

## DISTANCE LEGAL EDUCATION: LESSONS FROM THE \*VIRTUAL\* CLASSROOM

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### ABSTRACT

*In the 2018-2019 revision of the American Bar Association (ABA) Standards and Rules of Procedure for Approval of Law Schools, the ABA further relaxed the requirements relating to distance education in J.D. programs. However, outside of a handful of schools that have received permission to teach J.D. courses almost entirely online, most experiments in distance legal education have occurred in post-graduate (i.e. post-J.D.) programs: LL.M. degrees and various graduate certificates and Master's degrees in law-related subjects. These programs can be taught completely online without requiring special ABA permission.*

*This essay reflects my experiences over a number of years as both a teacher and student in distance education classes in both legal and other areas of instruction. I will identify practical lessons I have learned in this context relating to issues including: the kinds of skills that can most*

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*effectively be taught online; personnel requirements for developing and offering online courses; the pros and cons of asynchronous online formats; differing online social norms of behavior; optimum class size for online delivery; and access and administration issues. This discussion is intended as a jumping off point for future conversations about effective online course delivery in legal academia, which may be of particular relevance if J.D. programs ultimately do move toward greater online delivery.*

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## **I. INTRODUCTION**

It was 1995 and the Internet had just come to Australian law schools. Our browser was Gopher, we used dialup connections, and LEXIS was under consideration for

the first time, even though it didn't carry any Australian legal materials. The law school office manager joked that with all the new technology, we would soon be out of jobs, replaced with talking heads on computer screens. That seemed to me about as likely as the polar icecaps melting, or a reality TV personality becoming president.

Fast forward to 2019. The Internet has evolved as has legal education. The American Bar Association (ABA) is slowly moving toward allowing more J.D. credits to be taken online.<sup>1</sup> However, in recent years, most distance legal education has focused on LL.M. students and non-law students taking legal certificates in various areas like intellectual property,<sup>2</sup> privacy law,<sup>3</sup> financial services law,<sup>4</sup>

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<sup>1</sup> *Standards and Rules of Procedure for Approval of Law Schools 2019-2020, Standard 306(e)*, ABA (2019), [https://www.americanbar.org/groups/legal\\_education/resources/standards](https://www.americanbar.org/groups/legal_education/resources/standards) [<https://perma.cc/5NGL-QLUY>] (“A law school may grant a student up to one-third of the credit hours required for the J.D. degree for distance education courses qualifying under this Standard. A law school may grant up to 10 of those credits during the first one-third of a student’s program of legal education.”)

<sup>2</sup> *View Online LLM Programs in Intellectual Property Law 2019/2020*. LAW STUDIES, <https://www.lawstudies.com/LLM/Intellectual-Property-Law/Online> [<https://perma.cc/472Z-ABVN>] (last visited Jan. 3, 2019) (such as the online LL.M. degrees in intellectual property law offered at the University of New Hampshire Franklin Pierce School of Law, the John Marshall Law School, and Western Michigan University Cooley Law School).

<sup>3</sup> *Id.* (American law schools with online privacy curricula include Albany Law School, Drexel University Thomas R. Kline School of Law, Seton Hall University School of Law, Southwestern Law School, University of Maryland School of Law, and Western Michigan University Cooley Law School).

<sup>4</sup> *See MSJ – Financial Services Compliance*, SETON HALL UNIVERSITY SCHOOL OF LAW, <https://law.shu.edu/online/graduate-degrees/msj/msj-financial-services-compliance.cfm> [<https://perma.cc/NT7A-A5FC>] (last visited Jan. 3, 2019) (for example, Seton Hall University’s online MSJ/LL.M. program in Financial Services Compliance).

and health law.<sup>5</sup> Various degrees have sprung up like the MSL, MSJ, and various other acronyms with “Master’s,” “law,” or “jurisprudence” in them, alongside graduate certificate courses in various legal and compliance-related subjects. Some hybrid courses (i.e., courses that involve an online component) in the J.D. curriculum have also been introduced at a number of schools.<sup>6</sup> These courses took advantage of the previous ABA Standard 306, which allowed up to a third of class time to be online without being considered a “distance” class and without requiring ABA approval.<sup>7</sup> This aspect of Standard 306 has not

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<sup>5</sup> See *Compliance Education for Working Professionals*, SETON HALL UNIVERSITY SCHOOL OF LAW, <https://law.shu.edu/compliance/index.cfm> [<https://perma.cc/8XR9-KTMT>] (last visited Jan. 3, 2019); *Graduate Certificate in Health Care Compliance*, DREXEL UNIVERSITY THOMAS R. KLINE SCHOOL OF LAW, <https://online.drexel.edu/online-degrees/law-degrees/cert-hc-comp/index.aspx> [<https://perma.cc/4BYZ-U8DZ>] (last visited Jan. 3, 2019); *Health Care Compliance Online Graduate Certificate Program*, THE UNIVERSITY OF PITTSBURGH SCHOOL OF LAW, <https://www.law.pitt.edu/hcc> [<https://perma.cc/N24W-NNQZ>] (last visited Jan. 3, 2019).

<sup>6</sup> See *Blended Learning at Mitchell Hamline*, MITCHELL HAMLINE SCHOOL OF LAW, <https://mitchellhamline.edu/about/mitchell-hamlines-hybrid-program> [<https://perma.cc/WN6A-KZJ9>] (last visited Jan. 3, 2019); *Online Hybrid J.D.*, UNIVERSITY OF DAYTON SCHOOL OF LAW, [https://udayton.edu/law/academics/jd\\_program/online\\_hybrid\\_jd.php](https://udayton.edu/law/academics/jd_program/online_hybrid_jd.php) [<https://perma.cc/8SH6-5LEL>] (last visited Jan. 3, 2019); *Part-time Law Degree*, SETON HALL UNIVERSITY SCHOOL OF LAW, <https://law.shu.edu/part-time-jd-degree/index.cfm> [<https://perma.cc/AJ4Q-ENFB>] (last visited Jan. 3, 2019); *Weekend JD*, LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW <https://www.luc.edu/law/academics/degreeprograms/jurisdoctor/weekendjd> [<https://perma.cc/9WMG-8L8M>] (last visited Jan. 3, 2019); see also Doug Lederman, *The Uncertain Landscape for Online Legal Education*, INSIDE HIGHER ED (Jan. 24, 2018), <https://www.insidehighered.com/digital-learning/article/2018/01/24/recent-developments-legal-education-show-both-movement-and> [<https://perma.cc/6L97-7473>] (last visited Jan. 3, 2019) (providing a recent summary of the ABA’s stance on hybrid J.D. programs).

<sup>7</sup> *Standards and Rules of Procedure for Approval of Law Schools 2019-2020, Standard 306(e)*, ABA (Aug. 1, 2019), <https://www.americanbar.org>.

changed, although the ABA now allows a greater percentage of overall J.D. courses to be taken in this manner.<sup>8</sup>

The United States has not moved to a fully online J.D.—nor should it in my opinion—but the new ABA standard does allow for greater experimentation with distance formats in the J.D. context, and potentially provides greater opportunities for access to legal education by those who have trouble regularly attending in-person

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org/groups/legal\_education/resources/standards [https://perma.cc/ZM6U-2SJ7] (“A distance education course is one in which students are separated from the faculty member or each other for more than one-third of the instruction and the instruction involves the use of technology to support regular and substantive interaction among students and between the students and the faculty member, either synchronously or asynchronously.”).

<sup>8</sup> *Id.* (“A law school may grant a student up to one-third of the credit hours required for the J.D. degree for distance education courses qualifying under this Standard. A law school may grant up to 10 of those credits during the first one-third of a student’s program of legal education.”). The previous version of this Standard did not allow distance education in the first year and capped the amount of credits that could be taken via distance education over the entire J.D. degree at fifteen credits. See *ABA Standards and Rules of Procedure for Approval of Law Schools 2017-2018, Standard 306(e)*, ABA, [https://www.americanbar.org/content/dam/aba/publications/misc/legaleducation/Standards/2017-2018ABASStandardsforApprovalofLawSchools/2017\\_2018\\_standards\\_chapter3.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legaleducation/Standards/2017-2018ABASStandardsforApprovalofLawSchools/2017_2018_standards_chapter3.authcheckdam.pdf) [https://perma.cc/AFA7-LHVY] (last visited Jan. 14, 2019). Standard 306(a), in both the old and the amended iteration, allows no more than one-third of class instruction in any given course to be in a form in which students are separated from the relevant faculty or each other, and the instruction involves the use of technology to support “regular and substantive interaction” among students, and between the students and the faculty member. Sometimes, these courses are conducted in J.D. curricula by holding the in-person elements of the class on weekends and the rest online. This allows participation by students who are not physically living in, or near, the location of the law school.

classes.<sup>9</sup> This could include people with employment issues, family issues, geographical issues, and other responsibilities that limit their availability to attend regular classes. In addition, although still a relatively novel concept in legal education, online learning is common for graduate education in a number of other areas including MBA programs as well as Master's degrees in a number of other areas ranging from creative writing to library sciences.<sup>10</sup>

This essay aims to identify and unpack some of the pros and cons, the benefits and pitfalls, of increased forays into distance education in legal academia from the perspective of an instructor with significant experience in the area. The idea is not to engage in empirical or market-focused research on different student learning styles, nor is it to canvas the myriad of arguments that have been raised in the past about the desirability of replacing in-person instruction with online instruction for either all, or part of, any given class. Those issues have been addressed elsewhere.<sup>11</sup>

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<sup>9</sup> See Di Xu & Shanna S. Jaggars, *Performance Gaps Between Online and Face-to-Face Courses: Differences Across Types of Students and Academic Subject Areas*, 85(5) THE JOURNAL OF HIGHER EDUCATION 633 (2014).

<sup>10</sup> See *2019 Best Online Colleges for Master's Programs*, GUIDE TO ONLINE SCHOOLS, <https://www.guidetoonlineschools.com/degrees/masters#list> [<https://perma.cc/T4HX-DJB7>] (last visited Jan. 3, 2019) (many of these programs have now become so well-established that rankings systems have developed for them).

<sup>11</sup> See *Distance Learning in Legal Education: Design, Delivery and Recommended Practices*, WORKING GROUP ON DISTANCE LEARNING IN LEGAL EDUCATION (2015 ed.), [https://www.cali.org/sites/default/files/WorkingGroupDistanceLearningLegalEducation2015\\_PDF.pdf](https://www.cali.org/sites/default/files/WorkingGroupDistanceLearningLegalEducation2015_PDF.pdf) [<https://perma.cc/F74Z-72TW>] (last visited Jan. 3, 2019); see also Alison Becker & Carrie Lloyd, *An Invitation to Explore Online Legal Education and Strategically Realign Legal Education*, 44 MITCHELL HAMLIN L. REV. 203 (2018); Yvonne M. Dutton, Margaret Ryznar & Kayleigh Long, *Assessing Online Learning in Law Schools: Students*

What I want to do here is draw from my own experiences as an online student, online course developer, and online instructor to help inform the current debate about what online education is good for, and what those considering forays into the area might think about before proceeding. Over the past 15-20 years, I've taken a number of online and hybrid classes as a student in disciplines such as computer science, creative writing, and entrepreneurship which have been quicker to embrace digital technology than legal academia.<sup>12</sup> I also took a bar preparation course online. My own consulting business relies heavily on digital technology including regular video chats with clients. I've also developed and taught online courses in creative writing, legal and business issues for non-lawyers, as well as academic courses for LL.M. and MSJ/MSL students at a number of law schools.

I took my MFA degree in a hybrid format consisting of both in-person residences and online interactions. That program morphed organically from paper-based interactions with instructors, outside of in-person residencies, to digital interactions as the technology came online. Law courses don't seem to morph organically in this manner for a number of reasons, including the pervasive feeling that there's no substitute for the Socratic method, and that the Socratic method can't be effectively emulated via distance formats.<sup>13</sup>

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*Say Online Classes Deliver*, 96 DENV. L. REV. 493 (2019); Kenneth R. Swift, *The Seven Principles for Good Practice in (Asynchronous Online) Legal Education*, 44 MITCHELL HAMLINE L. REV. 105 (2018); Xu & Jaggars, *supra* note 9.

<sup>12</sup> Swift, *supra* note 11, at 106–07.

<sup>13</sup> See Becker & Lloyd, *supra* note 11, at 215–16 (discussing historical resistance to changing/updating legal teaching methodologies); Dutton et al., *supra* note 11, at 5 (discussing resistance to moving away from the Socratic method).

The point of this essay is to consider, from my own perspective as a distance educator and student over many years, how much of the reticence to bring law courses online has to do with fear of change or unfamiliarity with/suspicion of the technology, versus legitimate concerns about skills and educational values that are effectively “lost in translation” when attempting to bring traditionally in-class programs online.

My observations are broken down into the following areas: (a) skills that can be learned/taught effectively online compared with those that may be better taught in the classroom; (b) concerns about synchronous versus asynchronous learning formats; (c) netiquette/monitoring appropriate online behavior in forums which, by their nature, often create a disinhibiting effect; (d) ensuring sufficient student participation; (e) personnel requirements and associated costs and benefits; (f) concerns about online class size as compared with in-person class size; and (g) concerns about equity and access to technology, and associated concerns about identifying appropriate markets for new programs of study.

## **II. ONLINE CLASS SUBJECT MATTER**

If you walk into a room full of law professors (sounds like the opening for a bad joke, I know) and ask them to identify their greatest concerns about online legal education, one of the first answers is likely to be, “technology is no substitute for in-person interaction” or “I don’t see how you can replicate in-class discussions on the Internet.” That sounds reasonable. After all, we’ve all had the experience of talking face-to-face versus interacting online via email, text chat, Facebook, etc. It doesn’t “feel” the same, does it? In some ways people are more open and take more risks online. In other senses, they carefully

curate how they appear. Some people like to “lurk,” to watch what others are saying without engaging in interactions themselves.

In addition to what faculty may have personally encountered as different between online and in-person interactions, they may be concerned about additional perceptions that students have online versus in a physical classroom. For example, perhaps students assume that online you maybe don’t have to be “on your feet” as much as you do in the classroom, a sense that it’s easier to “hide” online because you are less visible in practical terms.<sup>14</sup> Many students will feel different about an instructor throwing an unexpected question their way in a physical classroom than online where they may be more easily able to ignore it, or take their time (look up information, etc.) before answering.

However, a lot of these comparisons are fallacious if you think them through. Comparing in-class interactions to our social online interactions is really comparing apples and oranges. The question isn’t whether online classroom discussions are *like* email or Facebook. Rather, the question is whether you can create an online environment that effectively mimics, or potentially supersedes in some senses, what you can achieve in the classroom.

In the spirit of full disclosure, I have to start out by admitting I’m not a technophile, not in the least. Despite having lots of computer equipment at home, being married

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<sup>14</sup> See *infra* Part VI (as discussed in Part VI, current technology cannot perfectly replicate the in-classroom experience even when using interactive video conferencing software. In a large class, often the instructor cannot get a clear view of the students to see who is fully engaged. It is also not possible to simply point at a student to call on them.).

to an I.T. consultant, and teaching cyberlaw, I was one of the most cynical about online legal education back in the 1990s. When one of my colleagues proposed a “law of the Internet” course that would be taught on the Internet and be all about the regulation of the Internet, I thought it would be a passing fad. It reminded me of the *Seinfeld* episode that featured a coffee table book about coffee tables in the shape of a coffee table: fun, self-referential twaddle for people who were tickled by the idea of playing with the then-quite-novel digital technology, but not much more.

I’ve now had decades to think about it, along with a bunch of eye-opening experiences of my own and, while I’d be the last person to advise taking the whole J.D. curriculum and launching it online, I can identify areas where I think digital education really works.

So, what are some of those areas?

In many parts of the curriculum that mimic actual legal practice, technology can be a useful tool, partly because of its inherent advantages in this context, and partly because it mimics what many of our students will be doing in the real world as attorneys. For example, attorneys often work remotely on documents with other attorneys when they’re drafting and redrafting in the transactional context and maybe in the course of settlement negotiations, drafting documents to put the terms on \*digital\* paper. Thus, using technology to learn how to share and mark-up documents in these contexts can be very useful. Online document sharing can be superior to trying to look at the same document in a regular class setting which would typically use video projections on a screen or physical handouts so everyone can be both literally and figuratively on the same page.

Of course, students can all bring a laptop to class and work on the same document with the instructor, but why is that necessary? With real-time audio or video chat and screen-sharing, students can emulate being in real life practice where they're unlikely to be in the same room with other attorneys while marking up a document.

Another area where online education can be particularly useful is with code-based classes that involve learning lots of rules, as opposed to common law classes which rely on discussions about how to analyze cases. I teach both commercial law and intellectual property law, and I can see a greater case for, say, teaching Article 2 of the U.C.C. online than international intellectual property law which is basically a series of policy discussions based on global politics and treaty interpretation.

Where a course is very heavy with rules that have to be mastered, online education can help by including lots of interactive, multiple-choice questions punctuating the materials to help students master the relevant rules. This may not be the sum total of the work in the course. It probably shouldn't be. Even Article 2 includes case law and inconsistent judicial decisions, but a greater percentage of the "rule comprehension" work could easily be done online so the students can get a handle on the basic rules before moving onto the inconsistencies in, and conflicting interpretations of, the rules by courts. In other words, it might not make sense to move an entire Article 2 course online, but certainly some aspects could usefully be taught online.

Other advantages of online multiple-choice testing are that students can do it in their own time and can go back and retest on areas they don't do well on the first go around. It's certainly more efficient than having the

professor give in-class quizzes and put them through a Scantron machine for grading. It's also good Bar preparation in relevant courses. Bar preparation for multiple-choice tested subjects relies on knowing rules and applying them under time pressure. Thus, a comfort level with learning rules through long-term, interactive multiple-choice testing is not a bad idea in these areas.

Of course, law school is not intended to be a Bar preparation course, but many students are woefully poorly prepared for the Bar at the end of their J.D. studies, and this is certainly a way that some percentage of online education could be helpful during the course of the J.D. program, if appropriately augmented with case-law analysis and legal reasoning. Challenging multiple-choice questions, such as those that appear on the Bar, are also good practice for developing legal reasoning skills. Many of the online Bar preparation courses are actually good models for this kind of incremental learning. Products such as AdaptiBar<sup>15</sup> and Kaplan's QBank<sup>16</sup> tailor the presentation of questions to an individual student's strengths and weaknesses and can help the student incrementally develop her skills in particular areas. The more "mainstream" online Bar courses, like Themis<sup>17</sup> and Barbri<sup>18</sup> also allow students to tailor their own multiple-choice quizzes to areas in which they might be struggling.

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<sup>15</sup> See *Everything You Need to Pass the MBE*, ADAPTIBAR, <https://www.adaptibar.com> [<https://perma.cc/7MFD-PHMM>] (last visited Jan. 3, 2019).

<sup>16</sup> See *QBank*, KAPLAN, <https://www.kaptest.com/bar-exam/practice/qbank> [<https://perma.cc/D2CZ-63AP>] (last visited Jan. 3, 2019).

<sup>17</sup> See *MBE Quiz Builder*, THEMIS BAR REVIEW, <https://www.themisbar.com> [<https://perma.cc/WE9B-HNC3>] (last visited Jan. 3, 2019).

<sup>18</sup> See *Bar Review*, BARBRI, <https://www.barbri.com> [<https://perma.cc/J5D9-NYGS>] (last visited Jan. 3, 2019).

As I noted above, I wouldn't recommend online formats for a number of skills students learn in law school, including the case-law method, and also practical skills like negotiation and mediation which are typically carried out in person. Some aspects of alternative dispute resolution could be learned online to prepare students for situations where a party or mediator is participating via distance, but the basic skills are probably better learned in the classroom. I must admit that I have less experience with teaching these kinds of subjects in class or online, because my main areas are business, commerce, intellectual property, and non-law courses, so I stand to be corrected here by those with more experience in these areas. Again, the point of this essay is to stimulate discussion, so I'm hoping that those with more experience in other areas will share their thoughts and ideas broadly as they develop.

### **III. SYNCHRONOUS VERSUS ASYNCHRONOUS DELIVERY**

One of the second things that a group of law professors would say if you asked them about the disadvantages of online learning relates to the perceived asynchronous nature of online learning.<sup>19</sup> Asynchronous simply means that the instruction doesn't occur at the same time (or "in real time," if you prefer). Instructors and students log on at different times to read, watch, and respond to pre-set materials, questions, and comments.

If you asked those professors to unpack their gut reaction that online learning is "no substitute for in-person learning," they might say that a key reason it's no substitute is because online learning is asynchronous. Of course, we know that's not true. Online formats can be synchronous

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<sup>19</sup> See Swift, *supra* note 11 (discussing asynchronous online legal education).

(happening in real time) or asynchronous, or a combination of both. There are advantages and disadvantages either way.<sup>20</sup>

If you're dealing with a group of students who are geographically dispersed, synchronous teaching becomes more of a challenge because of time zone differences. Some online classes I've taken have accommodated this simply by identifying a time zone in which all real-time interactions will take place and asking students to basically "deal with it." So, if the time zone is Pacific Time, and a class is scheduled for 6 p.m., a student on the East Coast will be logging in at 9 p.m. A student in another country will have to figure out the time difference themselves. Presumably, students from non-user-friendly time zones will self-select out of these courses. Obviously, this is not ideal for compulsory classes, but could work for some electives. Additionally, it may be possible to offer even compulsory classes in alternating sections (one online and one in-person), thus enabling those capable/interested in the online delivery to take advantage of it while not disadvantaging those who need to attend in person. The cost-benefits of offering multiple sections of a subject in various modes are discussed in Part V, *infra*.

The advantages of synchronous class sessions are obvious in terms of real-time interactions. However, other than time zone concerns, there are disadvantages. The more sophisticated the technology (video versus, say, text chat) the more likely it is that some students will face technical problems of incompatible systems, lack of I.T. help nearby, or simply lack of access to the relevant

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<sup>20</sup> Working Group, *supra* note 11, at 16–17 (for a summary and comparison of the two forms of content delivery).

technology.<sup>21</sup> Those problems are perhaps less occurrent than they would have been a generation ago as everyone becomes more computer savvy and more and more of our students have at least some access to relevant technology.

For some exercises, such as marking up documents in real time, synchronous video access may be necessary. For others, such as basic rule comprehension, an asynchronous discussion board or interactive student quiz may suffice. Thus, while synchronous interactions are preferable in many areas, asynchronous discussions can help with time zones and other issues, and are particularly well suited for general comprehension issues or comments on class readings that don't require real-time interactions for discussion points to be fleshed out. In addition, it is likely beneficial to let students work at their own speed asynchronously in some of these areas, like multiple-choice comprehension questions, allowing the student to re-take questions to improve their mastery at their own pace.

One other disadvantage of over-reliance on synchronous online teaching implicates class size. As discussed in more detail in Part VI, *infra*, synchronous learning may not work particularly well with large online classes. Even sophisticated video-conferencing software doesn't scale up particularly well to large classes if a degree of interactivity is desired.<sup>22</sup>

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<sup>21</sup> Dutton et al., *supra* note 11, at 16 (describing technical issues with synchronous online teaching).

<sup>22</sup> *Id.* ("Challenges for the professor [with synchronous video-chat teaching] include online platform features, such as the chat feature, where students can submit possibly unlimited questions during a lecture, requiring the professor to multitask between delivering instruction and monitoring a growing chat feed. Further, while a professor can require the use of webcams so she can see all of the students, she cannot simply point to call on a student . . . . There may

#### IV. NETIQUETTE

If you asked a millennial what “netiquette” means, they would probably have no idea.<sup>23</sup> It’s hard to believe that a word coined only twenty or so years ago now feels archaic. Nevertheless, the disinhibiting effect of interacting online is well-documented.<sup>24</sup> Coupled with this is the fact that permanent records tend to be kept of much online interaction, and this can come back to haunt a student or professor in a way it wouldn’t in the physical world,<sup>25</sup> or at least not to the same extent.

When individuals are interacting at a distance largely through online text, they tend to be less inhibited and more extreme in their views than when they’re interacting face-to-face in a classroom. Video chats where class participants can see each other are a middle ground that at least has the benefits of face-to-face interaction and the associated social cues (facial expressions, tone of voice, etc.), at least where the number of participants is small enough for everyone to see and hear the cues.

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be so many students participating in the course it could be difficult to see and track all of the students on the professor’s screen.”).

<sup>23</sup> Working Group, *supra* note 11, at 60 (“Appropriate online behavior, including the concept sometimes called *netiquette*, has become an important aspect of professionalism.”).

<sup>24</sup> See John Suler, *The Online Disinhibition Effect*, 7(3) CYBER PSYCHOLOGY & BEHAVIOR 321 (2004) (“Everyday users on the Internet—as well as clinicians and researchers—have noted how people say and do things in cyberspace that they wouldn’t ordinarily say and do in the face-to-face world. They loosen up, feel less restrained, and express themselves more openly. So pervasive is the phenomenon that a term has surfaced for it: the online disinhibition effect.”).

<sup>25</sup> See Working Group, *supra* note 11, at 60 (“The permanence of recorded sessions and written material present a risk that instructors or students may be perceived in a less than ideal light.”).

In my own experiences teaching online, I've seen fewer examples of disrespectful online interactions than I might have expected. That may have something to do with the fact that I largely teach professionals, whether lawyers or non-lawyers. My students have typically been professionals who interact online with others on a daily basis, so are more sensitive to concerns about appropriate behavior. Additionally, most of the institutions I've taught for have detailed policies about appropriate online behavior that students are required to read and acknowledge before participating in an online course. These behavioral guidelines are a good idea for any institution that considers teaching online.<sup>26</sup>

I did have one experience of a student who emailed me about wanting to start a "flame war" with a classmate whose views he disagreed with, and who told me, "this is going to be fun." I tried to quickly nip that in the bud by reminding him that such behavior was inappropriate. He tended to push the limits online and the classmate tended to react in a way that fueled the fires.

I was able to tamp down the situation by talking to each student separately via email and would have escalated to phone calls or video chats if I'd needed to, but luckily the email warnings to the instigator were enough, along with an offer to the classmate of additional measures if she felt unsafe in the class. At the end of the day, the classmate did tell me that she had a very unsatisfactory experience in the class which partly had to do with the fact that she hadn't found the material sufficiently challenging, but I can't help thinking that her experiences were also colored by the unpleasant interactions with the other student.

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<sup>26</sup> *See id.* at E1-E4 (model guidelines for online behavior of faculty and students targeted at different aspects of online learning).

I'm not aware of situations, at least not from my own experiences, where the interactions have become so inappropriate or hostile that a student has had to be removed from class, but I imagine it could happen, and that instructors have to be prepared to deal with these instances proactively rather than letting them fester. Again, I'd be interested to know if anyone has faced such a situation in practice.

Another “appropriate behavior” issue that perhaps plays out differently online than in an in-person class is where a student makes a comment that isn't aimed at any particular classmate, but that may be inappropriate in the broader social context. For example, I once had a student talk about a particular organizational behavior who analogized it to “too many chiefs and not enough Indians.” While many people wouldn't think twice about this old saying, it's derogatory to Native Americans, and expressions like this should be avoided.

It may be that in an online environment, where people are typing their thoughts quickly into text boxes, they are less attuned to these issues and may tend more easily to default to old, familiar (and possibly inappropriate) expressions without thinking twice about it. Of course, I have no empirical basis for saying that this is more likely to happen online than in a face-to-face class setting, but at least in a face-to-face setting the student has the benefit of visual and other cues from the instructor and classmates. It may be that the permanent record aspect of online discussions may be problematic here too. If someone makes an unfortunate comment in an unrecorded, in-person class, there is no ongoing record of it that can come back to haunt that student.

## V. STUDENT PARTICIPATION

One big concern many teachers have about online education is how to ensure adequate student participation. In class, you can adopt a “panel system” or a general class participation requirement and keep some kind of tally or record of how engaged a student is. At the very least, you know how often the student has attended class. Online, it’s actually easier to know these things than in the real world. The question really is whether online participation equals in-person participation qualitatively, and that’s a whole other kettle of fish.

Online systems easily track how often a student logs in, contributes to class discussions, engages in interactive quizzes, and so on. Students can be graded for participating on discussion boards, credited for watching class videos, and a tally can be kept of their general online attendance. So ensuring participation in these quantitative senses isn’t a problem. For anyone who’s taken the New York Law Exam (NYLE) online,<sup>27</sup> you can’t actually register for the exam until you’ve watched the course videos—and the system monitors you watching them and doesn’t permit you to fast forward. You are also required to answer multiple choice questions on the material presented in each video before the system allows you to move on to the next video. Again, law school is hardly the same as the NYLE, but if the issue is monitoring participation, it’s possible.

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<sup>27</sup> The NYLE tests the New York state law portion of the Bar Admission process and the course materials and exam are taken entirely online. The New York State Board of Law Examiners, *NYLC & NYLE Course Materials & Sample Questions*, <https://www.nybarexam.org/Content/CourseMaterials.htm> [<https://perma.cc/4X2F-K2RL>] (last visited Jan. 3, 2019).

Of course, there are ways around being monitored. A student can run the video in the background with the volume down and ignore it, but students can also show up to class and ignore what’s happening around them too. Sure, the professor can ask the disengaged student a question to ensure that he or she is paying attention, but videos can do that too with multiple choice comprehension questions. If you get the question wrong, the system can immediately take you back to the relevant section in the video and make you watch it again. This is how the NYLE course works.

In several of the online programs I’ve taught for, it’s a requirement for the professor to keep track of student participation and to follow up with students who fail to participate for a particular period of time. This is just as effective as keeping track of in-person students. And if the instructor is being monitored for compliance with this requirement (as is the case in some online programs), the instructor is as likely to be vigilant about following up with non-participating students as she will be in an in-class setting.

If the real concern is with the “quality” of student participation, rather than the simple fact of participation, then that’s a different issue. That issue isn’t resolved in-person by having a panel system or cold calling on students either. If a student isn’t prepared for class or is disengaged, that student is likely to be disengaged both in person and online. Would a professor be more likely to notice a disengaged student in class versus online? That probably depends on the professor.

## VI. STAFFING ONLINE COURSES

While it's possible to assign online or hybrid courses to full-time faculty and let those professors develop those courses however they like (academic freedom and all that), it's often not the most cost-effective option for "going online." Because online courses are often capped at a smaller number of students than in-person classes,<sup>28</sup> and fully online courses are typically not J.D. courses because of ABA requirements, it's simply not cost-effective to assign many online classes to regular, full-time faculty. Historically, full-time faculty are expected to teach a certain number of J.D. credits as their standard teaching package. LL.M. or other courses may be additional to those and may not be desirable for faculty concerned about scholarship time or with significant administrative loads on top of teaching.

Hybrid J.D. courses can work for full-time faculty, and can comply with current ABA restrictions, but, again, many full-time faculty would prefer to teach the way they've always taught (laminated notes, anyone?). A J.D. instructor who has taught a course completely in-person, might not see the immediate advantage of changing to a two thirds in-person, one third online format. However, for faculty at schools committed to part-time students, there might be more of an institutional recognition of the benefits of making scheduling more convenient for students.

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<sup>28</sup> See *infra* Part VI; see also Wayne D'Orio, *One Size Does Not Fit All*, INSIDE HIGHER ED (May 17, 2017), <https://www.insidehighered.com/digital-learning/article/2017/05/17/online-class-sizes-one-size-doesnt-fit-all> [<https://perma.cc/NHR6-5RDJ>] (last visited Jan. 3, 2019) (surveying caps on graduate and undergraduate online courses at a number of institutions and the impact of those enrollments on numbers of students enrolled in equivalent in-person classes).

As a result of these staffing issues, many fully online (LL.M. and MSL/MSJ) courses, and a number of hybrid J.D. courses, are taught by adjuncts and visiting professors. These teachers are obviously cheaper than full-time faculty so they're definitely cost-effective in that sense. However, it can be difficult to find adjuncts and visitors who have the appropriate experience teaching online or teaching at all.

Most adjuncts are practitioners and there can be concerns about consistency and quality of instruction amongst faculty with personnel who are not full-time or even part-time faculty employees. Of course, adjuncts are not confined to online classes and many law schools boast a large group of excellent adjunct instructors. Further, it's obviously not the case that teaching quality is always consistent even across full-time tenure track faculty. However, these are debates for other places. Suffice to say, I've had adjunct/practitioner colleagues who are likely superior teachers to me so I'm definitely not trying to "diss" practitioners as teachers. My aim is merely to point out that the more adjuncts hired to teach online courses, the larger the teaching faculty becomes, and the more an institution has to think about monitoring and oversight of teaching, and quality control and consistency.

As I mentioned, in several of the places where I've taught online, the teaching has been regularly monitored by an employee of the institution whose job it is to ensure the teaching is of a relatively uniform standard and that instructors are complying with stated requirements and practices. I've even taught writing classes where the managers of the institution have taken my classes as students which is a good way for them to get a sense of what I'm doing, and for me to get feedback on my

teaching, as long as it's done in a spirit of support and collegiality, which, in my experience, it always has been.

Another personnel issue that comes up with fully online classes, more so than hybrid J.D. classes, relates to the limitations of engaging a particular instructor to simply develop and teach a class online the way that person might develop and teach an in-person class. Many adjuncts who would have no problem developing a syllabus and coming into the school regularly to teach the class, do not have experience with the relevant teaching technologies to take it online, nor might they have the time to learn. There's no reason why those instructors can't learn the technology any more than there's a reason why full-time faculty can't learn, other than time pressure and cost-benefits when the time to learn the technology detracts from a practitioner's billable hours and may not be compensated by the academic institution.<sup>29</sup> Additionally, while full-time faculty could possibly obtain a reduced course load for developing online classes, an adjunct faculty member will not receive any such benefits.

In any event, it may be worth thinking about bifurcating the "course development" and teaching roles in some cases.<sup>30</sup> Obviously, it can cost more to hire a professional course developer to create the course and a separate instructor to teach it, but at the end of the day, you might have a superior product. With so many schools vying to experiment with online course delivery, anything that

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<sup>29</sup> See Working Group, *supra* note 11, at 46–47 (explaining that faculty teaching online courses typically require more significant training than faculty teaching face-to-face).

<sup>30</sup> See *id.* at 48 (contemplating distinct roles and training for content experts—typically a faculty member who identifies the pedagogical goals of the course—and course designers—who partner with the content expert to ensure the course is adequately designed).

gives an institution an edge is worth considering. The other permutation is to compensate the instructor separately for the course development aspects of his or her work.

I've worked in both course development and teaching. I've had experiences where I've developed and taught a course, and where I've developed a course for someone else to teach. In my experience, both models work, and obviously the former is potentially cheaper if the instructor is not compensated separately for the course development role but is simply hired to offer [x] course online. The main point to take away here is that, for a quality online product staffed predominantly by adjuncts, costs will remain a factor although development and teaching will still likely be cheaper using adjuncts than full-time faculty.

Another advantage of hiring separate course developers is that the course doesn't technically "belong" to anybody which minimizes staffing problems with respect to actually teaching the class. (Of course, legally, all the courses are the property of the institution that contracted for them—I'm using the ownership lingo in terms of the person who would regularly teach the course.) Adjuncts and other faculty are not always available to teach a class when the institution would ideally like to offer it; I've had this situation myself where I simply couldn't teach one of my online courses in the preferred semester due to other professional obligations. In that context, it was a course I "owned" (i.e. a course I both developed and taught, and featured heavily in the online lectures) so it would have been quite problematic for the institution to hire someone else to teach it for me without reinventing the wheel, so to speak. We ended up moving the course to another semester, which wasn't ideal for the institution's scheduling purposes.

In situations where I've developed courses I don't "own" (the video lectures, although scripted by me, don't feature my face or voice), any instructor who knows the subject matter can be plugged in to teach it. Thus, this model allows for additional flexibility in staffing the teaching side of things.

The downside is that if a single person doesn't "own" the course, a procedure has to be put in place for updating materials and making sure that updates don't fall through the cracks between the developer and the instructor(s). Where the same instructor both develops and regularly teaches the course, that instructor would presumably do the updates himself or herself. Thus, the bifurcated model ideally requires someone to be in charge of ensuring all courses are updated regularly by either the original developer or someone else knowledgeable in the subject matter. Again, cost may be a factor. Practitioners and other non-academic personnel may not have the time to do this without additional compensation.

In terms of developing actual online content, it's worth noting that ten to twenty-minute lectures seem to be today's "sweet spot" for length, often followed by brief, interactive comprehension questions or discussion questions, and ultimately more detailed assessment exercises. Keeping the length of the lectures manageable allows students to listen to them on the commute to work or at other times where they have bite-sized chunks of time (lunch time, break time, etc.) In the online Bar preparation course I took as a student, most of the lectures were twenty minutes or less and were the perfect length to review before moving on to the next step. Again, I appreciate that what we do in law schools is not Bar preparation, although perhaps more of it should be!

I have taken writing courses where the video lecture component is thirty seconds to two minutes. This very short format is good for a basic introduction to a weekly topic area or a lead-in to the readings and class discussions. It does also give the course a more “personal” feel if students can see the instructor online, even if only briefly. In other words, whoever the personnel developing the courses, if there are going to be audio or video lectures, it’s important to think about length of each recording, and how the information in the lecture will be reinforced through discussion or multiple-choice questions.

## VII. CLASS SIZE

A significant way in which online learning is different to in-person learning is the maximum number of students that can ideally be accommodated in a class without sacrificing participation or engagement. Of course, there are trade-offs between large and small sections of in-class instruction, but online, large classes can become unworkable for an instructor trying to monitor discussion boards and student participation, not to mention physically being able to see all the students during the video chats in synchronous courses.<sup>31</sup>

Ideally, an online class size where student participation is required probably shouldn’t be more than about twenty students maximum. Even this can be pushing an instructor’s limits to be able to give necessary attention to each student. Discussion boards can become very unwieldy and, even with interactive video or text chat software that allows synchronous discussion, chats with more than fifteen to twenty students can become difficult to manage.

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<sup>31</sup> See Dutton et al., *supra* note 11.

There are online platforms that allow many more than fifteen to twenty students to be involved.<sup>32</sup> Early experiments with Massive Open Online Courses (MOOCs) demonstrated both the availability, and limitations, of large-scale online education, largely in the undergraduate context.<sup>33</sup> MOOCs often garnered initial high course enrollment, but relatively few students completing the courses.<sup>34</sup> Today, a number of platforms like JoinMe<sup>35</sup> support webinars where the presenter screenshares with large numbers of participants who can ask text-based questions.<sup>36</sup> You can also do this on most standard video meeting platforms, like Skype,<sup>37</sup> Zoom,<sup>38</sup> and BlueJeans.<sup>39</sup>

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<sup>32</sup> In fact, there are now online platforms that cater specifically to getting law courses online. See iLAW, <https://www.ilawventures.com> [<https://perma.cc/2D8L-6VWJ>] (last visited Jan. 3, 2019).

<sup>33</sup> Audrey Watters, *The MOOC Revolution That Wasn't*, THE KERNEL (Aug. 23, 2015), <https://kernelmag.dailydot.com/issue-sections/headline-story/14046/mooc-revolution-uber-for-education> [<https://perma.cc/9WTW-ZLCS>] (last visited Jan. 3, 2019); see also Dutton et al., *supra* note 11, at 10 (“While the low-to-no-cost, unlimited enrollment online model makes higher education more accessible to all, these same attributes also contribute to the inherent disadvantages of MOOCs . . . . [S]tarting a MOOC might be relatively easy for a professor, but difficulties arise with managing interactions and grading potentially thousands of enrollees. Students may not receive adequate or any interaction with the professor, so they must instead seek out peer-to-peer interaction with varying degrees of success.”).

<sup>34</sup> Dutton et al., *supra* note 11, at 10.

<sup>35</sup> See JOIN.ME, <https://www.join.me> [<https://perma.cc/J4CG-8EUX>] (last visited Jan. 3, 2019).

<sup>36</sup> See Dutton et al., *supra* note 11, at 10 (explaining some of the downsides of these features).

<sup>37</sup> See SKYPE, <https://www.skype.com/en> [<https://perma.cc/EKJ6-YCX B>] (last visited Jan. 3, 2019).

<sup>38</sup> See ZOOM, <https://zoom.us> [<https://perma.cc/JK8W-JEV3>] (last visited Jan. 3, 2019).

<sup>39</sup> See BLUEJEANS, <https://www.bluejeans.com> [<https://perma.cc/VG8Z-HL7B>] (last visited Jan. 3, 2019).

The problem is that this format isn't very effective for interactive legal education. It's great for business presentations where participants may be asking one or two questions for clarification, but it's not so great for an interactive discussion. I often use these kinds of formats when presenting business or legal information to non-legal audiences as part of my consulting business, but not when I'm teaching legal classes.

If we assume that the sweet spot (or at least the maximum desirable enrollment) for an online law class is no more than fifteen to twenty students, that leads to the question as to how a typically large enrollment course, like Business Associations or Evidence, could be taught online. The obvious answer is that you need more sections. If your typical enrollment is forty-five to fifty students, you would probably need to divide the class into three sections, or to offer one in-person section and one (much smaller) online section. And, of course, you can't teach J.D. subjects, like Business Organizations or Evidence, entirely online yet without permission from the ABA.

If you're teaching solely to LL.M., MSJ, or MSL students, you can cap the class at whatever maximum you like and offer the subject more often, or in more sections, if the demand exceeds the supply. If your main instructor workforce in these online programs is adjuncts, it's generally cost-effective to offer more instances of the course than it would be if you were utilizing full-time faculty.

### **VIII. ACCESS/EQUITY CONSIDERATIONS AND ASSOCIATED MARKETING CONCERNS**

One of the major advantages of distance education generally, and online education in particular, has to do with

access and equity. Not requiring students to regularly attend classes during the day (or even physically in person at night or on weekends) theoretically allows more people who couldn't otherwise take advantage of educational programs to do so.<sup>40</sup> Taken to its logical extreme, an institution could effectively offer an entire set of degree programs online and grant access to students in far-flung corners of the world who otherwise would face terrible hardships in enrolling in, and attending, university. One model of this kind of ambitious endeavor is the University of the People,<sup>41</sup> an accredited online American university that offers purely online degrees tuition-free to those who have access to basic technology.<sup>42</sup> Its website currently boasts that 1,000 of its almost 19,000 students are refugees, of which approximately 600 are Syrian.<sup>43</sup>

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<sup>40</sup> Xu & Jaggars, *supra* note 9 (“While the rise of online distance education has expanded learning opportunities for all students, it is often the most attractive to nontraditional students, who are more likely to have employment and family obligations that make attending traditional face-to-face classes difficult. . . . Perhaps as a consequence, online learning enrollments have increased particularly quickly at community colleges . . . where a large proportion of the population are nontraditional students.”).

<sup>41</sup> See UNIVERSITY OF THE PEOPLE, <https://www.uopeople.edu> [<https://perma.cc/SH58-S9WL>] (last visited Jan. 3, 2019).

<sup>42</sup> See *What Programs Does University of the People Offer?*, UNIVERSITY OF THE PEOPLE, <http://support.uopeople.edu/Degree-Programs/30728410/What-programs-does-University-of-the-People-offer.htm> [<https://perma.cc/C3Q3-BWH3>] (last visited Jan. 3, 2019) (“University of the People offers the following six undergraduate degrees: Associate (A.S.) and Bachelor (B.S.) degrees in Computer Science, Associate (A.S.) and Bachelor (B.S.) degrees in Business Administration and Associate (A.S.) and Bachelor (B.S.) degrees in Health Science. In addition, we also offer Master’s degrees in Business & Education.”).

<sup>43</sup> See *In Brief*, UNIVERSITY OF THE PEOPLE, <https://www.uopeople.edu/about/uopeople/in-brief> [<https://perma.cc/9PHT-F6J5>] (last visited Jan. 3, 2019) (“UoPeople was founded in 2009 and accredited in February 2014. Today, it has 18,552 students enrolled from more than 200

This is not likely the model to which most American law schools aspire, even beyond existing ABA and other restraints. Apart from anything else, it's difficult, if not impossible, to offer a truly "global" legal degree because, even within the United States, law is such a state-based discipline. That said, many online programs do seek to reach out to students outside of a given state or even outside the United States, because of the interest of many students in learning American law for comparative research purposes or because they work for institutions that transact with entities in the United States.

In terms of cost, most LL.M. and MSJ/MSL programs, alongside the ever-increasing SJD programs, are intended as vehicles that can enhance the budgets of the relevant schools. No one reading this needs to be reminded that the qualifications of students enrolled in these programs do not impact U.S. News rankings in terms of student selectivity, so it's possible to grow these programs, and the associated fee-based revenue, without risking decreases in rankings.

In other words, the aim of these programs is typically not so much to provide access to those who otherwise wouldn't have access to education, but rather to move into new markets for budgetary reasons. Even accepting the increased market rationale for these online programs, equity and access concerns can arise. If a program is based purely on access to American websites, students in countries with problems accessing such websites will theoretically be unable to enroll, unless they can find ways to bypass technological constraints on access in their countries. Additionally, students who don't have

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countries and territories. 1,000 of these students are refugees, of whom 600 are Syrian.”).

the wherewithal to purchase or borrow (or otherwise access) the relevant technology, and support for that technology, will be unable to participate.

As I noted above,<sup>44</sup> that last issue is not likely to arise as much in practice today as in previous generations. Anyone who can't afford the relevant technology, probably can't afford to take the course in any event. Additionally, many of the courses currently offered online in LL.M. and MSJ/MSL programs are aimed at professionals in particular industries who want to hone their skills in the hopes of advancement at work. Those groups of students are likely to have access to relevant technologies through their employers, a number of whom may also be subsidizing the course fees for their employees.

Are there avenues for creating course offerings, and certificate programs, outside these professional niches that appeal to individuals who may find legal knowledge in a particular area useful in their lives? Would social justice courses be of interest to civil rights organizations? Would privacy law courses be useful to non-profit privacy advocates? Those may be untapped markets, or they may be areas in which the costs of offering the programs exceed the likely returns. Because launching new programs with projected market-appeal is such a new, and newly entrepreneurial, area for many law schools, it's hard to gauge the likely markets or the limitations to those markets.

Any foray into a new online market will involve certain sunk costs in terms of course development, marketing, student recruitment, student administration, etc. Even when the infrastructure is already in place for other degree or certificate programs, the costs of relevant

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<sup>44</sup> *See supra* Part II.

personnel taking on additional responsibilities for administration of new programs should be factored into the calculations. I've worked at law schools where the increased administrative load of managing even small, in-person programs in specialty areas (e.g. Master's programs in specialty areas like tax or environmental law) have outweighed the benefits of offering those programs.

## **IX. CONCLUSION**

It seems strange labeling this last section as “conclusion” because I haven't really come to many conclusions about online legal education as you'll have noticed if you've read this far. There are definitely more opportunities for legal academia to extend into the online space and, while the ABA standards are still limiting, this is a good time to experiment with new delivery modes, staffing practices, and discussions with students and instructors about what's working and what isn't.

One vital component of any foray into online education should be student feedback.<sup>45</sup> Instructors may have preconceived notions about what is and isn't “good” legal education, but students are the ultimate consumers/stakeholders (whatever word you want to insert there). They're the ones paying the fees and they're the ones who can explain what interests them and why they signed up for one school's course versus another's.

We're entering an age where most law deans are at least considering the possibility of venturing online (if they haven't already) or extending their online offerings or better targeting those offerings to a suitable market. My

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<sup>45</sup> Dutton et al., *supra* note 11, at 3 (noting the absence of research into student responses to online learning and the importance of incorporating their feedback into future developments in the area).

hope in presenting this essay is to add fuel to the discussions in terms of what works and what doesn't in practice, and to identify areas in which more discussion and further contributions to the discussion are necessary.

While there's a lot of information out there about distance education methodologies, platforms, student learning styles, access, and inclusion, far fewer law professors have ventured online than those who haven't. I'm not suggesting that every school, every teacher, or every program should get online, and certainly no one should take this step lightly in a knee-jerk reaction to a relaxing of the ABA standards on hybrid formats. However, I do think this is a discussion that will pick up steam in coming years, and I wanted to present my own two cents' worth. I hope this paper generates some discussion and I'm always happy to chat with anyone about my experiences, or theirs, as the discussion, the technologies, and the experiments progress.