Calculus doesn't change much from year to year, and there are a lot of people with advanced degrees capable of teaching it. The model does not work as well for law, where things change over time, even in first-year subjects like Torts and Contracts, not to mention Constitutional Law and Civil Procedure, where things tend to change even more rapidly. Plus, law students expected local talent, or national stars (recall the idea of “Arthur Miller on a disk”<sup>97</sup>). In either case, the talent wanted to be compensated, it understood its legal rights, and the lectures dated more quickly than in basic science—or even basic social science and English.

Without the potentially large savings to be had from asynchronous teaching, whether buying in or using home-brewed lectures, law schools were left with the distance-learning model. While it offered access to new markets abroad, and the ABA allowed it for LL.M. and other non-J.D. offerings, there were some fixed costs to remote teaching. At least for the J.D., the potential profits appeared limited at best given that there would be little in the way of economies of scale. A professor who taught a small class at home might instead teach a bigger one located in multiple places, but doing it live on a per-class basis limited the tuition implications.

Doing something more ambitious—trying to create better software or high production values—meant a bigger investment, and some substantial risk at least for first-movers. Certainly mere high-quality content without the fancy production values did not seem to be what law faculties were seeking. Harvard's early foray into online content, *The Bridge*,<sup>98</sup> did not become a national standard for introducing 1Ls into the mysteries of thinking like a lawyer, even though or perhaps because it was basically a mini-casebook online. (For those interested, *The Bridge* lives on in cyberspace;<sup>99</sup> meanwhile, Harvard is testing “Zero-L,” an introduction to law school that it plans to market nationally.<sup>100</sup>)

96. The work-for-hire doctrine vests copyright in an employee's work in the employer when the creation of the work falls within the scope of employment. MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 5.03[A].

97. See *supra* note 29 and accompanying text.

98. See *supra* notes 27–28 and accompanying text.

99. *The Bridge*, BERKMAN KLEIN CTR. FOR INTERNET AND SOC'Y AT HARV. UNIV., <https://cyber.harvard.edu/research/bridge>.

100. See *infra* text at notes 183–87.

The problems looked equally daunting on the sales side. A top law school such as Harvard could plausibly imagine a two-tiered pricing system in which its traditional offerings continued to fetch the same (oft-discounted) prices as always while the lower-priced virtual school functioned as an extension campus. A Harvard could reasonably imagine having standards high enough even for the virtual campus as to produce respectable graduates; meanwhile, discounting the virtual offering would pose little danger to the traditional product. Schools further down the prestige distribution, however, had to worry both about quality of the virtual admits—too low and you water the brand—and about pricing. Price the virtual offering too attractively, and the average law school might risk cannibalizing its usual admits, especially as law students proved to be more and more price-sensitive in the 2010s.<sup>101</sup>

Most of these calculations began to change when COVID-19 struck.

### III. Falling Barriers: Law Teaching in a Time of COVID

The pandemic hit suddenly and law schools, like others, struggled to adapt to rapidly changing conditions. As discussed above, law schools, like other educational institutions, responded to the highly contagious and potentially deadly virus by shutting down and moving to remote teaching.

As it became clear that the pandemic would extend into and probably through the fall 2020 semester, law schools began to prepare more seriously, and with a little more lead time, for both synchronous and asynchronous legal education. The enforced turn to teaching online in turn revived speculation that maybe law teaching would be better, or at least cheaper, if conducted without the encumbrance of a physical law school. The rise of the Omicron variant just in time for spring 2022 made those questions only more insistent.

#### *A. The Old is New Again*

The move to online teaching reinvigorated speculation about the future of virtual legal education, and indeed about the online delivery of higher education in general. However, something about this contemporary discussion about the future of legal education seemed oddly familiar.

We were told that MOOCs are “booming”:<sup>102</sup> “Coursera . . . added 10 million new users from mid-March to mid-May [2020], seven times the pace of new sign-ups in the previous year. Enrollments at edX and Udacity, two smaller education sites, have jumped by similar multiples.”<sup>103</sup> “The instructional ingredients of success include short videos of six minutes or less, interspersed with interactive drills and tests; online forums where students share problems and suggestions; and online mentoring and tutoring.”<sup>104</sup> Similarly, in the hope-springs-eternal

101. See *supra* note 42 and text accompanying.

102. Steve Lohr, *Remember the MOOCs? After Near-Death, They're Booming*, N.Y. TIMES (May 26, 2020), <https://www.nytimes.com/2020/05/26/technology/moocs-online-learning.html>.

103. *Id.*

104. *Id.*

department, it seemed that a few professors might be ready to try the virtual-worlds approach again.<sup>105</sup>

Once again commentators were predicting doom for the higher education world as we know it. Kevin Drum, then of *Mother Jones*, made familiar-sounding predictions about what would happen if MOOCs really took off:

- *Every existing university will go out of business.* They have to support a campus full of buildings and hundreds or thousands of professors. They will be unable to compete with online coursework that can be offered at a tenth of the price.
- Some research universities will disappear. Others will stick around as pure research centers. It's possible, for example, that online courses won't be good enough to generate PhDs, so research and graduate education will stick around.
- The star effect will overwhelm online courses. How many Econ 101 classes do you need, after all? Once everything settles down, I'd expect no more than a dozen or so featuring the very best teachers representing a modest range of viewpoints.
- Office hours with these star professors will be a thing of the past. Instead, online courses will offer online Q&A sessions—either one-on-one or group—with teaching assistants at an extra cost.
- Far more classes will be available. [. . .]
- There would no longer be any real distinction between 2-year junior colleges and 4-year BA-granting colleges. There would just be classes and certificate requirements. Take the classes needed for an AA, and you get an AA. Take the classes needed to be a dental assistant, and you get a certificate in dental assistantry. Take four years of classes in astrophysics, and you get a BA in astrophysics.  
[. . .]
- Admission requirements will go away. [. . .] If you're wrong, just drop the class and take an easier one.
- But what about classes that require hands-on training: music, drama, labs, and so forth? Well . . . I don't know. But they'll be expensive.<sup>106</sup>

105. Lilah Burke, *Virtual Classes in a Virtual World*, INSIDE HIGHER ED (Nov. 22, 2019), <https://www.insidehighered.com/digital-learning/article/2019/11/22/stanford-conducts-classes-virtual-world>.

106. Kevin Drum, *Here's a Look at the Future of Higher Education*, MOTHER JONES (May 26, 2020), <https://www.motherjones.com/kevin-drum/2020/05/heres-a-look-at-the-future-of-higher-education/> (bullet points in the original).

Similarly, legal technology entrepreneur Dan Currell suggested that universities in general are about to suffer a “great unbundling”:

Colleges now face what could be a lethal unbundling event set to begin in less than two months. Students and donors at residential four-year universities pay a high price for a prix fixe menu of unrelated services: teaching, attractive landscaping, research, food, housing, football, academic counseling, examination, certification, musical conservatories, student affinity groups, theater programs, mental health care, LEED-certified architecture, career counseling, alumni networking and much more. This is unique to American colleges; many fine European universities offer only the core of this bundle: teaching and certification.

Neither students nor administrators know precisely why students at American universities are willing to pay such a high price for this bundle of experiences—but they may be about to find out. The external shock of COVID-19 has reduced comprehensive four-year schools to a thin layer of online services for at least the fall semester of 2020, and possibly the full academic year and beyond. The next six weeks [starting from late June 2020] will begin to reveal how many students will continue to pay for the whole bundle while receiving only its two core elements: teaching (virtual or hybrid) and certification.<sup>107</sup>

And entrepreneur and Professor of Marketing Scott Galloway predicted that because the value of education has already “been substantially degraded,” Google and other large tech companies will partner with major universities to take over the higher education sector:

The post-pandemic future . . . will entail partnerships between the largest tech companies in the world and elite universities. MIT@Google. iStanford. HarvardxFacebook. According to Galloway, these partnerships will allow universities to expand enrollment dramatically by offering hybrid online-offline degrees, the affordability and value of which will seismically alter the landscape of higher education. Galloway, who also founded his own virtual classroom start-up, predicts hundreds, if not thousands, of brick-and-mortar universities will go out of business and those that remain will have student bodies composed primarily of the children of the one percent.<sup>108</sup>

Much of this, with the substitution of the internet for DVDs, is pretty similar to what I overconfidently predicted to the AALS twenty years ago. I was wrong then, or at least premature. Maybe this time is different?

Mark Cohen, CEO of Legal Mosaic, argues that, indeed, circumstances have changed:

107. Dan Currell, *The Great Unbundling* (172), LEGAL EVOLUTION BLOG (June 28, 2020), <https://www.legalevolution.org/2020/06/the-great-unbundling-172/>.

108. James D. Walsh, *The Coming Disruption*, N.Y. MAG. (May 11, 2020), <https://nymag.com/intelligencer/2020/05/scott-galloway-future-of-college.html> (quoting Galloway).

In a matter of weeks, legal education and service delivery have been transformed. The pandemic is putting tremendous pressure on courts to do the same.

The old guard will cling to the hope these are temporary changes. They will point to the recession precipitated by the 2008 global economic crisis and suggest the current one will take a similar course. This time is different. Technology and new delivery models are far more advanced than they were in 2008. Consumers have a different mindset and a greater urgency to solve a growing list of complex challenges. The potential of technology and its ability to support new models, processes, and paradigms is already on display. The genie is out of law's bottle, and it will not return.<sup>109</sup>

Although my track record in the crystal ball department may be suspect, I do agree that there are some good reasons to think that my old predictions to the AALS have new life. Much depends, however, on how quickly—or, if you prefer, how slowly—the U.S. manages to get the COVID-19 pandemic under control. To understand the path dependence of this possible transformation requires that we look at how law schools have responded to the pandemic.

### *B. Spring's Scrambling: Opening the Door to Online Learning*

The move to online teaching took place in parallel with sudden changes in the regulatory environment. The changes, and the circumstances that required them, stressed both instructors and students and generated some pushback.

#### 1. ABA (and ICE) Actions

As we have seen, up until the pandemic a full program of distance learning, much less a truly Virtual Law School, would have violated the ABA's law school accreditation standards. But the Standards do provide for exceptions in a crisis.<sup>110</sup> And the ABA quickly issued a "Guidance Memo" in February 2020, which in effect gave law schools carte blanche to move courses to distance learning if there was no practical alternative.<sup>111</sup>

Coincidentally, even before the pandemic began, the ABA had begun the process of changing its rules to remove the flat prohibition on law schools' offering a "Distance Education J.D. Program."<sup>112</sup> Indeed, as of the 2021-2022

109. Mark A. Cohen, *COVID-19 Will Turbocharge Legal Industry Transformation*, FORBES (Mar. 24, 2020), <https://www.forbes.com/sites/markcohen1/2020/03/24/covid-19-will-turbocharge-legal-industry-transformation/>.

110. See ABA 2019-2020, *supra* note 62, at § 107(a)(1).

111. ABA, MANAGING DIRECTOR'S GUIDANCE MEMO: EMERGENCIES AND DISASTERS 2 (2020), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/20-feb-guidance-on-disasters-and-emergencies.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/20-feb-guidance-on-disasters-and-emergencies.pdf) ("Distance learning often may be a good solution to emergencies or disasters that make the law school facilities unavailable or make it difficult or impossible for students to get to the law school.")

112. See Memorandum from ABA Council Chair Diane Bosse & Managing Director of Accreditation and Legal Education Barry A. Currier (Mar. 6, 2020), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/3-6-20-notice-and](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/3-6-20-notice-and)

standards, the ABA considers a law school's creation of an online J.D. to be only a "substantive change" under Standard 105.<sup>113</sup> "Substantive changes" require a law school to submit an application for the ABA's acquiescence before starting an all or mostly online program, rather than getting an actual waiver.<sup>114</sup> Thus, the ABA retains a role in reviewing online J.D. programs, but the door to them is, for the first time, wide open.

Thus, where previously the ABA was a major roadblock to the Virtual Law School, it is no longer. For one thing, the ABA has approved distance learning for the duration of the current emergency,<sup>115</sup> and as of this writing (December 2021) no end is in sight. If the distance-learning programs put on in response to the pandemic are successful, it is hard to see how the ABA could turn back the clock without opening itself up to substantial opprobrium, not to mention a new round of antitrust exposure.

The floodgates to partly virtual J.D. programs began to open in 2021 after the ABA rules changes and the early experience of pandemic law teaching: the University of Dayton, Loyola (Chicago), Seton Hall, Southwestern, Touro, University of Denver, and the University of New Hampshire Franklin Pierce spun up hybrid J.D.s,<sup>116</sup> as did Golden Gate,<sup>117</sup> Northeastern,<sup>118</sup> Seattle,<sup>119</sup> and Suffolk.<sup>120</sup> Meanwhile, UC Davis (ranked by U.S. News as a top forty law school), Loyola (LA), South Texas and Vermont submitted applications to the

comment-memo-distance-ed.pdf; Accreditation Counsel Stephanie Giggetts § B (May 6, 2020) (setting out proposed new text of Standard 105(12)), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/may2020/20-may-council-standards-report-items-circulated-for-notice-and-comment.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/may2020/20-may-council-standards-report-items-circulated-for-notice-and-comment.pdf) (reporting on progress of proposal).

113. ABA, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Standard 105(12), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2020-2021/2020-21-aba-standards-and-rules-for-approval-of-law-schools.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-for-approval-of-law-schools.pdf).
114. See Stephanie Francis Ward, *Law Schools Should Have Flexibility in Responding to 'Extraordinary Circumstances,' ABA House of Delegates Says*, ABA JOURNAL (Aug. 3, 2020, 4:18 PM), <https://www.abajournal.com/news/article/various-legal-ed-proposals-approved-by-aba-house-of-delegates>.
115. See, e.g., ABA, EXTENSION OF EXISTING VARIANCES TO SPRING 2022 (listing 140 law schools), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/2021/2021-nov-pandemic-variance-extensions.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/2021/2021-nov-pandemic-variance-extensions.pdf).
116. See *Online Juris Doctor Degree Programs for 2022*, 2U INC (2022), <https://onlinemasteroflegalstudies.com/law-degrees/juris-doctor/>.
117. *JD Flex Program*, GOLDEN GATE UNIV. SCH. OF L., <https://onlinelaw.ggu.edu/>.
118. *Northeastern Law Launches Part-Time, Online and On-Campus FlexJD Option*, NORTHEASTERN UNIV. SCH. OF L. (2022), <https://law.northeastern.edu/northeastern-law-launches-part-time-online-and-on-campus-flexjd-option/>.
119. *Flex JD*, SEATTLE U SCH. OF L., <https://law.seattleu.edu/academics/degree-programs/jd/flex-jd/> (last visited Aug. 11, 2022).
120. *Hybrid Online JD*, SUFFOLK UNIV. (2022), <https://www.suffolk.edu/law/academics-clinics/juris-doctor/hybrid-online-jd>.



ABA for acquiescence to similar programs.<sup>121</sup> The ABA also approved a more radical application from St. Mary's University School of Law in San Antonio, allowing it to become the United States' first online-only, albeit part-time, ABA-accredited J.D. program.<sup>122</sup>

Law schools dodged another major regulatory obstacle when, in early July 2020, the Trump administration quickly withdrew a regulatory proposal that would have required foreign students to attend at least one live class in order to avoid deportation.<sup>123</sup> This removed the specter of a major legal bar to fully online education.

## 2. Law School Emergency Actions

They got there in different ways, but most law schools took most or all of their classes online in spring 2020.<sup>124</sup> “[A]t least three-fourths of law students took most or all their courses online in the Fall 2020 (75%) and Spring 2021 (79%) semesters.”<sup>125</sup> Anecdotally, the methods included everything from, in a few cases, just posting PowerPoint slides online to—more commonly—posting videoed lectures and/or running classes synchronously over Zoom or the equivalent.

These expedients happened in a hurry and with little opportunity to plan for or train for the use of technology. An informal survey by Bridget Crawford and Michelle Simon reported that faculty suddenly switching to online teaching found it stressful.<sup>126</sup>

Unsurprisingly, the sudden and unexpected move online was not without its difficulties. Writing on online teaching has long suggested that it requires

121. See ABA, *Applications for Substantive Change*, [https://www.americanbar.org/groups/legal\\_education/public-notice/applications-for-substantive-change](https://www.americanbar.org/groups/legal_education/public-notice/applications-for-substantive-change) (listing law schools under Oct. 11, 2021).

122. See Nick Muscavage, *ABA Nod to St. Mary's U Online Law School a Turning Point*, LAW360 (Aug. 31, 2021, 10:03 AM), <https://www.law360.com/articles/1416701/aba-nod-to-st-mary-s-u-online-law-school-a-turning-point>; see also ST. MARY'S UNIVERSITY SCHOOL OF LAW, *Online J.D. Program*, <https://law.stmarytx.edu/academics/programs/jd/online-j-d-program/>.

123. See Miriam Jordan and Anemona Hartocollis, *U.S. Rescinds Plan to Strip Visas from International Students in Online Classes*, N.Y. TIMES (July 14, 2020), <https://www.nytimes.com/2020/07/14/us/coronavirus-international-foreign-student-visas.html>. The announcement of the quickly abandoned policy is at, *SEVP Modifies Temporary Exemptions for Nonimmigrant Students Taking Online Courses During Fall 2020 Semester*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (July 6, 2020), <https://www.ice.gov/news/releases/sevp-modifies-temporary-exemptions-nonimmigrant-students-taking-online-courses-during>.

124. “By the fall of 2020, around 80 schools moved to a completely online format, including two top-10 schools: Harvard Law School and University of California - Berkeley School of Law. Around 70 schools remained in person with safety measures, and the remaining 50 schools used a hybrid approach.” Michael Houlberg, *The Future of the Legal Profession: In Person or Virtual?*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. BLOG (Oct. 21, 2021), <https://iaals.du.edu/blog/future-legal-profession-person-or-virtual>.

125. GALLUP & ACCESSLEX, *LAW SCHOOL IN A PANDEMIC* 3 (2021).

126. Bridget J. Crawford & Michelle S. Simon, *Law Faculty Experiences Teaching During the Pandemic*, 65 ST. LOUIS UNIV. L.J. 455 (2021).

its own approach; as one scholar put it, “simple ‘onlinification’ of face-to-face lectures will not result in positive experiences for academics or students.”<sup>127</sup> Indeed, a headline in *Wired* said it all: “This is online learning’s moment. For universities, it’s a total mess.”<sup>128</sup> Recognizing the strains on both students and faculty, many law schools, including mine, moved to full or partial pass/fail instead of grades for spring 2020.

In addition to the inherent problems of learning to teach online on the fly, law schools had to cope with quirks and bugs in whatever software they adopted. Zoom, which was the choice of many, initially proved vulnerable to interlopers. News accounts of “zoombombing” by intruders who interrupted classes with pornographic or racist content created additional stress.<sup>129</sup>

### 3. Student and Other Reactions

The rushed nature of the move online meant that classes both small and large had to be transposed to a new medium while they were in progress. To the extent that instructors turned to synchronous tools such as Zoom, their experience and that of their students likely varied a great deal depending on the size of the class and the technical resources available to both faculty and students, as well as other factors.

Class size was clearly a major variable: Synchronous does not scale well, at least not on platforms like Zoom. Also, Zoom, like other synchronous tools, is vulnerable to lag and other technical glitches. In many cases it likely would have been better for large classes to use a blended approach, starting with asynchronous teaching, and involving “short videos, quizzes, short answer hypos, and group assignments . . . [and] a synchronous component with occasional Zoom discussions, likely as small groups.”<sup>130</sup> While that may have been good advice, it wasn’t something that most instructors who had planned a course based on teaching in person could easily conjure up in the middle of making sense of their new tools. And to the extent that what had been a big class now had breakout sections, that meant more hours teaching while also trying to learn to manage new tools, and perhaps also small children, elderly parents, crowded quarters and more.

127. Kyungmee Lee, *Coronavirus: Universities Are Shifting Classes Online—But It’s Not as Easy as It Sounds*, AL-FANAR MEDIA (Mar. 19, 2020), <https://www.al-fanarmedia.org/2020/03/coronavirus-universities-are-shifting-classes-online-but-its-not-as-easy-as-it-sounds/>.

128. Sabrina Weiss, *This Is Online Learning’s Moment. For Universities, It’s a Total Mess*, WIRED UK (June 2, 2020, 6:00 AM), <https://www.wired.co.uk/article/university-online-coronavirus>.

129. *See, e.g.*, Press Release, Kristen Setera, FBI Boston, FBI Warns of Teleconferencing and Online Classroom Hijacking During COVID-19 Pandemic (Mar. 30, 2020), <https://www.fbi.gov/contact-us/field-offices/boston/news/press-releases/fbi-warns-of-teleconferencing-and-online-classroom-hijacking-during-covid-19-pandemic> (discussing teleconferencing disruptions by pornographic and/or hate images and language).

130. Agnieszka McPeak, *Asynchronous Online Law School Teaching: A Few Observations* (Mar. 12, 2020), <https://ssrn.com/abstract=3553094>.

Students also faced a variety of new problems caused by the shift to online learning. Some students lacked adequate bandwidth in their homes. Shut out of campus, libraries, coffee shops and other places with internet, they struggled to keep up with classes that required video, and especially real-time video. Other students lacked a quiet place to work, finding themselves in crowded family or other living groups with no private space and children, pets, or various sorts of noise making both studying and online participation difficult. And, sadly, some students simply lacked homes: Shut out of dorms, they had no place to go, either because they had no family or because they came from abroad and could not return to their family for political, financial, or quarantine-related reasons.<sup>131</sup>

In their attempt to persuade the California Committee of Bar Examiners to cancel the bar exam and offer 2020 in-state graduates diploma privilege (that is, allowing law school graduates to practice without taking the bar), an advocacy group produced an online poll—an unscientific sample—claiming that 72.3% of respondents were concerned that they “either will not have, or are unsure of whether they will have, access to reliable and consistent internet to take the Bar examination if administered online.” An even larger number, 76.9%, reported “that they did not have, or are unsure whether they will have, a quiet space without interruptions to take an online bar exam.”<sup>132</sup> Even if the real numbers of students unable to study effectively remotely were only a tenth that size, that would still mean that the move to online learning caused severe hardship for a significant number, seven percent of the law student population—hardships caused by poverty or national origin.

Some students also had concerns about whether they were getting full educational value for their tuition. An online survey by LSAT prep firm TestMax in the summer of 2020 found that fifty-six percent of law students polled said their education last semester was “less effective” because of remote learning, while only thirty-seven percent said there was “no change” going from in-person to remote learning.<sup>133</sup>

131. See Ezra Marcus & Jonah E. Bromwich, *What's the Value of Harvard Without a Campus?*, N.Y. TIMES (July 11, 2020), <https://www.nytimes.com/2020/07/11/style/harvard-students-coronavirus.html> (“Many first-generation, low-income Harvard students feel that the elite institution has failed them.”).

132. UNITED FOR DIPLOMA PRIVILEGE, IMPACT SURVEY FACT SHEET (July 8, 2020) (N=1424), [https://drive.google.com/file/d/1inMy\\_DvoZnAgjsQIPmohmhlVgz12gp8Q/view](https://drive.google.com/file/d/1inMy_DvoZnAgjsQIPmohmhlVgz12gp8Q/view).

133. SURVEY MONKEY, *How Has COVID-19 Impacted Your Legal Education and Career Path?*, <https://www.surveymonkey.com/results/SM-T6PR9PDF7/>; see also Mehran Ebadolahi, *Law School Moves Online, Students Express Doubts*, ATTORNEY AT LAW (July 1, 2020), <https://attorneyatlawmagazine.com/law-school-moves-online-students-express-doubts> (TestMax surveyed “more than 1,700 current law students... regarding the effects of COVID-19 on their legal education and career prospects. Respondents were recruited via email and mobile app push notifications. Respondents represented a broad sample of TestMax users, and are attending law schools across the United States”); Richard Vedder, *Is a Law School Meltdown Coming?*, FORBES.COM (June 8, 2020), <https://www.forbes.com/sites/richardvedder/2020/06/08/is-a-law-school-meltdown-coming/> (suggesting survey results are plausible despite imperfect methodology).

It is only a short leap from complaints about quality to complaints about price. Almost eighty-seven percent of the TestMax survey group thought their education would be “overpriced” if “remote learning continued into multiple future semesters.” In the same vein, the Yale Daily News quoted one observer as saying that for Yale College to keep charging the same tuition for an online-only undergraduate education is “just flat murder . . . . What’s the difference if you’re University of Phoenix or Harvard?”<sup>134</sup>

A number of law students apparently felt that an online product, or at least the form being offered to them in fall 2020, was inferior to the live version they had been expecting. Being law students, they brought class action lawsuits for refunds. (To be fair, groups of undergraduate students at more than seventy colleges and universities filed similar lawsuits.<sup>135</sup>)

In *Barkhordar v. Harvard*, the plaintiff was a rising 2L seeking class action certification on behalf of himself and all similarly situated students at all twelve of Harvard’s degree-granting schools.<sup>136</sup> He alleged that distance education is and was “subpar in practically every aspect: lack of facilities, lack of materials, lack of efficient classroom participation, and lack of access to faculty. Moreover, students are being deprived of the opportunity for collaborative learning and in-person dialogue, feedback, and critique.”<sup>137</sup> As a result of the switch to a fully online program, “Plaintiff has also been unable to connect with professors and classmates on the same level online as he had in-person and is similarly lacking the intellectual stimulation of the in-person learning environment.”<sup>138</sup> Making

134. Matt Kristoffersen, *Fall 2020: More than Half of Yalies Consider Time off if Classes Go Online*, YALE DAILY NEWS (June 20, 2020, 2:58 PM), <https://yaledailynews.com/blog/2020/06/20/fall-2020-more-than-half-of-yalies-consider-time-off-if-classes-go-online/> (quoting “endowment expert” Charles Skorina).

135. See Angela Cappelliino, *More Than 70 Universities Sued for Refunds Following COVID-19 Campus Closures*, EXPERT INSTIT. (Apr. 27, 2022), <https://www.expertinstitute.com/resources/insights/universities-sued-for-covid-19-refunds-following-campus-closures/>; see also Associated Press, *Students at 25 Colleges Sue for Refunds After Campuses Close Because of Coronavirus* (May 5, 2020, 4:04 PM), <https://www.nbcnews.com/news/us-news/students-25-universities-sue-refunds-after-campuses-close-due-coronavirus-n1200746> (quoting Drexel University student as saying, “It’s just not the same experience I would be getting if I was at the campus”).

A putative class of undergraduates at Columbia University did get preliminary court approval for a settlement payment for their claim as to the loss of access to campus facilities, student activities, and other benefits for which they had paid fees, plus around \$4 million for their agreement to drop their claim for a tuition refund, *In re Columbia University Tuition Refund Action*, No. 1-20-cv-04208 (JMF) (S.D.N.Y. filed Dec. 3, 2021) a sum that happened to cover the lawyers’ share of the award and other litigation expenses. See Max Jaeger, *Columbia U. Settles COVID-19 Tuition Refund Suit for \$12.5M*, LAW360 (Nov. 24, 2021, 3:50 PM), <https://www.law360.com/articles/1443432/columbia-u-settles-covid-19-tuition-refund-suit-for-12-5m>.

136. Class Action Complaint, *Abraham Barkhordar v. Harv. Univ.* ¶¶ 55, 73 (D. Mass. Filed June 6, 2020), [https://images.law.com/contrib/content/uploads/documents/292/Barkhordar\\_v\\_Harvard\\_University\\_\\_madce-20-11203\\_\\_0001.o.pdf](https://images.law.com/contrib/content/uploads/documents/292/Barkhordar_v_Harvard_University__madce-20-11203__0001.o.pdf).

137. *Id.* at ¶ 3.

138. *Id.* at ¶ 16.

matters worse, he claimed, both the work and the grading got easier: “[T]he assignments and expectations of professors are less rigorous and less is expected of the students.”<sup>139</sup> And, as the complaint noted, Harvard Law planned to remain fully online in fall 2020—while charging the same tuition as previously.

Barkhordar’s complaint alleged that students intended to attend in person, and “a remote education is not even remotely worth” what Harvard Law is charging and is very different from what they signed up for.<sup>140</sup> That, it says, amounts to a breach of their contract, a contract that it alleges includes an “implied agreement . . . to complete their education . . . in the traditional in-person format.”<sup>141</sup> A separate count of the complaint alleged unjust enrichment, claiming that charging the same tuition as normal under the circumstances is “unjust and inequitable.”<sup>142</sup> A third count claimed Harvard is guilty of conversion for keeping all of the students’ tuition money in the spring 2020 term while forcing them off campus facilities and out of campus housing.

Thus, Barkhordar alleged, the court should order Harvard to give students a “proportionate reimbursement of tuition and fees . . . for any . . . academic term conducted in online format . . . . Such a reimbursement must be proportionate to the significantly lesser experience an online education provides as compared to a traditional in-person experience.”<sup>143</sup> The complaint did not address how one would calculate this (alleged) diminution in value. Nor did it explain at all clearly from what language in the actual contract between students and Harvard, or in the associated documents such as the student manual, the “implied agreement” arises.<sup>144</sup>

Judge Indira Talwani of the Massachusetts District Court was not impressed, finding that there was no breach of any sufficiently expressed contractual term, that the case was distinguishable from suits where schools had a cheaper distance education division but plaintiff had paid extra for the live version, and that the unjust enrichment claim failed as it was displaced by the existence of a valid contract.<sup>145</sup> A later decision allowed some more specific claims against Harvard Law School, the Harvard Graduate School of Education, and the Harvard School of Public Health as plaintiffs had amended their complaint to allege that these schools’ web sites had specifically touted on-campus facilities or the advantages of working with surrounding communities.<sup>146</sup>

139. *Id.* at ¶ 17.

140. *Id.* at ¶ 68.

141. *Id.* at ¶ 84.

142. *Id.* at ¶ 99.

143. *Id.* at ¶ 70.

144. *Id.* at ¶ 84.

145. *See* *Barkhordar v. President & Fellows of Harv. Coll.*, 544 F. Supp. 3d 203 (D. Mass. 2021).

146. *See* *Barkhordar v. President & Fellows of Harvard Coll.*, No. 20-CV-10968-AK, 2022 WL 605820, at \*3 (D. Mass. Mar. 1, 2022).

Similar claims will become, if anything, more difficult in the future, because in spring 2020 students—like everyone else—were surprised by the move to online education, but from fall 2020 forward all law students have been on some sort of notice either that classes will in fact be online or that a resort to online education might become possible, or even necessary.

### C. *The Longer Term: Teaching in the 'New Normal'*

Both the reality of the pandemic and the uncertainty as to its duration have created, and continue to create, great planning difficulties for law schools. Which of the potential health scenarios emerges likely will have an enormous effect on the extent to which law teaching's foray into online teaching takes root.

#### I. COVID-19 Scenarios

Although for a time it seemed that in-person instruction was returning to most campuses, the sudden spread of the Omicron variant of COVID-19 combined with high rates of nonvaccination in some locations suggests we could face the need for renewed mitigation measures, although clearly the popular appetite for masking and social distancing, much less lockdowns, is exhausted.

Looking further ahead, in principle, one can imagine a *Cheerful Scenario* in which Omicron frightens us into a sufficiently organized national and global response such that the COVID pandemic fades and becomes part of our background conditions, not much different from our annual flu season, or in which scientists achieve a pan-coronavirus vaccine that truly tames COVID variants.<sup>147</sup>

Less cheerfully, one can imagine multiple variations of a *Slow Scenario*, in which COVID-19 surges and fades in swings wide enough to produce mitigation measures that spur additional online instruction.

An even worse version, the *Permanent COVID* scenario, imagines that COVID-19 ultimately mutates to undermine the effectiveness of the country's vaccine project. In between these extremes are scenarios in which the virus is substantially controlled, but not totally, and there are random local outbreaks.

Which scenario materializes will have a defining effect on how much most law schools are able to teach in person. To the extent they cannot teach in person—whether because of legally mandated lockdowns or student, faculty, and staff having reasonable fears of infection, law schools will be forced to rely on distance learning, asynchronous teaching, or some combination of the two.

147. There are multiple intensive efforts for a vaccine that would make most coronavirus mutations irrelevant. See Elie Dolgin, *Pan-coronavirus vaccine pipeline takes form*, 21 NATURE 324 (May, 2022), <https://www.nature.com/articles/d41573-022-00074-6>, but see Jon Cohen, *Why efforts to make better, more universal coronavirus vaccines are struggling*, SCIENCE (Jul. 27, 2022), <https://www.science.org/content/article/why-efforts-make-better-more-universal-coronavirus-vaccines-are-struggling>.

Looking back on 2020, we know that a large number of law schools, including Harvard<sup>148</sup> and Berkeley,<sup>149</sup> were entirely virtual for the fall 2020 semester. Other schools, including Yale<sup>150</sup> and UC Irvine,<sup>151</sup> adopted a hybrid model, with some classes in person, especially in the first year, and some online. A few outliers resumed normal in-person teaching.<sup>152</sup> Unlike in spring 2020, when many schools imposed pass/fail on all instructors, in 2020–2021 and beyond, most schools returned to regular grades.

## 2. What the Scenarios Mean for the Virtual Law School

Seventy-five percent of law students responding to the TestMax survey said they would prefer to return to campus once it was safe to do so—but that also means that one out of four respondents said they would prefer to continue with remote education even after in-person returned to normal.<sup>153</sup> Whatever one makes of that online survey’s methodology, it certainly seems plausible that at least at present the substantial majority of students want their campuses back,<sup>154</sup> but also that there is already a significant minority who prefer to study from home or elsewhere. We do not know, however, how this group breaks down geographically, by credentials, or by the size or prestige of the law schools they attend, all differences that might matter significantly.

It seems plausible that the fraction of the class who prefer to stay off campus will only grow as law school instructors’ online education skills and offerings improve with time and practice. Furthermore, if students matriculate into an all-online, or predominately online “blended,” teaching environment, they may not experience the same sense of loss—or of bait and switch—as students who signed up expecting an on-campus experience, if only because post-COVID matriculants will not feel as keenly what they are missing. In the 2021 Gallup survey of law student satisfaction with online teaching, 1Ls were about fifty

148. See Karen Sloan, *Harvard Law Will Remain Online-Only for Fall Semester*, LAW.COM (June 3, 2020), <https://www.law.com/2020/06/03/harvard-law-will-remain-online-only-for-fall-semester/>.

149. See Sebastian Cahill, *UC Berkeley School of Law To Be Conducted Entirely Online in Fall 2020*, DAILY CALIFORNIAN (June 26, 2020), <https://www.dailycal.org/2020/06/26/uc-berkeley-school-of-law-to-be-conducted-entirely-online-in-fall-2020/>.

150. Dean Heather Gerken, *A Message from Dean Gerken on the Fall Semester* (July 1, 2020), <https://law.yale.edu/yls-today/media-inquiries/office-public-affairs/yale-law-school-covid-19-information>.

151. See Paul Caron, *UC-Irvine To Be 100% Online For 2Ls/3Ls in Fall 2020; 1Ls May Choose To Be on Ground for 1 or 2 Classes Each Week*, TAXPROF BLOG (June 27, 2020), [https://taxprof.typepad.com/taxprof\\_blog/2020/06/uc-irvine-law-school-to-be-100-online-for-2ls3ls-in-fall-2020-1ls-may-choose-to-be-on-ground-for-1-o.html](https://taxprof.typepad.com/taxprof_blog/2020/06/uc-irvine-law-school-to-be-100-online-for-2ls3ls-in-fall-2020-1ls-may-choose-to-be-on-ground-for-1-o.html).

152. See, e.g., *Liberty University Announces Plans to Fully Reopen in August*, LIBERTY UNIV. (June 2, 2020), <https://www.liberty.edu/index.cfm?PID=18495&mid=379980>.

153. See Survey Monkey, *supra* note 133.

154. There may also be parents who want their homes back. Cf. Walsh, *supra* note 108 (quoting Galloway regarding undergraduate tuition: “Even wealthy people just can’t swallow the jagged pill of tuition if it doesn’t involve getting to send their kids away for four years. It’s like, ‘Wait, my kid’s going to be home most of the year? Staring at a computer screen?’”).

percent more likely than 2Ls and 3Ls to rate the quality of their J.D. program as “excellent” or “good.”<sup>155</sup> This could reflect something about upper-class students being more jaded, of 1Ls having chosen to go to law school in the knowledge that they might be forced out of the classroom, or it could reflect 1Ls not knowing what they were missing. The survey also suggested that “perceptions of online J.D. courses were higher among students who had a more consistent or prolonged experience with distance learning,” which the study’s authors suggest may demonstrate that instructors got better with more experience.<sup>156</sup>

If a large group of law students really does come to prefer online education, or even if they just become resigned to it, then the longer the pandemic continues, the more the demand for on-campus education could shrink. Furthermore, most of the five factors identified in Part II above as having blocked the growth of virtual education will also attenuate over time. Those that do not may nonetheless be overwhelmed by the circumstances.

ABA Rules. I suggested above that the ABA’s standards for law school accreditation were a major reason that neither distance nor virtual legal education took off in the past two decades.<sup>157</sup> Having relaxed its rules out of necessity, can the ABA reimpose them once the pandemic is seen to be easing? This seems unlikely. Even if we get the Cheerful Scenario, in which everyone may be very relieved to return to something close to where we were in 2019, the distance genie is out of the ABA Standards bottle, at least as regards part-time study and a substantial fraction of upper-class credits.

Conversely, the longer the pandemic lasts, the more that law schools and law students will become accustomed to teaching and learning entirely online. While I have no doubt that many schools will choose to return to a mostly in-person curriculum, some fraction may not, and more will choose to run both types of programs in parallel.<sup>158</sup> If online education is seen to be effective—and that will be the subject of an interesting debate—and not too unpopular, then it will be very difficult for the ABA to attempt to legislate distance and/or virtual education out of existence. Indeed, any effort to ban either one could be grounds for a convincing antitrust case.

And, of course, if we get a serious form of the Permanent COVID scenario, in which the virus mutates, remains virulent, and resists vaccination, then social distancing may have to become a permanent feature of our lives. Packed classrooms may become a relic of the past. And in that scenario, the question of a change in the ABA rules becomes moot, because they will be de facto permanent.

155. GALLUP, *supra* note 125, at 3.

156. *Id.* at 15. This finding might also reflect some self-selection bias if teachers gravitated to what they were good at.

157. *See supra* § II.A.

158. *See* Andrew Strauss, *Post Coronavirus: Legal Education Will Never be the Same. Online Law School is Here to Stay*, NAT’L JURIST (Apr. 10, 2020, 10:37 AM), <https://nationaljurist.com/national-jurist-magazine-post-coronavirus-legal-education-will-never-be-same-online-law-school-here/>.



**Bad Software.** Although instructors teaching remotely and virtually in 2020–2021 had more time to prepare than they did for the sudden shift the previous year, prep time is still quite limited given the magnitude of the task, especially in large classes. And the fact is that the technology most in use in fall 2020 or spring 2021 just was not good enough to equal or surpass the quality of in-person teaching in most cases.

Zoom, which by all accounts was the most commonly used platform for synchronous teaching, is fine for small classes, but it presents many challenges for big ones.<sup>159</sup> Instructors have to multitask between notes, tiny student images that either span multiple screens or require toggling between pages, and a separate discussion pane (or external discussion tool). Trying to keep track of all this is not likely to enhance faculty teaching. Students too must juggle note-taking with the other feeds; if students cannot see one another well, then their interactions likely will suffer also, as compared with a physical classroom.

Professor Josh Blackman suggests that professors will need a professional teleprompter so they can read notes and maintain eye contact with the camera or else “your eyes drift around,” which viewers experience as “very disconcerting.”<sup>160</sup> In what is likely an extreme approach, he uses no fewer than eight monitors, including a laptop and a teleprompter, as demonstrated in an arresting photograph of his workspace for online teaching that he posted online.

159. Ilya Somin, *Tentative Reflections on Online Teaching*, REASON (Apr. 7, 2020), <https://reason.com/2020/04/07/tentative-reflection-on-online-teaching/>.

160. Josh Blackman, *My New Eight-Monitor Display*, REASON (May 24, 2020, 6:00 PM), <https://reason.com/2020/05/24/my-new-eight-monitor-display/>.



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All those monitors, or even just two or three, cost money, as does a computer and graphics card capable of running them,<sup>162</sup> and that is before the professor or law school has invested in the software licenses needed either to provide quality prerecorded content or to run classes live online in an effective and attractive manner.

Blackman has also suggested that any attempt at teaching a large class interactively online should incorporate a note-taker, if only to manage the flow of student volunteers, since detecting “hands up” on Zoom and monitoring the chat box is too distracting for someone trying to give a lecture.<sup>163</sup> In a smaller seminar, by contrast, it is easier to keep track of the flow, and often students can just be invited to interrupt when they want to contribute.

Meanwhile, vendors are coming forward with a plethora of tools designed to facilitate online instruction by creating opportunities for polls, quizzes, and other feedback mechanisms. Some of these are free-standing, some work with

161. *Id.*

162. Professor Blackman apparently felt that even this setup was inadequate, as he later upgraded it with even-more-expensive equipment. Josh Blackman, *My New Eight-Display Workstation with 4K and UltraWide Monitors*, REASON (May 20, 2021, 9:00 AM), <https://reason.com/volokh/2021/05/20/my-new-eight-display-workstation-with-4k-and-ultrawide-monitors/>.

163. Josh Blackman, *Another Proposal for the “Hybrid” Class*, REASON (June 18, 2020, 1:51 AM), <https://reason.com/2020/06/18/another-proposal-for-the-hybrid-class/>.

Blackboard, Canvas, Moodle, or PowerPoint. Each requires a licensing decision on the part of a law school or an instructor, and most if not all will also require some training. It was a lot to pack into one summer.

On the other hand, the longer that internet-mediated teaching is the norm, the more the market will shake out and standardize on (one hopes) good tools. Even standardizing on adequate tools will help control licensing costs and the time it takes both instructors and students to acclimatize themselves to the technology. Standardization, however, also has its costs, as it can impose limits on teaching methods and define participant power relationships. Indeed, the more that online teaching aims to leverage the reach of an individual instructor, the more pressure there may be for tools that limit the ability of students to break out of the script.

The longer the pandemic lasts, and the more that instructors and institutions learn what technology works for them and begin to master it, the better on the whole we should expect distance and virtual education to become. And the better the teaching, the stronger the case will be that it should continue, or at least that it deserves a place alongside traditional in-person education.

Indeed, even before the onset of the COVID-19 pandemic, iLawVentures, a subsidiary of BarBri,<sup>164</sup> was offering a suite of distance-learning law school classes under the brand “iLaw” that it invited law schools to purchase and offer for credit. The 2021–2022 offerings included more than thirty courses ranging from Administrative Law taught by Professor Carlton Waterhouse of Howard to Wills, Trusts, and Estates taught by Professor Gerry Beyer of Texas Tech.<sup>165</sup> According to iLaw, its “Online J.D. content can not only help you bolster your school’s subject offerings, but can also help with enrollment or budget challenges, and attract prospective students.”<sup>166</sup> In 2020 iLaw reported that it had already “delivered online content to more than 12,000 students,” and “worked alongside 25% of accredited U.S. law schools,”<sup>167</sup> although neither statistic identified what fraction involved U.S.-based J.D. students.

Pedagogy / Skills Training / Networking. There is more to good online teaching than using the right technology, although technology matters, since sufficiently bad technology can undermine even very good teaching. But the change in form of delivery also offers an opportunity to reexamine what it is

164. See *Bar Review Leader BARBRI Acquires iLawVentures, LLC, Pioneer in Legal Education Distance Learning*, CISION PR NEWSWIRE (Jul. 10, 2017), <https://www.prnewswire.com/news-releases/bar-review-leader-barbri-acquires-ilawventures-llc-pioneer-in-legal-education-distance-learning-300485194.html>.

165. *Fall 2021 & Spring 2022 Subjects*, BARBRI LEGAL ED, <https://legaled.barbri.com/spring-fall-subjects/> (last visited Dec. 21, 2021).

166. *Id.*

167. *Northeastern Law Launching Part-Time, Online and On-Campus FlexJD Option*, CISION PR NEWSWIRE (Jan. 26, 2021), <https://www.prnewswire.com/news-releases/northeastern-law-launching-part-time-online-and-on-campus-flexjd-option-301215215.html>.

that law teaching delivers. Just as good TV is not “radio with pictures,” so too it is likely that good online education is not traditional lectures with computers.

As noted above, several authors suggest that the switch to computer-mediated education is an occasion to adopt the “flipped classroom,” a teaching strategy in which lectures are taped in advance and assigned along with class readings. Class time is then saved for hypotheticals and other problem-solving exercises designed to help students master and apply the material.<sup>168</sup>

While it has its fervent partisans, the flipped classroom also has its detractors, and not only because “[f]lipped classrooms are challenging to get right, and they demand a different skill set from instructors accustomed to lecturing.”<sup>169</sup> Unless lectures substitute for reading—which I would argue would be a bad strategy for training future lawyers—the effect of putting lectures on tape and then doing problems means that students either will have to spend more time doing homework for every class, or they will inevitably slack off on one or the other. If an entire semester’s load “flipped” without cutting reading, that could add another twelve to sixteen hours of weekly homework for a full-time law student, which I suspect students would not appreciate.

Others argue that law classes, or at least the good ones, have always had something of flipped character, in that the instructor poses hypotheticals and asks the class, or some unlucky subset of it, to work through it.

Still others suggest that if online learning requires small groups, then higher education should switch to something like the Oxbridge tutorial system—a combination of large lectures with small group meetings.<sup>170</sup> But this too is not without its difficulties:

Active, online learning means a lot more work for professors and other instructors. For a college course with 20 students, split into four tutorials of five students each, our teaching time could quadruple. And that estimate doesn’t include the time required to adapt and record lectures for online viewing.<sup>171</sup>

It would be ironic if the move to online teaching, so often touted as cost-saving, were in fact to prove so labor-intensive as to increase costs. Faculty workloads could increase, but that works only up to a point. After that, the number of faculty would have to increase—but instructors’ salaries would likely crater, as would their time for research, the institution of tenure, and the law school’s idea of itself as a part of a university devoted to scholarship rather than a trade school.

168. See *supra* note 68 and accompanying text.

169. Claire L. Jarvis, *The Flip Side of Flipped Classrooms*, CHEM. & ENG’G NEWS (C&EN) (Jan. 17, 2020), <https://cen.acs.org/education/undergraduate-education/flip-side-flipped-classrooms/98/13>.

170. Lisa Feldman Barrett, *College Courses Online Are Disappointing. Here’s How to Fix Them.*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/07/08/opinion/college-reopening-online-classes.html>.

171. *Id.*

Separate issues arise with experiential education. Again, however, the longer the pandemic lasts, the more that the legal system itself will have to adapt to remote technology. Learning how to deal with the socially distanced practice of law will itself be a critical skill, and one that *can* and maybe *must* be taught remotely. Appearing before online courts, arguing to socially distant or remote juries, not to mention conferring with remote clients and co-counsel, are already skills that practicing lawyers are having to teach themselves by doing.<sup>172</sup> All of these could easily become essential parts of a revamped skills and clinical education curriculum.

It remains to be seen, however, how well the informal in-person values of law school can be transposed to an online setting. Gallup's 2021 survey of law student attitudes found that "[l]ess than one-third of students attending classes mostly or completely online (31%) say they felt a sense of community with their law school peers, compared with almost half of those attending classes mostly or completely in person (48%)."<sup>173</sup> Given the makeshift nature of emergency arrangements, a temporary seventeen percent loss on this metric is not all that bad—but could be a real issue if the gap persisted. Networking, many extracurricular activities, and not least socializing will all suffer, at least at first, and possibly for the long term. Perhaps Generation Zoom will figure it out, but if they do, they will need to teach it to older generations also.

**Branding Worries.** In Part II, I suggested that law schools contemplating a move toward a virtual offering would have been put off by the inevitable association with what were seen, rightly or wrongly, as low-quality schools such as Concord or Phoenix. Here, too, the length and nature of the epidemic will affect the outcome, but given the number of schools fielding hybrid programs, the stampede may already have begun.

In the Permanent COVID scenario, the question is moot: Everyone is doing it because none of us have a choice.

For the Slow Scenario, we have to ask—how slow? Once again, if the rules about lockdown, masks and distancing last long enough, and distance and virtual education become normalized, then, again, the stigma will be much less—and the odds increase that a top school, or several top schools, will make a major commitment in the area.

In the increasingly unlikely Cheerful Scenario, it is possible that very few schools choose to retain the majority of their internet-based offerings and thus things return to close to pre-COVID normal. Even in this scenario, however,

172. The ABA approved remote practice in December 2020, even if the lawyer is outside the jurisdiction in which admitted, so long as lawyers do not establish an office or advertise their services in the region they are inhabiting. ABA, FORMAL OPINION 495 (2020), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba-formal-opinion-495.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-495.pdf); ABA, FORMAL OPINION 498 (2021), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba-formal-opinion-498.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-498.pdf) (discussing ethics rules most likely to be violated by remote practice).

173. GALLUP, *supra* note 125 at 4.

if the online courses are seen as a success, and if a substantial fraction of the student body prefers to study from home, there will be pressure to keep the virtual offerings as part of the curriculum. And if a top school makes a serious commitment to virtual education, then any thought of stigma may be erased for everyone.

Note, however, that from the point of view of many law schools, especially those not at the very top of the prestige rankings, their branding worries will trap them in a kind of Catch-22: The more attenuated the reputational barriers to providing a full-service or near-full-service Virtual Law School become, the more that law schools will have to face competition from peers—or worse, higher-ranked schools—that offer a virtual product, and some of whom may be charging less for it.

What that competition will mean, however, depends on questions of capacity and price.

**Economic Concerns.** In short order, students will expect to pay less for a virtual education than a live one. As a result, unless the Cheerful Scenario manifests and quickly, it seems more likely than not that all but the top law schools risk getting caught in an economic vise.

Above I suggested that the longer the pandemic continues, the more the demand for on-campus education could shrink. The alternative hypothesis is that people will just get fed up with being alone so much and will want to go back to pre-pandemic lifestyles. But even if that is correct, what happens if brand-name schools make all or most of their offerings available online at a substantially lower price?<sup>174</sup>

Schools will resist cutting prices for virtual education, but it is almost inevitable that one or more will try it. Then the first question becomes how much of a discount might tempt a sufficient number of students to forgo the in-person option even if *ceteris paribus* that would be their preference. And the second question is how much price cutting it will take to create competitive pressure for other law schools.

#### IV. Coming Soon: Winners and Losers, 2.0

If and when the pandemic is perceived to be over, lowest-tier schools may have no choice but to stay virtual, or become more virtual—if the virtual model allows them cost savings that they can then pass on their students. That will create pressure on the middle tier as well.

The issue of cost of producing quality virtual content remains the largest uncertainty in any prediction. Whether courses are synchronous or asynchronous, how law schools structure programs, what technology they use, who runs the live component and how often, all these and more will factor into the cost of running an online program. The longer the pandemic runs, i.e., the more we move from the Cheerful Scenario to the Slow Scenario or even the Permanent Scenario, the more that law schools will have to invest in either distance education,

174. See *supra* note 134 and accompanying text.

virtual education, or both. Thus, the longer the pandemic lasts, the more that law schools will have been forced to make the financial, human, and intellectual capital investments in new ways of teaching. At some point, probably not too far away, the fact of having endured the fixed and now sunk costs could shift the overall equation for some law schools.

Once a few schools start offering a lower-priced online option, that will increase the pressure on the rest. Even if the elite schools have not entered the market before then, the need for at least some law schools to find cost savings may jump-start the market for brand-name courseware starring famous-name lecturers—or, better yet, *teams* of famous-name lecturers.

For those savings to materialize, law schools will need to cut costs. Buying content may save on tenured faculty, but it is not free and it creates a need for de facto TAs to staff the discussion sections and to grade papers and exams. In the short run, staffing those jobs with existing faculty will create disgruntlement, to say the least, as faculty lose curricular control and are asked to teach higher loads.

Even if there are savings to be had, law schools in the middle tier that consider pushing ABA standards to the limit will hate the idea of undercutting and underpricing—and thus potentially cannibalizing—their regular brand offerings. Indeed, mid-tier or mid-lower-tier schools will face pressure from all sides: lower-prestige schools buying in content and charging low prices; upper-tier schools offering a virtual “extension campus” version alongside their ordinary offerings; and mid-tier rivals running virtual classes at reduced prices.

Unless the demand for law school among qualified students increases so substantially as a result of the lower online prices—a vision of elasticity of demand for which there is little evidence—then a significant number of schools will either have to shrink their classes, lower their standards, join the virtual stampede, or go out of business.<sup>175</sup> That said, what little data we have on price is equivocal. We do know that in the past decade, while not cutting their sticker price, law schools have in effect cut prices by discounting for desirable students.<sup>176</sup> There is, however, no evidence that this price discrimination created a rush of new applicants; rather, schools mostly competed with one another for more highly credentialed members of the applicant pool.<sup>177</sup> On the other hand, Mitchell Hamline does not discount for its online offering and claims

175. Applications to law schools did rise thirteen percent for the fall 2021 entering class, with a rise also in the credentials of the applicant pool, despite the specter of online education. Karen Sloan, *Law School Applicants Are Down, Breaking Five-Year Streak*, REUTERS (Nov. 29, 2021, 2:51 PM), <https://www.reuters.com/legal/legalindustry/law-school-applicants-are-down-breaking-five-year-streak-2021-11-29/>. That rise, however, was temporary as the fall 2022 applicant pool was 0.4% smaller than the 2020 group. Christine Charnosky, *Number of 2022 Law School Applicants Trails 2020, While Applications Filed Jumps Double Digits*, LAW.COM (Aug. 1, 2022).

176. See *supra* note 6 and accompanying text.

177. See *supra* note 45 and accompanying text.

its “blended learning”<sup>178</sup> program has not harmed its in-person offerings.<sup>179</sup> In 2020 Mitchell Hamline enrolled between 210 and 240 students in the program, up from about 175 in 2019.<sup>180</sup> Conversely, in 2014, Georgia Tech, a highly rated engineering school, priced its online master’s in computer science at one-sixth the cost of its in-person program. By 2020 it had “nearly 10,000 students enrolled, making it the largest computer science program in the country. Notably, the online degree has not cannibalized its on-campus revenue stream. Instead, it has opened up a prestigious degree program to a different population, mostly midcareer applicants.”<sup>181</sup>

I predicted twenty years ago that top schools, and high-profile academics and practitioners, would be able to leverage their brands into courseware they could sell to multiple law schools.<sup>182</sup> In 2020 Harvard Law School (HLS) announced that its introductory legal program, “Zero-L,” would be free to any interested law school that wanted to adopt it in fall 2021: “While it was designed for Harvard law students, and the modules are taught by its faculty, the content covered in Zero-L is broad and universal enough that it’s applicable to any law school.”<sup>183</sup> HLS had previously made Zero-L available to four other law schools in summer 2020 and claimed “positive results.”<sup>184</sup> According to the Zero-L website, the materials cover: “essential legal concepts from first-year courses; the organization of the federal and state court systems; how to read, analyze, and brief a case; the legal profession and career options for law students; connections between law and other disciplines.”<sup>185</sup> This description sounds more practical and focused than The Bridge, HLS’s earlier and mostly unsuccessful effort.<sup>186</sup>

In 2021, 120 U.S. law schools took up HLS’s open offer of free access to the Zero-L course, meaning that the program reached a total of almost 20,000 students.—but for academic year 2022-23, HLS “will return to its pre-pandemic

178. Mitchell Hamline, *Blended Learning at Mitchell Hamline*, <https://mitchellhamline.edu/academics/j-d-enrollment-options/blended-learning-at-mitchell-hamline/>.

179. See Don Macaulay, *First “Hybrid” Law Students Graduate from Mitchell Hamline*, NAT’L JURIST (Jan. 12, 2018), <https://nationaljurist.com/national-jurist-magazine-first-hybrid-law-students-graduate-mitchell-hamline/>.

180. E-mail from Professor Gregory M. Duhl, Former Faculty Director, Blended Learning, to A. Michael Froomkin (July 27, 2020, 3:37 PM) (on file with author).

181. Hans Tappia, *The Future of College Is Online, and It’s Cheaper*, N.Y. TIMES (May 25, 2020), <https://www.nytimes.com/2020/05/25/opinion/online-college-coronavirus.html>.

182. See note 29 and accompanying text.

183. Karen Sloan, *Harvard to Offer Free ‘Zero-L’ Course for Incoming Students at All Law Schools*, LAW.COM (May 20, 2020, 2:13 PM) (remarks of Jessica Soban, Harvard’s associate dean for strategic initiatives).

184. Id.

185. *Course Overview*, ZERO-L BY HARV. L. SCH., <https://online.law.harvard.edu/course-overview/> (last visited July 11, 2020).

186. See *supra* notes 28, 98 and accompanying text.



plan to offer Zero-L as an educational tool that other law schools can purchase for a reasonable fee to share with their students,<sup>187</sup> which sounds like a confirmation of my prediction that the elite brands would produce content to sell to other schools. Zero-L may include substantive orientation content that some schools do not already provide. But one has to wonder if Torts or Contracts or, perhaps, “modules” for Torts and Contracts, might not be next.

Indeed, if I were an entrepreneurial associate dean at a brand-name law school and I wanted to make money for my school by selling course content, I would concentrate on producing one- or two-week modules offering specific perspectives that some instructors might feel less able to provide themselves, which could be used in existing large-enrollment classes. Examples might include feminist, law-and-economics, or CRT approaches to first-year courses, and basic statistics for lawyers. The next step might be longer one-credit programs, focusing on legislation, statutory interpretation, or the basics of the international legal system, suitable for in-term short courses or for an intensive intersession program. Only then would I aim at specialized “commodity” courses such as Legal Accounting, or Programming for Lawyers. But even with this portfolio in hand, moving to providing full-credit mainstream courses such as Property or Business Associations could trigger some resistance from the customer law schools. Better perhaps to aim for advanced or specialist subjects that schools usually cannot staff themselves.

Buying any substantial number of courses from outside vendors, whether HLS or iLaw, means that a law school sacrifices some of its claims to uniqueness. Sacrifice enough of it, and there is no reason students should pay you rather than the lowest-cost provider—other than the credentialing effect of the diploma. But if markets for credentials are not completely rigid, one could expect the value of the credentials to change to reflect the origin and nature of the courses being offered. At that point law schools are in the position of online sellers of music CDs—the product feels like a standardized commodity and the customer cares only about the price.

Unlike middle- and low-tier law schools, the few top-tier law schools may be able to adopt an extension campus model without doing harm to their in-person entering class. Even if the top-tier law school offers an online product at somewhat lower cost, the most selective law schools will be able to maintain their prices for their in-person product. In this they resemble elite colleges:

Elite colleges . . . have tremendous power in the market. They can keep tuition rates constant and insist that students enroll on their terms, because they know that few will forgo the opportunity to graduate with the Class of 2024 and reap a lifetime of status and social connection. If

187. HLS News Staff, *For a Second Year, Harvard Law to Offer Pre-term 'Zero-L' Course to Other Law Schools for Free*, HARV. L. TODAY (May 20, 2021), <https://today.law.harvard.edu/for-a-second-year-harvard-law-to-offer-pre-term-zero-l-course-to-other-law-schools-for-free/>.

anyone decides otherwise, there is an endless wait list of eager applicants happy to take their place.<sup>188</sup>

Middle-of-the-pack schools may face much greater pressure to provide more in-person classes, as they lack the top-ranked schools' market power.<sup>189</sup>

Twenty years ago I suggested that the rise of the Virtual Law School would cause existing law schools to fall into four groups: (1) elite schools; (2) state schools; (3) low-cost providers; and (4) losers.<sup>190</sup> It may be, however, that this prediction was slightly optimistic. I thought then that state schools would be kept afloat by their state legislatures. But times have changed: By and large, direct state aid is a much smaller portion of law school revenues, and state law schools have raised tuition in response. Federal aid responding to the COVID-19 pandemic helped state budgets overcome COVID-related emergency expenses, and some of that new money went to higher education<sup>191</sup> in part to make up for previous budget cuts. Nevertheless, when state budgets revert to their normal trend, state largesse to higher education likely will revert to trend also, and state schools may be forced to be the early adopters of whatever comes along, because of budgetary pressures. Thus, law schools face a future in which there might be only three categories: (1) elite schools; (2) low-cost providers; and (3) losers—including many state schools. Thus, a large number of law schools could fall into the third category.<sup>192</sup>

The story is not much more cheerful for law school faculty. All the post-COVID scenarios other than “back to how it was” are likely bad for law faculty working outside elite institutions. By and large, law professors will also be

188. Kevin Carey, *What Harvard and Your Local Commuter College Now Have in Common*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/07/08/upshot/virus-colleges-harvard-reopening.html> (forecasting that commuter colleges will go mostly online like top schools, but the middle will be squeezed).

189. *Id.*

190. See *supra* text between notes 32-34.

191. See NAT'L ASS'N OF STATE BUDGET OFFS, SUMMARY: FALL 2021 FISCAL SURVEY OF STATES 2 (2021) (Figure 2), [https://higherlogicdownload.s3.amazonaws.com/NASBO/gd2d2db1-c943-4f1b-b750-ofca152d64c2/UploadedImages/Issue%20Briefs%20/Fall\\_2021\\_Fiscal\\_Survey\\_Summary.pdf](https://higherlogicdownload.s3.amazonaws.com/NASBO/gd2d2db1-c943-4f1b-b750-ofca152d64c2/UploadedImages/Issue%20Briefs%20/Fall_2021_Fiscal_Survey_Summary.pdf).

192. Compounding the risks, some law schools may become losers through no fault of their own if the university of which they are a part founders under the weight of changes in the nature of higher education service delivery. One analysis suggests that “18 law schools will perish in the near future (because their university will perish). That is 1 school in the top 50, 5 in the 51-100, 5 in the 101-147, and 7 in the unranked law schools.” See James Phillips, *Will My Law School Perish?*, PRAWFSBLAWG (July 28, 2020, 8:10 PM), <https://prawfsblawg.blogs.com/prawfsblawg/2020/07/will-my-law-school-perish.html> (summarizing analysis by Scott Galloway, *USS University*, ProfGalloway.com (July 17, 2020), <https://www.profgalloway.com/uss-university/>). The perish list included Campbell, Cardozo (Yeshiva), Chapman, Chicago-Kent, DePaul, Detroit Mercy, Drexel, Elon, Fordham, Hofstra, Loyola (Chicago), Massachusetts-Dartmouth, New England, Nova Southeastern, Pace, Pacific, Seton Hall, and Willamette. In addition, another “28 schools are predicted to struggle.” *Id.*

among the losers as they get turned into TAs for elite institutions' (or even their own institutions') courseware or are asked to teach a large number of sections to make class size tractable.<sup>193</sup>

- Most nonelite law faculty lose when teaching goes truly virtual. The star system model turns them into de facto TAs when law schools start buying in content by brand-name academics and reduces them to running discussion sections on someone else's material plus grading exams and quizzes.
- Most nonelite law faculty lose if law schools try to provide their own local synchronous content, because they will be forced to teach more sections; alternatively, law schools will hire more instructors and perforce pay them less.
- Most nonelite law faculty lose when law schools outside the elite try to compete by creating their own asynchronous content. Instructors will be expected to create content to which they will surrender the intellectual property rights. They will also be asked to update it regularly—and they get to be their own TAs.
- Most nonelite law faculty lose pay and even their jobs as law schools cut tuition in the face of increasing price competition from schools that offer cut-price degrees with lots of purchased content.

I will leave it to others to decide whether these changes represent a net social gain or loss, but either way they will not be pleasant for law faculty at all but a few schools.

The most important question, however, is whether students will be winners or losers as a result of convulsions in legal education due to the rise of the Virtual Law School. Certainly if the financial savings that reach students are large, many students will graduate with less debt, which is surely good. And if the demand for law school is more elastic than I suspect, then lower prices will allow more people to enjoy a legal education, which I persist in thinking of as a good; perhaps a larger supply of less-indebted lawyers will make legal services more affordable for more people, also a good thing. Commuters can study from home. Disabled students may struggle less with arranging necessary accommodations.<sup>194</sup> Then again, if the financial savings prove to be small, then

193. “[L]aw schools can cut costs in many ways, including by not having tenured professors who only teach eight hours a week.” Sarah Martinson, *4 Ideas for Updating Law Schools Post-Pandemic*, LAW360 (Aug. 30, 2021, 12:02 PM) (quoting Mark Cohen, founder of Legal Mosaic, a legal business consulting company), <https://www.law360.com/articles/1409538/4-ideas-for-updating-law-schools-post-pandemic>.

194. See Amanda Morris & Emily Anthes, *For Some College Students, Remote Learning Is a Game Changer*, N.Y. TIMES (Aug. 26, 2021), <https://www.nytimes.com/2021/08/23/health/covid-college-disabilities-students.html>.

the Virtual Law School truly will remain the answer to the riddle of “What is the most expensive video streaming in the world today?”<sup>195</sup>

But the unknowable thing, at present, is what these changes will do to the *quality* of legal education. Part of the answer is surely the lawyer’s favorite one: It depends. For one thing, it depends on learning styles and on a student’s personal circumstances. It seems likely that some people will learn better on their own, at least if they have ready access to the necessary technology and bandwidth. On the other hand, there is some evidence that, at least at the current state of the art, many undergraduate students, and thus maybe many law students too, may learn more from in-person classes.<sup>196</sup> It is also possible that if students become more accustomed to distance and asynchronous learning in K-12 and in college, they will be better adapted to cope with it in law school.<sup>197</sup> And perhaps it depends on teaching styles also: Some teachers may be better suited to Zoom than others.<sup>198</sup> But a great deal about the quality of the learning process also depends on things we just do not know yet, not least the extent to which law teachers figure out more effective ways of teaching from a distance or from a recording. Another unknown is the extent to which legal employers will shift their demands from traditional credentials to demonstrated competence in both lawyering skills (pace MacCrate) and “soft skills”<sup>199</sup> and how we might go about teaching those skills remotely.

More ominously, the move to distance and virtual classrooms carries some risk of exacerbating class and wealth disparities, and not only because of the digital divide. If the push to computer-mediated teaching is driven in substantial

195. The original form of this riddle appeared on Reddit as “What is the most expensive video-streaming at this time? College.” REDDIT (Oct. 7, 2020, 8:43 AM), [https://www.reddit.com/r/Jokes/comments/j6q49y/what\\_is\\_the\\_most\\_expensive\\_videostreaming\\_service/](https://www.reddit.com/r/Jokes/comments/j6q49y/what_is_the_most_expensive_videostreaming_service/).
196. See Stephanie Riegg Cellini, BROOKINGS INST., *How Does Virtual Learning Impact Students in Higher Education?* (Aug. 13, 2021), <https://www.brookings.edu/blog/brown-center-chalkboard/2021/08/13/how-does-virtual-learning-impact-students-in-higher-education/> (Colombian “bachelor’s degree students in online programs perform worse on nearly all test score measures—including math, reading, writing, and English—relative to their counterparts in similar on-campus programs.”).
197. See *supra* text at note 155 (noting that 1Ls—who might have experienced virtual classes in college—were more satisfied with Zoom classes than 2Ls and 3Ls).
198. Cf. Ira Steven Nathenson, *Teaching Law Online: Yesterday and Today, But Tomorrow Never Knows*, 65 ST. LOUIS U. L.J. 607, 639–40 (2021) (suggesting that “sometimes [Zoom] is better” than in-person classes); Neil Reisner, *I Miss Teaching on Zoom*, WASH. POST (Nov. 26, 2021, 9:37 AM), <https://www.washingtonpost.com/opinions/2021/11/26/college-classes-zoom-teaching-benefits/>;
199. “Legal training has been dismissive of ‘soft skills’—collaboration, empathy, cultural awareness, client management, and customer service. That will change, because those traits are increasingly important for legal professionals in a diverse, global, multidisciplinary, and fluid marketplace. Law schools have focused on teaching students to identify problems, not to solve them. Their pedagogy views education from the lawyer—not client—perspective. This does not prepare students for law in the age of the customer.” Mark A. Cohen, *Post-Pandemic Legal Education*, FORBES (Aug. 13, 2020, 5:58 AM), <https://www.forbes.com/sites/markcohen1/2020/08/13/post-pandemic-legal-education/#c356e0575d2f>.

part by a need to cut law school costs in the face of a new round of tuition price competition, then there is a real danger that it will undermine the current financial aid system, imperfect as it may be. Currently, need-based financial aid calculations take account of the cost of room and board. Whether that would continue to be the case if students were expected to study “from home,” whatever that means for adults, is unknown, as is how whatever allowances get made would reflect the varied geographic and personal circumstances of remote students.

Another speculative concern relates to bar passage rates. Even if the ABA relinquishes much of its power to block distance and virtual legal education, it is very likely to be monitoring the bar pass rates of the institutions that offer them.<sup>200</sup> True, the bar exam as currently constituted is a poor measure indeed of what students have learned about the law, and of what kind of lawyers they will be.<sup>201</sup> However, the correlations are probably not zero, and it is possible that the bar exam will be reformed to better reflect the actual practice of law.<sup>202</sup> In any case, bar passage rate matters to law schools, which can lose their accreditation if their two-year bar pass rate drops below seventy-five percent.<sup>203</sup>

If students learn as well or better online than in person, then there should be no bar pass rate issue for the virtual providers.<sup>204</sup> But any of several speculative factors might cause the graduates of online programs to have lower bar pass rates than their counterparts. First, the online courses might not be as good. Second, some students might misperceive their own learning styles, not being aware that they do not learn as well online.<sup>205</sup> Third, if the cost difference is substantial,<sup>206</sup> some students might choose the online option despite being better suited

200. I am indebted to Dennis Lynch for this observation.

201. “[T]o write merely that the bar exam is the subject of criticism would be a colossal understatement.” Ben Bratman, *Improving the Performance of the Performance Test: The Key to Meaningful Bar Exam Reform*, 83 UMKC L. REV. 565, 565 (2015).

202. See, e.g., ABA COMM’N ON THE FUTURE OF LEGAL EDUC., PRINCIPLES FOR LEGAL EDUCATION AND LICENSURE IN THE 21<sup>ST</sup> CENTURY (2020), <https://www.americanbar.org/content/dam/aba/administrative/future-of-legal-education/cfile-principles-and-commentary-feb-2020-final.pdf>.

203. ABA 2019-2020, *supra* note 62, Standard 316 (“At least 75 percent of a law school’s graduates in a calendar year who sat for a bar examination must have passed a bar examination administered within two years of their date of graduation”).

204. The exception would be the extension campus model, in which a top-ranked school admits online those students who did not make the cut to be offered a place in person. So long as only top schools adopt the extension campus model, one can presume that the bar pass rate for even the online students with lower credentials will remain high enough not to trigger action by the ABA.

205. There is suggestive evidence that for a substantial fraction of the student population, pure online learning does not work as well as blended or all in-person learning. See, e.g., William T. Alpert, Kenneth A. Couch & Oskar R. Harmon, *A Randomized Assessment of Online Learning*, 106 AM. ECON. REV. 378, 381 (2016) (finding that in a microeconomics class “those who completed the purely online course had learning outcomes that were significantly worse than those in the face-to-face section of the course: this difference is about four to five points or one-half of a letter grade.”).

206. Or, in the case of the extension campus model, the prestige difference is substantial.

for an in-person education. Fourth—especially if overall demand increases in response to tuition price decreases—it might be that students who choose online education have lower credentials or less preparation, or are materially different in their bar-taking abilities than law students in general for some other reason. If, for any or many of these reasons, those in the online group pass the bar at a lower rate than their in-person counterparts, it likely will lead to a reaction from the ABA, if only because of pressure from state Supreme Courts, some of which are reputed to have been long suspicious of distance learning anyway.

Alternatively, students in the online course might do better than the traditional students. If virtual schools attract better students, either initially or because applicants react to reports of better outcomes, that would leave in-person schools with less capable applicants, which might in turn reduce their bar pass rates and create first marketing and then accreditation problems for some number of traditional law schools.

In a third scenario, if tuition decreases at virtual law schools are substantial enough to draw in a large number of new students, and these students succeed in passing the bar at the same rate as other students, then it is possible that state Supreme Courts may react to the influx of new lawyers by raising the threshold for bar passage.<sup>207</sup> The courts might do this opportunistically, seeing the large number of test-takers as a chance to “improve” the quality of the bar, or they might do it as a kind of protective measure to reduce competition for lawyers already in practice, or it might be mainly for reputational purposes.<sup>208</sup> In any case, raising the score required for bar passage risks having an outsized influence on law students from historically disadvantaged and underserved communities;<sup>209</sup> raising the minimum score might also have a disproportionate effect on the law schools that most serve them.

It would be sad and ironic if the removal of the ABA’s prohibition on “correspondence” schools—a prohibition initially driven in substantial part by disdain for low-class interlopers said to be flooding the legal profession<sup>210</sup>—were to have the unintended effect of raising up those same barriers again, whether financially or via the bar exam. Yet, unless the tuition for the Virtual Law School 2.0 is much lower than seems reasonable to expect, it may not do as much for the

207. For a statistical critique of this practice see Deborah J. Merritt, Lowell L. Hargens & Barbara F. Reskin, *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929 (2001).

208. “States want to be regarded as tough as [insert state here] (usually California or New York) and they see raising their cut or passing scores as a way to raise the reputation of the quality of their bar.” Mary Wood, *Bar Exam Standards, ‘Misapplication’ to Law Schools Offer Obstacles to Minorities Seeking to Become Lawyers*, Johnson Says, U. VA. SCHOOL OF L. (July 23, 2013) (quoting Professor Alex Johnson), [https://www.law.virginia.edu/news/2013\\_spr/johnson\\_qa.htm](https://www.law.virginia.edu/news/2013_spr/johnson_qa.htm).

209. See Alex M. Johnson, Jr., *Knots in the Pipeline for Prospective Lawyers of Color: The LSAT Is Not the Problem and Affirmative Action Is Not the Answer*, 24 STAN. L. & POL’Y REV. 379, 406 (2013) (“recent efforts by many state bars to raise their cutoff scores for passage clearly have had a detrimental impact on minorities—those unfortunately disproportionately at the bottom.”).

210. See *supra* notes 20–22 and accompanying text.

borrowing crisis as one would hope. And unless bar pass results are reasonably stable, the move to challenge the accreditation of law schools with low pass rates may get new life.

Fifty years from now, the modal law teacher may well be an AI that provides a personalized course for every student. Perhaps group instruction from an actual human will seem odd and archaic, or reserved for advanced seminars. But none of that is going to be the case in two years, or even ten. So for the short and medium terms we will need a human solution to the problems of the loss of in-person teaching, in-person group activities, and even in-person drinking. Realistically, we do not yet know whether and how we are going to do that, but the COVID crisis is forcing a lot of smart people to work on the problem.

The majority of the changes I predicted twenty years ago have yet to manifest. Rather than confess error, however, I will claim that most of my predictions were just a little premature. See you, or maybe virtual reality you, in twenty years?