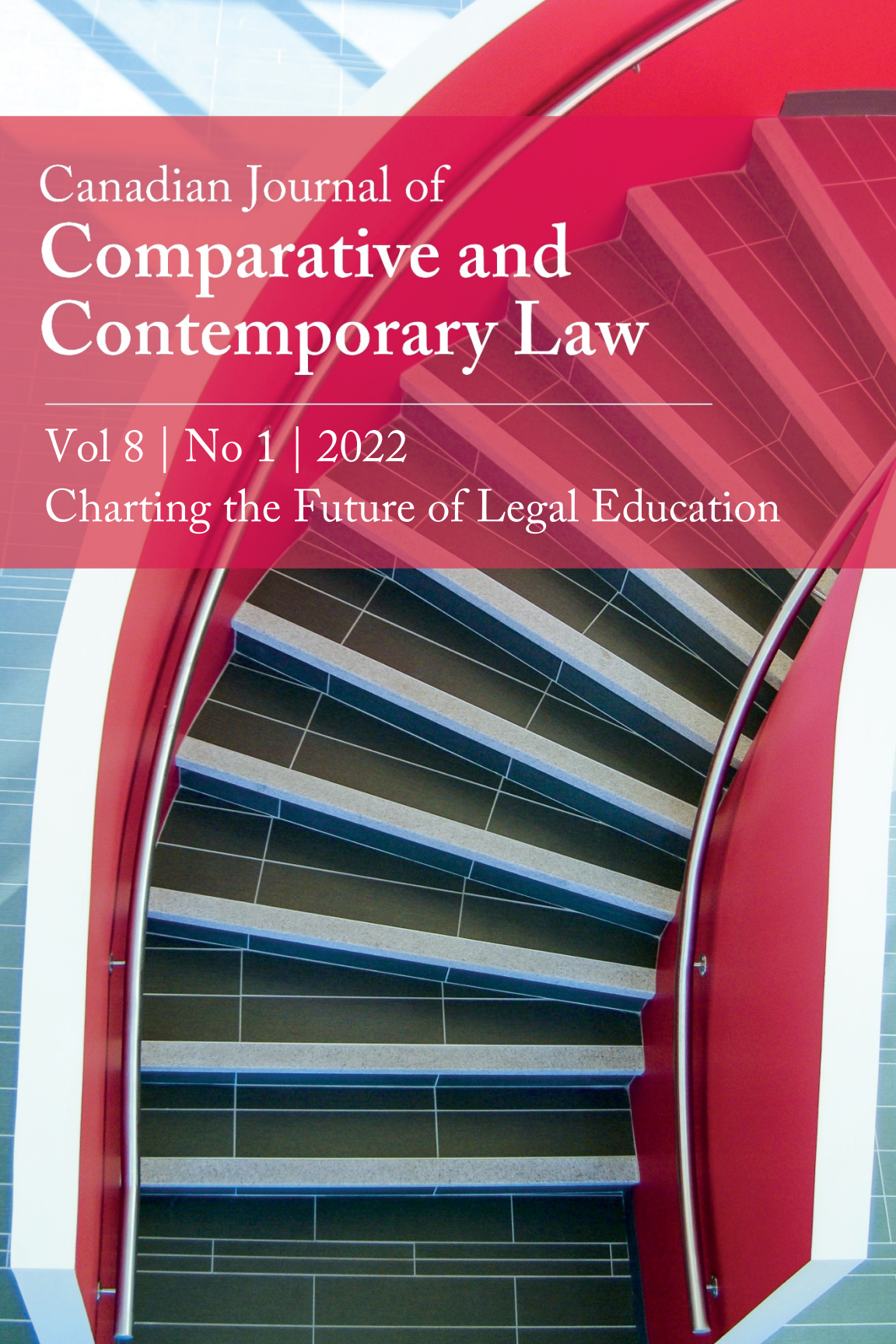


Canadian Journal of Comparative and Contemporary Law

Vol 8 | No 1 | 2022

Charting the Future of Legal Education

Canadian Journal of

Comparative and Contemporary Law

Vol 8 | No 1 | 2022

Charting the Future of Legal Education

The CJCCL is published by
The Canadian Association of Comparative and Contemporary Law
at Thompson Rivers University
Kamloops, BC

Canadian Journal of Comparative and Contemporary Law

Publication
The Canadian Journal of Comparative and Contemporary Law (CJCCL) is an open-access publication that is available online at http://www.cjccl.ca. Hardcopies can be ordered on request. Each issue focuses on a particular theme or area of law. The CJCCL encourages contributors to take a comparative approach in their scholarship.

Editorial Policy
All submissions are subject to a peer review process.

Submissions
The Journal accepts the following types of manuscripts:

(i) Articles between 8,000 to 15,000 words in length;
(ii) Case Comments between 3,000 to 6,000 words in length; and
(iii) Book Reviews less than 3,000 words in length.

Please visit our website for more details.

Contact Information
Canadian Journal of Comparative and Contemporary Law
Thompson Rivers University
Faculty of Law
805 TRU Way
Kamloops, BC, Canada V2C 0C8
E-mail: editor@cjccl.ca
Web: http://www.cjccl.ca

Cover Photo
The front cover depicts the main stairwell that leads to the atrium of Thompson Rivers University, Faculty of Law. The back cover depicts the distinct exterior of the Faculty of Law. The curved design of the roof was inspired by the natural beauty of the mountains visible from the building.

ISSN 2368-4046 (Online)
ISSN 2368-4038 (Print)
ISBN 978-1-9994425-4-5

This Issue should be cited as (2022) 8(1) CJCCL.

Canadian Journal of Comparative and Contemporary Law

List of Contributors

Swethaa S Ballakrishnen, Assistant Professor of Law and co-director of the Center on Empirical Research on the Legal Profession (CERLP) at University of California Irvine School of Law.

Peter D Burdon, Associate Professor and Deputy Dean at The University of Adelaide, Law School.

Eamonn Carpenter, B Com, LLB (Candidate), The University of Adelaide.

Tan Ciyiltepe, Juris Doctor (Candidate) and Research Assistant at Robson Hall, University of Manitoba, Faculty of Law.

Christine A Corcos, Richard C Cadwallader and Judge Albert Tate Foundation Associate Professor of Law at the Louisiana State University Law Center and Associate Professor, Women's, Gender, and Sexuality Studies Program, Louisiana State University.

Jonathan D Glater, Professor of Law, University of California, Berkeley, School of Law.

David Ireland, Lawyer and Assistant Professor of Law at Robson Hall, University of Manitoba, Faculty of Law.

Richard Jochelson, Dean of Law at Robson Hall, Faculty of Law, University of Manitoba.

Cornelia Koch, Senior Lecturer, Adelaide Law School, The University of Adelaide.

Silas Koulack, Juris Doctor, Robson Hall, Faculty of Law, University of Mantioba.

List of Contributors

Melanie Murchison, Instructor II at the University of Manitoba in the Department of Sociology and Criminology.

Camille A Nelson, Dean and Professor of Law at University of Hawai'i at Mānoa William S Richardson School of Law.

Christopher Nowlin, Instructor in the Department of Criminal Justice and the Department of Aboriginal Studies at Langara College in Vancouver, British Columbia.

Teresa Scassa, Canada Research Chair in Information Law and Policy, University of Ottawa, Faculty of Law.

Carole Silver, Professor of Global Law and Practice at Northwestern Pritzker School of Law.

Matthew Stubbs, Associate Professor, Adelaide Law School, The University of Adelaide.

Canadian Journal of Comparative and Contemporary Law

VOLUME 8 | NUMBER 1 | 2022

CHARTING THE FUTURE OF LEGAL EDUCATION

Canadian Journal of Comparative and Contemporary Law

VOLUME 8 | NUMBER 1 | 2022

CHARTING THE FUTURE OF LEGAL EDUCATION

"Never Let a Crisis Go to Waste": The Impact of COVID-19 on Legal Education

Peter D Burdon*

The COVID-19 pandemic represents the most significant rupture to universities since the advent of neoliberalism. In Australia, the economic shock was brought about primarily by a drop in international student fees, border closures, plus efforts from the Federal government to keep public universities from accessing financial support. In this article, I discuss the impacts of COVID-19 on legal education. What concerns me is the rhetoric under which massive structural changes have been justified in response to the pandemic. Most commonly, university leaders have sought to externalise the problem and adopt the language of unforeseeability, emergency and necessity. Changes to learning and teaching have also been described as an 'opportunity' to re-examine outdated pedagogical practices and forms of assessment. While not denying the unprecedented nature of the pandemic, this article argues that current changes in higher education are not a break from the past but a continuation of the neoliberal project.

* Peter Burdon is Associate Professor and Deputy Dean at The University of Adelaide, Law School. Correspondence can be sent to peter.d.burdon@adelaide.edu.au.

I. Introduction

Since the 1990s, Australian universities have been shaped in the image of neoliberalism. Under this ideology, the idea of the university was transformed into a vehicle for facilitating economic growth. Overseas markets need to be found or created for lucrative internal student fees. With respect to learning and teaching, students are interpellated as customers who consume a product. The curriculum in law schools has been stripped of critical content in favour of an instrumental or commercial focus.[1] Teachers have also been required to make significant adjustments to pedagogy. Scholars rarely connect teaching to political economy.[2] However, we have been required to adjust our craft to accommodate increased class sizes, changes in technology and performance measures that are known to be biased.[3] Casual staff, who labor

1 Margaret Thornton, *Privatising the Public University: The Case of Law* (New York: Routledge, 2012).

2 Peter Burdon, "Neoliberalism in Legal Education Research" in Ben Golder, Marina Nehme, Alex Steel & Prue Vines, eds, *Imperatives for Legal Education Research Then, Now and Tomorrow* (London: Routledge, 2020).

3 Colleen Flaherty, "Even 'Valid' Student Evaluations Are 'Unfair'" (27 February 2020) *InsideHigherEd*.

under conditions of precarity, also do an increasing amount of teaching and marking.[4]

The COVID-19 pandemic represents the most significant rupture to universities since the advent of neoliberalism. In Australia, the economic shock was brought about primarily by a drop in international student fees,[5] border closures and efforts from the Federal government to keep public universities[6] from accessing financial support.[7] I will discuss the specific impacts of COVID-19 on learning and teaching below. However, what concerns me in this paper is the rhetoric under which massive structural changes have been justified in response to the pandemic. Most commonly, university leaders have sought to externalise the problem and adopt the language of unforeseeability, emergency and necessity. Adjustments[8] to learning and teaching have also been described as an 'opportunity' to re-examine outdated pedagogical practices and forms of assessment. While not denying the unprecedented nature of the pandemic, this paper argues that current changes in higher education are not a radical break from the past but a continuation of neoliberalism. Crisis, from this perspective, is inherent to and constitutive of neoliberalism.

To support this argument, this paper proceeds in the following parts. In Part II, I develop the argument that the idea of the university is an empty signifier

---

4 Jess Harris, Kathleen Smithers & Nerida Spina, "More Than 70% of Academics at Some Universities Are Casuals. They're Losing Work and Are Cut Out of JobKeeper" (15 May 2020) *The Conversation*.

5 Some Australian universities have seen an increase in international students since COVID-19: Jordan Baker, "Top Universities See Overseas Student Numbers Increase Despite 'Crying Poor'" (19 June 2021) *The Age* [Baker, "Top Universities"].

6 Private universities were able to access government support: Naaman Zhou, "Four Private Australian Universities Allowed to Access Jobkeeper Payments" (25 May 2020) *The Guardian*.

7 Gavin Moodie, "Why Is the Australian Government Letting Universities Suffer?" (18 May 2020) *The Conversation*.

8 I am deliberately avoiding the word 'reform' in this paper because that term connotes improvement.

that changes over time. Attention is given to the role of neoliberalism in shaping the contemporary university and learning and teaching. In Part III, I develop a theory of crisis capitalism that draws on the writing of economist Milton Friedman. Crisis, for Friedman, represented an opportunity through which unpopular reforms could be promoted under the language of necessity. While Friedman sought to influence national governments and state programs, I argue that his reflections on crisis provide an instructive lens through which to understand current changes in higher education. With this in mind, in Part IV, I critically examine five recent changes that are relevant to learning and teaching: (1) job losses and casualization; (2) cuts to programs; (3) finding new markets for international students; (4) online teaching; and (5) changes to assessment. While not denying the scale of the challenge that confronts higher education, I argue that university leaders are using the COVID-19 pandemic as a crisis to push through unpopular changes. I substantiate this argument by comparing statements prior to and during the pandemic and through a reading of how leaders have used the language of necessity. Ultimately, I conclude that Rahm Emanuel's dictum that one should "never let a good crisis go to waste"[9] is the governing mantra in universities today and will have a profound impact on learning and teaching for decades to come.

II. Neoliberalism and Legal Education

The 'idea of the university' is an empty signifier. Despite noble attempts to articulate the idea as a kind of natural law,[10] it is fundamentally indeterminate. The dominant form that pervades the Euro-Atlantic world is only one variant of an institution that has changed its shape countless times since the first university was established in Bologna in 1088. No coherent argument can be made that the idea of the university necessarily entails a commitment to training democratic citizens, critical thinking or abstract thought. Likewise, the idea of

9 The quote is often attributed to Winston Churchill but I could find no evidence for that claim; Rahm Emanuel, "Opinion: Let's Make Sure This Crisis Doesn't Go to Waste" (25 March 2020) *The Washington Post*.

10 John Henry Newman, *The Idea of a University* (London: Penguin, 2015).

the university cannot be marshalled in support of the economy or as a site for training job-ready graduates. At most, the term carries a simple image of an institution of higher learning, which is authorised to grant academic degrees. To this, we might add the pursuit of research, but given the assault on humanities, this is far from guaranteed or universal. In this respect, the idea of the university is an "unfinished principle"[11] whose structure and commitments are determined by what Professor Mari Matsuda called the "war of wills".[12] Sometimes, universities are 'acted upon' or respond to circumstances outside of their control. At other times, university leaders make active and self-serving choices intended to bolster the standing or reputation of their institution.[13]

For the purpose of this paper, the changing nature of universities is expressed as a truism. The point can easily be understood if we imagine taking a contemporary law student and dropping them into the Inns of Court in the 19th century. Even if our imaginary student had the necessary background (*i.e.* class, gender, ethnicity) for admission, they would be in a completely foreign environment. Notably, the Inns of Court were concerned with turning aristocratic boys into gentlemen and the curriculum included training on the 'moral and social' aspects of life, including the fine arts, "music and dance".[14] How many of our students would find their feet — pun intended — in this environment?

While the purpose of legal education narrowed over the centuries, the idea that universities could be sites for personal growth persisted into the 20th century. An example can be seen in Robert Menzies' speech, "The Forgotten

11 Wendy Brown, *Democracy in What State?* (New York City: Columbia University Press, 2012) at 45.

12 Mari J Matsuda, "Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice" (1986) 16:3 New Mexico Law Review 613 at 616.

13 Hannah Forsyth, *A History of the Modern Australian University* (Sydney: NewSouth Publishing, 2014) at 45.

14 David Lemmings, *Gentlemen and Barristers: The Inns of Court and the English Bar 1680-1730* (New York: Oxford University Press, 1990); T Raleigh, "Legal Education in England" (1898) 10 Juridical Review 1 at 1–5.

People",[15] delivered in 1942. While targeted at the middle class in Australia, the speech was designed to reflect the values of the Liberal Party of Australia. Menzies described universities as sites of pure learning where students might grow under "the lamp of learning".[16] Menzies noted further:

> [a]re the universities mere technical schools, or have they as one of their functions the preservation of pure learning, bringing in its train not merely riches for the imagination but a comparative sense for the mind, and leading to what we need so badly - the recognition of values which are other than pecuniary?[17]

This vision is largely consistent with the writings of Max Weber who provided the best defence of objectivity in education.[18] For Weber, universities should be sites of pure learning and not contaminated with the weapons of politics. He also warned against professors giving moral instruction or straying too far from their central mandate — to give students "the capacity to think clearly and know what one wants".[19]

Contemporary law schools have a much more vocational purpose and are largely agnostic about the inner life of students.[20] In direct contrast to Menzies and Weber, education ministers in Australia have played an increasingly interventionist role and have sought to reshape higher education to serve

---

15 Robert Menzies, "The Forgotten People" (22 May 1942), online: *Liberals* <www.liberals.net/theforgottenpeople.htm>.

16 *Ibid*.

17 *Ibid*.

18 Max Weber, *Charisma and Disenchantment: The Vocation Lectures*, ed by Paul Reitter & Chad Wellmon, translated by Damion Searls (New York: New York Review of Books, 2020).

19 *Ibid* at xiii. For a broader discussion of Weber in the context of legal education, see Burdon, *supra* note 2.

20 Anthony T Kronman, *Educations End: Why Our Colleagues and Universities Have Given Up on the Meaning of Life* (Connecticut: Yale University Press, 2007).

economic goals.[21] This is not conjecture — education ministers are explicit about this project. For example, in June 2020, the then Minister for Education, Dan Tehan, issued a joint statement with the then Minister for Employment, Michaelia Cash. The purpose of the statement was to announce a policy to lower fees for students enrolled in "areas of expected employment growth and demand".[22] Tehan — who wrote his master's thesis on the Marxist philosopher Jürgen Habermas[23] — defended this intervention on the following basis:

> [t]o power our post-COVID economic recovery, Australia will need more educators, more health professionals and more engineers, and that is why we are sending a price signal to encourage people to study in areas of expected employment growth…We are facing the biggest employment challenge Australia has faced since the Great Depression and the biggest impact will be felt by young Australians. They are relying on us to give them the opportunity to succeed in the jobs of the future. Universities need a greater focus on domestic students and greater alignment with industry needs.[24]

The message was clear — study accounting, not the classics. Or, "[i]f you are going to do ancient Greek, do IT with it".[25] Alan Tudge, the current Minister for Education, is just as explicit in his attempt to marshal universities for a post-COVID-19 recovery. Commenting on research funding, he expressed his desire

---

21 On the lack of intervention from the Menzies government see: Frank Bongiorno, "The Preservation of Pure Learning" (4 June 2021) *Inside Story*; Forsyth, *supra* note 13 at 52–56.

22 Dan Tehan & Michaela Cash, "Job-Ready Graduates to Power Economic Recovery" (19 June 2020), online: *Ministers' Media Centre* <ministers.dese.gov.au/tehan/job-ready-graduates-power-economic-recovery>.

23 Bongiorno, *supra* note 21.

24 Tehan & Cash, *supra* note 22.

25 Interview of Dan Tehan by Lisa Millar (22 June 2020) on *News Breakfast*, ABC Australia, Market Screener.

for "academics to become entrepreneurs"[26] and take their "ideas from the lab to the market".[27] Tudge noted further:

> [t]oo often, our research does not make it through to translation and commercialisation — it falls into the 'valley of death' between academia and industry, between theory and real-world application.…
>
> How can we strategically direct our investment to de-risk universities and businesses reaching across the valley of death, and drive a higher return on public funding?[28]

Implicit in this statement is a vision of research that is necessarily linked to commercialisation — a trend that has worrying implications for non-STEM[29] based disciplines like law.

Tudge's words were not met with outcry or an impassioned defence from vice chancellors about the virtues of pure learning. Over the past thirty years,[30] university managers have grown accustomed and actively cultivated the economisation of research and the instrumentalisation of knowledge. As Australian sociologist, Raewyn Connell, observes, "[t]he face of the modern university, as it smiles out from the television news, is a neat middle-aged man or woman in a well-cut business suit, speaking with confidence about markets, league tables and excellence".[31] The most common name for this transformation

---

26 Alan Tudge, "Lifting the Impact of Universities to Strengthen Australia's Future" (26 February 2021), online: *Ministers' Media Centre* <ministers.dese.gov.au/tudge/lifting-impact-universities-strengthen-australias-future>.

27 *Ibid.*

28 *Ibid.*

29 STEM stands for Science, Technology, Engineering and Mathematics.

30 The origins of neoliberalism in Australia is best dated to the Hawke-Keating government: Elizabeth Humphrys, *How Labour Built Neoliberalism: Australia's Accord, the Labour Movement and the Neoliberal Project* (Chicago: Haymarket Books, 2019).

31 Raewyn Connell, *The Good University: What Universities Actually Do and Why It's Time for Radical Change* (London: ZED Books, 2019) at 115.

is neoliberalism. The term captures an ideological agenda that encourages "competition, privatization and individualism".[32] While the efficacy of this term is debated,[33] I consider it the dominant logic of universities today. If it is hard to identify, it is only because, like the air we breathe, it is everywhere and hegemonic.

While the dominant history of neoliberalism stresses the role of new-right governments[34] and conservative think-tanks,[35] in Australia the shift was ushered in by the Labor Party and the Dawkins reforms which started in 1987.[36] While not every aspect of these reforms was neoliberal,[37] it was during this period that fields of study were expanded in areas considered vital for economic growth and the cost burden began to shift from the state to individual students. Hannah Forsyth argues that during the 1990s, our universities entered into a "Faustian bargain",[38] which "explicitly reposition[ed] higher education as an industry,

32 *Ibid.*

33 Damien Cahill & Martijn Konings, "Neoliberalism: A Useful Concept?" (13 November 2017), online: *Progress in Political Economy* <www.ppesydney.net/neoliberalism-useful-concept/>.

34 On the Thatcher and Reagan governments see David Harvey, *A Brief History of Neoliberalism* (New York: Oxford University Press, 2007) at 39–63.

35 Philip Mirowski & Dieter Plehwe, *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* (Cambridge, Mass: Harvard University Press, 2009).

36 Elizabeth Humphrys, *How Labour Built Neoliberalism: Australia's Accord, the Labour Movement and the Neoliberal Project* (Chicago: Haymarket Books, 2019). See also: Elizabeth Humphrys, "Is the Term Neoliberalism Useful?" (29 September 2016), online (blog): *Progress in Political Economy* <www.ppesydney.net/term-neoliberalism-useful/> where she argues that: "the labour movement was not simply an object or victim of neoliberal change but an active constructor of it".

37 For example, a critical aspect of the Dawkins reforms involved linking funding to a set of national objectives for the economy, society and culture. This goes against the logic of a purely free market as articulated by Milton Friedman: Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 2020).

38 Forsyth, *supra* note 13 at 226.

seeing financial reward".[39] It was in this context, that Simon Marginson and Mark Considine coined their iconic phrase: "[t]he Enterprise University".[40]

Changes in funding, combined with the dominance of free-market liberalism in public policy, economised the idea of higher education and allowed it to be described in terms of "individuals exchanging goods and services at prices set by the laws of supply and demand, these prices providing the signals that allowed factors of production to be allocated with maximum efficiency".[41] In practical terms, this rendered higher education a "service to the consumer that should be bought and sold like any other commodity",[42] rather than something that could be framed in non-instrumental terms or through alternative values such as educating citizens for robust participation in a democracy.[43]

In Australia in 2012, Margaret Thornton produced the most sustained and detailed analysis of how neoliberalism has impacted law schools. I will return to elements of this discussion in Part III. Thornton theorises neoliberalism as a political theory that promotes the marketisation of public goods and the erosion of state responsibility for producing an "educated and culturally aware citizenry".[44] Marketisation, according to Thornton, is a process rather than something that has been fully accomplished. Thus, she argues that while "there

39 *Ibid.*

40 Simon Marginson & Mark Considine, *The Enterprise University: Power, Governance and Reinvention in Australia* (Cambridge: Cambridge University Press, 2000).

41 Stuart Macintyre, André Brett & Gwilym Croucher, *No End of a Lesson: Australia's Unified National System of Higher Education* (Carlton: Melbourne University Publishing, 2017) at 37 [Macintyre, Brett & Croucher].

42 *Ibid.*

43 *Ibid.*

44 Thornton captures this shift with reference to a Government report which stated: "[t]he term "public" university now refers more to the historical circumstances at the time of foundation rather than the nature of institutional financing": Thornton, *supra* note 1 at 1.

has been a notable shift away from public to private responsibility",[45] we currently operate in a hybrid public-private system.[46]

With respect to learning and teaching, Thornton argues that law schools are increasingly concerned with "what law is, with little regard for critique, reflective analysis or what the law ought to be".[47] This is a general statement, and practices vary considerably between institutions — and even between courses in a single degree. With respect to pedagogical practices, Thornton claims that law schools have returned to a "sage on the stage"[48] model of pedagogy to cope with a massive increase in student numbers without a concomitant increase in resourcing. An anonymous academic from a third-generation law school expressed the shift as follows: "[i]n the 1990s, it would have been the standard subjects taught by 2 x 2hr seminars. Then that was compressed to 1 x 3hr seminar and, just the last year or so, it's 1 x 2hr seminar, with the option of a 1hr lecture".[49] What is driving this shift is not pedagogy but economics and efficiency.

In response to this change to pedagogy it must be stated that legal educators have known for a long time that the top-down delivery of information stifles critical thinking and promotes a black-and-white interpretation of the law. It was on these grounds that in 1964, the Martin Report[50] condemned the form of legal education that developed in Australia in the post-war period:

> most of the instruction in the law provided by busy practitioners was of the dogmatic kind [which] meant little or no teacher /student contact, no

45 *Ibid*.

46 *Ibid*.

47 *Ibid* at 59.

48 *Ibid* at 85.

49 *Ibid* at 86.

50 Austl, Commonwealth, Committee on the Future of Tertiary Education in Australia, *Tertiary Education in Australia: Report of the Committee on the Future of Tertiary Education in Australia to the Australian Universities Commission: Volume II* by Chairman LH Martin et al (Canberra: Government Printer, 1964) at 57–58.

> supervised work by the student, little or no student work concerned with original materials, and, for the majority of students, a strong temptation to satisfy all requirements by cramming potted information in short periods before examinations. In brief, legal education of that kind was fairly simple and very cheap, but it had very little else to commend it.[51]

Further, it was dissatisfaction with passive pedagogy that led to the creation of law schools at UNSW[52] and Macquarie in the 1970s. The guiding vision for these schools was for teaching to focus less on lectures and more toward small interactive seminars.[53] Marlene Le Brun and Richard Johnstone documented these changes,[54] and by the 1990s it was commonplace for law schools to develop a "student-centered, interdisciplinary approach to learning, in which the undergraduate law student assume[d] an active role in the making of meaning within the discipline of law".[55] However, the turn toward student-centered learning was only brief and small-group teaching lasted only five years in some law schools.[56] At the same time, as legal education was becoming more professional and focused on pedagogy, government policy was moving toward massification to "augment the supply of new knowledge workers with the aim of ensuring that nation states are competitive within the global economy".[57]

As noted, this policy decision was not matched by funding and so law schools have been coerced into the model of the firm — finding money from the private sector and military, locating efficiencies and adopting an

---

51 *Ibid* at 57.

52 UNSW stands for University of New South Wales.

53 Thornton, *supra* note 1 at 85.

54 Marlene Le Brun & Richard Johnstone, *The Quiet (R)evolution: Improving Student Learning in Law* (North Ryde: Law Book Co, 1994) 97.

55 The phrase 'making of meaning' derives from: Neil Postman & Charles Weingartner, *Teaching as a Subversive Activity* (New York: Delacorte Press, 1969) at 82–97.

56 Thornton, *supra* note 1 at 90.

57 *Ibid* at 13.

entrepreneurial posture toward the international student market.[58] Coercion is the key term here because, while university managers have done their level best to comport themselves to the market, this has occurred within an economic and ideological context. As Forsyth notes, "the system that history has forged compels us all, whether vice-chancellor or casual academic, senior accountant, librarian or student support officer, to protect ourselves, our institutions and our work with what feeble tools history has left us with".[59]

III. Crisis and Neoliberalism

Crisis inhabits multiple identities in the literature on neoliberalism. For some, crisis represents a contradiction which may lead to a crack in neoliberal capitalism or usher in its demise.[60] For others, crisis is a recognition of failure and an opportunity to take stock, evaluate and do better in the future.[61]

In this paper, I promote a third interpretation that is specific to neoliberal capitalism — capitalism is inherently built on contradictions which inevitably lead to crisis. Crisis, in this paper, is not a bug but a feature of capitalism and the mechanism through which it projects itself deeper into the fabric of economic policy and ideology. As Ben Golder has written, "we are better off understanding contemporary capital accumulation as functioning not on the brink of or in

58 Wendy Brown & Timothy Shenk, "Booked #3: What Exactly Is Neoliberalism?" (2 April 2015) *Dissent Magazine*.

59 Forsyth, *supra* note 13 at 227.

60 John Holloway, *Crack Capitalism* (London: Pluto Press, 2008); Harvey, *supra* note 34. Marx's *Grundrisse* is an early expression of the idea that crisis would lead to the collapse of capitalism: Karl Marx, *Grundrisse: Foundations of the Critique of Political Economy* (London: Penguin, 1973) at 750 [Marx, *Grundrisse*]. However, note that he later abandoned this idea: Karl Marx, *Capital: Volume 1: A Critique of Political Economy* (London: Penguin, 1992) [Marx, *Capital*].

61 Martin Wolf, "Why a Crisis is Also an Opportunity" (8 February 2008) *The Financial Times*.

spite of crisis but in and through it".[62] Golder argues further that crisis "produces particular political subjectivities and fashions objects of institutional and intellectual knowledge".[63] This can be noted by the tendency of higher education to limp from crisis to crisis and normalise a state of constant change.[64] This has had a detrimental effect on staff morale and diminished our collective sense of possibility for the idea of the university.[65]

Karl Marx provided the earliest theorisation of the relationship between crisis and capital.[66] It is not necessary, for our purpose, to unpack this analysis or engage the various debates it engendered in the 19th and 20th centuries.[67] More recently, political theorists have noted the way crisis or 'shocks' have been introduced to bring about structural economic changes.[68] An iconic example was carried out in 1979 by Paul Volcker, the then chairman of the U.S. Federal Reserve Bank. Known today as the Volcker Shock, the intervention sought to

---

62 Ben Golder, "From the Crisis of Critique to the Critique of Crisis" (2021) 92:4 University of Colorado Law Review 1065 at 1076.

63 *Ibid*.

64 Connell, *supra* note 31 at 68–72.

65 *Ibid* at 69; Bronwyn Davies & Peter Bansel, "The Time of Their Lives? Academic Workers in Neoliberal Times" (2005) 14:47 *Health Sociology Review* at 80.

66 See *e.g.* Marx, *Grundrisse, supra* note 60 at 750:

> Hence the highest development of productive power together with the greatest expansion of existing wealth will coincide with depreciation of capital, degradation of labourer, and a most straightened exhaustion of his vital powers. These contradictions lead to explosions, cataclysms, crises, in which by momentaneous suspension of all labor and annihilation of a great portion of capital, the latter is violently reduced to a point where it can go on fully employing its productive powers without committing suicide. Yet, these regularly recurring catastrophes lead to their repetition on a higher scale, and finally to its violent overthrow.

References to the automatic overthrow of capitalism were removed from Marx's writing in Marx, *Capital, supra* note 60.

67 For a summary see Sasha Lilley et al, *Catastrophism: The Apocalyptic Politics of Collapse and Rebirth* (California: PM Press, 2012) at 32–33.

68 Philip Mirowski, *Never Let a Serious Crisis Go to Waste: How Neoliberalism Survived the Financial Meltdown* (Brooklyn: Verso, 2014).

lower the rate of inflation by initiating "a long deep recession that would empty factories and break unions in the US and drive debtor countries to the brink of insolvency, beginning the long era of structural adjustment".[69] Crisis, Volcker argued, was the most efficient means to introduce changes into the structure of the U.S. economy and combat stagflation.[70] Naomi Klein[71] and Antony Loewenstein[72] have documented dozens of other examples where 'shock therapy' was introduced into the economies of countries in the majority world to pave the way for free markets.[73] In presenting this analysis, Klein gives prominence to the economist Milton Friedman who argued:

> only a crisis – actual or perceived – produces real change. When that crisis occurs, the actions that are taken depend on the ideas that are lying around. That I believe is our basic function: to develop alternatives to existing policies, to keep them alive and available until the politically impossible becomes politically inevitable.[74]

Friedman applied this thinking to a variety of circumstances — not just at the level of a national economy. For example, in the aftermath of Hurricane Katrina, he wrote an article for the Wall Street Journal which opined on the future of the regions ailing school infrastructure: "Most New Orleans schools are in ruins, as are the homes of the children who have attended them. The children are now

---

69 Volcker quoted in: Doug Henwood, *After the New Economy* (New York: New Press, 2003) at 208.

70 David Harvey, *A Brief History of Neoliberalism* (New York: Oxford University Press, 2007) at 23.

71 Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (London: Picador, 2007); Naomi Klein, "Naomi Klein: How Power Profits from Disaster" (6 July 2017) *The Guardian*.

72 Antony Loewenstein, *Disaster Capitalism: Making a Killing Out of Catastrophe* (New York: Verso, 2016).

73 The best-known example is Chile. See Eduardo Galeano, *Open Veins of Latin America: Five Centuries of the Pillage of a Continent* (Melbourne: Scribe Publications, 2009).

74 Friedman, *supra* note 37.

scattered all over the country. This is a tragedy. It is also an opportunity to radically reform the educational system".[75]

Friedman's proposal was not to restore public infrastructure and services. Instead, he argued that only the private schools should be rebuilt and that poorer families could be issued with vouchers. This was not pitched as a temporary measure but as a "permanent reform"[76] aimed at redistributing public wealth into private hands. Other examples could be detailed — including the 32 policies enunciated in the "Pro-Free-Market Ideas for Responding to Hurricane Katrina and High Gas Prices".[77] But the necessary point should be clear — crisis can create an opportunity through which capitalism can find space for growth and consolidation. The opportunity here is neutral and might be occupied by the social left. However, because capitalism creates crisis and is crisis-dependent those benefiting from its continuation have proven to be better placed to exploit the political moment.

Having laid out the basic thesis of crisis capitalism, I shift now to consider how its logic has played out in higher education. In doing so, I am not suggesting that disasters such as Hurricane Katrina are in any way commensurate with what is happening in higher education policy in Australia. Rather, I am arguing that the logic of crisis capitalism has applications to a range of policies and political moments. Moreover, I argue that crisis capitalism provides a better explanation for changes in higher education policy than the rhetoric of necessity that is given by university leaders.

IV. Never Let a Good Crisis Go to Waste

> In addition to making cost savings in the post-COVID19 [*sic*] world, universities could also look to see if there are opportunities that present which could be capitalised upon. There is never a better time for universities to

75 Milton Friedman, "The Promise of Vouchers" (5 December 2005) *The Wall Street Journal*.

76 *Ibid*.

77 The policies can be read here: Naomi Klein, "GOP Opportunity Zone" (23 September 2005) *The Nation*.

> explore new ways to deliver courses, improve the student experience and undertake research, whilst systematically examining the underpinning management of resources, staffing structures and costs.[78]

The COVID-19 pandemic has radically altered the landscape of higher education in Australia. As described above, it is the single most significant shock to hit the higher education sector in decades. The extent of the shock was also exacerbated by efforts from the Federal Government to keep public universities from accessing economic assistance or job protection programs.[79] In broad terms, the outcome is stark. As of June 2021, 17,000 university workers have lost their jobs and the sector has lost AUD $1.8 billion in revenue. This loss is expected to grow to AUD $2 billion in 2021.[80] On top of this, the job-ready graduate amendments to the *Higher Education Support Act* made the deepest funding cuts in a generation.[81] Furthermore, Senator Kim Carr notes, "[t]otal support for domestic student places under the Commonwealth Grants Scheme was cut, and the scheme no longer cross-subsidises research".[82]

Universities have responded to the COVID-19 pandemic in various ways, depending on their size and financial health. It is not my intention to provide a

---

78 Elizabeth Baré, Janet Beard & Teresa Tija, "Does the Extent of Casualisation of the Australian Academic Workforce Provide Flexibility to Beat the COVID-19 Hit?" (27 May 2020), online: *The University of Melbourne* <melbourne-cshe.unimelb.edu.au/lh-martin-institute/fellow-voices/does-the-extent-of-casualisation-of-the-australian-academic-workforce-provide-flexibility-to-beat-the-covid-19-hit>.

79 Although Baker reported, "[u]niversities also pocketed $46 million in JobKeeper subsidies through companies they owned, despite being ineligible themselves, with the University of NSW collecting $13 million": Jordan Baker, "'Restless and Unsettled': The Pandemic is Taking its Toll on Students" (9 August 2020) *The Sydney Morning Herald* [Baker, "Restless and Unsettled"].

80 "17,000 UNI JOBS LOST TO COVID-19" (3 February 2021), online: *Universities Australia* <www.universitiesaustralia.edu.au/media-item/17000-uni-jobs-lost-to-covid-19/>.

81 Kim Carr, "Arts Courses Are Under Threat From the Chorus of Philistines" (25 July 2021) *The Australian Financial Review*.

82 *Ibid*.

comprehensive account of these changes. Instead, I focus primarily on Group of Eight Universities because of their relative size and role in shaping higher policy in Australia. Moreover, rather than focusing on the details of changes, I am specifically interested in how university managers have framed changes related to learning and teaching. Here there is near uniformity. Without exception, leaders have positioned COVID-19 as a crisis that has forced them to make 'hard choices' to secure the long-term viability and competitiveness of their institution. Rather than seeing these decisions as a continuation of current economic governance (neoliberalism), most leaders have also framed the pandemic as a radical break from the past and an opportunity to modernise university education.[83] I turn now to examples to support my argument.

A. Job Losses and Casualization

The corporatisation of higher education has become synonymous with the erosion of tenure and the casualization of academic teaching. Today, it is not uncommon for law students to go through their entire degree without having a meaningful conversation with a full-time academic staff member. By one count, 80% of undergraduate courses are being taught by casual academics.[84] Higher education is also the third-largest employer of casual workers in Australia,[85] just behind other so-called 'public goods' such as health and social care. While commonly seen as a political or economic issue, I wish to frame precarity and casualization as materially linked to learning and teaching. Implicit in this characterisation is the view that the identity and security of a teacher is relevant — for better or worse — to the learning that takes place in a classroom.

---

83 Tawana Kupe & Gerald Wangenge-Ouma, "Post COVID-19: Opportunity for Universities to Have to Rethink" (15 November 2020) *The Conversation*.

84 Christopher Klopper & Bianca Power, "The Casual Approach to Teacher Education: What Effect Does Casualisation Have for Australian University Teaching?" (2014) 39:4 Australian Journal of Teacher Education 101 at 102.

85 Julia Savage & Vikki Pollard, "Taking the Long Road: A Faculty Model for Incremental Change Towards Standards-Based Support for Sessional Teachers in Higher Education" (2016) 13:5 Journal of University Teaching and Learning Practice 5 at 14.

In response to the pandemic the first lever that many universities pulled was to announce job losses. While handled with varying levels of sensitivity the overall impact has been similar. For example, the University of Adelaide announced a voluntary separation scheme, which gave eligible staff an economic incentive to leave. Staff also voted for a reduction in pay[86] to delay forced redundancies, which will take place in 2021.[87] Other universities took a more direct approach while continuing to spend discretionary money. For example, the Australian National University cut 465 jobs[88] while spending $800,000 for a new office for their Chancellor, Julie Bishop.[89] Similarly, the University of Melbourne cut 450 jobs while continuing some building works.[90] This figure does not include the 5,000 casual staff whose contracts were not renewed and who were given little notice or opportunity to find alternative work.[91] Vice-Chancellor Professor Duncan Maskell justified the cutbacks with the language of necessity: "[w]ith fewer students, the university must be smaller and we will need fewer staff".[92] Other vice-chancellors issued similar statements in response

86 Michelle Exner, "COVID-19 Jobs Protection Framework" (29 July 2020), online: *The University of Adelaide* <adelaide.edu.au/hr/news/list/2020/07/29/covid-19-jobs-protection-framework>.

87 Dean Faulkner, "Decline in International Students for Adelaide Uni to Consider Axing 130 Jobs" (8 July 2021) *ABC News*.

88 "Australian National University to Lose 465 Jobs Due to Financial Impact of COVID-19" (16 September 2020) *ABC News.*

89 Myriam Robin, "ANU Spent $800k on Julie Bishop's New Office in Perth" (1 August 2021) *The Australian Financial Review*.

90 Conor Duffy, "University of Melbourne Reveals 450 Job Losses as COVID-19 Creates Revenue Hit, Drop in International Students" (5 August 2020) *ABC News*.

91 *Ibid.*

92 *Ibid.*

to job cuts; for example, Ian Jacobs noted, "[t]his is a painful but unavoidable reality in current circumstances".[93]

There are, of course, elements of truth in this justification for cutting jobs. Universities have suffered a significant drop in income, and salaries are a non-fixed cost where managers can exercise a degree of control. It is precisely for these reasons that job cuts and casualization are commonly the first measure utilised in response to a crisis — real or imagined.[94] Michael Spence, the immediate preceding Vice-Chancellor of the University of Sydney, went so far as to claim that the job losses were good for staff morale because they demonstrated financial responsibility.[95] With this in mind, I contend that we ought to think about the latest round of job cuts as part of a trend in university management and approach claims about necessity with "cool suspicion and scepticism"[96] — especially when money continues to be spent on non-essential projects.

Against the argument of necessity, it is noteworthy most established universities made a profit[97] in the last reporting period and, in some instances, enjoyed an upturn in international student numbers. "Across the sector", reports Jordan Baker, "enrolments from China have grown from 42.6 per cent of total overseas enrolments in 2018 to 42.8 per cent in 2020, mostly due to Sydney and UNSW".[98] Tellingly, neither of these institutions have refilled lost positions or reversed structural changes made in response to the pandemic. Universities

---

93 Paul Karp, "University of New South Wales to Cut 493 Jobs and Merge Faculties" (15 July 2020) *The Guardian*.

94 Benjamin Presis, "Melbourne University Staff to Protest Against up to 500 Job Cuts" (3 June 2014) *The Age*.

95 Lexi Metherell, "Sydney Uni Vice-Chancellor Maintains Cuts Good for Morale" (21 February 2012) *ABC News*.

96 Golder, *supra* note 62 at 1073.

97 Damian Glass, "University Announces Preliminary Financial Results for 2020" (25 February 2021), online: *The University of Melbourne* <about.unimelb.edu.au/newsroom/news/2021/february/university-announces-preliminary-financial-results-for-2020>.

98 Baker, "Top Universities", *supra* note 5.

have also seen a steep increase in philanthropic donations and domestic student enrolments.[99] Postgraduate student numbers and short course enrolments have also increased by significant margins across the sector.[100] These gains are not limited to established (*i.e.* Group of Eight) universities. For example, Charles Darwin University in Darwin reported that postgraduate applications rose by almost 60% and enrolments in health degrees have more than doubled.[101]

The culmination of these facts has given some commentators cause to describe the recent round of job cuts as crisis capitalism. For example, Damien Cahill, Secretary of the New South Whales branch of the National Tertiary Education Union, argued:

> university management has chosen to see this crisis as an opportunity to carry out a whole lot of restructuring that they've wanted to do for a long time. We've seen a whole lot of job cuts but the total downturn was only a few per cent. Revenue decreased by six per cent, but the vice-chancellors have chosen to sack or discontinue contracts of thousands of staff.[102]

This perspective is consistent with the broader thesis of this paper. To substantiate the argument I turn now to examine other reforms initiated in response to the pandemic.

B. Cuts to Programs

While neoliberalism purports to be about choice, it has resulted in a massive reduction in programs, the prioritisation of instrumental learning and cuts to the humanities. The hollowing out of departments like English, History,

99 *Ibid*.

100 Naaman Zhou, "Huge Increase in Demand for Postgraduate Courses as Australians Look to Upskill" (9 February 2021) *The Guardian*.

101 *Ibid*.

102 Baker, "Top Universities", *supra* note 5.

Gender Studies and the Classics has been chronicled in numerous books and does not need to be recounted here.[103]

In light of this history, it was unsurprising that university leaders sought to make deeper cuts to programs in response to the pandemic. For example, the University of Western Australia plans to abolish anthropology and sociology.[104] The University of Tasmania is set to drop three-quarters of its programs.[105] Swinburne University has also announced the abolition of all language courses.[106] In each instance, university leaders evoked the language of necessity. For example, Pascale Quester, Vice Chancellor at Swinburne University, noted: "[t]he current environment requires the university to make some difficult decisions about where it invests in teaching and research in order to ensure its financial sustainability and deliver on its strategy".[107] One reason not to take this rhetoric at face value, is the record Quester has for making cuts to the humanities.[108] Quester's intentions may be better understood through an examination of her comments when she was appointed at Swinburne University:

---

103 See for example, Frank Donoghue, *The Last Professors: The Corporate University and the Fate of the Humanities* (New York: Fordham University Press, 2018), Bill Readings, *The University in Ruins* (Cambridge, Mass: Harvard University Press, 1996) and Christopher Newfield, *Unmaking the Public University: The Forty-Year Assault on the Middle Class* (Cambridge, Mass: Harvard University Press, 2011).

104 Carr, *supra* note 81.

105 Alexandra Humphries, "University of Tasmania Slashes Degree Offerings in Cost Cutting Exercise to Stay 'sustainable'" (10 March 2020) *ABC News*.

106 Carr, *supra* note 81.

107 Adam Carey & Anna Prytz, "Swinburne Looks to Cut All Foreign Language Studies as Pandemic Bites" (4 December 2020) *The Age*.

108 Katherine Gale, "DVC(A) Comments on EB in On Dit" (18 March 2013), online: *National Tertiary Education Union* <www.nteu.org.au/article/DVC%28A%29-Comments-on-EB-in-On-Dit-14358>; Kylar Loukissian, "Alarm at Adelaide Court Cuts" (28 August 2013) *The Australian* at 30; Kylar Loukissian, "Staff Told to Keep Mum on Uni Cuts" (4 September 2013) *The Australian* at 30.

> I am going to pare down everything that doesn't speak to technology or science. Because, do we need to be the 10th university that teaches Chinese or Italian? No…we are the Swinburne University of Technology, we are going to be working with industry and students on creating the technology of the future.[109]

In light of this statement, one might reasonably regard the program cuts at Swinburne as an example of crisis capitalism. This point was not lost on Melissa Slee, Division Secretary of the NTEU Victoria: "[Professor Quester's] first move as vice-chancellor has been to use the cover of COVID-19 to cut jobs and undermine Swinburne".[110]

To date, law schools have been largely immune from this process since they offer few programs and are viewed as prestigious within the university and the broader community.[111] However, given that university leaders socialise pain, law schools have also felt pressure to cut courses with low enrolments. Each university defines 'low enrolments' in its own way, but at the University of Adelaide, it is classes with fewer than 50 students. This has put bespoke courses at risk. For example, legal clinic courses have low enrolments by design but serve a critical function in legal training and as a service for the community.[112]

---

109 Farrin Foster, "Pascale Quester: 'It is the Innovative and the Creative Ones That Will Survive'" (3 July 2020) *The Adelaide Review*; Stephen Matchett, "Swinburne VC Does What She Says She Would" (8 December 2020) *Campus Morning Mail*.

110 Adam Carey, "Swinburne University Staff Condemn Leadership Over 'Excessive' Cuts to Courses, Jobs" (12 November 2020) *The Age*.

111 The same is not true in North America or the UK: Jessica Dickler, "Colleges Cut Academic Programs in the Face of Budget Shortfalls Due to Covid-19" (23 June 2020) *CNBC*; Jonathan Ames, "Future Lawyers Can Bypass University Degree Under Legal Reforms" (30 October 2020) *The Times*. See also Adam Carey & Anna Prytz, "Swinburne Looks to Cut All Foreign Language Studies as Pandemic Bites" (4 December 2020) *The Age*.

112 Adrian Evans et al, *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School* (Acton: Australian National University Press, 2017) at 11–38. Clinics are commonly threatened in times of economic downturn: Patricia Tuitt, "Law Clinics at Risk from University Funding Cuts" (28 June 2010) *The Guardian*.

Consistent with Thornton's argument about jettisoning critical material, course 'rationalisation' also tends to concentrate on subjects with a focus on theory and history. This is not because these courses are unimportant[113] or poorly taught; rather, the framing of universities in instrumental terms encourages students to approach their education as market actors.[114] Economic coercion has heightened this encouragement. For example, recent fee changes resulted in a 28% increase in the cost of law degrees.[115] In response to fee increases, it is perfectly rational for students to seek out courses that will maximise their earning capacity, emancipating them from debt as quickly as possible.

C. Finding New Markets

One notable response that has been missing from university leaders is an acceptance of responsibility. Framing the pandemic as an unforeseeable crisis enables them to by-pass their complicity in underwriting the financial health of universities on the back of international student fees. The risks were known and proclaimed loudly. For example, a few months before COVID-19 made contact with its first human carrier, the Auditor-General of New South Wales warned: "universities should assess their student market concentration risk where they

113 Karl Llewellyn provides an early statement on the importance of being able to think abstractly and flexibly about the law:

> There is yet another thing which experience long and sad has caused us disillusion. We have discovered that students who come eager to learn the rules and who do learn them, and who learn nothing more, will take away the shell and not the substance. We have discovered that rules alone, mere forms of words are worthless. We have learned that the concrete instance…is necessary in order to make any general proposition…mean anything at all. Without the concrete instances, the general proposition is baggage, impedimenta, stuff about the feet. It not only does not help, it hinders.

Karl Llewellyn, *The Bramble Bush: The Classic Lectures on the Law and the Law School* (New York: Oxford University Press, 2008).

114 In previous work I have described this in terms of neoliberal rationalisation: Burdon, *supra* note 2.

115 Conor Duffy, "University Fees to be Overhauled, Some Course Costs to Double as Domestic Student Places Boosted" (18 June 2020) *ABC News*.

rely heavily on students from a single country of origin".[116] This is one of dozens of reports that were read, filed and ignored. The pandemic burst this bubble and laid bare the "market concentration risk"[117] described by the Auditor-General. While some universities have increased their international student numbers, the broader story is one of decline — particularly amongst Indian and Nepalese students.[118]

The version of history promoted by university leaders is that they have been forced to find new income sources in response to successive cuts to government funding.[119] This material context is true but the narrative does not absolve university leaders from their participation in this process or recruitment strategies that drew predominately from a single destination — China.[120] Moreover, the dominant narrative ignores the role of greed and the logic of growth that also underpinned the turn toward international students. Andrew Norton, the higher education director for the Grattan Institute has argued that Universities have taken a "calculated risk"[121]: "[t]hey know that the China boom probably won't last forever, but that they might as well take the money while they can".[122] Adrian Piccoli, former Minister for Education of New South Wales, puts things differently. Speaking in the more sanitised language of the corporate university, he argues that university leaders have made a "business

116 Barry Underwood, "Universities 2017" (8 June 2018), online: *Audit Office of NSW* <www.audit.nsw.gov.au/our-work/reports/universities-2017>; Michael McGowan, "Universities Rely Too Much on Foreign Student Fees, Auditor Says" (9 June 2018) *The Guardian*.

117 Underwood, *ibid*.

118 Baker, "Top Universities", *supra* note 5.

119 Julia Horne, "How Universities Came to Rely on International Students" (22 May 2020) *The Conversation*.

120 "However, while the total number of overseas students has increased, and their country of origin has diversified, there is a clear concentration risk with over 54 per cent of all overseas students sourced from a single country of origin": Underwood, *supra* note 116.

121 McGowan, *supra* note 116.

122 *Ibid*.

decision".[123] Piccoli goes on to inadvertently undermine the dominant narrative that University leaders have been forced to pursue a growth strategy through international students:

> I actually don't think the growth in international students would be any different even if there was additional commonwealth funding because it's still additional revenue. They wouldn't be sitting back, they'd still be pursuing it. It's a source of revenue, it's in the national interest and it's good for the general economy.[124]

In response to the broad drop in international student numbers, universities have not re-evaluated their strategy or sought to concentrate on providing a world-class education for domestic students. Instead, their focus has been on finding new markets and securing supply for students currently in the 'pipeline'. With respect to the latter, dominant strategies have focused on offering financial discounts of up to 20%[125] and the establishment of dedicated quarantine faculties in New South Wales[126] and South Australia.[127] Such is the importance of these schemes that they are expected to go ahead despite the emergence of the Delta strain of COVID-19 in the Australian community.[128]

To date, Monash University has been the most successful in finding new international markets. Due to Commonwealth restrictions on inbound travellers, their strategy has been to establish a physical presence in Indonesia. Indonesian students have traditionally been in the second tier for the Australian

123 *Ibid*.

124 *Ibid*.

125 Naaman Zhou, "Universities Discount Fees for International Students Stuck Outside Australia" (1 February 2021) *The Guardian*.

126 Bellinda Kontominas, "NSW to Welcome Back International Students Under Pilot Quarantine Plan" (10 June 2021) *ABC News*.

127 "International Students to Return to SA After Parafield Airport Quarantine Hub Gets Approval" (18 June 2021) *ABC News*.

128 Julie Hare, "Despite Delta Variant, International Student Plans Forge Ahead" (30 June 2021) *The Financial Review*.

international student market.[129] However, new enrolments have not contracted at the same rate as other countries.[130] Moreover, because of its proximity and large population, they have long been courted by Australian universities through initiatives, such as the aptly named "Indonesia Market Action Plan".[131] Against this context, Monash University has signed an memorandum of understanding with the Indonesian Government to "forge solid and institutionalised partnerships".[132] The MOI grants an exclusive licence to Monash University to establish a campus which focuses on lucrative postgraduate students. Naaman Zhou has provided the anticipated numbers: "[w]ithin the next 10 years, the Indonesian campus aims to grow to 2,000 masters [*sic*] students, 1,000 "executive education students" and 100 PhD students every year, according to the university's own recruitment site".[133] The University of Western Australia has also signalled its intent to expand into Indonesia. For example, its strategic plan for the next decade notes that "[i]ncreasing our engagement with Indonesia is a vital part" of its vision".[134]

I have some sympathy for this work, particularly because the Commonwealth Government has not stepped up to support universities. I also

---

129 20,000 in 2017 as opposed to Chinese students which numbered at 166,000 and Indian students at 70,000: Avery Poole, "Australian Universities to Benefit in Australia-Indonesia Free Trade Deal" (1 September 2018) *The Conversation*. In 2019 there were 18,091 students: Naaman Zhou, "Monash University Signs Deal with Indonesian Government as Universities Diversify from China" (8 April 2021) *The Guardian* [Zhou, "Monash"].

130 New enrolments from Indonesia fell at a rate of 0.9% compared to an overall fall of 4.9%: Zhou, "Monash", *ibid*.

131 The plan, which is from 2019, can be read online here: "Education Market Profile – Indonesia", online: *Australian Government: Australian Trade and Investment Commission* <www.austrade.gov.au/australian/education/countries/indonesia>.

132 Zhou, "Monash", *supra* note 129.

133 *Ibid*.

134 See "The Australia-Indonesia Centre", online: *UWA Public Policy Institute* <www.uwa.edu.au/institutes/public-policy/home/the-australia-indonesia-centre>.

acknowledge that large institutions cannot move away from the logic of neoliberalism overnight. However, one might also reasonably object to the eagerness with which universities have recommitted to this strategy and the opportunity cost that comes with not pursing a more sustainable and ethical[135] financial strategy. As Jeff Sparrow has noted: "[r]estoring our lives to normality after Covid is not the solution, it's the problem".[136] The attempt to reignite international student enrolments is also an instructive illustration of the theory of crisis capitalism adopted in this paper. The pandemic has elevated the need for universities to cut back their exposure and implement sound financial management. Instead, universities are going through a 'shock' with an immediate cutback in international student numbers. Rather than changing direction, decision makers can now insist that universities grow into new markets, which promise a lucrative population of students. The rhetoric of necessity masks this process and the human toll that has come during the pandemic. Moreover, creating new markets for international students is presented as the only alternative to economic hardship. Few other serious options are on the table.

D. Online Learning: Here to Stay?

The hegemony of neoliberalism in higher education has led to the idolatry of efficiency. University managers demand each year that faculties and schools find savings in teaching and administration. The mass lecture and online learning have been promoted on this basis. Thornton notes, "[t]he lecture method is driven by efficiency and the bottom line. It means that one lecturer can teach,

135 That universities profit on the back of international students can hardly be denied. I regard this as a serious form of exploitation that has no ethical justification: Chris Dite, "The Pandemic Has Exposed Australia's Mistreatment of International Students" (31 January 2021) *Jacobin Magazine*.

136 Jeff Sparrow, "Restoring Our Lives to Normality After Covid is Not the Solution, it's the Problem" (21 July 2021) *The Guardian*.

or at least purport to teach, 500 students simultaneously, and possibly many more in distant sites through online transmission and video-link".[137]

Academics have vocally opposed online teaching for efficiency,[138] and that remains true even after the pandemic.[139] There are a range of reasons for this, including demographic profile and a lack of training in new technology. However, teachers also offer profound reflections on the importance of learning in the same physical space, including the capacity for empathy and understanding and the opportunities for students to establish a learning community that continues once they leave a shared space.[140] In these accounts, traditional activities, such as lectures, are not a one-way presentation of ideas but an interactive conversation with a learning community.[141] Anybody who has taught online to a wall of black screens[142] might be sceptical about the extent to which these experiences can be replicated online — at least not without considerable resources and training.

When the pandemic first reached Australia, academic staff shifted their classes online — generally without a pause.[143] The share market value of tools,

137 Thornton, *supra* note 1 at 85.

138 *Ibid*.

139 Anna McKie, "Third of Academics 'Want Live Lectures to Stay Online' Post-Covid" (25 February 2021) *Times Higher Education*.

140 R Scott Webster, "In Defence of the Lecture" (2015) 40:10 Australian Journal of Teacher Education 88; Miya Tokumitsu, "In Defense of the Lecture" (26 February 2017) *Jacobin Magazine*.

141 For a useful summary of the debate surrounding the efficacy of lectures see: Shelley Kinash, Colin Jones & Joseph Crawford, "COVID Killed the On-Campus Lecture, but Will Unis Raise it from the Dead?" (15 February 2021) *The Conversation*.

142 This is not intended as a criticism of students who do not (or cannot) turn on their computer camera: Tabitha Moses, "5 Reasons to Let Students Keep Their Cameras Off During Zoom Classes" (17 August 2020) *The Conversation*.

143 Matthew Johnston, "Online Mass Exodus: How Australian Unis are Coping with COVID-19" (20 March 2020) *IT News*.

such as Zoom, skyrocketed overnight.[144] To say that we were providing 'online learning' would be generous and a disservice to those with the training and resources to dedicate themselves to this craft. Most of us were scrambling to provide a basic service while navigating new concepts such as 'Zoom bombing'.[145] Some of my colleagues had never taught online before the pandemic and there was a mad rush at the institutional level to make sure people had the right equipment and bandwidth to run classes. Rebecca Barrett-Fox captures something of those heady days in her advice to university teachers:

> [f]or my colleagues who are now being instructed to put some or all of the remainder of their semester online, now is a time to do a poor job of it. You are NOT building an online class. You are NOT teaching students who can be expected to be ready to learn online. And, most importantly, your class is NOT the highest priority of their OR your life right now. Release yourself from high expectations right now, because that's the best way to help your students learn.[146]

The completion of classes was due to the dedication of academic staff — both full time and casual — and the generosity of students who were willing to forgive our fumbling and a reduction in educational quality. University leaders recognised these difficulties and often praised staff for their work and dedication.[147] However, the leaders were also eager to send a message to the

144 Rupert Neate, "Zoom Booms as Demand for Video-conferencing Tech Grows" (31 March 2020) *The Guardian*.

145 Greg Elmer, Anthony Glyn Burton & Stephen J Neville, "Zoom-Bombings Disrupt Online Events With Racist and Misogynist Attacks" (10 June 2020) *The Conversation*.

146 Rebecca Barrett-Fox, "Please Do a Bad Job of Putting Your Courses Online" (March 2020), online (blog): *Any Good Thing* <anygoodthing.com/2020/03/12/please-do-a-bad-job-of-putting-your-courses-online/?fbclid=IwAR336tXzjTLfthAQI71b75z2C6D7JKcDe2MfUQ8lrBe2x90xlrCzhWdYIA>.

147 Ian Jacobs, "Transcript of UNSW Vice-Chancellor Video Message to Staff, May 2021" (May 2021), online: *UNSW Sydney* <www.inside.unsw.edu.au/vc-message/transcript-unsw-vice-chancellor-video-message-staff-may-2021>.

market about the success of 'online learning'. For some, the experiment of online learning was advancing to be permanent.[148] For example, John Domingue, director of the Open University's Knowledge Media Institute, argued that the "online genie"[149] is out of the bottle and will not go back in. Darren McKee, the chief operating officer of Murdoch University, made a similar comment, noting, "[t]he face-to-face mass lecture is all but dead".[150]

Perhaps the most robust response came in the form of a report from Optus and Cisco, which included responses from "executives across 80% of Australian higher education and Tafe institutes".[151] A leading claim in the report is that COVID-19 has accelerated changes that were already underway toward online teaching — including the use of virtual reality and augmented reality — and making teaching flexible to fit around student schedules. It also highlighted the need for universities to create "Instagram-worthy moments":[152]"[s]tudents are increasingly expecting education institutions to mimic their digital experiences in other parts of their life: interactions with technology that are intuitive, rewarding and low touch".[153]

---

148 Fergus Hunter & Jordan Baker, "Uni Bosses Predict Permanent Shift to Online Learning, But Not a Full Scale Revolution" (11 April 2020) *The Sydney Morning Herald*.

149 Richard Doughty, "The Future of Online Learning: The Long-Term Trends Accelerated by Covid-19" (16 February 2021) *The Guardian*.

150 Naaman Zhou, "'Instagram-Worthy': Covid-19 Predicted to Change Design of Australian Universities" (10 February 2021) *The Guardian* [Zhou, "Instagram"].

151 The report can be read here: Vector Consulting, "The Tipping Point for Digitisation of Education Campuses" (2020), online (pdf): *Vector Consulting* <www.optus.com.au/content/dam/optus/documents/enterprise/accelerate/tipping-point-report_final_nov20.pdf>.

152 *Ibid*.

153 *Ibid* at 12. Swanson captures the thin edge of the wedge: "[h]ow long before universities get their own influencer mansions, with professors made to compete for students' attention, blending course material with sad TikTok dances?": Barrett Swanson, "The Anxiety of Influencers" (June 2021) *Harper's Magazine*.

None of this is new and the push for online learning has grown steadily over the last two decades.[154] For example, in 2012, Shirley Alexander, the then Deputy Vice-Chancellor and Vice-President (Education and Students) at University of Technology Sydney argued: "[a]t UTS we're in the middle of spending a billion dollars on our campus and as part of that we've got two new buildings going up…there's a not a single traditional lecture theatre in either of those new buildings".[155] In similar tones, Ian Young, former Vice-Chancellor at Australian National University noted, "[o]n-campus education is going to change. The large lecture theatre, if not dead now, is disappearing".[156] Young went on to opine, "[w]hy in the world would a student come along and sit in a passive lecture with 300 other students when they can access the material online themselves"?[157] But what makes this an example of crisis neoliberalism, is the way university leaders have used the pandemic as an opportunity to push through plans with a greater concentration of online learning. This includes generational decisions about campus design and infrastructure spending.[158] Academic staff have not been broadly consulted about this shift and, instead, online learning is presented as an inevitable response to the pandemic, and technological disruption as a way to offer flexibility to students.[159]

---

154 A report from Studiosity in 2018 found that "19 per cent of Australian tertiary students think physical campuses will cease to exist with in [*sic*] 20 years time [*sic*]. The figure rose to 25 per cent for students in regional Queensland and 36 per cent for those in Tasmania": Robert Bolton, "Online Learning: Universities Push for Physical Classes Battles Virtual Trends" (11 February 2018) *The Australian Financial Review*.

155 Charis Palmer, "Lecture Theatres to Go the Way of the Dodo" (1 October 2012) *The Conversation*.

156 *Ibid*.

157 *Ibid*.

158 Zhou, "Instagram", *supra* note 150.

159 Most students work and study: Natalie Gil, "One in Seven Students Work Full-time While They Study" (12 August 2014) *The Guardian*; Sally Weale & Richard Adams, "'Covid Has Been a Big Catalyst': Universities Plan for Post-Pandemic Life" (13 July 2021) *The Guardian*.

Before concluding this section on online learning's viability in the future, it is important to note the several factors that have slowed down the push for online learning in Australia. The most important has been conditional government funding that was predicated on a return to in-person teaching. Alan Tudge, the current Minister for Education, offered the following justification for this decision: "[i]f we can have 50,000 people at a football match surely we can have COVID-safe face-to-face learning on campus. Our universities have to focus more on giving Australian students the best possible learning experience".[160] A second, and related factor, is domestic student demand. After a period in lockdown, students sought out opportunities to reconnect with their peers and teachers. Many students reported increased feelings of loneliness, depression and anxiety from prolonged remote learning.[161] To their credit, universities have largely listened to these concerns and are offering a blended mode of delivery, which prioritises face-to-face teaching but also offers online options in most courses.

E. Changes to Assessment

Over the last decade there have been periodic calls to abolish exams or move them online.[162] Macquarie University was the first institution to openly push for full abolition. John Simons, then Executive Dean for the Faculty of Arts,

160 Michael Koziol, "Tudge Calls for Universities to Bring All Local Students Back on Campus" (18 April 2021) *The Sydney Morning Herald*.

161 My argument is that these problems have been exacerbated by forced remote learning: *ibid*; Baker, "Restless and Unsettled", *supra* note 79. I note that these feelings are widely reported during a regular academic year: Suzanne Lischer, Netkey Safi & Cheryl Dickson, "Remote Learning and Students' Mental Health During the Covid-19 Pandemic: A Mixed-Method Enquiry" (5 January 2021), online (pdf): *Springer International Publishing* <link.springer.com/content/pdf/10.1007/s11125-020-09530-w.pdf>; Teghan Beaudette, "Nearly 70% of University Students Battle Loneliness During School Year, Survey Says" (9 September 2016) *CBC News*.

162 For an excellent overview of online exams, see Alex Steel et al, "Use of E-Exams in High Stakes Law School Examinations: Student and Staff Reactions" (2019) 29:1 Legal Education Review 1.

justified this position on the belief that exams fail to develop "questioning, self-sufficient learners".[163] Against this argument, scholars have articulated the benefits of exams which include the development of broad, higher-order thinking skills.[164] Like all areas of teaching, there is vigorous debate on this issue and no settled position. Reasonable people will disagree about the efficacy of exams. However, disciplines like law also need to navigate professional accreditation bodies, which require evidence of individual academic achievement.[165]

The pandemic brought this debate to a head as universities were forced to move all assessment online. Courses with exams were required to either change their assessment scheme, undertake a non-invigilated exam[166] or use proctoring software.[167] These changes were necessary to safeguard the health of staff and

163 John Simons, "Why We Should Abolish the University Exam" (8 July 2011) *The Conversation*.

164 Scholars have also argued that multiple choice exams can test higher order reasoning in law: Danielle Bozin, Felicity Deane & James Duffy, "Can Multiple Choice Exams Be Used to Assess Legal Reasoning? An Empirical Study of Law Student Performance and Attitudes" (2020) 30:1 Legal Education Review 1; Penny Van Bergen & Rod Lane, "Exams Might Be Stressful, but They Improve Learning" (19 December 2014) *The Conversation*; Penny Van Bergen & Rod Lane, "Should We Do Away With Exams Altogether? No, But We Need to Rethink Their Design and Purpose" (1 December 2016) *The Conversation*.

165 In South Australia that is the Legal Practitioners Education and Admission Council: "Legal Practitioners Education and Admission Council (Including Admissions)", online: *Courts Administration Authority of South Australia* <www.courts.sa.gov.au/law-practice/legal-practitioners-education-admission-council/>.

166 In law, submissions were routinely through software such as Turnitin. For a robust critique of this software see Nick Roll, "New Salvo Against Turnitin" (19 June 2017), online: *Inside Higher Education* <www.insidehighered.com/news/2017/06/19/anti-turnitin-manifesto-calls-resistance-some-technology-digital-age>.

167 The use of proctoring software has given rise to privacy concerns: Zhou, "Monash", *supra* note 129. Students at the ANU also organise a mass petition against the use of surveillance technology: "Tell ANU: Students Say NO to

students and promote a pathway for students to continue their education. However, what makes this an example of crisis capitalism, is that many universities have sought to use the pandemic as an opportunity to abolish exams once and for all.[168] This time there is no pedagogical discussion or debate about the utility of exams and, in some cases, staff were simply informed of the decision. An example of the latter is Curtin University, which, in November 2020, circulated a memo to staff that stated, "no more exams will be held after mid-next year, except in special circumstances".[169] A spokesperson from Curtin denied that the pandemic was being used as a cover for the change, but a close reading of their statement is instructive: "[t]he fact that it is happening during a year that experienced a pandemic, and so soon after the pivot to online delivery, is coincidental *but timely*".[170]

At the University of Adelaide, staff have been given a proposal and asked to send feedback to an online portal. This is an example of what Thornton calls "top-down managerialism",[171] because it denies academics the opportunity to genuinely influence the parameters of discussion. Here is the text of the proposal:

> [w]e should ensure assessment tasks are authentic to practice in the discipline and enable students to apply their knowledge and skills to real world/work problems and challenges, including through Work Integrated Learning tasks and group assessments. This means we should move decisively away from the use of low-authenticity, traditional exams. Where exams are maintained, we

---

Proctorio", online: *change.org* <www.change.org/p/australian-national-university-tell-anu-students-say-no-to-proctorio>.

168 Simon Jenkins, "Let's Seize This Rare Chance to Abolish School Exams and League Tables" (2 October 2020) *The Guardian*; Sally Weale & Richard Adams, "'Covid Has Been a Big Catalyst': Universities Plan for Post-Pandemic Life" (13 July 2021) *The Guardian*.

169 Rebecca Turner, "Curtin University Plans to Ditch In-Person Lectures and Exams, Even After Coronavirus Pandemic Ends" (26 November 2020) *ABC News*.

170 *Ibid* [emphasis added].

171 Thornton, *supra* note 1 at 18.

> should adopt authentic approaches to exam-based assessment design. We should enhance the student experience, and the fairness and effectiveness, of group assessment.[172]

There is a lot to unpack in this paragraph, but the clear mandate is that assessments should prepare students for work in the economy. The word 'authentic' should be interpreted as linked to this instrumental goal and the overall trajectory is to move 'decisively' away from 'traditional' exams. We are not told what constitutes a 'traditional' exam. However, 'authentic' exams could be ones that test other qualities such as critical thinking, historical knowledge or abstract thought. These qualities were once central to the mandate of Australian universities [173] but they are barely recognised as relevant in the neoliberal university.

V. Conclusion

In this article, I have argued that the COVID-19 pandemic has not created a radical break with the past and that current changes to learning and teaching are a continuation of neoliberal governance. This argument rested on a conception of capitalism, which views crisis as constitutive of its further consolidation and growth. Further, I have also argued that university managers have used the pandemic as an opportunity to usher in changes that are unpopular by using the language of necessity. To demonstrate this argument, I have sought to identify lines of inconsistency between what university leaders argued before and during the pandemic. I supplemented this with a critical reading of the rhetoric deployed by leaders when promoting changes.

In past research, I have outlined strategies for academic resistance to neoliberalism.[174] Much of that remains relevant for how we might respond to

172 *Ibid.*

173 Forsyth, *supra* note 13 at 4.

174 Mary Heath & Peter Burdon, "Academic Resistance to the Neoliberal University" (2013) 23:2 Legal Education Review 379 at 379.

the changes initiated by COVID-19. We might also adopt Mark Fisher's[175] call to remove our labour from processes of surveillance and data gathering — the 'inspection regime'. In addition, I follow Golder in noting that: "moments of crisis, and diagnoses of crisis, clearly can be – and historically have been – generate for critique".[176] It is incumbent on us, as academics and critics, to not simply accept the rhetoric and justifications presented by university leaders. Instead, our writing should aim to open-up discussions and disclose possibilities that have been disguised by a certain curation of facts. We should also try to broaden our frame of reference so that we can see changes in context or as connected to other events. Finally, it is important that our critique of neoliberalism is framed in a language that holds out the possibility for something new and different. University managers may have co-opted terms like "flexibility", "agility", and "spontaneity" but it would be self-defeating to directly oppose those ideas. "Resistance to the new", notes Fisher, "is not a cause that the left can or should rally around."[177]

While we might feel despondent, if not defeated, by the latest round of changes, it is it is vital that we understand that crisis is not the exclusive domain of the neoliberal right. Crisis opens a gap which can be filled by whoever is better organised and able to exert influence. To return to my opening theme — indeterminacy — just because the university is currently governed by the logic of neoliberalism, does not mean that will always be the case. It is futile, I think, to resist neoliberalism by demanding that universities live up to some determined notion of the university. Instead, we ought to use whatever power and influence we have now if we are to prevail in the "war of wills"[178] and create a better institution in the future.

---

175 Mark Fisher, *Capitalist Realism: Is There No Alternative?* (Winchester: Zero Books, 2009) at 59.

176 Golder, *supra* note 62 at 1069.

177 Fisher, *supra* note 175 at 28.

178 Matsuda, *supra* note 12.

'Really Engages Students': Flipped and Inquiry Learning in Law in the 21st Century

Eamonn Carpenter,* Cornelia Koch** & Matthew Stubbs***

This article examines the implementation of a fully flipped classroom pedagogy and inquiry learning experience in a large first-year undergraduate law course in Australia. After summarising the relevant literature, we describe the interventions we implemented and the context within which our course operates. We then examine the effectiveness of our interventions, analysing their impacts on student success and satisfaction, and reflecting on the experience from a staff perspective. Finally, we examine how these innovations fared when confronted with the educational disruptions of the COVID-19 pandemic. We suggest that our experience offers insights for the future of legal education generally, speaking to key questions of legal pedagogy: how to engage students, achieve maximum value from student/staff interactions, use assessment to support student learning and build students' capacity to undertake research in real-world contexts. While our innovations were largely resource-neutral at the institutional level, we also reflect on the reasons why we found the increased investment of our own time in implementing these changes to be worthwhile.

* B Com, LLB (Candidate), The University of Adelaide, Participant in the Principles of Public Law course in 2019.

** Senior Lecturer, Adelaide Law School, The University of Adelaide.

*** Associate Professor, Adelaide Law School, The University of Adelaide.

[See acknowledgements at the end of this article.]

I. Introduction

Law in Australia is predominantly an undergraduate discipline. The traditional (and still most common) pedagogical approach consists of didactic lectures (typically with student cohorts in the hundreds) supported by smaller-group tutorials. Assessment primarily comprises lengthy problem-based examinations. This was the method followed in the compulsory course Principles of Public Law ("PPL") at Adelaide Law School, taught annually to 350-400 first-year undergraduate law students, until 2014.

This article describes our experiences implementing a flipped classroom pedagogy, incorporating a substantial inquiry learning experience and employing continuous assessment, in an attempt to transform the learning experience for our students. In the first substantive section of this article, we survey existing literature addressing the flipped classroom, continuous assessment and inquiry learning, particularly in legal education. Given that less

than 1% of studies on flipped learning address legal education, this article fills a considerable a gap in the literature.[1] The following section then describes the interventions we implemented and the context within which our course operates. We then examine the effectiveness of our interventions, analysing their impacts on student success and satisfaction, and reflecting on the experience from a staff perspective. Our final substantive section addresses how our flipped classroom and inquiry-learning pedagogy fared when confronted with the educational disruptions of the COVID-19 pandemic.

We suggest that our experience offers insights for the future of legal education generally, whether undergraduate or postgraduate, and irrespective of class sizes. Ultimately, the flipped classroom pedagogy that we implemented, backed by continuous assessment, and the research-focused inquiry learning experience that we incorporated, speak to overarching questions of legal pedagogy: how to engage students, achieve maximum value from student/staff interactions, use assessment to support student learning as it occurs (not merely to evaluate it after the fact), and build students' capacity to undertake research in real-world contexts. These, in our view, are critical issues for all legal educators to consider in the twenty-first century.

II. The Flipped Classroom and Inquiry Learning

A. Flipped Classroom

Flipped learning is "a pedagogical approach in which direct instruction moves from the group learning space to the individual learning space, and the resulting group space is transformed into a dynamic, interactive learning environment where the educator guides students as they apply concepts and engage creatively in the subject matter".[2] Students are responsible for learning material before

1 Bengi Birgili, Fatma Nevra Seggie & Ebru Oguz, "The Trends and Outcomes of Flipped Learning Research between 2012 and 2018: A Descriptive Content Analysis." (2021) 8:1 Journal of Computers in Education 365.

2 Jonathan Bergmann & Aaron Sams, "Flipped Learning, Gateway to Student Engagement" (2015) 1:1 International Society for Technology in Education 6 at 19.

coming to class, instead of the instructor delivering information during the class in the traditional didactic manner. Through pre-class videos, assignments, readings or tasks, students come to class armed with the skills necessary to engage with the material in a more meaningful way. During class, students are then able to work on activities and problems with the support of the instructor and their peers. This level of engagement is generally not achieved in a traditional didactic lecture. The flipped classroom model is supported by research showing that students are better able to follow material in class when they have been exposed to it previously, and thus, better prepared to understand the significance of the received material.[3] Students ask questions more related to the core concepts and the application of material. [4] And they have an opportunity in collaborative sessions to verbalize their thinking to other students to establish mutual understanding and facilitate cooperative problem-solving.[5]

In the flipped classroom, the group lecture space becomes more focused on actively answering problem questions with real world depth and complexity, instead of the traditional lecture structure in which students more passively receive information from the lecturer (or are subjected to a flow of information in the hope — possibly in vain — that all or at least some of it will be received). We concur with April Trees and Michele Jackson that "[l]arge enrolment courses in higher education are the bane of active learning pedagogy … even the most engaging lecture is limited in how much it can support and facilitate widespread student involvement and interaction".[6] The flipped classroom intends to foster

3 Daniel Schwartz & John Bransford, "A Time for Telling" (1998) 16:4 Journal of Cognition and Instruction 475.

4 Michael Marcell, "Effectiveness of Regular Online Quizzing in Increasing Class Participation and Preparation" (2008) 2:1 International Journal of School of Teaching & Learning 10.

5 Kelly Miller et al, "Use of a Social Annotation Platform for Pre-Class Reading Assignments in a Flipped Introductory Physics Class" (2018) 3:8 Frontiers in Education 43; and Catherine Crouch & Eric Mazur, "Peer Instruction: Ten Years of Experience and Results" (2001) 69:3 American Journal of Physics 970.

6 April Trees & Michele Jackson, "The Learning Environment in Clicker Classrooms: Student Processes of Learning and Involvement in Large

active learning by engaging students through activities and discussions on a deeper level than what could be achieved were students first being introduced to the material. After all, as Frank Rhodes powerfully observed: "[e]ducation is not a spectator sport; it is a transforming encounter. It demands active engagement, not passive submission; personal participation, not listless attendance".[7]

The idea underlying the flipped classroom is that students, through the process of preparing for lectures, engage in more meaningful learner-content interaction: students reflect on the information recently learned, talk to others about the material and prepare more meaningful questions. Through this process, students integrate the newly gained information with previous knowledge prior to engaging with problem scenarios in class. Students are able to prepare material and questions around what they perceive as more meaningful issues, which allows for a more complex and collaborative learning setting in the flipped classroom, where students and instructors can focus on higher level learning.[8] This process highlights learning priorities for students, reinforces self-reliance and encourages peer-to-peer communication and engagement.[9] By providing consistent support and feedback, the flipped classroom model pushes student development towards the zone of proximal development, as first presented by Vygotsky as: "the distance between the actual development level as determined by independent problem solving and the level

University-level Courses using Student Response Systems" (2007) 32:1 Journal of Learning Media and Tech 21.

7 Frank HT Rhodes, *The Creation of the Future: The Role of the American University* (Ithaca, NY Cornell University Press 2005).

8 Schwartz & Branford, *supra* note 3; Marcell, *supra* note 4.

9 Ngoc Thuy Thi Thai, Bram De Wever & Martin Valcke, "The Impact of a Flipped Classroom Design on Learning Performance in Higher Education: Looking for the Best "Blend" of Lectures and Guiding Questions with Feedback" (2017) 107:1 Computers & Education at 113; and Hyun Cho et al, "Active Learning through Flipped Classroom in Mechanical Engineering: Improving Students' Perception of Learning and Performance" (2021) 8:46 International Journal of Stem Education 23.

of potential development as determined through problem solving under… guidance or in collaboration with more capable peers".[10]

The flipped classroom model may also help manage the cognitive load of students. Students are free to watch pre-class video content at their own pace, pausing and rewinding as necessary. Substantial use of student self-pacing with recordings has been observed for quite some time.[11] Students struggling with the content have the freedom to allocate more time, as necessary, to re-watch material, while faster paced students are free to skip learned content for other priorities. It is not abnormal for law students to be exposed to a multitude of lengthy cases and readings, and by staggering out preparation through pre-lecture videos and quizzes, students can self-manage their preparation outside of lectures. Consistently with this view, it has been shown that flexible learning opportunities do increase student satisfaction.[12]

A common concern raised regarding the implementation of blended or flipped learning is how the new format would be received by students. An experiment conducted in 2011 by Deslauriers, Schelew and Wiemann compared the amount of learning achieved between traditional lectures and an active learning approach. The experiment found that student attendance and engagement were higher in the active learning approach, and students overwhelmingly preferred the entire course to be taught with the new active

10 Lev Vygotsky, *Mind in Society: the Development of Higher Psychological Processes* (Cambridge, MA: Harvard University Press, 1978) at 86.

11 Ron Owston, Denys Lupshenyuk & Herb Wideman, "Lecture Capture in Large Undergraduate Classes: Student Perceptions and Academic Performance" (2011) 14:4 Internet and Higher Education 262.

12 Peter Strelan, Amanda Osborn & Edward Palmer, "Student Satisfaction with Courses and Instructors in a Flipped Classroom: A Meta-analysis" (2020) 36:3 Journal of Computer Assisted Learning 295; and Judy Drennan, Jessica Kennedy & Anne Pisarki, "Factors Affecting Student Attitudes toward Flexible Online Learning in Management Education" (2005) 98:6 The Journal of Education Research 331.

learning approach.[13] Another enquiry conducted at Griffith University in 2015 compared the results of face-to-face teaching in 2014 and flipped learning in 2015, finding improved student engagement and enjoyment.[14] However, they noticed an aberration in the distribution of grades which indicated that weaker students may have benefitted more from the flipped classroom than higher achieving students, and that the number of students achieving the highest grades declined substantially. [15] Conversely, in assessing the impact of their implementation of a pilot program of flipped learning at Monash University in 2015, Melissa Castan and Ross Hyams found that: "no matter what favourable comments the students made about their level of enjoyment or engagement with the videos, the objective testing showed no significant improvement in student performance".[16] A more recent study, conducted by our colleagues at Adelaide University, surveyed student satisfaction with courses taught in the new flipped learning format. Strelan, Osborn and Palmer found a positive, weak to moderate, effect of the flipped classroom on student satisfaction over the traditional approach which corresponds with wider research. [17] Student satisfaction has been noted as an important predictor in course outcomes, such

13 Louis Deslauriers, Ellen Schelew & Carl Wieman, "Improved Learning in a Large-Enrolment Physics Class" (2011) 332:12 American Association for the Advancement of Science 862.

14 Kylie Burns et al, "Active Learning in Law by Flipping the Classroom: An Enquiry into Effectiveness and Engagement" (2017) 27:1 Legal Education Review 163.

15 *Ibid.*

16 Melissa Castan & Ross Hyams, "Blended Learning in the Law Classroom: Design, Implementation and Evaluation of an Intervention in the First Year Curriculum Design" (2017) 27:1 Legal Education Review 143.

17 Strelan, Osborn & Palmer, *supra* note 12; Jenny Moffett & Aileen Mill, "Evaluation of the Flipped Classroom Approach in a Veterinary Professional Skills Course" (2014) 5:1 Advanced Medicine Education Practice 415; and Travis Roach, "Student Perceptions toward Flipped Learning: New Methods to Increase Interaction and Active Learning in Economics" (2014) 17:1 International Review of Economic Education 74.

as failures and dropouts, but also has wider institutional ramifications.[18] As will become clear below, our experience with student satisfaction and its impact on student engagement and results aligned with the majority of research in the field, which indicated a net positive impact from the implementation of flipped learning. We did not experience the ambivalent, or even negative, impacts on student grades reported in the two Australian studies noted above. Instead, our observation of improved results corresponds with the broader flipped classroom literature addressed above.

B. Continuous Assessment

Effective assessment tasks generally guide students towards what they should be learning about while aiding the development of deep learning and mitigating the effects of student procrastination. As part of our implementation of the flipped classroom model, we also wanted to include assessments in a meaningful way that provided a tangible benefit to students. By including pre-lecture quizzes students are motivated to prepare, not simply because they are motivated to do well in summative assessment but, also, because students are able to accurately track the development of their competence. It is important, however, to avoid a system of assessment that led to students not engaging in deep learning and, instead, only attempting to meet course requirements with minimal effort.[19] The assessment is intended to identify gaps in the degree of expertise held by the student, so the student can rectify that gap prior to engaging in more complex problems. Student growth is continuous, and "should not be conceptualized as neatly packaged units of skills or knowledge",[20] and thus

18 Strelan, Osborn & Palmer, *supra* note 12 at 309; Lyle McKinney et al, "Giving Up on a Course: An Analysis of Course Dropping Behaviors Among Community College Students" (2018) 60:2 Research in Higher Education 184.

19 For a further discussion on surface and deep learning see: Tim McMahon, "Teaching for More Effective Learning: Seven Maxims for Practice" (2006) 12:1 Radiography 33.

20 Royce Sadler, "Formative Assessment and the Design of Instructional Systems" (1989) 18 Instructional Science 119 at 123.

students should expect to be broadly tested to identify where those gaps are. Wider research in this field has demonstrated that frequent testing and timely feedback increases student motivation and active engagement.[21] Furthermore, continuous assessments have also been noted to lead to more uniform attendance and examination scores.[22] Given that students vary their approaches to education based on their level of engagement, continuous assessment in the form of pre-lecture quizzes and timely feedback may more closely align assessment outcomes to the desired deep learning outcomes.[23]

Our pre-lecture quizzes scaffold the level of engagement required to proceed: students construct a body of knowledge that is subjected to a test that highlights gaps to rectify. Scaffolding the learning processes has the additional benefit of forcing students to engage in retrieval-based learning, that is, the acquisition of new knowledge, encoding of that knowledge into a toolbox of problem solving, actively retrieving, and implementing those skills. In 2009 Richland, Kornell and Kao examined the effects of unsuccessful retrieval attempts on learning and concluded that even unsuccessful attempts to answer questions are valuable learning events when followed by instruction on how to come to the correct answer.[24] Tests and quizzes are not simply opportunities for educators to assess

---

21 George Kuh, "What We're Learning about Student Engagement from NSSE" (2003) 35:2 Change: The Magazine of Higher Learning 24; Pru Marriot & Alice Lau, "The Use of On-line Summative Assessment in an Undergraduate Financial Accounting Course" (2008) 26:2 Journal of Accounting Education 7; and Brad Potter & Carol Johnston, "The Effect of Interactive On-line Learning Systems on Student Exam Results in Accounting" (2006) 24:1 Journal of Accounting Education 16.

22 Jonathan Cole & Stephen Spence, "Using Continuous Assessment to Promote Student Engagement in a Large Class" (2012) 37:5 European Journal of Engineering Education 508.

23 Paul Ramsden, "Learning to Teach in Higher Education" (London: Routledge; 1992); Roger Narloch, Calvin Garbin & Kimberly Turnage, "Benefits of Prelecture Quizzes" (2006) 33:2 Teaching of Psychology 109.

24 Lindsey Richland, Nate Kornell & Kao Liche, "The Pretesting Effect: Do Unsuccessful Retrieval Attempts Enhance Learning?" (2009) 15:3 Journal of Experimental Psychology: Applied at 243.

the development of their students, rather, these pre-lecture quizzes are learning events for students, making them aware of what they do and do not know. A traditional lecture structure — disconnected from assessments which follow much later — does not present as many opportunities for retrieval nor as many opportunities for feedback to address gaps in student expertise.

C. Inquiry Learning

Inquiry learning is a question-oriented research-based methodology that explicitly engages groups of students with the process of knowledge creation and co-creation which hopes to develop dispositions and capabilities relevant to complex real-world problems.[25] Key to inquiry learning is the discovery of new (at least to the learner) knowledge. As Levy et al explain: "[q]uestions provide the stimulus for student learning through an emergent process of exploration and discovery, with the teacher working in a facilitative role".[26] Inquiry learning aims to extend beyond active learning, into active scholarship, research and knowledge building.[27]

There are several major studies that provide evidence that inquiry learning, with authentic pedagogy, assessments, and interactive instruction, improves students' academic achievement and development outcomes. Newmann, Marks and Gamoran evaluated the effect of implementing authentic pedagogy involving higher-order thinking, deep-knowledge approaches with real implications in elementary, middle and high school. The study observed 504 lessons, and analyzed 234 assessment tasks while sampling student work and

25 Phillipa Levy, Ola Aiyegabyo & Sabine Little, "Designing for Inquiry-based Learning with the Learning Activity Management System" (2009) 25:3 Journal of Computer Assisted Learning 238; and Angela Brew, *Research and Teaching: Beyond the Divide* (UK: Palgrave Macmillan, Basingstoke, 2006).

26 Levy, Aiyegabyo & Little, *ibid* at 239.

27 Phillipa Levy, "Technology-supported Design for Inquiry-based Learning" In: Mang Li and Yang Zhao (eds) *Exploring Learning and Teaching in Higher Education* (Berlin: Springer, 2014) at 289; and Carl Bereiter, "Education and the Mind in the Knowledge Age" (Mahwah: Lawrence Erlbaum Associates, 2002).

concluded that restructured learning environments with high levels of authentic pedagogy led to higher academic achievement, and that authentic pedagogy could be equitably distributed among students of diverse social backgrounds.[28] Similarly, Newmann, Bryk and Nagaoka examined over 2000 students across 23 schools and found that students who received more challenging and authentic intellectual work achieved higher than normal gains.[29] They defined authentic intellectual work as involving "original application of knowledge and skills, rather than just routine use of facts and procedures. It also entails disciplined inquiry into the details of a particular problem and results in a product or presentation that has meaning or value beyond success in school".[30]

Other researchers have demonstrated that when teachers adopt student focused learning approaches, students are themselves encouraged to adopt approaches to their individual learning that lead to deeper conceptual understandings.[31] As such, inquiry learning has been identified as 'high impact' for its ability to positively contribute to student intellectual and personal development.[32] Moreover, other research has indicated that inquiry learning has

28 Fred Newmann, Helen Marks & Adam Gamoran, "Authentic Pedagogy and Student Performance" (1996) 104:4 American Journal of Education 280.

29 Fred Newmann, Anthony Bryk & Jenny Nagaoka, "Authentic Intellectual Work and Standardized Tests: Conflict or Coexistence" (2001) Chicago, IL: Consortium on Chicago School Research.

30 *Ibid* at 14–5.

31 Michael Prosser & Keith Trigwell, *Understanding Learning and Teaching: The Experience Education* (Buckingham: SRHE/Open University Press, 1999); Petros Lameras et al, "Blended University Teaching Using Virtual Learning Environments: Conceptions and Approaches" (2012) 40:1 Instructional Science 141.

32 Phillipa Levy & Robert Petrulis, "How Do First-year University Students Experience Inquiry and Research, and What Are the Implications for Inquiry-based Learning?" (2012) 37:1 Studies in Higher Education 85; and Shouping Hu, George Kuh & Shaoqing Li, "The Effects of Engagement in Inquiry-oriented Activities on Student Learning and Personal Development" (2008) 33:1 Innovative Higher Education 71.

the capacity to make a significant overall contribution to a student's understanding of the legal working method.[33]

This survey of the literature suggests that there is considerable potential for flipped classroom pedagogy, continuous assessment and inquiry learning to benefit student learning in law schools. We now turn to describing our implementation of these pedagogies before we assess the effectiveness of our interventions.

III. Transforming our Principles of Public Law Course

When we inherited the PPL course,[34] it featured a very traditional pedagogy. In each of the twelve weeks of semester, students attended a two-hour lecture (of up to 400 students although, of course, not all students attended given it was recorded) and a one-hour tutorial. Assessment consisted of an individual research essay, submitted after eight weeks of the course, and a problem-based three-hour handwritten exam a couple of weeks after the course concluded.

The challenges of keeping a large group of students engaged across a two-hour lecture were immediately obvious, and this was certainly not helped by the fact that public law can be a dry subject (and the constitutional law relating to the separation of judicial power in Australia, which is a major topic of PPL, perhaps particularly dry). When the assessment was submitted, it became clear that even students who remained engaged in the course, nonetheless, struggled with the content. The research essays, notwithstanding a reasonable quantity of research skills and essay writing support on offer, were disappointing overall. It seemed to us that students were 'thrown in the deep end' without being taught how to swim; while they had the potential for critical thinking and research,

33 Roland Broemel & Olaf Muthorst, "Inquiry-Based Learning in Legal Studies" in Mieg H.A. (ed) *Inquiry-Based Learning – Undergraduate Research* (Springer, Cham, 2019) 305.

34 Matthew Stubbs first taught into the course in 2010 and was the coordinator from semester two of that year, and was then joined by Cornelia Koch from 2013. More recently, Cornelia has been coordinator of the course.

many students were not able to demonstrate it in this, their first ever research essay in law school. The exam marking — even allowing for the natural tendency of this task to be dispiriting for educators — was even more disappointing.

Our perceptions were backed by key measures of student success and satisfaction. Adelaide Law School is fortunate to attract very high-quality students, and the best students still performed outstandingly in PPL. However, student results overall were simply not as good as we aimed for. In 2011 and 2012, the average proportion of students receiving a High Distinction (the highest grade band) was only 6%, a Distinction 18% and a Fail 15%. Considering our students completed secondary education in the top 5% of their year cohort, we were not satisfied with these results. Similarly, student responses in the University of Adelaide's formal, anonymous Student Experience of Learning and Teaching ("SELT") surveys reported a lower level of satisfaction with the course than we wanted to see. In semester two of 2010, student agreement with the statement "overall, I am satisfied with the quality of this course" was 5.4 (on a Likert 1-7 scale), marginally above the university-wide mean of 5.3;[35] in 2011 and 2012, average satisfaction was 5.65, compared with a university-wide mean of 5.4.[36] While these figures indicate satisfaction above the mean for our university, from our perspective they did not indicate a sufficient return for the very significant efforts we were putting into refining the course content and increasing the interactive content of lectures. We have described and analysed those efforts in detail elsewhere:[37] they included

35 SELT, 2010.

36 SELT, 2011; and SELT, 2012.

37 Chad Habel & Matthew Stubbs, "Mobile Phone Voting for Participation and Engagement in a Large Compulsory Law Course" (2014) 22:1 Research in Learning Technology 12; Matthew Stubbs, "Engaging Students in Large Lectures through Small-Group Discussions and Voting" (Invited presentation delivered at the Learning@Adelaide Masterclass, Adelaide, 28 May 2013 and Vice-Chancellor's Learning & Teaching Showcase, Adelaide, 17 June 2013) [unpublished]; and Chad Habel & Matthew Stubbs, "Mobile Engagement: Phone Voting in Large Lectures' (Poster presented at the University of Adelaide

assigning pre-readings in advance of lecture classes and implementing small-group problem-solving activities in class, leading to mobile device voting and whole-class discussions.

In 2014, we 'took the plunge' and transformed our course. Over the years, we have naturally refined our approach in response to staff and student experiences.[38] External factors, including resourcing and COVID-19, have brought about other changes. Therefore, what we describe here is our typical, but not invariable, pedagogy.

The first set of changes related to the flipped classroom. First, we replaced all traditional, didactic lecture material in the course (which originally totalled 24 hours) with a series of shorter videos on discrete topics which totalled around 12 hours. Second, in the two hours per week now available to us to interact with students in what would formerly have been a lecture, we implemented interactive classes (still with our whole cohort in a large lecture theatre) involving three key components: reading the whole of critical High Court of Australia judgments to learn key content and develop the critical professional legal skill of case analysis, applying public law to solve complex legal problems in realistic hypothetical scenarios, and undertaking activities to develop students' critical thinking skills. Anyone walking into our two-hour 'lectures' would not find a talking-head at the front, but students working in small groups, two lecturers co-teaching, and throwable microphones and audience response systems being used in an active, engaging learning experience. Third, our course became significantly front-loaded — we taught the substantive content in the first seven weeks (of the traditional 12-week semester). This was a natural result of having more hours per week due to adding the videos. Front loading the substantive content was not merely convenient but, in fact, essential to our inquiry learning experience, the third change described below.

Festival of Learning and Teaching, Adelaide, 22 November 2011) [unpublished].

38 In 2013, Matthew Stubbs was on sabbatical and the course was coordinated by another member of staff.

The second set of changes related to assessment. To support learning from our videos, and ensure student engagement with them as a necessary precondition for success in our interactive flipped lectures, we instituted weekly online quizzes, collectively worth 20% of each student's final grade in the course. Further, we moved our exam from being a hand-written paper completed in a central examination venue in the university's standard exam period (commencing one week after the end of teaching), to being a typed paper completed by students in an invigilated setting during the mid-semester break (a two-week non-teaching period after the first eight of the 12 weeks of semester). This was a natural fit given our substantive course ran for seven, rather than 11, weeks (the final week being dedicated to revision). It also had implications beyond our course. By completing their examination during the teaching part of semester, students would now face one fewer examination at the end of their semester, relieving some of the stress typically associated with first-year exams.

The third set of changes involved the introduction of our inquiry learning experience. We believed that our students were capable of producing quality research, even in first-year, if they had sufficient guidance. Therefore, we turned the previous individual research essay into a supervised, collaborative inquiry learning experience. The introduction of flipped lectures described above had created space for a four-week capstone experience in our course, in which our students could focus fully on their first ever research project in law.

Our inquiry learning experience sees students work in teams of three to four to research and write a 2000-word law reform submission that explores a public law question at the heart of contemporary debates. For example, students have investigated whether Australia should adopt a Charter of Rights, or if an Indigenous Voice to Parliament should be enshrined in the Australian Constitution. To support our first-years, we provide individualized supervision to each student team. Teams spend three sessions over three weeks with an academic mentor who is an active public law researcher. This level of supervision is more akin to honours supervision than typical first-year teaching and is essential to the success of our inquiry learning experience. We also organize

tailored workshops with the Law Librarian for direct hands-on assistance with students' specific research projects and expose students to the broader communication skills support available through the university. The inquiry learning experience sessions are conducted in the Law Library computing suite, allowing immediate access to assistance from library staff and resources. Finally, to support our students' development of vital critical thinking, legal research and group work skills, we provide a suite of tailored online resources (videos and written guides).

A key feature of our implementation of an inquiry learning experience is that it was resource neutral — we did not employ greater resources than previously used in the course (or used in other comparable courses). Instead, we used the four weeks no longer required to teach the substantive content (weeks nine to 12 of the course). Staff supervision hours were drawn from the tutorials no longer required in those weeks.

We took a risk with such a comprehensive transformation of the course. Our approach was unique at Adelaide Law School and novel for the students. To our great relief, our interventions were highly successful from both a student and staff perspective, as the next part demonstrates.

IV. The Effectiveness of our Interventions

Experiencing our re-designed course together with our students in 2014 was encouraging. We felt that our flipped lectures, supported by continuous assessment in the weekly quizzes, led to higher student engagement in classes and therefore more enjoyment for everyone. The research projects that students produced in the inquiry learning experience were clearly of a higher standard than the previous individual research essays. This part explains how our interventions have improved student outcomes. First, we discuss the effectiveness of the three major changes to the course individually, focusing especially on student and peer feedback. Then, we present the improvement of student success and satisfaction in the course overall. Finally, we add a staff perspective on the experience of teaching the course in this new format.

A. Flipped Classroom

Our flipped lectures led to deeper student engagement and active learning. Instead of passive listeners, students are now active participants in in-class activities, who engage in critical thinking and problem solving. Students have commented positively on their experience:

> "I have found the level of engagement … in lectures to be very beneficial to our learning. The promotion of in-class discussions and encouragement to form our own views on legal mechanisms equipped and enabled me to think critically on my perception of the function of public law in Australia".[39]

> "Flipped lecture … gave a really good understanding of topic and had to have done some preparation meaning people were engaged and could talk to peers and deepen understanding".[40]

> "[Classes are] high energy and good fun".[41]

> "[T]he interactive element of the PPL course is invaluable … enables students to make mistakes during the lectures and have their knowledge of public law clarified … I hope to see more courses as interactive as PPL around the university".[42]

Academic peers have also found our flipped lectures instrumental in engaging students. In a 2018 University Teaching Review Program ("TRP") evaluation (a formal, summative peer assessment), Dr Robyn Davidson, a University of Adelaide Education Specialist, stated that "this was an excellent example of how a flipped classroom should be conducted. … The amount of interaction indicates that students enjoy the format". In a 2016 University TRP evaluation, Education Fellow Dr Cate Jerram wrote that "students were very actively and effectively engaged".

---

39 Unsolicited student email, 2019.

40 SELT, 2019.

41 SELT, 2019.

42 Unsolicited student email, 2020.

The essential foundation for our flipped lectures are our pre-lecture videos and quizzes. As explained above, the videos deliver the content traditionally covered in didactic lectures and provide students with a foundation of knowledge to undertake the in-class activities. The quizzes allow students to self-test their foundational knowledge before coming to lectures. Students have explained that the pre-lecture quizzes offer them incentives to learn, and provide feedback on their learning: "a barometer to keep me on task and engaged"; "an amazing way to keep me accountable for my learning"; "a great idea to help me absorb concepts better"; and "[t]he weekly quizzes were motivating and ensured students stayed up to date".[43] Assessment and feedback have thus become an essential part of the learning process, not merely a measure of its outcomes:

> "Although the pre–lectures videos often took a while to get through, they were extremely valuable in providing the content required to effectively participate in the lectures and in the seminars. The pre–lecture quizzes were also very useful for testing my knowledge and to clarify gaps in my knowledge".[44]
>
> "Found that the flipped learning method really helped … Thought the pre–lecture quizzes were great idea and helped me absorb concepts better".[45]
>
> "The weekly lecture quizzes and pre lecture videos are utter perfection … it enables me to come to lectures already understanding what is going on. Furthermore, the quizzes provide me with feedback so that I know at what level my understanding per topic is so that I can determine what I need to improve on".[46]

B. Assessment Changes

Our re-designed course introduced the pre-lecture quizzes and the early computer-based exam in the mid-semester break, after eight weeks of learning of course content in flipped lectures and tutorials. Beyond keeping students

43 SELT 2019; SELT, 2018; SELT, 2020; and SELT, 2020.

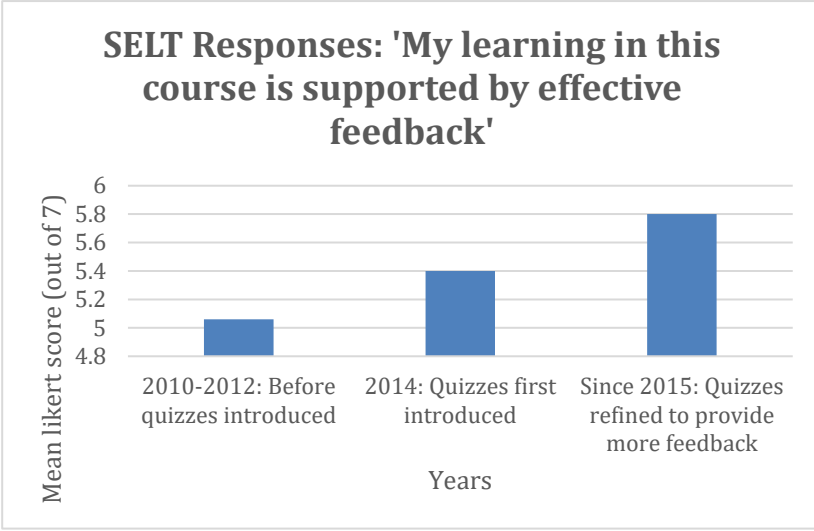
44 SELT, 2020.

45 SELT, 2020.

46 SELT, 2015.

accountable for their learning, the pre-lecture quizzes also provide students with immediate feedback on their learning. Students recognise and value this, which is demonstrated in a significant improvement in student responses to the SELT question regarding the effectiveness of feedback in the course (Figure 1). It is worth noting that the original implementation of quizzes did not have the full impact we had hoped for. We then refined the quizzes to provide students with a greater volume and detail of feedback for every question, which generated a further significant increase in student response.

Figure 1



As explained above, the course curriculum was re-designed so that all substantive content in PPL is delivered in weeks one through eight and examined in the mid-semester break that follows. This allows students to focus exclusively on their inquiry learning experience project in the final four weeks of the course. Students really liked the new structure and this comment from the 2017 SELT is typical: "The early exam is really good as it allows you to … really focus on the Inquiry Learning Experience".

C. Inquiry Learning Experience

Our inquiry learning experience has led to several student benefits. First, the quality of students' research work increased significantly. Second, students enjoyed being involved in investigating public law issues of contemporary relevance in Australia in a professional setting. Third, students developed vital legal research and writing skills relevant for the entirety of their law degree and for legal practice. Fourth, individual supervision led to enhanced student support. Finally, the experience has given our first-years a sense of belonging to Adelaide Law School by fostering closer connections between students.

From the first iteration of the inquiry learning experience in 2014, the teaching team noticed that the quality of the research projects produced had increased markedly, compared with research essays submitted by students pre-2014. Beyond our own observations, this quality is demonstrated by our top students being accepted to present at Undergraduate Research Conferences and (as first-years) winning prizes ahead of Honours and final year students. Professor Mick Healey, a UK-based international expert in undergraduate student research and inquiry learning, judged some of these teams and observed:

> "I heard two groups of first year students present. If I had not been told, I would have thought they were final year undergraduate or postgraduate students. The exceptional quality of their presentations were a testament to [the staff's] outstanding mentorship and facilitation skills. One of the groups deservedly won the award to participate in the Australian Conference on Undergraduate Research and the other won the prize for the best oral presentation from Level 1 students".

Altering the assessment task from an 'ordinary' essay to a law reform submission made the task more job-relevant for our students. Offering inquiry topics at the heart of contemporary public debate in Australia enhanced student motivation and increased their sense of the real-life relevance of their learning in PPL to contemporary debates. One student commented: "Inquiry Learning Experience was probably my favourite part of the course. It was great to actually

apply what we had learnt to current problems that are occurring today".[47] Another said that the best part of the PPL course was "the Inquiry Learning Experience; my topic was interesting to research and [I] loved to do it".[48]

Beyond producing better research projects in our course, our inquiry learning experience has equipped students with the legal research and writing skills that they need throughout their law degree and in legal practice. This is demonstrated by the following feedback:

> "The research skills that we learnt … were invaluable … I have literally used these skills on every single assignment since completing the Inquiry Learning Experience".[49]

> "Currently I am working part time at a Barristers Chambers, and recently have started to do legal research for some of the barristers here. I just wanted to email you and say that what you taught last year was really worthwhile and has helped me a lot".[50]

Students also really value the individual supervision of research projects that is part of the inquiry learning experience. Over the course of three weeks, student teams meet with an experienced researcher three times to discuss the progress of their projects:

> "[T]he ability to personally engage with the academic staff was invaluable. The increased correspondence with academic staff in comparison to other courses made an immensely positive impact in terms of learning and knowledge retention".[51]

47 SELT, 2019.

48 SELT, 2015.

49 Unsolicited email from a student in 2016, reflecting on their experience in PPL in 2015.

50 Unsolicited email from a 2014 student.

51 Anonymous student survey, 2016.

> "[S]upport provided was amazing and [I] felt equipped from the prior lectures to do well".[52]

Finally, we were delighted to receive strong feedback that fostering connections between students has been another key achievement of our inquiry learning experience. Because students work together intensively in teams of three to four, they are building connections with their peers in what can otherwise be an isolating discipline. This is demonstrated by a student comment that the best aspect of the PPL course is "the chance to discuss key concepts with others regarding the workings of public law".[53] Other students explained that the inquiry learning experience not only enabled consideration of broader perspectives on the law learned in the first eight weeks of the course, but also supported the building of a sense of support and cohort for students:

> "It allows you to make connections with other students and working with other people helps you to consolidate your understanding by seeing it from another perspective. This is something I've found the most difficult in my experience at law school. As a student in such large numbers you can often feel extremely distant from the help you need".[54]

> "[The inquiry learning experience] will be something I will never forget, especially because I had the opportunity to work with three amazing relax[ed] and smart girls … they were patient and very supportive … your course will influence myself in a positive way when working with other people. Thank you!!".[55]

D. Student Success and Satisfaction Overall

While we were thrilled to get positive feedback on the flipped classroom, assessment changes and inquiry learning experience, we were even more pleased

52 SELT, 2019.

53 SELT, 2020.

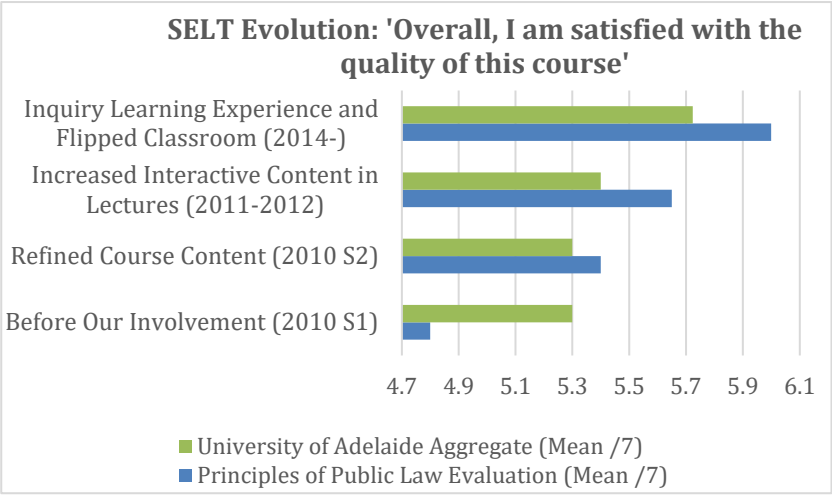
54 Anonymous student survey, 2016.

55 Unsolicited email from student, 2014.

that our course re-design has substantially increased student satisfaction and achievement in PPL.

First, student satisfaction has increased significantly, and PPL is now consistently one of the highest ranked courses in SELT surveys, not only in Adelaide Law School, but across the University of Adelaide, as Figure 2 shows.

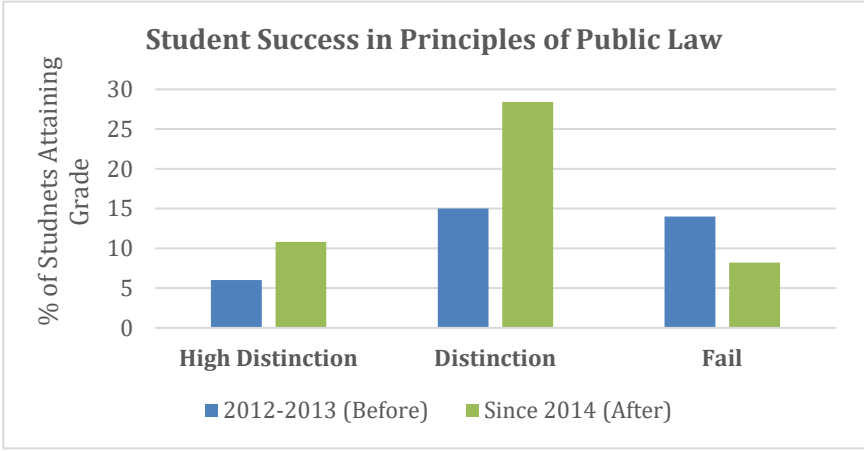
Figure 2



This level of student satisfaction is remarkable because large first-year courses traditionally receive much less positive responses from students than small, boutique electives and postgraduate courses. The level of student satisfaction with our course is further indicated by the Student-Led Teaching Award from the Adelaide University Union (the university's premier student-selected teaching award) we received in 2016.

Second, student results have improved significantly. Comparing results from before our course re-design (2012-2013) with those after (since 2014), the number of Fail results has nearly halved, while the number of HDs and Ds has almost doubled, as Figure 3 shows.

Figure 3



Students recognise that their learning in PPL is high quality:

> "The depth of knowledge gained in public law is great for a [first-year] course".[56]

> "[R]eally engages students … All courses in the law department should be taught like this. If you want to know what the future of learning looks like I highly recommend … Principles of Public Law".[57]

E. Staff Perspectives

From a staff perspective, the critical question is probably whether we think transforming our course was worth the effort. Happily, our view is unequivocally that it was. The data we have analysed above gives us considerable confidence about the impacts on students. We reflect here on the impacts that these changes had on staff.

It is important to be clear that, with the benefit of hindsight, we underestimated the amount of work required to transform our entire course for the 2014 offering. While implementing our desired changes all at once was

56 SELT, 2020.

57 SELT, 2014.

exhilarating, it was also exhausting. We would suggest to colleagues contemplating major course renovation that they consider whether it can be achieved in smaller batches over successive iterations of the course, so as to balance their workload. This would have the added bonus of enabling the pedagogy to be more readily tailored in response to student feedback along the way.

What, then, did we as staff get back from these efforts (other than the satisfaction of their impacts on student learning)? First, the interactive flipped lectures are vastly more fun to teach than traditional didactic lectures. It is even possible to have meaningful engagement with students in a lecture theatre with hundreds of students in attendance. Second, habits of active participation learned by students in the flipped lectures transfer across to increased student participation in tutorials and online discussion fora. Third, more engaged students who understand the law better are more fun to teach and marking their assessment can be quite an affirming experience. Fourth, being able to spend time with small groups of students supervising their inquiry learning experiences is a real pleasure. In short, the investment of time and effort to transform our course also transformed the teaching experience radically for the better.

V. Charting a Course Through Troubled Waters: The Impact of COVID-19

In this section, we offer some reflections on the experience of using flipped classroom and inquiry learning pedagogies during the disruptions of the COVID-19 pandemic. Our aim is not to provide any comprehensive analysis of the impact of the pandemic on law teaching generally, but instead to detail some aspects of our own experience of COVID-19's impact on the particular pedagogies that we have described in this article.

Broadly, our experience shows that some parts of our pedagogy lend themselves to being transferred to online learning more easily than others. The flipped classroom supported by pre-lecture quizzes was easier to adapt to online learning (though modifications were required), while we ultimately felt that we could not continue to offer the inquiry learning experience in its traditional

format. Instead, we substituted smaller group projects which were more strongly structured and involved less supervision and research.

COVID-19 disrupted learning and teaching at the University of Adelaide in March 2020. Suddenly, within the space of one week, all classes had to be moved online and face to face interaction was no longer possible. At that point, the semester had already started, and there was little room to change course content or teaching plans. Therefore, what had been intended for in-person classes had to be delivered online, whether it was suitable for online delivery or not.

A. Flipped Classroom

Our experience shows that the flipped classroom pedagogy with the supporting pre-lecture quizzes could be transferred online, though this transfer still had some problems. As in the years before COVID-19, students still watched the pre-lecture videos and completed the pre-lecture quizzes before the lecture. The lecture was now held live on Zoom. However, we encountered problems with the amount of material that could be covered in online classes, the effectiveness of peer-to-peer learning, and lower student engagement.

The first problem was that it was difficult to cover as much ground in a Zoom lecture as can be covered in an in-person lecture. This was due to technological errors and delay that occurred from time to time. It also took more time to read and respond to all student comments in the chat function. We addressed this by moving one of the three lecture activities out of the synchronous lectures and delivered it asynchronously instead. Simply put, instead of an interactive activity led by students in the live lecture, we recorded a video that identified the main points of the activity, modelling how students should approach it, and made this video available online. While this part of the activity was no longer interactive, gaining extra time in the live lecture allowed for the other two lecture activities to remain interactive. We found that engaging in only two of our usual activities in a live online lecture allowed sufficient time for student engagement.

However, another problem was peer to peer learning that usually occurs in small student groups in the lecture theatre. In our 'ordinary' flipped classes, the

lecturer encourages students to talk to their neighbours and develop (e.g.) three arguments for a particular proposition. Lecturers walk around the room and help individual groups with their discussions. If lecturers become aware of a common misunderstanding, they make an announcement to the whole class to clarify the point. After the small group discussion, students submit their answers on an interactive online learning platform. The submitted answers are displayed on the board and discussed with the whole class. Individual students volunteer or are asked their views on the question under discussion and on answers that others have given.

On Zoom, this approach proved problematical. Breakout rooms were used for small group peer to peer discussions. However, these did not seem to be as effective as small group discussions in the lecture theatre. We suspect this was because the teacher was unable to supervise small groups' work, answer questions instantly for the benefit of all students, or correct common misconceptions. In the absence of the teacher in breakout rooms, students are also more easily distracted. Moreover, groups were unable to submit their answers to the whole group because Zoom does not have a function for free text answers. Zoom surveys only allow for multiple choice questions. In a law course, this is not as useful as free text answers, especially when addressing critical thinking questions.

A third problem was student engagement online. While attendance at the live online lectures was comparable to attendance at in-person lectures in this course, only a handful of students participated in the online class discussions. Unlike in a classroom, it was harder for teachers to encourage quieter students to participate. Some students also had technical difficulties with their camera, microphone, or chat function, forcing them to be passive listeners, even if they wished to participate.

In summary, our experience was that, while pre-lecture videos and quizzes work well in the online environment, interactive live online classes had to be tailored to contain fewer activities. Peer-to-peer discussion in breakout rooms were not as effective as in the lecture theatre, active participation online was lower, and the tools available for surveys were more limited on Zoom. While

flipped lectures can be beneficial in the online environment, the lecture activities have to be designed specifically for this environment, paying special attention to strategies for student online engagement and to the survey tools available.

B. Inquiry Learning Experience

The COVID-19 disruption caused significant mental health challenges for many people, including law students. In light of this, we significantly restructured the inquiry learning experience, reducing the scale of the project very substantially, providing much more scaffolded support to students, and requiring them to undertake much less research (and with less supervision), leading to an assessment which carries a very small weighting. We took these steps because we did not want to heighten student stress. Students are often apprehensive about the group work aspect of the inquiry learning experience. However, in ordinary years strategies are in place to assist students with group work. These include the ability of groups to have regular face to face meetings, including with their academic mentors, and early teacher interventions if a group encounters a problem. Ordinarily, most teams in PPL regard their group research project as a positive experience upon completion (see some of the student comments above). However, we were concerned that, in an online environment, we would not be able to provide groups with the support that they need. Therefore, we opted for a very substantially reduced version of the inquiry learning experience. We were disappointed not to be able to continue with the more ambitious inquiry learning experience in the online world during the pandemic, but ultimately the approaches that had made our inquiry learning experience possible in face-to-face mode did not translate easily to a fully online world. We felt that we could demand much less of students in the context of highly increased student stress resulting from the pandemic.

In our view, if teachers wanted to run such an experience in a fully online environment, special supports and safeguards would have to be put into place to foster student success and support their mental health and wellbeing. At a minimum, it would be crucial that all students have the technology and IT support available to participate easily in the experience; second, teachers would

not only have to be available for group consultations during set hours and by appointment, but proactively check in frequently on how all groups are travelling; third, evidence of ongoing participation by all group members in the project would have to be created, for example, by requiring groups to use online collaboration tools that teachers can access and that show which work was done by each team member and when. In our view, the resources required for a successful, large scale online inquiry learning experience are more than what our law school (and probably most law schools) can provide for an individual course.

Perhaps it would be possible to engage students in a successful online group inquiry learning experience in a later year elective course with comparatively few students (50 maximum). Later year students are more likely to have the experience and maturity to engage successfully in such an experience, especially in an elective in their area of interest. One academic would have the capacity to supervise and support a smaller group of up to 50 students. However, we do not believe that a fully-fledged online inquiry learning experience would be successful for our large, compulsory, first-year course within the existing resources available to us.

VI. Conclusion

Our experience of implementing the flipped classroom, continuous assessment and inquiry learning in a large, compulsory first-year law course has been very positive overall. We have found considerable benefits to student learning from these pedagogies — as would be predicted from the majority of the literature — even though they remain somewhat unusual in law teaching today. In particular, we have seen strongly increased student satisfaction with our course, substantially improved student success (in contrast with some earlier Australian studies) and greatly increased staff satisfaction.

Through necessity, we have also trialed these approaches during the COVID-19 pandemic. The flipped classroom (supported by continuous assessment) was able to continue online with only minor changes required. Inquiry learning, however, we found more difficult to implement in this context,

and we were able to offer only a very much reduced (in size and intellectual scope) version of our inquiry learning experience in the pandemic.

What is the significance of our experience for the future of legal education? First, we think it demonstrates the importance of achieving active student engagement in all forms of teaching. Periodically, we see comments presaging the death of the lecture. These have to be treated with some skepticism, given the continued prevalence of lecture teaching, and the efficiency (and thus economic advantage) of large-group as opposed to small-group teaching. But, we are convinced that traditional didactic talking-head lectures with no active engagement fail to take advantage of the opportunities presented by the precious time available for teaching staff to interact with students, and for students to interact with each other. There are many ways of promoting active learning, even in large classes. We have found that the flipped classroom provides us with really valuable opportunities to increase student engagement (with course material, with their peers, and with teaching staff) and elevate the level at which our classes (and in particular our large lecture classes) operate.

Second, we see an evolution in approaches to assessment. It is no longer predominantly a tool deployed at the end of a course to evaluate whether or not a student has mastered the content. Instead, assessment is a tool that can be used throughout the course to actively support the student learning journey. Assessment can provide students with real-time feedback on their understanding and assist to build a baseline level of student familiarity with material across the cohort, which allows for classes to be conducted at a significantly higher level. The pre-lecture quizzes that support our flipped classroom pedagogy are an example of continuous assessment that serves a predominantly educative, and not merely evaluative, purpose.

Third, we think there is considerable value that can come from implementing inquiry learning in appropriate contexts. We hope that our experience demonstrates that no cohort is beyond engaging with research in a meaningful way — our first-year students responded extremely well to the substantial inquiry learning experience we implemented. Many academics choose their career pathway on the basis of a love of research, and we found the

opportunity to share the research experience with students to be enriching for both staff and students. We note one potential difference: students were particularly engaged when the end product had a real-world focus. Their interest in generating a research-informed law reform submission was greater than their interest in generating a more traditional research essay. This suggests to us that the most effective pathway to implementing inquiry learning is to find a form of output which students can see as having professional significance as well as intrinsic intellectual interest.

We are the first to acknowledge that our innovations have required much more effort to implement than would have been required to just continue offering fundamentally the same course every year. What is going to drive the necessary effort to reinvigorate legal education pedagogies? In our view, there are several drivers. First, students are increasingly sophisticated consumers of education and they have the capacity to influence educational approaches. Second, there will be institutional drivers — our initial flipped classroom implementation enjoyed some financial support from the university as part of a teaching initiative. Third, and for us perhaps most importantly, there is a substantial return on the investment of time and energy made by teaching staff — we found that we substantially increased the enjoyment we derived from our teaching. While not all staff will choose to make a dramatic whole-course implementation of a major pedagogical change, we have already seen many of our colleagues adopt and adapt elements of what we have done in courses across our university and beyond. Incremental change is more readily attainable and can still bring substantial benefits to student learning as well as the staff teaching experience.

Our greatest satisfaction is the impact we have had on student learning, demonstrated by significant and sustained increases in student achievement and satisfaction. The student experience is exemplified in an unsolicited email received in 2020 from a 2014 student who had just completed a Masters at Oxford: "the teaching you continue to pioneer in Adelaide … continues to top any law school … [I am] extremely grateful for the skills you taught me in Public Law". Our flipped classroom, continuous assessment and inquiry learning

experience have assisted our students to learn more deeply about public law and to develop research and teamwork skills for their whole degree and professional lives. It is our great pleasure to continue this journey with future student cohorts in Principles of Public Law and beyond.

Acknowledgments

The authors wish to thank Dr Gabrielle Appleby (now Professor of Law at the University of New South Wales) and Dr Adam Webster (now Associate Professor at the University of Oxford) who were instrumental in the teaching of the course with us in earlier periods, and all our other colleagues and students over the years who have joined us on our journey with this course.

The authors are grateful to the participants who engaged with our (unpublished) presentations regarding our course, including: Matthew Stubbs et al, "Delivering a Small-Group Discovery Experience in Large Classes" (Conference Paper delivered at the Higher Education Research Group of Adelaide Conference, 27 September 2013); Matthew Stubbs, "Discovering Public Law Through Research: An SGDE Tale" (Invited presentation delivered at the University of Adelaide Festival of Learning and Teaching, Adelaide, 12 November 2014); Matthew Stubbs & Gabrielle Appleby, "Blending Learning in Public Law Classrooms" (Conference Poster, delivered at the Public Law in the Classroom Conference, 12 February 2015); Cornelia Koch & Matthew Stubbs, "Inquiry-Based Learning in Law: Three Years of a Small Group Discovery Experience in the First-Year Curriculum" (Conference Paper delivered at the Higher Education Research Group of Adelaide Conference, 22 September 2016); Matthew Stubbs & Cornelia Koch, "Inquiry-Based Learning in Public Law: Adelaide's Small Group Discovery Experience"(Conference Poster, Public Law in the Classroom, 16 February 2017); Cornelia Koch & Matthew Stubbs, "Inquiry-Based Learning in Public Law: Adelaide's Small Group Discovery Experience" (Conference Paper, delivered at ALTA Conference, 6 July 2017); Matthew Stubbs, "The Flipped Classroom and Inquiry Learning: A Public Lawyer's Journey" (Invited presentation delivered at the University of South Australia School of Law Blended Learning Seminar,

Adelaide, 12 July 2017); Matthew Stubbs, "Flipping and Inquiring in Public Law" (Presentation delivered at the University of Adelaide Festival of Learning and Teaching, Adelaide, 21 July 2017); Cornelia Koch & Matthew Stubbs, "Using Innovation to Deliver Pedagogical Value in the Age of the Economically Efficient Corporate University – Adelaide's Flipped and Inquiring Public Law Curriculum" (Conference Paper, delivered at the HERDS Annual Conference, 4 July 2018); and Matthew Stubbs, Cornelia Koch & Azaara Perakath, "Technology-Enabled Assessment and Feedback in a Large First-Year Law Class: Student and Staff Perspectives" (Presentation delivered at the University of Adelaide Festival of Learning and Teaching, Adelaide, 20 July 2018).

The authors acknowledge with thanks the recognition of their work through a Student-led Teaching Award from the Adelaide University Union (2016), a University of Adelaide Beacon Commendation for the Enhancement and Innovation of Student Learning (2016), the Executive Dean's Award for Excellence in Teaching (Faculty of the Professions, University of Adelaide, 2017) and the Citation for Outstanding Contributions to Student Learning (Australian Awards for University Teaching ("AAUT"), 2020).

Legal Uncertainties: COVID-19, Distance Learning, Bar Exams, and the Future of U.S. Legal Education

Christine A Corcos*

The COVID-19 pandemic forced the U.S. legal academy and legal profession to make changes to legal education and training very rapidly in order to accommodate the needs of students, graduates, practitioners, clients, and the public. Like most of the public, members of the profession assumed that most, if not all, of the changes would be temporary, and life would return to a pre-pandemic normal.

These assumed temporary changes included a rapid and massive shift to online teaching for legal education, to online administration of the bar exam in some jurisdictions, or the option to offer the diploma privilege in others. Many employers made efforts to accommodate new law graduates and employees who needed to work from home.

As legal educators and the legal profession shift back to 'normal', we are now discovering that some of these changes might be rather desirable. Thus, we can begin to look at the last two years as an opportunity to re-evaluate how we teach and learn law and how we might evaluate the competence of those entering the profession in different ways. As we move forward, instead of automatically readopting to the status quo, we can instead examine approaches that would allow us to make headway on solving problems that have been with us for decades.

---

* Christine Corcos is Richard C Cadwallader and Judge Albert Tate Foundation Associate Professor of Law at the Louisiana State University Law Center and Associate Professor, Women's, Gender, and Sexuality Studies Program, Louisiana State University. She received a JD from Case Western Reserve University School of Law and an MA from Michigan State University. She writes in the area of freedom of expression, freedom of religion, legal history, and law and popular culture.

I. Introduction

In the United States calls for change and criticism of legal education are as old as legal education itself.[1] Some of the changes date from a few decades after Christopher Columbus Langdell initiated the first big change in the training of U.S. lawyers, the 'Socratic method', at Harvard Law School, [2] which transformed that training from apprenticeship to classroom learning, and from on the job training to the dreaded one-on-one questioning by a professor so familiar to many non-lawyers from films such as *The Paper Chase*[3] and *Legally*

1 For a history of legal education in the United States, see generally Anton Hermann Chroust, *The Rise of The Legal Profession in America* (Norman, Okla: The University of Oklahoma Press, 1965); Robert Bocking Stevens, *Law School: Legal Education in America from the 1850's to the 1980's* (Chapel Hill, NC: University of North Carolina Press, 1983).

2 See Cynthia G Hawkins-León, "The Socratic Method-Problem Method Dichotomy: The Debate Over Teaching Method Continues" (1998) 1:1 Brigham Young University Education & Law Journal 1 at 4.

3 *The Paper Chase*, 1973, DVD (Beverly Hills, Cal: 20th Century Fox Home Entertainment, 2003). A television series followed (CBS, 1978-80; Showtime,

Blonde.[4] However, both students and faculty eventually objected to this type of training, and over the decades since the 'Professor Kingsfield' model of teaching held sway, more and more faculty moved away from it, adopting a lecture model or friendlier model of engagement.[5] Nevertheless, some law faculty continue to use the Socratic method, maintaining that such questioning prepares students for the rigorous world of law practice, particularly in the courtroom.[6] It also teaches students to think through the various alternatives to an answer that the professor poses, which is difficult with the lecture method. Some professors also suggest that 'reframing' the Socratic method by using questioning that emphasizes practice skills keeps the 'good' about the Socratic method and updates this traditional approach to the kind of engagement that allows the mingling of doctrine and skills teaching.[7]

Another innovation which faculty are increasingly adopting in the U.S. legal curriculum is the integration of the skills curriculum. The MacCrate Report[8] ("MacCrate Report") was the first comprehensive overview of U.S. legal education to highlight the importance of skills in legal education, although many law schools took time to adopt the MacCrate Report's recommendations.

1983-86). John Housman played Professor Kingsfield in both the film and the television series.

4 *Legally Blonde*, 2001, DVD (Beverly Hills, Cal: Metro-Goldwyn-Mayer Distributing Corporation (MGM), 2001).

5 See *e.g.* Orin S Kerr, "The Decline of the Socratic Method at Harvard" (1999) 78:1 Nebraska Law Review 113.

6 Law professors in other countries use versions of the Socratic method, as well. See *e.g.* Lowell Bautista, "The Socratic Method as a Pedagogical Method in Legal Education" (2014) 14:1 University of Wollongong, Faculty of Law, Humanities and the Arts – Papers 81. However, most lawyers never enter the courtroom. The percentage might be as low as 20 percent.

7 See Jamie R Abrams, "Reframing the Socratic Method" (2015) 64:4 Journal of Legal Education 562.

8 Robert MacCrate et al, *Legal Education and Professional Development – An Educational Continuum*, (Chicago: American Bar Association, 1992) ["MacCrate Report"].

As one might expect, one outcome of the MacCrate Report and subsequent reports[9] was the call for the hiring of additional instructors to teach skills (clinical, legal research, and writing). From the MacCrate Report flowed requests, then demands, from these instructors as well as doctrinal colleagues for employment that tracked that of doctrinal faculty, including salaries and eventually tenure.[10]

Progress on many of these changes has been slow until relatively recently. Some schools decided to try some online learning programs and obtained permission from the American Bar Association ("ABA"), the only official U.S. accreditor for law schools,[11] to set up such programs. However, these programs

---

9 These reports include William Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (San Francisco: Jossey-Bass/Wiley, 2007) and Roy Stuckey et al, *Best Practices for Legal Education* (Place of publication unknown: Clinical Legal Education Association, 2007).

10 See *e.g.* Bryan L Adamson et al, "The Status of Clinical Faculty in the Legal Academy: Report of the Task Force on the Status of Clinicians and the Legal Academy" (2012) 36:2 Journal of the Legal Profession 353; Minna J Kotkin, "Clinical Legal Education and the Replication of Hierarchy" (2019) 26:1 Clinical Law Review 287; and Kristen K Robbins & Amy Vorenberg, "Podia and Pens: Dismantling the Two-Track System for Legal Research and Writing Faculty" (2015) 31:1 Columbia Journal of Gender and Law 47. Tenure status and benefits for law library faculty is another issue. Although more and more law librarians hold dual degrees (JD and MLS), usually only the law library director holds a tenure track appointment. If another law librarian carries out teaching duties, that individual might only hold a courtesy faculty appointment. But see James G Milles, "Legal Education in Crisis, and Why Law Libraries Are Doomed" (2014) 106:4 Law Library Journal 507; and Carol A Parker, "The Need for Faculty Status and Uniform Tenure Requirements for Law Librarians" (2011) 103:1 Law Library Journal 7.

11 The US Department of Education recognizes the ABA under US, *Code of Federal Regulations,* c 34, s 602 (2022). See also US Department of Education, "Accreditation in the United States" (27 October 2009) online: *ED Gov* <www2.ed.gov/admins/finaid/accred/accreditation_pg5.html> [US Department of Education, "Accreditation"].

were limited in terms of scope and content.[12] Prior to 2020, only one law school in the United States offered a fully online program, and the ABA did not accredit it, although a regional accreditor did so.[13] In 2021, the ABA has accredited nine hybrid (partly online, partly in-person) programs.[14] However, the traditional path for most law school graduates has been to acquire traditional skills, including some 'practice ready' skills,[15] with an eye to practicing law, after passing the bar exam. Passing the bar is a separate exercise for all U.S. law

---

12 See *e.g.* the University of Alabama "LLM Program in Tax" (2022) online: <www.law.ua.edu/llmdegrees/taxation/>.

13 See "Concord Law School: The First Online Law School and One of the First to Be State Accredited" (2021), online: *Concord Law School* <www.concordlawschool.edu/about/accreditation/>.

14 "University of Dayton: The ABA-Approved Online Hybrid J.D. Program" (2021), online: *University of Dayton* <requestinfo.onlinelaw.udayton.edu/index-d.html?experimentid=18583661935&s=onlinelawsite&l=prog_jd_cta>; "Loyola University: Weekend JD" (2021), online: *Loyola University (Chicago) School of Law* <www.luc.edu/law/academics/degreeprograms/jurisdoctor/weekendjd/>; "Mitchell Hamline School of Law: Earn your J.D. from your Hometown" (2021), online: *Mitchell Hamline School of Law* <mitchellhamline.edu/admission/intro/earn-your-j-d-from-your-hometown/>; "Seton Hall Law: Part-time Law Degree" (2021), online: *Seton Hall Law* <law.shu.edu/part-time-jd-degree/index.cfm>; "Southwestern Law School: Part-Time Evening J.D." (2021), online: *Southwestern Law School* <www.swlaw.edu/jd-llm-programs/part-time-evening-jd>; "Syracuse University: JDinteractive" (2021), online: *Syracuse University* <jdinteractive.syr.edu/>; "Touro College: FlexTime JD Program" (2018), online: *Touro College* <www.tourolaw.edu/Academics/Flextime-JD-Program>; "Sturm College of Law: Professional Part-Time JD Program" (2021) online: *Sturm College of Law* <www.law.du.edu/academics/degrees-certificates/jd-degrees/professional-part-time-jd-program>; "University of New Hampshire: Hybrid Juris Doctor (J.D.)" (2021) online: *University of New Hampshire* <law.unh.edu/HybridJD>.

15 See *e.g.* American Bar Association, *2021-2022 Standards and Rules of Procedure for Approval of Law Schools,* Chicago: ABA, 2021, ch 6, at 303, ["ABA Standards"].

graduates, except in one jurisdiction.[16] Over a specific set of days, new law graduates take a closed book examination that tests their knowledge of doctrine and purports to test some other areas of law. To pass this examination, graduates enroll for an additional, expensive course of study.[17] They might also have to acquire other credentials, depending on the jurisdiction.[18]

However, the COVID-19 pandemic has highlighted the need to focus on (1) the lack of consensus in many of these areas; (2) the need to change; (3) the need to decide which, if any, of the changes the pandemic has forced on legal education are worthy of permanence; and (4) what, if anything, legal academia should do to respond to the changes the bar examiners seem unwilling to undertake permanently to respond to claims that the bar exam itself does not adequately act as a test of lawyer competency, at least in its current form. The pandemic has forced upon members of the legal profession the necessity of making changes to legal education, and in some cases, the legal profession itself.[19] Because of the possibility that new graduates might need temporary bar

---

16 See Stephanie Francis Ward, "Bar Exam Does Little to Ensure Attorney Competence, Say Lawyers in Diploma Privilege State" (21 April 2020), online: *ABA Journal* <www.abajournal.com/web/article/bar-exam-does-little-to-ensure-attorney-competence-say-lawyers-in-diploma-privilege-state>.

17 For the steps see *e.g.* Harvard Law School, "Taking the Bar Exam" (2021) online: *Harvard Law* <hls.harvard.edu/dept/dos/taking-the-bar-exam/>. The various requirements depend on the jurisdiction.

18 These normally include a character and fitness clearance and background check and can require a passing grade on a second-year exam called the Multistate Professional Responsibility Examination ("MPRE"). See National Conference of Bar Examiners, "Comprehensive Guide to Bar Admission Requirements: Chart 6" (2021), online: *Bar Admission Guide-NCBE* <reports.ncbex.org/comp-guide/charts/chart-6/>.

19 While legal employment is not the focus of this article, the pandemic has brought focus to some employment issues in the legal profession. Specifically, women, who traditionally carry the burden of childcare, have had to make more sacrifices than men in terms of making decisions about working from home and teaching children who were also staying at home but learning online during the pandemic. Yet they had no childcare during work meetings held on Zoom, for example. This sort of conflict was necessarily a real problem for

privileges, the legal profession and legal academia focused for a time on whether recent graduates were practice ready, and, in turn, on whether legal education provided a practice ready curriculum, and whether law schools had the responsibility, in three years, to train students to enter the work world ready to practice. These questions raised in turn serious inquiries over the questions of what the traditional three-year law school experience should provide. If it cannot provide practice ready graduates, then what responsibility does the legal profession have to guide new graduates through the profession? What responsibilities do lawyers themselves have to prepare and continue their training? What responsibilities do employers and employees together have to address questions of work/life balance? The pandemic did not create these questions, but it has exacerbated the need to find answers, even if some members of the profession might prefer to try to return to the way we were pre-COVID-19.

The pandemic focused attention most immediately on the question of bar exam administration and temporary bar privileges. However, problems with bar exam administration led, fairly quickly, to more substantive questions about the value of the bar exam generally. Once concerns arose about the value of the bar exam, those concerns led to the justifications for the bar exam; that it tests competency to practice, at least at a fixed point in time, in a way that a law school diploma might not, that law school education itself might continue to need some examination and overhaul, and that the legal profession itself might need to engage in some thoughtful reflection about what it expects from all its practitioners.

---

them. See Avi Stadler, "The Legal Profession's Child Care Problem" (2 March 2021), online: *Esquire* <esquiresolutions.com/the-legal-professions-child-care-problem/>.

II. The Bar Exam and the Diploma Privilege Prior to the COVID-19 Pandemic

According to a short article from the mid-1990s, we know very little about the history of the bar exam.[20] The ABA endorsed the credential of the bar exam in the 1920s.[21] After that decision, the popularity of the diploma privilege dropped precipitously. As of today, Wisconsin is the only U.S. state that currently maintains a permanent diploma privilege for its law school graduates. Many champions of the diploma privilege hold it up as an example of an alternative to the bar exam, which has now taken hold in every other jurisdiction. A lawyer may not enter the practice of law anywhere else except by passing a bar exam, and might well have to pass more than one, unless she can be admitted through reciprocity. Reciprocity might or might not be an available means of admission. Some states do not allow it at all.[22]

Defenders of the diploma privilege argue that, on the whole, it is as likely to measure the competence of new law school graduates as well as the bar exam. Over the years, members of the Wisconsin Bar and members of the faculties of the two Wisconsin law schools have both criticized and defended the state's diploma privilege, leading to changes in its formulation, particularly in the weighting of coursework as well as articulated concerns about costs to students and the public.[23]

---

20 Robert M Jarvis, "An Anecdotal History of the Bar Exam" (1996) 9:2 Georgetown Journal of Legal Ethics 359.

21 Stuart Duhl, *The Bar Examiners' Handbook*, 3d (Madison, Wis: National Conference of Bar Examiners, 1991).

22 For an extensive list of reciprocity rules (including admission on motion), see the charts that the NCBE provides, updated regularly, at National Conference of Bar Examiners, "Comprehensive Guide to Bar Admission Requirements" (2021), online: *NCBE* <www.ncbex.org/publications/bar-admissions-guide/> [NCBE, "Comprehensive Guide"]. Louisiana does not offer reciprocity with any state because of the state's unique legal system.

23 See generally Peter K Rofes, "Mandatory Obsolescence: The Thirty Credit Rule and the Wisconsin Supreme Court" (1999) 82:4 Marquette Law Review 787.

At least one University of Wisconsin Law School law professor, Paul Horwitz, has some criticisms to make of the diploma privilege, however. While he does not dispute the likelihood that it measures relative competence of in-state law school graduates, he suggests that it provides a relative market advantage for those graduates over out-of-state graduates, who still must pass the in-state bar in order to practice:

> [r]ather, it largely serves to provide the in-state law schools with a competitive advantage in the market for law students who wish to practice in Wisconsin. A student from La Crosse who wants to practice in his hometown and who has offers from Marquette and from the University of Minnesota will have to think long and hard about whether going to the better-ranked school is worth it when going to Marquette will save him the hassle, cost, and uncertainty of the bar exam. It is no wonder that the Wisconsin law schools advertise Diploma Privilege as a benefit of attending their schools. It is a substantial one, especially as prospective law students tend to view the bar exam with unreasonable dread.[24]

Further, Horwitz points out that diploma privilege, which allows in-state law graduates to practice in the state but nowhere else, also acts as an automatic barrier to exit. That is, any Wisconsin state law graduate wishing to practice elsewhere must pass a bar exam in that other jurisdiction:[25]

> [s]econdarily, we can view Diploma Privilege as encouraging the graduates of in-state schools to stay in state after they graduate. A UW graduate may be less likely to take a law job in Chicago over one in Madison if doing so means that he has to take and pass the Illinois bar exam. In that way, Diploma Privilege

---

24 Paul Horwitz, "A Skeptical Comment on the Wisconsin Diploma Privilege" (16 May 2020), online (blog): *PrawfsBlawg* <prawfsblawg.blogs.com/prawfsblawg/2020/05/a-skeptical-comment-on-the-wisconsin-diploma-privilege.html>.

25 Other states may provide reciprocal admission for Wisconsin diploma privilege graduates based on admission on motion and/or length of practice. See NCBE, "Comprehensive Guide", *supra* note 22; and NCBE, "Chart 15: Admission on Motion – Legal Education and Reciprocity Requirements (2021), online: *NCBE* <reports.ncbex.org/comp-guide/charts/chart-15/>.

> probably increases the supply of Wisconsin lawyers—good for Wisconsin's consumers of legal services, but probably not so good for Wisconsin lawyer salaries.[26]

One could point out, though, that diploma privilege is an advantage only for in-state law graduates, as he acknowledges. Some have argued that the bar exam in some states seems to act as a gatekeeper for in state law graduates as well.[27] For example, some states do not offer reciprocity admission (admission for members of the bar of other states), either because the state has a legal regime that is quite different from the norm,[28] or because many attorneys perceive the state as an attractive venue for practice.[29] However, New York, which is an obvious attractive venue, offers admission on motion in certain cases.[30]

Eliminating the bar exam and returning to a pattern of diploma privilege in multiple jurisdictions would raise a number of issues. Those who defend the bar exam as a measure of competence to practice law make the following arguments against return to the diploma privilege.

One argument that supporters of the current bar exam method make is that the present law school curriculum[31] in many law schools does not test 'to bar

---

26 Horwitz, *supra* note 24.

27 See William C Kidder, "The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification" (2004) 29:3 Law & Social Inquiry 547.

28 Louisiana is the obvious example.

29 California and Hawaii are examples.

30 New York State Board of Law Examiners, "The New York State Board of Law Examiners: Admission Information: Reciprocity/Motion Information" (2021), online: *The New York State Board of Law Examiners* <www.nybarexam.org/AOM/AdmissiononMotion.htm>.

31 I use 'the law school curriculum' to mean law school curricula generally in most law schools in the country. In this article, I cannot address the question of general or specific differences in curricula in law schools. Discussion of the law school curriculum generally, or what should constitute the core curriculum, is beyond the scope of this article, and is long-standing and extensive but for some recent examples see Adam Lamparello, "The Integrated Law School Curriculum" (2016) 8:2 Elon Law Review 407; and Anthony Niedwiecki,

standards'. That is, it does not test the skills that bar exams do, and supporters of the present bar exams assume that bar examinations test lawyering skills adequately or well, and that what they test are skills that lawyers actually use. Further, they maintain that law school exams do not test lawyering skills.[32] Another point they make is that bar exam questions integrated issues, whereas law school exams limit themselves by course.[33]

The debate over whether the bar exam actually tests lawyer competence is decades old. Over the years, various groups have attempted to add components or make changes in order to verify that the exam actually does test competence, on the assumption that a state bar exam provides some uniformity for graduates that successful completion of three years at law schools that offer varying experiences might not.[34] California included a closed book portion of the bar exam in 1983.[35] In 1997, the National Conference of Bar Examiners ("NCBE") added the component called the Multistate Performance Test ("MPT"), for example,[36] in its own effort to test non-doctrinal skills.

All of these criticisms may well be valid. What they fail to recognize is that law school curricula and law school exams do not overlap or take the place of the bar exam for a reason; the bar exam intentionally serves a different purpose from law school training. If the bar exam did not exist, law school education and law school exams would fill that gap. Before the existence of bar exams, the

---

"Law Schools and Learning Outcomes: Developing a Coherent, Cohesive, and Comprehensive Law School Curriculum" (2016) 64:3 Cleveland State Law Review 661.

32 Denise Riebe, "A Bar Review for Law Schools: Getting Students on Board to Pass Their Bar Exams" (2007) 45:2 Brandeis Law Journal 269 at 279.

33 *Ibid* at 273–77. Riebe discusses various arguments for and against the bar exam.

34 Stephanie Francis Ward, "A Better Bar Exam? Law Profs Weigh in on Whether Test Accurately Measures Skills Required for Law Practice" (8 January 2020), online: *ABA Journal* <www.abajournal.com/web/article/building-a-better-bar-exam>.

35 *Ibid*.

36 *Ibid*.

legal profession tested lawyer competency in other ways. It could find ways to test lawyer competency in ways other than through the bar exam.

In addition, bar exams test skills that lawyers do not actually use in practice. A multiple-choice question on a closed-book bar exam does not replicate real life conditions.[37] Asking examinees to choose 'the best answer' to a hypothetical situation will rarely, if ever, replicate a real-life situation. While in non-pandemic or non-emergency situations, most examinees could manage to get through multiple-choice sections of such bar exams. During the pandemic, when examinees were alone in a testing situation, systems that monitored such online exams put examinees at a disadvantage, leading to allegations that the examiners unfairly accused bar exam candidates of cheating.[38]

---

37 Andrea A Curcio, "A Better Bar: Why and How the Existing Bar Exam Should Change" (2002) 81:1 Nebraska Law Review 362 at 376.

38 See Sam Skolnik, "Third of California Online Bar Exams Cited for Possible Cheating" (22 December 2020), online: *Bloomberg Law* <news.bloomberglaw.com/business-and-practice/third-of-california-online-bar-exams-cited-for-possible-cheating>.

Further, these criticisms assume that the bar exam actually does test lawyer competency, which some critics of the bar exam dispute.[39] That the profession and the public worry about unqualified lawyers is perfectly understandable.[40]

This assumption is actually what critics of the bar exam, including many practicing attorneys, put in doubt when discussing the bar exam.[41] They argue that what bar exams test are not really practice skills. Bar exams primarily test doctrine,[42] and they do so under artificial conditions. They do not replicate

---

39 See *e.g.* Deborah L Rhode, "Institutionalizing Ethics" (1994) 44:2 Case Western Reserve Law Review 665 at 690:

> [n]o showing has ever been made that performance either on bar exams or in law school correlates with performance in practice. Although it is reasonable to infer some relationship, it is not self-evident that an inflexible three-year educational program plus a general knowledge test offer the best screening for many specialties. Nor do states' widely varying exam cut-off scores and procedures for admitting out-of-state lawyers bear any demonstrated relationship to competence. The limited data available indicates that legal education and standardized tests neglect skills that surveyed lawyers find most important, while disproportionately excluding low income and non-white applicants. Although some jurisdictions have begun to require continuing legal education, existing requirements (of ungraded participation for a minimal number of hours) are unlikely to improve performance among those most in need of improvement.

In a later article Andrea Curcio makes the same point, quoting Cecil J Hunt, "Guests in Another's House: An Analysis of Racially Disparate Bar Performance" (1996) 23:3 Florida State University Law Review 721 at 764. See Curcio, *supra* note 37 at 370:

> [c]learly, in order for a bar examination to be a legitimate test of minimum competence to practice law, it must be rooted in a reasonable definition of the very quality it professes to measure. However, not only have bar examiners noticeably failed to articulate a reasonable definition, but they have also failed to enunciate any definition at all.

For an updated list of jurisdictions that require CLE hours and how they calculate those hours, see The American Bar Association, "Mandatory CLE" (2022) online: *ABA* <americanbar.org/events-cle/mcle/>.

40 Curcio addresses the public's concerns about lawyers and the bar exam's failure to address them in "A Better Bar", see Curcio, *ibid* at 383–86.

41 Rhode, *supra* note 39 at 690.

42 Curcio, *supra* note 37 at 373–83.

actual working conditions for attorneys, who would normally have time to look up doctrine, as one would expect them to do.

One could respond that, first, assuming that the law school curriculum tests material other than overall competency at a specific point in time, that is because law schools and bar examiners agree that to the extent that such testing is necessary, the bar exam serves that purpose.[43] If the bar exam did not exist, however, law schools could create a comprehensive mechanism to measure competency at the end of the three-year period of study, for example written exams to cover agreed-upon core courses and skills. Or, they could test competencies through a series of yearly examinations, which teach core competencies and skills. Still another method might be to test doctrinal competencies and skills at set periods through law school, or at graduation; the exams and results comprising a portfolio of the graduate's competencies and representing the graduate's practice readiness. That readiness would represent whatever criteria the accredited law schools and the accrediting agency agree are appropriate. I am not suggesting that such a portfolio of criteria would be easy to determine, but I suggest the schools and agency could devise one if they agree upon the core courses, which schools generally already agree upon given the shared curriculum, and the sorts of skills schools and various reports are already discussing as necessary for the 'practice ready' graduate.[44]

---

43 Note that another test, with which nearly the entire U.S. population is familiar, is the driving licensure test. We generally assume that it tests, at least minimally, competence to drive. However, that might not be true. Georgia's governor suspended driving tests in 2020, allowing people to obtain licenses without taking the tests. Although this decision might seem counter-intuitive, in that we assume that drivers' tests actually assure competency, at least one article discusses the lack of relationship between drivers' tests and competency. See Aaron Gordon, "Abolish the Driving Test" (15 June 2021) *VICE*.

44 I am not discussing such an approach in this article. That would be for another publication. However, I am suggesting that if the legal profession wanted to pursue such approach, simply abandoning it because the bar exam already exists is not a sufficient reason to do so, if most of the legal profession comes to the conclusion that the bar exam doesn't already test for competency. Curcio also suggests other methods of training the law student and graduate, including

One scholar points out why legal education and bar exams have widely different goals:

> [l]aw schools do not train students to become experts in "the law." Instead, for decades, law schools have trained students to "think like lawyers." The "law" changes dramatically over time, and it is often (perhaps almost always) ambiguous. The trick for lawyers is to become proficient at gathering and looking at specific facts, determining legal issues arising out of those facts, ascertaining the rules that might apply to those facts (which generally requires research and review of various legal authorities), and predicting, persuading, or prescribing for third parties (whether clients, judges, juries, opposing advocates, or contractual participants) how those rules should govern the situation at hand. That is why it takes months to teach first year law students contracts when the same subject matter is covered in a matter of a few hours in a bar exam class. Law school classes are not as focused on teaching students the acceptable substitutes for consideration or the mechanics of the current statute of frauds as are bar preparation courses. Of course, the class may cover those issues, but not in a "here are the rules" fashion. Instead, law school (and particularly the first year curriculum at most institutions) focuses on basic skills like spotting legal issues, understanding multiple sides of those issues, separating the relevant facts from those facts that are not outcome-determinative, and deriving legal rules from complicated and often ambiguous statutes, regulations, and judicial opinions. Considerations like the evolution of legal doctrine and how public policy and economic considerations impact the development of law are also important in most classes, as these considerations do come into play when lawyers act as counselors and advocates.[45]

---

importing the Canadian model and or adopting an apprenticeship approach, in "A Better Bar", see Curcio, *supra* note 37 at 398–411.

45 Carol Goforth, "Why the Bar Examination Fails to Raise the Bar" (2015) 42:1 Ohio Northern University Law Review 47 at 59.

III. The Law School Curriculum and Its Position with Regard to Competencies Prior to the Pandemic

One of the defenses supporters of bar exams raise is that they test competencies of law school graduates in a uniform way. This argument presupposes that the bar exam also tests skills that the law school curriculum does not. In effect, the argument is that the bar exam, through essays and multiple-choice questions, tests doctrine, critical thinking, and other skills in a closed book setting that about 200 accredited law schools with varying curricula might not, given that those schools have generally settled on a set of core courses but different goals and audiences. The asserted purpose of a state bar exam is to set legal standards to protect the consumers of a particular jurisdiction. The purpose of a law school, whether private or public, is to serve the school's mission, which includes educating the students, serving the school's faculty, and seeing to the needs of alumni and community.[46]

U.S. law schools today generally share a minimal set of core standards, based on ABA requirements.[47] Bar exams test general areas of law; thus, law graduates tend to have studied roughly the same doctrine. However, to the extent that specific jurisdictions might also decide to test certain areas of law, they specify those areas, and many law students (but not all) will have decided at some point that they want to take the bar exam in those jurisdictions and will have taken specific courses that prepare them for the bar exam in those jurisdictions.[48]

---

46 Law schools generally post their mission statements on their websites or in their catalogs. See Irene Scharf and Vanessa Merton, "Table of Law School Mission Statements" (2016), online: *Scholarship Repository at the University of Massachusetts School of Law* <scholarship.law.umassd.edu/cgi/viewcontent.cgi?article=1174&context=fac_pubs>.

47 See ABA Standards, *supra* note 15 at 301–303.

48 The ABA requires law students to complete 83 credits in order to graduate. See *ibid* at 311. LSU Law Center requires as many as 94 credits. Other standards

If students have not taken a particular area tested on the bar exam they plan to take, they rely on the bar exam review course they take in preparation for that bar exam. The bar exam for a particular jurisdiction thus tests all the examinees on the same material regardless of where they earned their law degrees.[49] Because of the 'gatekeeping function' that bar exams provide and the different missions of the exam and the law school, there can be a mismatch between what students learn in law school and what the bar examiners expect them to produce on the exam.[50] Faculty at a number of law schools admit that they struggle with whether they have a primary or substantial responsibility to 'teach to the bar', or whether they should be helping students and graduates prepare for life in practice.[51]

---

govern how many and under which circumstances students may transfer credits or earn credits at other institutions.

49 Bar examiner websites indicate the areas that the exam for that jurisdiction covers. See *e.g.* "The Florida Bar Exam" (28 August 2020), online: *Florida Board of Bar Examiners* <www.floridabarexam.org/web/website.nsf/52286AE9AD5D845185257C07005C3FE1/125BA5AFD5EB7D2385257C0B0067E748>.

50 One of the more scrutinized aspects of the bar exam is the 'cut score', or the passing score, on the exam. Some jurisdictions have maintained a relatively high score, which critics say reflects a desire to prevent a high number of successful applicants rather than an accurate measure of competency. See Debra Cassens Weiss, "Several States Consider Lowering Cut Scores on Bar Exams, Making It Easier to Pass" (29 March 2021), online: *ABA Journal* <www.abajournal.com/news/article/several-states-consider-lowering-cut-scores-on-bar-exam-making-it-easier-to-pass>. California's cut score is one that attracts particular attention. See Joan W Howarth, "The Case For a Uniform Cut Score" (2018) 42:1 The Journal of the Legal Profession 69.

51 Most faculty at the top tier (T14) law schools do not have this worry. They assume that their students will pass any bar, and they consider that their mission is to train elite lawyers, future judges, and future scholars. Again, the debate over what law schools should be teaching is beyond the scope of this article, but it is a current one and could be more prominent if jurisdictions move to eliminate the bar exam. If the bar exam were to disappear wholly or partially, what law schools teach might become an issue for law graduates at various schools who cross geographic boundaries. On teaching to the bar, see Emmeline Paulette Reeves, "Teaching to the Test: The Incorporation of

Other changes that schools might consider include a move to change the law school curriculum to reflect not just doctrinal learning but also specific practice ready skills that lawyers need. To be fair, law schools have been making these changes for some time, as a response to the MacCrate Report and other studies of the traditional law school curriculum.[52] The bar exam does not really test practice ready skills, except to the extent that they assist examinees in answering doctrinal questions.[53] That is, it does not test in-person client negotiation or interviewing, for example. However, employers generally agree that they want recent graduates to have these 'practice ready skills', if only because one can look up doctrine. The practice of law itself is open book. As we practice law, we do learn the law. It does save time when we know the doctrine, and we are wise to learn the doctrine we are likely to use routinely. But, unless we are actually in court, we normally have some time to look up the law before pronouncing on it. It might be more helpful to create a curriculum that develops (1) critical thinking skills; (2) legal research skills; (3) legal writing skills; (4) dispute resolution skills; (5) client interviewing and counseling skills; and (6) law management skills. The shift to providing these skills began shortly after the ABA issued the MacCrate Report, which lists and emphasizes the importance of these skills.[54] One section of the MacCrate Report lists a Statement of Skills

---

Elements of Bar Preparation in Legal Education" (2015) 64:4 The Journal of Legal Education 645.

52 A large bibliography exists of materials devoted to reactions to the MacCrate Report. See for example as an early response the frequently cited John Costonis, "The MacCrate Report: Of Loaves, Fishes, and the Legal Education" (1993) 43:2 The Journal of Legal Education 157. See also Russell Engler, "From 10 to 20: A Guide to Utilizing the MacCrate Report Over the Next Decade" (2003) 23:2 Pace Law Review 519.

53 See Curcio, *supra* note 37 at 371. Curcio is less generous:

> [e]ven if one accepts the contention that the bar exam should test only for basic skills unique to lawyers, the existing bar exam still fails to test for the ability to do legal research and to read and comprehend judicial opinions, statutes, and other sources of the law, all skills also unique and critical to lawyers.

54 MacCrate Report, *supra* note 8.

and Values "desirable for practitioners to have".[55] However, the Task Force which put together the MacCrate Report noted that it does not purport to present a definitive list of those skills and values. Instead, the Task Force hoped that the profession itself will begin the process of discussing which skills and values lawyers should have.[56]

The Task Force lists a number of skills as fundamental for law schools to provide in the curriculum.[57] It also lists the following values as fundamental for law school students to acquire during their training: (1) "provision of competent representation"; (2) "striving to promote justice, fairness and morality"; (3) "striving to improve the profession"; and (4) "professional self-development".[58] Law schools frequently recommend these skills for students interested in pursuing a law degree.[59]

As one could expect, members of the academy and the bar had strong opinions about the MacCrate Report. In an article published in 2002, Russell Engler assessed the MacCrate Report's effects as well as reactions to it.[60] He pointed out that among the critics were law school deans (worried about cost

---

55 *Ibid* at 123.

56 *Ibid* at 123–24.

57 *Ibid* at 138–40. The MacCrate Report lists the following as skills: "problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute-resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas".

58 *Ibid* at 140–41.

59 See *e.g.* Michigan State University College of Law, "Core Skills for Law School" (2021), online: <perma.cc/3AZA-VKCM>; University of California, Berkeley "Law School — Skills for Law School" (2021), online: <career.berkeley.edu/Law/LawSkills>. See also American Bar Association, "Legal Education & Admissions to the Bar. Pre-Law: Preparing for Law School" (2021), online: *ABA* <www.americanbar.org/groups/legal_education/resources/pre_law/>.

60 Russell Engler, "The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow" (2002) 8:1 The Clinical Law Review 109.

and perceived critiques of the academic model), doctrinal faculty (worried about constraints on academic freedom), and, somewhat surprisingly, clinical teachers (concerned that externships and simulation courses might displace clinics, and legal research and writing teachers).[61] Some critics focused on the MacCrate Report's failure to identify whether the skills and values were those that a graduating student should possess at the point of graduation or whether they were those that a lawyer should have the means to acquire at some point, yet unidentified, after graduation.[62]

In 2007, another report, "Educating Lawyers: Preparation for the Profession of Law", appeared.[63] In 2013, the Committee on the Professional Educational Continuum, Section on Legal Education and Admissions to the Bar, issued a report assessing the MacCrate Report's influence.[64] Both of these reports amplified the MacCrate Report's suggestions that legal education should prepare for change in the legal profession in order to address the need for practice-ready law graduates.

One cannot doubt, however, that the MacCrate Report, discussion of the MacCrate Report, follow-up reports, and discussion of those reports have engendered lively discussion of the traditional law school curriculum and of the bar exam, and whether the exam truly tests readiness to practice. The pandemic, and the changes that it forced upon bar examiners to modify or eliminate the exam temporarily, have further focused attention on it as the last hurdle that

---

61 *Ibid* at 119.

62 Jonathan Rose, "The MacCrate Report's Restatement of Legal Education: The Need for Reflection and Horse Sense" (1994) 44:4 The Journal of Legal Education 548 at 556–57.

63 Sullivan, *supra* note 9.

64 Dean Mary Lu Bilek et al, "Twenty Years After the MacCrate Report: A Review of the Current State of the Legal Education Continuum and the Challenges Facing the Academy, Bar, and Judiciary" (12 March 2013) *American Bar Association*.

would-be lawyers must clear in their initial search for admission to the bar in any jurisdiction in the United States.[65]

IV. The Effects of the Pandemic

A. The Impact of COVID-19 on In-Person Legal Education and Bar Exams

Law schools all over the United States shut down quite suddenly because of the rapid and unexpected spread of COVID-19, just as they did around the world.[66] Like their counterparts everywhere, U.S. law school administrators, faculty, staff, and students moved from the familiar in-person environment to an online environment, for which nearly all had some but not complete preparation.[67]

---

65 Again, the only exception is Wisconsin, and only for Wisconsin law school graduates.

66 Zena Olijnyk, "Law Schools Adjust As COVID-19 Shifts Classes Online" (10 December 2020) *Canadian Lawyer Magazine*.

67 Assessments and critiques of the types of online techniques that faculty decided to use began almost immediately, even though these faculty had little time to select such techniques and tools, and almost no training in them. See *e.g.* Alanna Gillis & Laura M Krull, "COVID-19 Remote Learning Transition in Spring 2020: Class Structures, Student Perceptions, and Inequality in College Courses" (2020) 48:4 Teaching Sociology 283.

Law schools, unlike other schools, have relatively few educational objectives that require in-person learning and performance. While in-person learning is preferable, faculty, staff, and students can adapt most types of classes to remote learning if they need to. Clinical programs and externships tend to be the exceptions. Some law faculty have begun to share their pedagogical techniques for making the most of remote teaching and technology. See *e.g.* Columbia Law School, "Socratic Zooming: Faculty Weigh In on Teaching Remotely" (27 April 2020), online: *Columbia Law School* <www.law.columbia.edu/news/archive/socratic-zooming-faculty-weigh-teaching-remotely>. Some faculty point out some positive attributes of remote learning, including the opportunity to have students participate in teaching and prepare hypotheticals outside of class. Note that faculty could have and could now use these techniques in traditional (in-person) classes, as well.

Film, dance, photography, and health (dentistry, medicine) are examples of educational programs that had more difficulty making the transition to remote

Although some U.S. law schools had a somewhat robust online presence because they had been developing online programs for some time,[68] even those schools struggled to expand their entire program in a few days to accommodate the demands of the spring 2020 semester.[69] In addition, the ABA, the accrediting agency which the U.S. Department of Education recognizes as the only one to accredit U.S. law schools, had to make decisions swiftly about its existing limitations on remote learning in order to make certain that law schools teaching through Zoom or another remote method[70] did not inadvertently put their students at risk of losing credit for those courses and themselves at risk of losing accreditation. The then current standard, ABA Standard 306, allowed accredited law schools to offer up to one-third of their credits online.[71]

---

learning. See Lilah Burke, "The Big Transition" (31 March 2020) *Inside Higher Education*. What works more effectively for the student can depend on the goals of the student, the instructor, and the program. See Miranda Cyr, "Online vs In-Person Classes" (2021) *College Times*.

68 A number of US law schools offer advanced degrees online. For example, the University of Alabama School of Law has offered an online LLM in tax for a number of years. See University of Alabama, "Online LLM Concentration in Taxation" (2021), online: *The University of Alabama* <www.law.ua.edu/llmdegrees/taxation/>.

69 The US Department of Education recognizes the ABA under US, *Code of Federal Regulations,* c 34, s 602 (2022). See also US Department of Education, "Accreditation", *supra* note 11.

70 Note that law schools, as well as universities, were already discussing remote learning and asynchronous learning prior to the pandemic. Much of the discussion involved the 'flipped classroom'. See *e.g.* William R Slomanson, "Blended Learning: A Flipped Classroom Experiment" (2015) 64:1 Journal of Legal Education 93.

71 ABA Standards, *supra* note 15 at 306:

> [d]istance Education.
>
> (a) A law school may offer credit toward the J.D. degree for study offered through distance education consistent with the provisions of this Standard and Interpretations of this Standard. Such credit shall be awarded only if the academic content, the method of course delivery, and the method of evaluating student performance are approved as part of the school's regular curriculum approval process.

The ABA issued a guidance memo in February 2020 regarding emergencies and disasters that served as a precursor to its later decisions regarding Standard 306.[72] In the memo, the ABA noted that law schools could use distance learning:

> as 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. A law school that explores that way of delivering its J.D. program to accommodate students in response to an emergency or disaster must consider

---

(b) Distance education is an educational process characterized by the separation, in time or place, between instructor and student. It includes courses offered principally by means of:

(1) technological transmission, including Internet, open broadcast, closed circuit, cable, microwave, or satellite transmission;

(2) audio or computer referencing;

(3) video cassettes or discs; or

(4) correspondence.

(c) A law school may award credit for distance education and may count that credit toward the 45,000 minutes of instruction required by Standard 304(b) if:

(1) there is ample interaction with the instructor and other students both inside and outside the formal structure of the course throughout its duration; and

(2) there is ample monitoring of student effort and accomplishment as the course progresses.

(d) A law school shall not grant a student more than four credit hours in any term, nor more than a total of 12 credit hours, toward the J.D. degree for courses qualifying under this Standard.

(e) No student shall enroll in courses qualifying for credit under this Standard until that student has completed instruction equivalent to 28 credit hours toward the J.D. degree.

(f) No credit otherwise may be given toward the J.D. degree for any distance education course.

72 See American Bar Association., "Managing Director's Guidance Memo – Emergencies and Disasters February 2020" (2020), online (pdf): *ABA* <www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/20-feb-guidance-on-disasters-and-emergencies.pdf>.

> whether the distance learning is appropriate for that course, whether the course was designed for or can easily be accommodated to that method or delivery, whether the faculty member has the experience and training needed to deliver a distance education course meeting the requirements of the Standards, whether the school has the technological capacity (in general and in the context of the disaster or emergency) to support that form of instruction, and whether students have or can be provided with the technology needed to access the course. Simply moving a classroom-based course to a video conference call or to a school's learning management system that supports other courses may be relatively easy, but unless factors such as those set out above have been considered, may not be an appropriate accommodated compared to, for example, adding extra days to the term when a regular schedule can be resumed.[73]

This memo offered guidance to schools facing temporary disruptions such as those caused by major winter storms or hurricanes. Those disruptions normally clear up in a few days or weeks.[74] Once it became clear that the

---

73 *Ibid*.

74 Note, however, that Hurricane Katrina (2005) forced the New Orleans law schools, Tulane and Loyola, to close for the fall semester 2005; many faculty and students relocated from New Orleans for that semester to other parts of Louisiana or the country. The University of Houston Law Center took in most, if not all, Loyola students, although some relocated to LSU Law Center and Southern Law Center. Tulane Law students went to a number of law schools, including the University of California, Berkeley, School of Law (then called Boalt Hall), Boston University Law School, and various other law schools in California.

See "Hurricane Katrina: 20 Tulane Law Students Start Classes at Boalt" (7 September 2005), online: *Berkeley Law* <www.law.berkeley.edu/article/hurricane-katrina-20-tulane-law-students-start-classes-at-boalt/>; Rebecca Lipchitz, "More Than 200 Tulane Students Register at BU" (8 September 2005), online: *BU Today* <www.bu.edu/articles/2005/more-than-200-tulane-students-register-at-bu/>; Diane Curtis, "Back to School at Tulane Law" (February 2006), online: *California Bar Journal* <archive.calbar.ca.gov/archive/Archive.aspx?articled=73755&categoryld=73746

coronavirus pandemic would cause major disruptions in law school scheduling across the United States for months, the ABA revisited its distance learning guidelines. At its summer 2020 meeting, the ABA deleted Standard 306 and merged it with Standard 105.[75] It also changed the language of Rule 2, which permits the Council to "grant or deny applications for variances" to law schools, which the ABA accredits.[76]

In parallel, the NCBE moved to issue guidance to the various jurisdictions administering bar exams across the United States.[77] It issued a White Paper in April 2020, which looked at the possibilities open to 2020 law school graduates who could not take the July bar exam in-person.[78]

&month=2&year=2006> (listing other schools which took in Tulane Law students including Stanford and UCLA).

For more about the effects of Hurricane Katrina on Loyola Law School (New Orleans), see Brian Huddleston, "A Semester in Exile; Experiences and Lessons Learned During Loyola University New Orleans Fall 2005 Hurricane Katrina Relocation" (2007) 57:3 Journal of Legal Education 319.

75 See Stephanie Francis Ward, "Law Schools Should Have Flexibility In Responding To "Extraordinary Circumstances," ABA House of Delegates Says" (3 August 2020), online: *ABA Journal* <www.abajournal.com/news/article/various-legal-ed-proposals-approved-by-aba-house-of-delegates>. For the text of the new Standard 105, see ABA Standards, *supra* note 15 at 7.

76 ABA Standards, *supra* note 15 at 51.

77 As it indicates on its website, the staff of the NCBE:

> [d]evelop and produce the licensing tests used by most US jurisdictions for admission to the bar: the Multistate Bar Examination (MBE), the Multistate Essay Examination (MEE), and the Multistate Performance Test (MPT); coordinate the Uniform Bar Examination (UBE), which results in score portability; develop the Multistate Professional Responsibility Examination (MPRE) required for admission to the bar by most US jurisdictions; score the MBE and the MPRE and report scores to the jurisdictions.

This is in addition to a range of other services provided by the NCBE. See National Conference of Bar Examiners, "About" (2021), online: *NCBE* <www.ncbex.org/about/>.

78 See National Conference of Bar Examiners, "Bar Admissions During the COVID-19 Pandemic: Evaluating Options for the Class of 2020" (9 April

Several scholars moved to offer ways to assess possible responses to administration of the bar exam in a pandemic, as well:

> [m]edical experts advise that at least some of these restraints will continue for 18 months or more—until a vaccine is developed, tested, and administered widely. It is possible that localities will be able to lift some of these restrictions (such as lockdowns and school closures) intermittently during those months, but other restraints (social distancing, limits on large gatherings) are likely to continue for a year or more.
>
> Under these conditions, jurisdictions will not be able to administer the July 2020 bar exam in the usual manner. Even if some of the most rigorous restrictions have been lifted by July 28, prohibitions on large gatherings are likely to remain. Attempting to administer the bar exam to hundreds of test takers in a single room would endanger the test takers, staff administering the exam, and the public health. The variation in jurisdictional outbreaks and public health responses may also compromise the ability to set a single test date across the country.
>
> At the same time, it is essential to continue licensing new lawyers. Each year, more than 24,000 graduates of ABA-accredited law schools begin jobs that require bar admission. The legal system depends on this yearly influx to maintain client service. The COVID-19 crisis, moreover, will dramatically increase the need for legal services, especially among those who can least afford those services. We cannot reduce entry to the profession at a time when client demand will be at an all-time high.[79]

The paper listed a number of options for bar examiners, most of which many jurisdictions adopted in some fashion: (1) postponement; (2) online exams; (3) small-group exam administration; (4) emergency diploma privilege; (5) emergency diploma privilege-plus (diploma privilege plus completion of some

---

2020), online (pdf): *NCBE* <thebarexaminer.ncbex.org/wp-content/uploads/Bar-Admissions-During-the-COVID-19-Pandemic_NCBE-white-paper.pdf>.

79 Claudia Angelos et al, "The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action" (2020) 1:1 Scholarly Works 1284.

additional credentials); and (6) supervised practice.[80] In particular, the authors of the paper pointed out that supervised practice, the sixth option, could allow graduates from any state to practice across state lines.[81] These options include types of credentialing that put more emphasis on legal education, including skills acquired before graduation, and training acquired after graduation, and less on the bar exam credential. Thinking about relying less on the bar exam and its associated requirements[82] as the ultimate signifier of readiness for practice had entered the debate.

Quite naturally, state bar examiners and state supreme courts, responsible for administering bar exams and admitting new attorneys, did not want to overreact to the possibility that the virus was more out of control, as it ultimately turned out to be. In the months of March, April, and May, institutions and law schools wanted to take measures to prepare for the July bar exam period, and then see what follow-up, if any, might be necessary for the rest of the year. Early changes in some states included preparations to administer the bar at additional locations, thus cutting down on the possibility that many hundreds of candidates would be exposed in large venues and hotels as they stayed overnight for a traditionally multi-day exam.[83] As the extreme situation became clear, however, some bar examiners began to understand that cancelling or radically changing the nature of the administration of the bar exam were the only options to a traditional in-person bar exam.

Louisiana was the first state to cancel both in-person and online bar exams. On July 15, 2020, it canceled its modified one-day exam, which it had planned to administer on July 27.[84] It had already changed its traditional three-day exam

---

80 *Ibid* at 3–7.

81 *Ibid* at 7.

82 For example, the character and fitness examination.

83 See *e.g.* Trina S Vincent, "Louisiana Court Update" (8 May 2020) *Louisiana Supreme Court News*.

84 See Dana DiPiazza, "Louisiana Bar Exam Canceled Due to Increase in COVID-19 Cases Statewide" (15 July 2020) *WBRZ*. On September 24, 2020, the NCBE provided an updated list of canceled, remote, and in-person bar

to a one-day format; it abandoned that exam and offered a type of diploma privilege to graduates of the four Louisiana law schools instead.[85] The Court noted that it would admit otherwise "qualified candidates" if they completed 25 hours of continuing legal education and the Louisiana State Bar Association's mentoring program by the end of December 2020.[86] Other states followed suit. Delaware cancelled its exam on July 24 and allowed 2020 graduates to practice under temporary licenses, with certain limitations.[87] Other states rescheduled their exams and moved to administer them online.[88] Florida offered its graduates the option of practicing under supervision[89] or taking the bar exam

---

exam administrations by jurisdictions, and those which had refused or accepted requests for diploma privilege. See National Conference of Bar Examiners, "July 2020 Bar Exam: Jurisdiction Information" (24 September 2020), online: *NCBE* <www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/> [NCBE, "July 2020"].

85 See US, Supreme Court of Louisiana, *Emergency Order* (By the Court, 22 July 2020), online*: LASC* <www.lasc.org/COVID19/Orders/2020-07-22_LASC_BarExam.pdf>. The four Louisiana law schools are Louisiana State University Law School, Loyola University Law School, New Orleans, Southern University Law Center, and Tulane University School of Law. Washington, Utah, and Oregon had granted emergency diploma privileges in June. See Stephanie Francis Ward, "Oregon Is Third State To Grant Diploma Privilege, While Tennessee Cancels Its July UBE" (30 June 2020), online: *ABA Journal* <www.abajournal.com/news/article/third-state-agrees-to-temporary-diploma-privilege-with-some-restrictions>.

86 See US, Supreme Court of Louisiana, Press Release, "Louisiana Supreme Court Announcement Regarding 2020 Bar Examination" (22 July 2020), online: *Louisiana Supreme Court* <www.lascba.org/news.aspx#:~:text=The%20Louisiana%20Supreme%20Court%20(the,24%2C%202020%20has%20been%20cancelled.>.

87 US, Supreme Court of Delaware, *In Re Certified Limited Practice Privilege For 2020 Delaware Bar Applicants* (By the Court, 12 August 2020), online: <courts.delaware.gov/rules/pdf/OrderCertifiedLimitedPracticePrivilege2020.pdf>.

88 See NCBE, "July 2020", *supra* note 84.

89 US, Supreme Court of Florida, *In Re: Covid-19 Emergency Measures Relating to the 2020 Bar Applicants—Creation of the Temporary Supervised Practice Program* (No. AOSC20-80) (By the Court, 24 August 2020), online:

online.[90] Other jurisdictions created other variations, but some states offered the traditional in-person exam.[91] Overall, law schools seem to have adjusted quickly, and fairly well, to pandemic challenges. Although online teaching is not the preferred environment, legal academics understood quite early that they needed to provide a continuous learning experience for their students, and they provided it within days of the decision to close down campuses in the spring of 2020.[92] However, bar examiners delayed decisions, repeatedly made changes, and left examinees with little certainty during the period from May through the fall.[93] As a result, thousands of law graduates failed to take the bar exam during the period as:

> [t]he National Conference of Bar Examiners reports that about 38,000 candidates took one of the exams that states offered between July and October 2020. But 46,370 candidates took the July 2019 bar exam. Law schools conferred more JDs in 2020 than in 2019. So why did the number of bar takers plunge by almost one-fifth? Some graduates secured licenses through pandemic-based diploma privileges or supervised practice, but those numbers were small. Most of the missing bar takers are qualified candidates who could not overcome the obstacles that the pandemic and bar examiners placed in their way. [94]

<www.floridasupremecourt.org/content/download/643402/file/AOSC20-80.pdf>.

90 US, Supreme Court of Florida, "Florida Bar Exam Rescheduled for October 13th" (26 August 2020), online: *Florida Supreme Court* <www.floridasupremecourt.org/News-Media/Court-News/Florida-Bar-Exam-rescheduled-for-October-13?_ga=2.209456978.1563396964.1598530659-2114326372.1598530655>.

91 See NCBE, "July 2020", *supra* note 84.

92 Deborah Jones Merritt et al, "Pandemic Bar Exams Left Many Aspiring Lawyers Behind" (6 January 2021) *Bloomberg Daily Tax Report*.

93 *Ibid*.

94 *Ibid*.

The NCBE did not indicate whether these potential candidates simply delayed sitting for the exam or abandoned plans altogether.[95]

The COVID-19 pandemic re-introduced the idea of using diploma privilege (albeit temporarily) to allow spring 2020 law graduates to practice law because of the recognized difficulty of administering in-person or online bar exams. It also brought into focus arguments about the efficacy and usefulness of the exam as a measure of competency.

B. Reactions of Some Spring 2020 Law School Graduates

Recent graduates began to analyze the impact of COVID-19 on the delay of bar exam administrations quite early. Dillon Harris, then working at the Prince Law Offices, Bechtelsville, PA, [96] described the problems of young graduates attempting to qualify as lawyers in one jurisdiction and transfer passing scores to another jurisdiction that does not offer reciprocity for part or all of the first jurisdiction's exam. [97] In a second blog post, he described the emerging movement toward granting diploma privilege and made clear that he, like other recent graduates, thought this option was a good option given the disarray the pandemic had caused.[98]

---

95 *Ibid.*

96 See Prince Law Offices PC (2021), online*: Prince Law Offices* <www.princelaw.com/>.

97 Dillon Harris, "How COVID-19 Has Impacted New Attorney Licensing In PA" (25 June 2020), online: *Prince Law Offices Blog* <blog.princelaw.com/2020/06/25/how-covid-19-has-impacted-new-attorney-licensing-in-pa/>.

98 Dillon Harris, "Impact of COVID-19 on New Attorney Licensing Part 2: Diploma Privilege" (2 August 2020), online: *Prince Law Offices Blog* <blog.princelaw.com/2020/08/02/impact-of-covid-19-on-new-attorney-licensing-part-2-diploma-privilege/>.

C. Responses from Employers, Summer 2020

Legal employers responded to the pandemic by shifting to work from home and moving procedures online and, in particular, taking seriously the situation of recent law school graduates who had planned to take the July 2020 bar exam and who were now facing uncertainty. Generally, law firms, agencies, judges, and other employers for whom law licensure is the entry credential for a new hire give their new law graduates one chance to pass the bar exam. Normally, that chance comes with the first administration of the bar exam after new employees graduate. Many spring 2020 law graduates found that the pandemic disrupted their plans to take the July bar exam, and possibly administrations after July.

Understanding that incoming hires would be unable to take the bar exam prior to beginning work, beginning in the summer of 2020 a number of law firms made adjustments in their expectations with regard to when first year associates could take the bar exam. Depending on the jurisdiction, some firms initially relied on their states' Supreme Court guidance to make decisions. A number of firms shortened their summer clerkships. For example, Akin Gump Strauss Hauer & Feld cut its summer associate program from ten to five weeks and converted it to a remote program. It also paid associates for the entire originally scheduled ten-week program and indicated that it expected the participants would receive offers to return, either as summer associates the next year or as first year associates on graduation.[99] Other firms, such as Ropes & Gray and Schulte, Roth & Zabel, made equally generous arrangements.[100] Some firms, such as Thomson Hine, decided to push back the beginning of their summer associate program because they wanted to preserve an in-person program.[101] Such firms also made clear the situation was still evolving and they

---

99 ALM Staff, "Summer Associate Programs and COVID-19: How Law Firms Are Responding" (20 May 2020) *The Recorder*.

100 *Ibid*.

101 *Ibid*.

wanted to see how it proceeded before making final plans for the summer.[102] Some firms continued to prefer bar licensure over diploma privilege, however, which put pressure on new graduates to take the bar exam, even if the local jurisdiction had offered the diploma privilege alternative.[103]

However, even by the end of July 2020, when many law firms had made offers to new law graduates, things were still chaotic because so many states had delayed or cancelled bar exams,[104] or substituted some kind of temporary diploma privilege to bridge the gap. On September 24, 2020, the NCBE provided an updated list of canceled, remote, and in-person bar exam administrations by jurisdictions, and those which had refused or accepted requests for diploma privilege.[105]

As the pandemic continued, various jurisdictions continued to issue delays or cancellations for their intended in-person exams. Others moved to administer online exams. Many of the online examinations have received criticism, particularly for technical glitches. Some test takers alleged that the first online

---

102 *Ibid*.

103 Caroline Spiezio, "Despite Diploma Privilege in WA, Some Firms Want Grads to Take Bar Exam" (22 June 2020) *Reuters*.

104 Louisiana was the first state to cancel both in-person and online bar exams. On July 15, 2020, it canceled its modified one-day exam, which it had planned to administer on July 27. See DiPiazza, *supra* note 84. On September 24, 2020, the NCBE provided an updated list of canceled, remote, and in-person bar exam administrations by jurisdictions, and those which had refused or accepted requests for diploma privilege. See NCBE, "July 2020", *supra* note 84.

105 See DiPiazza, *supra* note 84.

The present head of the NCBE, Judith Gundersen, has come in for a fair amount of criticism because, like her immediate predecessor, Erika Moeser, she is a graduate of a Wisconsin law school and has never taken a bar exam. See Paul Caron, "Queen of the Multistate Bar Exam Bids Adieu" (20 August 2017), online (blog): *TaxProfBlog* <taxprof.typepad.com/taxprof_blog/2017/08/queen-of-the-multistate-bar-exam-bids-adieu.html>; Henry Greenstein, "The Bar Exam and Its Impact on the Legal Business" (17 February 2021), online: *National Center for Business Journalism* <businessjournalism.org/2021/02/the-bar-exam-and-its-impact-on-the-legal-business/>.

examination, in October 2020, presented problems during the second day of administration.[106] One candidate, who took the New York state bar exam, said he encountered repeated software crashes that day and believes that ExamSoft, the company providing the software, expected the problems, which the company denies.[107] Another issue that developed over the months that bar examiners administered bar exams online was the allegation that some candidates cheated on the exam. This allegation arose from the way that the software monitors candidates' presence during the exam. Briefly, candidates must ensure that they remain within strict view of their computer webcams; straying outside triggers alerts.[108] Candidates reported being unable, for example, to take bathroom breaks or attend to emergencies in private during the exam period.[109] In addition, the software uses facial recognition technology and tends to misidentify people of color, also triggering cheating allegations.[110]

Examinees from the July 2021 bar exam also reported problems, including "technical failures" and "blank screens".[111] Many bar exam takers also reported frustration with a lack of response from ExamSoft, the company providing the software and testing.[112] The response from the NCBE was also interesting. "We

---

106 Stephanie Francis Ward, "Amid Claims That Online Bar Exam Went Well, Some Test-Takers Have a Different View" (20 October 2020), online: *ABA Journal* <www.abajournal.com/web/article/amid-claims-that-online-bar-exam-went-well-some-test-takers-have-a-different-view>.

107 *Ibid*.

108 Sam Skolnik & Jake Holland, "Cheating Scandal Aside, New Bar Exam Looks a Lot Like Old One" (1 February 2021) *Bloomberg Law* [Skolnik & Holland, "Cheating Scandal"].

109 Sam Skolnik, "October Online Bar Exams Spark Technology, Privacy Concerns" (18 August 2020) *Bloomberg Law*.

110 Skolnik & Holland, "Cheating Scandal", *supra* note 108.

111 Katheryn Tucker, "Remote Bar Examinees Report Blank Screens, Lost Time, Panic, and 'Looking Death in the Eye'" (28 July 2021), online: *Law.com* <www.law.com/2021/07/28/remote-bar-examinees-report-blank-screens-lost-time-panic-and-looking-death-in-the-eye/?slreturn=20220225191115>.

112 *Ibid*.

are aware of the technical issues some examinees faced during today's administration", the group said in a Twitter post.[113] They continued, "[w]hile NCBE does not administer the exam, we are communicating with ExamSoft to seek solutions for those affected".[114]

The NCBE advised examinees to contact ExamSoft for problems with software and their jurisdictions for issues relating to "lost testing time",[115] although examinees might not be able to tell how and whether the latter issue correlated to the former.

As confusion and criticism over bar exam administration continued, the movement to dispense with the bar exam altogether and return to diploma privilege began to take hold. In the summer of 2020, a group called United For Diploma Privilege[116] asked a New York state appellate court to allow a hearing over allowing diploma privilege rather than the scheduled bar exam.[117]

On June 1, 2021, the NCBE announced that it expected state bar examiners to return to the practice of in-person bar exams in February 2022.[118] The NCBE noted that, "[t]he July 2021 bar exam is expected to be the last that includes a remote testing option; 29 jurisdictions plan to administer that exam remotely,

---

113 NCBE, "We are aware of the technical issues some examinees faced during today's administration. While NCBE does not administer the exam, we are communicating with ExamSoft to seek solutions for those affected" (27 July 2021 at 5:07pm), online: *Twitter* <twitter.com/NCBEX/status/1420174150975463424?cxt=HHwWgICtwbW3vLUnAAAA>.

114 Tucker, *supra* note 111.

115 *Ibid.*

116 Now called National Association for Equity in the Legal Profession on Twitter as @NA4ELP.

117 Valerie Strauss, "Why This Pandemic Is a Good Time To Stop Forcing Prospective Lawyers to Take Bar Exams" (13 July 2020) *The Washington Post*.

118 National Conference of Bar Examiners, "NCBE Anticipates Return To In-Person Testing For February 2022 Bar Exam" (1 June 2021), online: *NCBE* <www.ncbex.org/news/ncbe-anticipates-return-to-in-person-testing-for-february-2022-bar-exam/>.

while 24 will administer it in-person".[119] It pointed out, however, that public health authorities in each jurisdiction have the authority to determine that conditions might require that candidates take the exam remotely.[120]

Legal employers, both in the private and public sectors, have also had to contend with claims from women, people of color, and underserved employees about the extent to which their usual expectations about work output conflict with realities the pandemic imposes. In particular, women who usually handle the bulk of childcare and housework cannot meet the increased demands of both when children are learning online or regular childcare is not available, and cleaning services are not available, all due to the pandemic.[121] One report notes that employees do not want to reveal difficulties to their employers,[122] which suggests that employers need to make extra efforts to uncover these problems without prejudice to the more burdened members of their workforces.[123] If established employees reported these issues, beginning employees, like those just entering the workforce, found the problems even more daunting. In a podcast episode, judicial law clerk Graham Bryant noted that new graduates attempting to enter the legal profession in the summer of 2020 faced, among other problems, low or no hiring possibilities, difficulties in establishing networks, higher levels of stress due to loan payments, childcare issues, and loneliness.[124]

---

119 *Ibid.*

120 *Ibid.*

121 Cynthia L Cooper, "Work-Life Imbalance: Pandemic Disruption Places New Stresses on Women Lawyers" (2020) 28:2 Perspectives 3; Liane Jackson, "How Pandemic Practice Left Lawyer Moms Facing Burnout" (1 August 2021), online: *ABA Journal* <www.abajournal.com/magazine/article/how-pandemic-practice-left-lawyer-moms-on-the-verge>.

122 "The Impact of COVID-19 on Working Parents (Report)" (29 September 2020) online: *Catalyst* <www.catalyst.org/research/impact-covid-working-parents/>.

123 *Ibid.*

124 Sharon Nelson et al, "COVID-19 Is Brutal To Young Lawyers" (27 August 2020), online (podcast): *Legal Talk Network*

V. Enduring Effects of the Pandemic

A. Replacing, Altering, or De-Emphasizing the Bar Exam

One of the concerns during the pandemic, as I note above, has been the difficulty of administering the bar exam remotely. Diploma privilege alleviates the problem of administering a bar exam. However, for those who criticize the diploma privilege option, the legal profession is at work formulating alternatives to the one-size-fits-all bar exam that takes into account the increasing demand that law school graduates show practice ready skills on completion at graduation or soon after.[125]

Some alternatives to taking multiple bar exams already exist. As I note above, some states offer reciprocity if an attorney has already been admitted in one jurisdiction.[126] Another alternative might be a uniform exam that tests each candidate on the same material in each jurisdiction. The Uniform Bar Exam ("UBE") already exists and is an attempt to create this solution. However, not

<legaltalknetwork.com/podcasts/digital-edge/2020/08/covid-19-is-brutal-to-young-lawyers/>.

125 One of the reasons law schools continue to feel such pressure that new graduates have such skills is that the old model that law school graduates have time acquire skills 'on the job' exists less than it did. In the past, law schools had the luxury of teaching doctrine, able to rely on the fact that employers would teach new graduates skills after licensure. That is no longer uniformly the case. While large law firms continue to guide young lawyers in the acquisition of practice skills, smaller law firms have neither the time nor the money to do so. See David Van Zandt, "Client Ready Law Graduates" (2009) 36:1 Litigation 11.

126 See Kerr, *supra* note 5 and accompanying text.

all jurisdictions administer this exam,[127] and at least one jurisdiction that had adopted it is reconsidering that decision.[128]

In June 2021, a Task Force created by the Oregon Supreme Court forwarded its final recommendations concerning two alternatives to one of the current components of the total packages of requirements Oregon law graduates must complete in order to satisfy licensure.[129] One is the Oregon Experiential Pathway ("OEP"), and the other is a supervised pathway ("SPP").[130] The Task Force noted:

---

127 See National Conference of Bar Examiners, "Uniform Bar Examination. Jurisdictions That Have Accepted the UBE" (2021), online: *NCBE* <www.ncbex.org/exams/ube/>.

128 See Federation of State Medical Boards, "State Specific Requirements for Initial Medical Licensure" (2021), online: *FSMB* <www.fsmb.org/step-3/state-licensure/#:~:text=2%20years-,Time%20Limit%20for%20Completing%20Licensing%20Examination%20Sequence,additional%20attempts%20at%20Step%203>.

Other alternatives include virtual practice, although virtual practice might raise disciplinary and ethical questions. See Eli Wald, "Federalizing Legal Ethics, Nationalizing Law Practice, and the Future of the American Legal Professional in a Global Age" (2011) 48:1 San Diego Law Review 489.

Finally, lawyers who practice in the federal courts might be able to practice anywhere in the United States. Under 8 C.F.R. 292.1(a)(1) an immigration lawyer may represent clients in courts and agency proceedings anywhere. "A person entitled to representation may be represented by any of the following, subject to the limitations in 8 CFR 103.2(a)(3)". 8 CFR §1.2 defines an attorney as:

> *[a]ttorney* means any person who is eligible to practice law in, and is a member in good standing of the bar of, the highest court of any State, possession, territory, or Commonwealth of the United States, or of the District of Columbia, and is not under any order suspending, enjoining, restraining, disbarring, or otherwise restricting him or her in the practice of law.

129 See Oregon State Board of Bar Examiner, "Recommendation of the Alternatives to the Bar Exam Task Force" (18 June 2021), online (pdf): *Task Forces* <taskforces.osbar.org/files/Bar-Exam-Alternatives-TFReport.pdf>.

130 *Ibid.*

> [c]urrently, there are several components to admission in addition to sitting for and passing the bar examination, including graduating from an ABA accredited law school, passing a character and fitness review, and passing the Multistate Professional Responsibility Examination (MPRE). The proposed alternative pathways are intended to offer only an alternative to a single component of admission: sitting for and passing the Uniform Bar Examination (UBE). The other components of admission would remain unchanged by the adoption of these alternative pathways.[131]

The OEP would function during law school and relies on a set curriculum which Oregon law schools would make available. It relies heavily on the skills curriculum as:

> [a]t the core of the OEP is recognition of the value of experiential learning. The experiential focus reinforces the curricular changes that have already begun at each of the Oregon schools. More specifically, law schools across the country are in a period of transformation-moving from traditional doctrinal-focused courses to an innovative and experiential legal education. Although this trend toward implementation of experiential learning in law schools has been happening for quite some time, in 2015, the ABA, for the first time, mandated that every law student complete at least six credit hours of experiential learning prior to graduation.[132]

The Oregon Task Force proposals have obviously taken into account not just the effects of the pandemic but also the much more long-term critique of legal education.

Another idea might be to test law students not just once, at the end of the three years of study, but periodically, for example, once a semester, or once a year, over several agreed-upon matters taken in the first, second, and third years. Such a scheme might be unpopular and expensive. But it might address questions about competency. Similarly, David Friedman, a professor at

---

131 *Ibid* at 2.

132 *Ibid* at 8.

Willamette University School of Law, has suggested that lawyers undergo periodic retesting.[133]

If the legal profession wishes to keep the bar exam as a general test of competency, another approach might be to acknowledge that it measures competency only at one point and to require attorneys who plan to limit their practices to particular areas of the law to take exams only in those areas of the law at specific periods (every five years, or every eight, or every ten years, for example). One of the reasons for testing and re-testing is that a frequent claim for the bar exam's efficacy is that it preserves some guarantee that previously successful candidates continue to be competent, maintain their awareness of changes in the field, and are responsible and ethical members of the bar. If that is true, we would expect that successful bar exam passage correlates to lower rates of disciplinary sanctions. Statistics seem mixed on this point.[134] Retesting in some areas, both substantive and in areas of professional responsibility, might reinforce necessary messages. Currently, the profession delivers substantive updates, including professional responsibility and legal ethics information through the continuing legal education mechanism, which requires only that the admitted attorney attend an approved Continuing Legal Education ("CLE") session, submit the appropriate forms, and obtain credit through the approved CLE-granting institution.[135] The profession places great faith in its members by adopting this model. It is possible, however, that it should require some greater accountability. One scholar writes:

> [t]he costs of the CLE system today are enormous, and its burdens fall most heavily on new lawyers, public interest lawyers, solo practitioners, and others in the profession with relatively high debt and lower incomes. Moreover, although the competence, ethics, and public relations justifications remain in

---

133 David A Friedman, "Do We Need a Bar Exam…For Experienced Lawyers?" (2022) 12 Irvine Law Review Working Paper, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3803623>.

134 See *e.g.* Goforth, *supra* note 45.

135 American Bar Association, "Events and CLE Facts" (2021), online: *ABA* <www.americanbar.org/groups/departments_offices/abacle/clefaqs/>.

> heavy rotation, no evidence-based reason has emerged to support the conclusion that CLE bears any relationship — much less a causal one — to better lawyering.[136]

Whether we decide to maintain the bar exam as the accepted standard of competence for law graduates or choose to move to one or more alternatives, we should consider the difficulties that the pandemic has revealed to us. The most obvious is the difficulty of administering in-person or online one-time exams at a scheduled time for thousands of graduates.[137] Spreading competency over a series of months, for example, might address that problem. Perhaps looking at the bar exam as the first of a series of competency exams, instead of the only exam, would be a way to recalibrate the way we think about certifying practitioners. We could then require practitioners to take specialized exams, in whatever area of law they decide to practice (trusts and estates, family law, criminal law, securities law, patent and trademark, for example). To quote Justice Holmes:

> [i]t is revolting to have no better reason for a rule of law than that so it was laid down in the line of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and rule simply persists from blind imitation of the past.[138]

Some state regulators seem more interested in re-introducing the option of jurisdictionally specific exams, even though they had adopted the UBE. For example, New York had opted into use of the UBE. However, in June of 2021,

---

136 Rima Sirota, "Can Continuing Legal Education Pass the Test? Empirical Lessons From the Medical World" (2022) Notre Dame Journal of Law, Ethics & Public Policy Working Paper, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3857997>.

137 The bar exam is not the only exam that has encountered problems. Other online exams, previously administered in-person, have also been problematic. See *e.g.* Valerie Strauss, "College Board Changing How AP Test-takers Can Submit Answers after Complaints of Botched Online Exams" (17 May 2020) *The Washington Post*.

138 Oliver Wendell Holmes Jr, "The Path of the Law" (1997) 110:5 Harvard Law Review 991 at 1001.

the New York State Bar Association's House of Delegates voted to approve a task force's recommendation that the state cease using the UBE and replace the exam with an exam that tests state-specific law, and is, in addition, "rigorous", in the words of the Task Force Chair.[139] As Chair Alan Scheinkman noted, the current two-day state-law specific exam, half of New York's current four-day exam, is open book and only requires candidates to pass 30 of 50 multiple-choice questions.[140] Scheinkman also said that another criticism concerns supervision of the exam as well as behavior of the examinees. He noted, "[i]t's also lent itself to cheating by groups of students taking the exam in the same room and comparing notes…". [141] Currently, states can and do administer state-law specific exams to out-of-state barred lawyers who ask for admission in their states. For example, California offers a one-day bar exam for out-of-state barred attorneys.[142]

Criticism of the bar exam and calls for its abandonment do not mean that such a radical step is the future. As the Oregon Task Force and various reports and analyses suggest, there are other approaches that could incorporate changed law school curricula that further reflects the integration of doctrine and skills. If those in charge of testing law graduates determine that the bar exam model needs some change, there will be some effect on the law school curriculum. Depending on the degree of change to the bar exam, the effects could be minor and selective, or they could be major. Some changes, including those that emphasize the acquisition of practice ready skills, were already underway before the pandemic. However, because so many graduates entered the legal market

---

139 Sam Skolnik, "N.Y. Should Withdraw from Uniform Bar Exam, State Bar Group Says" (14 June 2021) *Bloomberg Law*.

140 *Ibid*.

141 *Ibid*.

142 California administers a one-day exam to out of state attorneys who meet the criteria. See State Bar of California, "Changes to the California Bar Exam" (2021), online: <www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/Changes-to-Bar-Exam>.

without the bar exam credential and uncertain of when they might acquire them, those skills acquired more attention than they might otherwise have had.

One model that might be instructive is the medical school model, not because law schools should necessarily adopt all of the features of medical school education, but because medical education has already thought about integrating doctrine and skills for a long time. The idea that an examination of the medical education model might be useful in considering legal education is not new. In a 1981 article, Robert Hardaway suggested that the 1907 Flexner Report, an influential discussion of medical education, might be helpful in addressing some of the deficiencies critics have identified in existing legal education, even with the introduction of clinics, fieldwork, and more skills training.[143] Medical schools offer a different educational model from law school, and the medical profession uses a different testing model from the one used in the legal profession. Medical education has been shifting to competency-based testing for some time.[144] However, this testing includes written and oral communication, social skills, and critical thinking,[145] all of which are also necessary to lawyers.

The medical profession tests when medical school graduates begin practice, whether or not they continue on to residencies.[146] Physicians cannot obtain reciprocal licensing in various jurisdictions; they must request separate licensing

---

143 See Robert M Hardaway, "Legal and Medical Education Compared: Is It Time for a Flexner Report on Legal Education?" (1981) 59:3 Washington University Law Quarterly 687.

144 AAMC Group on Student Affairs ("GSA") Committee on Admissions ("COA"), "Core Competencies for Entering Medical Students" (2021), online: *AAMC* <www.aamc.org/services/admissions-lifecycle/competencies-entering-medical-students>. The movement may have started as far back as the 1970s. See William McGaghie et al, "Competency-based Curriculum Development in Medical Education: An Introduction" (1978) 68:1 World Health Organization Public Health Papers 91.

145 McGaghie et al, *ibid*.

146 American Medical Association, "Navigating State Medical Licensure" (2021), online: *AMA* <www.ama-assn.org/residents-students/career-planning-resource/navigating-state-medical-licensure>.

in each jurisdiction.[147] The Federation of State Medical Boards maintains a central database that holds physicians' credentials that state medical boards may check to verify physician credentials.[148] The licensing exams that physicians must complete can take years to finish, and there is some concern that young physicians could reach a time limit or attempt limit before finishing them.[149] In contrast, a few jurisdictions limit law school graduates to attempts to pass the bar.[150]

An obvious difference between medical and legal education is the length of time that practitioners take to complete formal education. The idea that law school should take a longer, rather than a shorter, amount of time to complete would undoubtedly be unpopular, given the current and likely continuing cost of legal education, and new legal graduates' difficulty in finding employment that allows the repayment of the cost of that education within a reasonable number of years. Yet the pandemic has forced legal academia to rethink the way it delivers the educational experience technologically and pedagogically for a temporary period, which could in turn offer us ways to rethink ways of delivering the law school experience long-term. Such a re-evaluation could also allow us to re-evaluate not just technology and pedagogy, but whether legal education needs to be as expensive and as stressful as it is right now.

For example, those of us in legal education might continue to think about recalibrating the doctrinal and skills mix throughout the usual three-year law school experience. If law schools concentrated on continuing to present doctrine and skills full-time during the first year, they might then think about splitting the educational day between doctrinal/skills classes and on the job training in

147 *Ibid.*

148 *Ibid.*

149 Some states limit attempts at three and years at seven, for example. See Federation of State Medical Boards, *supra* note 128.

150 Judith A Gundersen & Claire J Guback, "Comprehensive Guide to Bar Admissions Requirements" (2020), online (pdf): *NCBE* <www.ncbex.org/assets/BarAdmissionGuide/CompGuide2020_021820_Online_Final.pdf>.

the latter years. This arrangement would allow students to spend half the day in class and then half in externships or work in the second and third years. Students who opt to work could more easily earn money while in school to help them defray the cost of law school. Students could work in the morning (or afternoon) and attend class the rest of the day. Another approach might be to alter the current academic year to encompass the calendar year, allowing students to attend classes and work year-round. The physical plant and staff of a law school already exist. Faculty could select two out of the three semesters of the year to teach if the school is on a semester schedule, three of the four quarters, if the school is on the quarter system, or two of the three trimesters, if the school is on a trimester schedule. The ABA requires that a semester be 15 weeks,[151] but for schools that follow semester schedules it might also be possible to adjust semesters to fewer than 15 weeks to accommodate a change to three complete semesters a year (thus creating trimester schedules). Such suggestions obviously need some thought and flexibility, but there is nothing about the traditional three-year, nine-month schedule that requires that we keep it in place forever. For example, some critics of the current three-year program have already suggested that law school programs be cut to two years, in part to address questions of cost.[152] If we considered a year-round program that allowed students to attend school and work, some might choose to follow such a program and finish in roughly the same calendar amount of time. Others might want to borrow funds in order to finish law school in fewer than three calendar years. Now that law school faculty and staff have more facility with online courses and technology, they might be able to explore the possibility of offering part-time programs to students with full-time careers who have not been able to think seriously about pursuing law degrees, either because of cost or time.

Schools that offer courses year-round might also be able to explore the possibility of offering more flexibility to faculty. Faculty with children in school

---

151 Currently, the ABA requires that a semester be 15 weeks. See ABA Standards, *supra* note 15 at 310.

152 Elizabeth Olsen, "The Two-Year Law Education Fails to Take Off" (26 December 2015) *The New York Times*.

might elect not to teach in the summer; faculty without childcare responsibilities but with other concerns might want to take a fall or spring semester off and teach in the summer. Faculty could teach online or in-person. Visiting faculty could teach from anywhere in the world. Students who would like to work for an entire semester could do that and return to school the next semester. Law schools would have to work at making curriculum accessible to some extent, and students would have to plan their schedules carefully and give their schools notice in order not to disrupt the income stream. Schools and employers would need to work together to find enough employment for students who wanted to pursue externships or clerkships. The traditional model, in which students often must look for employment on their own and try to fit work and classes into a 24 hour/7 day a week schedule, puts tremendous strain on students themselves. It leads to stress, students' lack of focus on some aspects of their training, and ultimately less practice ready graduates than legal academia and the legal profession would like. Students want practical training, employers want practice ready graduates, and law schools would like to integrate doctrine and skills. Note also that the ABA allows students more flexibility with regard to time to pursue their degrees than they normally take advantage of. Students might have up to seven years to complete their degree.[153]

I am not suggesting that any of these ideas would be easy to put into practice. But some of them might be interesting and advantageous for some schools to pursue and for the ABA to consider. Current law school educational costs are high and continue to rise, and unhappiness with some aspects of the existing model has been obvious for some time.[154]

---

153 ABA Standards, *supra* note 15 at 311.

154 James E Moliterno, "The Future of Legal Education Reform" (2012) 40:2 Pepperdine Law Review 423; Deborah L Rhode, "Legal Education: Rethinking the Problem, Reimagining the Reforms" (2012) 40:2 Pepperdine Law Review 437.

VI. Conclusion

The pandemic has focused attention on a number of issues that legal educators and practitioners have already been thinking about and evaluating for years. The need for rapid results has shown members of the legal profession that they can respond quickly, and to a great extent thoughtfully and competently to a long-term threat to the status quo. Cautious steps in a world in which it is easy to overlook disparities, particularly between white men and others, such as women and people of color, the wealthy and those of lower socioeconomic status, those with few or no childcare responsibilities and those with them, those with no problems to overcome in gaining access to legal education and those with disabilities. However, these disparities are no longer easy to overlook when legal education is suddenly remote and teaching is online, materials must be available in formats accessible to all students, and technology might still be available only to those with the money and space to accommodate it. Returning to the situation that existed before the pandemic, as the NCBE seems to expect, might not be so simple. Expectations are now much higher and many faculty, staff, and students seem more unwilling to return to the *status quo ante*,[155] but to carry some lessons forward. They seem willing instead to think about different approaches to delivering content, adapting technology to the classroom, rethinking how we integrate doctrine and skills, and recapturing the old

---

155 Certainly, some members of the legal profession think the pandemic has permanently changed legal practice. Some lawyers say clients seem less likely to contact them in the event of a legal problem, precisely because of fear of the virus, and the approaches developing out of COVID-19 claims might well apply to disputes arising out of similar disputes. See Abbas Poorhashemi, "Impacts of the Coronavirus COVID-19 on Legal Professionals" (24 September 2020) *Law Technology Today*. See also Randy Maniloff, "8 of the Nation's Leading Lawyers Discuss Impacts of COVID-19 on their Practice Areas" (2 June 2020), online: *ABA Journal* <www.abajournal.com/web/article/leading-lawyers-discuss-the-impact-of-the-pandemic-on-practice-areas>.

partnership between law schools and employers to ready our students for their exciting and rewarding profession.

Criticism, Crises, and Opportunity: 21st Century Challenges for U.S. Law Schools

Jonathan D Glater*

U.S. law schools confront challenges both old and new at this moment. As institutions, they face criticism of the material they teach, the methods they use to teach it, and the price they charge to students. Inextricable from such criticism is ambivalence over the role of legal education in a political environment divided over efforts to address historical and longstanding, racial injustice. And at the same time, a global pandemic has highlighted inequality of opportunity among law students, forcing law schools to consider their role in contributing and obligation to respond. These uncertain and volatile conditions may make possible far-reaching changes in legal education, with schools adopting distinct and probably more explicit ideological stances. The result may be greater attention to access and success for increasingly diverse student population, but it is also unlikely that legal education will directly resolve tensions over methods and purpose, even in the wake of a global health emergency.

* Professor of Law, University of California, Berkeley, School of Law. The author is grateful to Rachel Moran and Michael Olivas for comments on an earlier version of this Essay.

I. Introduction

Given the powerful role of law and legal institutions in the politics and culture of the United States,[1] attention to and controversy over legal education comes as no surprise. Even so, the series of challenges that the legal academy has faced in the second decade of the new millennium is striking. The popular media attacked swaths of law schools as institutions, criticizing them for deceiving students about their job prospects in the profession, charging them far too much, and leaving them indebted and unable to find employment.[2] Applications to law schools declined sharply in the years after this reporting[3] and

1 "There is, so to speak, no political event in which [one] does not hear the authority of the judge invoked": Alexis de Tocqueville, *Democracy in America*, vol 1, English ed by Eduardo Nolla, translated by James T Schleifer (Indianapolis: Liberty Fund, 2012) at 168.

2 David Segal, a reporter at *The New York Times*, led the charge with a series of articles that criticized in particular less selective law schools. See David Segal, "Law School Economics: Ka-Ching!" (17 July 2011) *The New York Times* (criticizing legal education for offering "diplomas [that] have such allure that law schools have been able to jack up tuition four times faster than the soaring cost of college. And many law schools have added students to their incoming classes — a step that, for them, means almost pure profits — even during the worst recession in the legal profession's history").

3 According to the Law School Admission Council, the number of applicants fell steeply between 2010, when applications reached a high of 87,916, and 2015, when they hit a low of 54,433 — a decline of nearly 40 percent: "Archive: 2001-2016 ABA End-of-Year Summaries – Applicants, Admitted Applicants,

scholars engaged in soul-searching debates over what law schools do, how they do it, how much they cost, and what the effects are on students who often borrow in order to pay.[4]

Very public assertions that law school was not worth the cost[5] lent new urgency to longstanding concerns about what and how law schools teach. Some have worried that legal education does not adequately prepare students for the

---

Applications" (2021), online: *Law School Admission Council* <report.lsac.org/View.aspx?Report=AdmissionTrendsApplicantsAdmitApps> [*LSAC* (2001-2016)]. The numbers have since recovered somewhat, rising to 63,384 in 2020: "Admission Trends: ABA Applicants, Admitted Applicants & Applications" (2021), online: *Law School Admission Council* <report.lsac.org/View.aspx?Report=AdmissionTrendsApplicantsAdmitApps> [*LSAC* (2020)]. In 2021, the number of applicants appears to have increased, rising to 70,674: "Three Year U.S. Volume Comparison" (2021), online: *Law School Admission Council* <report.lsac.org/ThreeYearComparison.aspx> [*LSAC* (2021)].

4 Perhaps the best-known critics were Brian Tamanaha and Paul F Campos, the authors of *Failing Law Schools* and *Don't Go to Law School (Unless),* respectively. Brian Z Tamanaha, *Failing Law Schools* (Chicago: The University of Chicago Press, 2012); Paul F Campos, *Don't Go To Law School (Unless): A Law Professor's Inside Guide to Maximizing Opportunity and Minimizing Risk* (Scotts Valley: CreateSpace Independent Publishing Platform, 2012). These books, as well as articles by Professor Tamanaha and Professor Campos, in turn fueled debates in the pages of law journals; see *e.g.* Michael A Olivas, "Ask Not For Whom the Law School Bell Tolls: Professor Tamanaha, Failing Law Schools, and (Mis)Diagnosing the Problem" (2013) 41:1 Washington University Journal of Law & Policy 101.

5 See *e.g.* Paul F Campos, "The Crisis of the American Law School" (2012) 46:1 University of Michigan Journal of Law Reform 177 at 179 (arguing that a "contraction in the employment market for new lawyers has combined with the continuing increase in the cost of legal education to produce what many now recognize as a genuine crisis for both law schools and the legal profession") [Campos, "American Law School"]; but see Michael Simkovic & Paul McIntyre, "The Economic Value of a Law Degree" (2014) 43:2 Journal of Legal Studies 249 (arguing that a legal education is worthwhile and finding that a law degree confers a pre-tax, lifetime earnings premium of approximately $1 million).

actual practice of law.[6] Others worry that legal education also does not adequately prepare students to be "independent, intentional, and self-directed learners" able to thrive in law school and in the profession.[7] These concerns in turn prompted questioning of the curriculum, asking whether the program of legal education should be two years instead of three, for example, or about the need for more opportunities for experiential learning in the curriculum.[8]

Law schools' pricing, pedagogy, and substance all have an effect on who applies and enrolls. Growing recognition of disparities in educational opportunity for students who are members of historically excluded and still underrepresented groups has put additional pressure on schools both to diversify the ranks of their faculty and students, as well as to ensure that the curriculum attends to the role of law in creating and maintaining inequality. Though longstanding, underrepresentation of students of color in law school classes now persists in the same historical moment as fierce, worldwide protests over the role of race across all aspects of society take place in the wake of police killings of unarmed Black men.[9] Critical recognition of the role of law in perpetuating racial inequality, demanded by some students, has grown more salient and more controversial. Responding to the demands for inclusion of more critical perspectives in law school classes has also drawn ferocious counterattack by

---

6 Critics voiced this concern both within and outside the academy. Within: William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (San Francisco: Jossey-Bass, 2007) at 179; and outside: David Segal, "What They Don't Teach Law Students: Lawyering" (20 November 2011) *The New York Times*.

7 Jennifer A Gundlach & Jessica R Santangelo, "Teaching and Assessing Metacognition in Law School" (2019) 69:1 Journal of Legal Education 156 at 158.

8 "Report and Recommendations American Bar Association Task Force on the Future of Legal Education" (2014), online (pdf): <www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf> ["Task Force Report"].

9 See *e.g.* Norimitsu Onishi, "George Floyd Protests Stir a Difficult Debate on Race in France" (17 June 2020) *The New York Times*.

critics who decry such moves as inappropriate political activism. Opposition to exploration of historical racism has grown more intense and focused, with lawmakers in several states passing legislation aimed at curbing the teaching in K-12 schools of material generally deemed inconsistent with a hagiographic perspective of U.S. history that consigns discrimination to an irrelevant past that is best ignored.[10]

The questioning of the effects of law schools' business practices and pedagogy has occurred before and the legal academy has thrived nonetheless.[11] Indeed, as of this writing, the application numbers have recovered significantly from the lows of a few years ago[12] — a development that may undermine efforts to reform legal education or its business model. After all, increasing demand for what law schools offer may be interpreted as vindication of the *status quo* and refutation of critics. Further, apparent growth in interest in legal education may have yet more symbolic meaning when it occurs in the course of a global pandemic unlike anything the world has faced in nearly a century. The pandemic prompted radical changes in teaching methods, implemented overnight as public health mandates dictated the cessation of in-person,

10 See *e.g.* FAC tit 6 §6A-1.094124(3)(b) (2019) (proscribing the teaching of "theories that distort historical events and are inconsistent with State Board approved standards [such as] the denial or minimization of the Holocaust, and the teaching of Critical Race Theory, meaning the theory that racism is not merely the product of prejudice, but that racism is embedded in American society and its legal systems in order to uphold the supremacy of white persons. Instruction may not utilize material from the 1619 Project and may not define American history as something other than the creation of a new nation based largely on universal principles stated in the Declaration of Independence").

11 Bryant G Garth, "Crises, Crisis Rhetoric, and Competition in Legal Education: A Sociological Perspective on the (Latest) Crisis of the Legal Profession and Legal Education" (2013) 24:2 Stanford Law & Policy Review 503 at 506–509 (describing depression-era criticism of legal education and likening that criticism to the more recent variety); see also Simkovic & McIntyre, *supra* note 5 at 252-53 (summarizing criticism of cost of law school).

12 See *LSAC* (2001-2016), *LSAC* (2020), *LSAC* (2021), *supra* note 3.

classroom teaching.[13] Whether any of those changes will survive the end of pandemic isolation measures is an open question; the pandemic is, then, a fourth challenge that simultaneously may open a window of opportunity for meaningful change.

Legal education thus confronts multiple, powerful criticisms. The business model is under fire because legal education is perceived as too costly relative to the financial benefit to graduates. The substance of the curriculum is under fire as irrelevant to practice and/or insufficiently attentive to the role of law in perpetuating inequality, both implicating institutional mission. The processes used to select students and to hire faculty are under fire for failure to result in populations that look like that of the nation as a whole, a criticism that also implicates institutional mission. This Essay argues that the global pandemic has made possible institutional innovation that in the past has been elusive.

It is striking that three of these challenges, captured in the criticism of law schools, have presented themselves at earlier times, too; concern over the gap between what law schools teach and what lawyers need to know is certainly not new.[14] While the health crisis precipitated by the spread of COVID-19 has highlighted challenges faced by law students, in particular, the challenges themselves — the cost to them of their legal education, the teaching methods of law schools, among others — are not new. Perhaps what *is* new, and what has made discussion of legal education more fraught, is the degree to which decisions about legal education are seen — or explicitly recognized — as political decisions. What law schools teach, how they teach it, what they exhort their

13 Jonathan D Glater, "Pandemic Possibilities: Rethinking Measures of Merit" (17 June 2021) at note 5 and accompanying text, online (blog): *UCLA Law Review Discourses* <www.uclalawreview.org/pandemic-possibilities-rethinking-measures-of-merit/> [Glater, "Pandemic Possibilities"].

14 Eli Wald puts it bluntly at the start of a 2021 article: "[f]or a century, critics have called for a law school reform agenda centered around integrating skills and formation of professional identity into the mainstream of legal education, only to be ignored …": Eli Wald, "Formation Without Identity: Avoiding a Wrong Turn in the Professionalism Movement" (2021) 89:3 University of Missouri-Kansas City Law Review 685 at 685.

students to go forth and accomplish, all have partisan, political significance. Decisions made by law school administrators and faculty have implications for the credibility of the legal academy as a source of neutral perspective and perhaps of the law as an objective institution. These are weighty concerns indeed. But more worrisome is the prospect that in an effort to avoid appearing partisan, the legal academy also avoids adopting a morally correct stance consistent with both the rule of law and the demands of justice.

The discussion that follows examines this set of challenges confronting law schools and ponders paths forward in a time of political volatility. Part II describes the financial model and summarizes criticism of that model, identifying the consequences for students of rising tuition, increasing indebtedness, and distribution of financial aid to recruit high-scoring students rather than support those with financial need. Part III turns to the substance of legal education, noting the modest changes made in the century and a half since Langdell pioneered the use of the case method. Part IV turns to the reckoning with racial injustice made more evident by the context of the global pandemic. Part V notes the difficulty of responding to the challenges already identified, if there is no overriding mission statement to provide guidance. The final substantive Part then explores the costs and benefits that attach to different responses to those challenges, given the degree of polarization around legal education and the law in a dynamic and politically tense moment. There follows a brief conclusion.

II. The Financial Model

The dominant criticism of law schools in recent years has begun, and often enough been limited to, cost.[15] By cost, critics typically mean the price that students pay, not the cost of operations, although faculty salaries routinely come under fire, too.[16] According to *U.S. News & World Report,* which collects data on the costs of law school, tuition and fees at a private, nonprofit law school in

15 See *e.g.* Tamanaha, *supra* note 4.

16 See *e.g.* Campos, "American Law School", *supra* note 5 at 187–91.

the 2020-2021 academic year cost more than USD $50,000;[17] the total cost, including room and board, would necessarily be greater. However, what each student actually pays is the result of a complex system, and the effects of what students pay — and, often, how much they borrow in order to pay — for their legal education are many and likely subtle. This Part first describes the costs of law school for students, then turns to the potential effects that the high and rising price has on their lives after obtaining a degree.[18]

When critics attack tuition, the argument is not simply that law school costs more than it should, but that it is not a worthwhile investment. As Paul Campos wrote in 2012: "[i]f the cost of becoming a lawyer continues to rise while the economic advantage conferred by a law degree continues to fall, then eventually both the markets for new lawyers and for admission to law school will crash".[19] This is a straightforward cost-benefit argument, resting on assumptions about why students pursue legal education that this Part will explore in more detail below,[20] and it is couched as a warning to law schools that they must reduce their prices or risk financial ruin.

While the financial collapse of legal education has yet to materialize, the cost-benefit critique still resonates for law students, who after all are the people who bear the burden of debt. For a particular student, it may well be that the wage to be earned after graduation is insufficient to manage the repayment obligation comfortably. Not surprisingly, the question of whether law school confers an income benefit that justifies the cost has drawn scholarly scrutiny; Michael Simkovic and Frank McIntyre find that a law degree leads to a lifetime income

17 Farran Powell & Ilana Kowarski, "10 Law Schools that Offer the Most Tuition Help" (14 April 2021) *U.S. News & World Report*.

18 Limiting the analysis to students who complete the course of study is not intended to diminish the impact of cost and indebtedness for students who do not graduate. These students may find themselves in an extremely difficult financial position, lacking the anticipated income boost from obtaining a *juris doctor* while confronting the obligation to repay student loans.

19 Campos, "American Law School", *supra* note 5 at 178–79.

20 See *infra* traditional knowledge.

boost of USD $1,000,000, a sum that certainly exceeds the cost of a legal education, at least for now.[21] Their finding does not mean every law school graduate experiences this kind of benefit — far from it.[22] But it does refute the equally vague and potentially misleading claim that law school is generally not a worthwhile financial investment.

Law school tuition has risen. A task force of the American Bar Association reported in 2015 that between 1999-2000 and 2014-2015, tuition at private law schools rose by 29 percent and by 104 percent at public law schools.[23] Net tuition, a figure taking into account scholarship aid to students, rose 29 percent at private institutions and 102 percent at public institutions.[24] Not surprisingly, student borrowing has increased as well. The same 2015 report found that in 2012-2013, total borrowing by students at private law schools on average reached USD $127,000 and by students at public law schools, USD $88,000.[25] That was eight years ago, and the numbers have increased since. At the same time, institutions of higher education generally have had to weather the uncertain revenue environment created by the pandemic, and law schools are not immune. Both public and private institutions are vulnerable, the former in particular as state revenues wane and perhaps, with the benefit of federal support, wax.

Rising costs to students mean that access to credit is increasingly important, and that has serious implications. First and perhaps most obviously, the burden of debt is not evenly distributed across the student population: those students

---

21 Simkovic & McIntyre, *supra* note 5.

22 The authors acknowledge this, observing that "individual outcomes vary", *ibid* at 285.

23 Memorandum from Dennis W Archer to Interested Parties (17 June 2015) at "Task Force on Financing Legal Education", online (pdf): *American Bar Association* <www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2015_june_report_of_the_aba_task_force_on_the_financing_of_legal_education.pdf>.

24 *Ibid* at 8.

25 *Ibid*.

whose backgrounds are less privileged are more likely to need to borrow and to borrow larger amounts. Thus, the debt finance structure penalizes those who arrive at law school with greater financial need. The repayment obligation at the back end, in turn, weighs on students as they make career choices. While there is not extensive research on this, much of what exists suggests that debt leads students to enter the private sector rather than seek lower-paying, public interest opportunities that they might have wished to pursue otherwise.[26] The debt burden also affects other life decisions, like having a family or buying a house.[27] And the mere prospect of debt deters some number of students from pursuing a law degree entirely.[28]

These hard financial realities have disproportionate demographic effects, as Dalié Jiménez and I have argued.[29] Black students, who are more likely to

---

26 See *e.g.* Erica Field, "Educational Debt Burden and Career Choice: Evidence from a Financial Aid Experiment at NYU Law School" (2009) 1:1 American Economic Journal: Applied Economics 1 (reporting on positive impact on pursuit of public interest jobs when law school offered grant aid to students rather than loans); see also Christopher J Ryan, Jr, "Paying for Law School: Law Student Loan Indebtedness and Career Choices" (2021) 2021:1 University of Illinois Law Review 97 at 130 (finding that higher law school cost of attendance correlates with a lower, stated interest in a public interest job upon graduation).

27 Much has been written on this in the popular press. See *e.g.* Yuki Noguchi, "Heavy Student Loan Debt Forces Many Millennials to Delay Buying Homes" (1 February 2019) *NPR* (describing student borrowers who have put off investing in housing as a result of their loan obligations); see also Claire Cain Miller, "Americans are Having Fewer Babies. They Told Us Why" (5 July 2018) *The New York Times* (describing student debt as factor contributing to financial insecurity and consequent reluctance to start a family).

28 See Steven A Boutcher, Anna Raup-Kounovsky & Carroll Seron, "Financing Legal Education through Student Loans: Results from a Quasi-Experiment in Tuition Remission" (2018) 67:3 Journal of Legal Education 755 at 776–77 (describing finding that debt aversion affected indebtedness and warning that the "phenomenon of fear of debt may have wider implications for how this emerging generation of law graduates manages their careers").

29 Dalié Jiménez & Jonathan D Glater, "Student Debt is a Civil Rights Issue: The Case for Debt Relief and Higher Education Reform" (2020) 55:1 Harvard Civil Rights-Civil Liberties Law Review 131 at 131–32 (observing that Black

borrow and to borrow larger amounts than other students,[30] consequently have a heavier repayment burden weighing on them when they complete a course of study. Latinx students may be less likely to borrow, but those who do are more likely to default. Disparities in wealth and wages along lines of race[31] mean that repayment of any given amount is more challenging for Black and Latinx borrowers in particular. Student loans simultaneously make higher education and its desirable corollary, a pathway to far greater economic security,[32] more accessible while ensuring that members of the same groups historically subject to discrimination attain less of a benefit because of debt.[33]

---

and Latinx students "are disproportionately likely to borrow, to borrow larger amounts, to take out student loans to attend for-profit schools with worse career outcomes, and to default on their loans relative to their White peers" and that while Latinx students are less likely to borrow than White students but those who do are also more likely to attend a for-profit institution and to default than White students).

30 *Ibid*.

31 Brandon Fuller, "Understanding the Racial Wealth Gap" (2020), online (pdf): *Federal Reserve Bank of Richmond* <www.richmondfed.org/-/media/RichmondFedOrg/publications/research/econ_focus/2020/q4/at_the_richmond_fed.pdf>; see also Neil Bhutta et al, "Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances" (28 September 2020), online: *Board of Governors of the Federal Reserve System* <www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm> (contrasting wealth of different racial and ethnic groups); on the wage gap between Latinx workers and White workers, see Marie T Mora & Alberto Dávila, "The Hispanic-White Wage Gap Has Remained Wide and Relatively Steady" (2 July 2018), online: *Economic Policy Institute* <www.epi.org/press/the-hispanic-white-wage-gap-has-remained-wide-and-held-steady-for-decades/>.

32 Data continue to show that the financial benefit of higher education remains robust, even as the cost of attendance has risen. "Learn More, Earn More: Education Leads to Higher Wages, Lower Unemployment" (May 2020), online: *US Bureau of Labor Statistics* <www.bls.gov/careeroutlook/2020/data-on-display/education-pays.htm>.

33 Sociologists who have studied the phenomenon of student debt have dubbed this pattern "predatory inclusion". Jiménez & Glater, *supra* note 29 and accompanying text.

In the context of historical and persistent wealth and income inequality that tracks race and ethnicity, then, the rising cost of law school, the concomitant increases in indebtedness, and aversion to taking on debt all work together to undermine the appeal and feasibility of legal education for the same kinds to students who, not so many decades ago, were excluded under color of law.[34] The financing of legal education as a result contributes to unequal levels of access to the profession and stands in the way of efforts to promote inclusivity in the practice of law. The commitment to diversity expressed by the organized bar[35] thus has powerful implications for law schools' admissions and financial aid practices.

However, those admissions and financial aid practices may not level the playing field. First, law schools compete to enroll the students with the highest scores, not least because enrolled students' scores affect an institution's position on influential rankings. The LSAT test results show gaps along lines of race, with White and Asian American students receiving higher scores.[36] The admissions goal of admitting students with higher scores works against inclusion of more Black students in particular, for example.[37] Further, because law schools increasingly use scholarship aid as a lure to entice high-scoring students

34 See *Sweatt v Painter*, 339 US 629 at 631 (1950) (describing the facts of a case in which the plaintiff was denied admission to the University of Texas Law School "solely because he is a Negro"; the Court struck down the policy).

35 See *e.g.* "Diversity & Inclusion", online: *American Bar Association* <www.americanbar.org/topics/diversity/> ("[t]he ABA maintains a longstanding commitment to diversity through eliminating bias and enhancing inclusion in the Association, the legal profession, and the justice system").

36 Susan P Dalessandro, Lisa C Anthony & Lynda M Reese, "LSAT Performance with Regional, Gender, and Racial/Ethnic Breakdowns: 2007-2008 through 2013-2014 Testing Years" (2014), online: *Law School Admission Council* <www.lsac.org/data-research/research/lsat-performance-regional-gender-and-racialethnic-breakdowns-2007-2008>.

37 See William C Whitford, "Law School-Administered Financial Aid: The Good News and the Bad News" (2017) 67:1 Journal of Legal Education 4 at 9 (observing that need-based aid is critical to "enhance diversity in background in the legal profession").

regardless of their actual financial need,[38] aid practices may contribute to larger debt burdens for students with lower scores.[39] These students are disproportionately Black. Heavier debt burdens in turn almost certainly influence students as they make various career choices; those students who are unencumbered by debt, or whose debt burden is lighter, experience more freedom to take jobs that may pay less.[40]

While federal student aid programs have features intended to reduce the burden of repayment for students who enter public service careers,[41] flexible repayment plans with payments tied to borrower income,[42] and the prospect of forgiveness for students who make their payments for a period of years,[43] those programs may be politically vulnerable.[44] The Public Service Loan Forgiveness Program, too, has been very slow to cancel the debt obligations of potentially

38 *Ibid* at 7–8.

39 This pattern has drawn criticism from writers charging that the result is a regressive subsidy from poorer, lower-scoring students to better-off, higher-scoring students. Jerome M Organ, "Net Tuition Trends by LSAT Category from 2010 to 2014 with Thoughts on Variable Return on Investment" (2017) 67:1 Journal of Legal Education 51 at 74–75 (describing "this pattern of awarding scholarships [as] pretty well-entrenched within legal education").

40 See Steven A Boutcher, Anna Raup-Kounovsky & Carroll Seron, "Financing Legal Education through Student Loans: Results from a Quasi-Experiment in Tuition Remission" (2017) 67:3 Journal of Legal Education 755 at 776 (studying effects of reducing or eliminating tuition for cohorts of students at a new law school and suggesting that financial aid that has an "equalizing effect" on students "may also open up a space for a broader swath of students to explore a wider range of career options, including public service, at career launch").

41 34 CFR § 685.219(a) (2021).

42 34 CFR § 685.209 (2017).

43 34 CFR § 685.209(a)(6) (2017).

44 The Trump Administration called for elimination of the Public Service Loan Forgiveness program, see *e.g.* Adam S Minsky, "Trump Proposes Repealing Public Service Loan Forgiveness – Can He Do That?" (11 February 2020) *Forbes*.

eligible borrowers,[45] and at least until quite recently has canceled the debt of only a small number of applicants.[46] Unfortunately, it is possible that students may be reluctant to rely on these federal aid programs.

All the financial concerns that the cost of law school rightly raises contribute, and have contributed, to a more subtle shift in thinking about legal education. More students approach their legal education with a consumer mindset, expecting a particular rate of return in the form of a well-paying job upon completion of their three years of study, as well as a particular level of service for the lofty price that law schools charge. In confronting such a consumer mindset, legal education resembles undergraduate higher education in the United States: surveys show an increasing share of college students emphasizing the employment and wage benefits of higher education as a reason to pursue their studies, even as students also cite the importance of intellectual growth.[47]

This mercantile conception of law as a career is in some tension with the historical view of the lawyer as a guardian of the public good who performs an essential role in well-functioning civil society. An American Bar Association task force a few years ago weighed the future of legal education and concluded that this "fundamental tension … underlies the current set of problems" confronting legal education.[48] Students may be forgiven for focusing on the private benefit

---

45 Some of the federal Education Department's conduct of the program led to litigation by borrowers who argued that they were eligible for debt cancellation. The Department lost. Judge Timothy J Kelly, "Memorandum Opinion, American Bar Association et al v. United States Department of Education et al, Civil Action No. 16-2476" (2019), online (pdf): *Courthouse News* <www.courthousenews.com/wp-content/uploads/2019/02/ABA.pdf>.

46 Erica L Green & Stacy Cowley, "Broken Promises and Debt Pile Up as Loan Forgiveness Goes Astray" (29 November 2019) *The New York Times* (reporting that "[f]ewer than 1 percent of those who have applied for relief under the Public Service Loan Forgiveness program have been deemed eligible").

47 Rachel F Moran, "City on a Hill: The Democratic Promise of Higher Education" (2017) 7:1 UC Irvine Law Review 73 at 85.

48 "Task Force Report", *supra* note 8 at 6–7.

of investing in legal education, given the price they are expected to pay and the need to earn enough to repay any loans used.

Viewing legal education as a private good, benefitting only the student who receives it, has a macro effect as well: the willingness of taxpayers to subsidize access to the legal profession may wane. After all, a subsidy perceived to redound to the benefit of people who will earn high incomes in an elite field must be regressive. Perhaps this shift in perspective is one reason that tuition at public law schools has risen more quickly than has that at private, nonprofit institutions — although the cost at public institutions remains lower in absolute terms:[49] law schools have long been viewed as "cash cows" to subsidize the larger university, rather than vulnerable entities in need of subsidy themselves.[50] Law schools may also face revenue effects of the pandemic, though it is difficult to know at the time of writing. Public law schools in particular may face challenges and pressure to raise tuition and fees, if states reduce their financial support as a result of declining tax revenue.

For critics who argue that law schools produce too many lawyers — meaning that there are not enough law jobs that pay salaries sufficient to justify (or cover repayment of) the cost to law students[51] — disinvestment in legal education both by individual, potential students and by anyone who would subsidize accessibility of the profession are rational, desirable market corrections. The

---

49 "Law School Tuition 1985-2012," Microsoft Excel: *Data from the 2013 Annual Questionnaire ABA Approved Law School Tuition History Data* (online: *American Bar Association* <www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/lawschool_tuition_averages_by_year_public_private.xls>).

50 Jay Sterling Silver, "Pedagogically Sound Cuts, Tighter (Not Looser) Accreditation Standards, and a Well-Oiled Doomsday Machine: The Responsible Way Out of the Crisis in Legal Education" (2014) 66:2 Rutgers Law Review 353 at 358.

51 Campos, "American Law School", *supra* note 5 at 197 (asserting that "[t]here aren't enough jobs for lawyers, especially new lawyers, and too many of the legal jobs that do exist do not pay enough to justify incurring the cost of a legal education").

trouble is, as various commentators reacting to criticisms of legal education have noted, the United States actually suffers from a shortage of lawyers, though not in the most lucrative fields. Any decline in their availability may worsen a longstanding gap in access to justice for those of greater and lesser means.[52] Recognizing this access-to-justice crisis, the cost of law school presents a slightly different problem: not how expensive it is but who pays. Where more of the cost shifted from students, whether through repayment assistance programs at the back end or grant aid that need not be repaid at the front end, students wishing to work in lower-pay jobs would be freer to do so. Perhaps, if more law students could provide lower cost legal services to people who cannot currently afford counsel, they would.

Some critics of the cost of legal education have argued that the current business model, with its reliance on loans that borrowers may not be able to pay and potentially regressive allocation of financial aid, marks law school as a "fundamentally unsustainable institution",[53] in the words of Paul Campos. He continued in that article, published in 2012: "[t]he ongoing contraction in the employment market for new lawyers has combined with the continuing increase in the cost of legal education to produce what many now recognize as a genuine crisis for both law schools and the legal profession".[54] That is not quite how the ensuing decade played out, proving yet again the wisdom underlying Yogi Berra's caution about predictions. The persistence of inequality of access to legal education suggests that a greater concern about the rising cost of legal education and its undesirable implications is not that the business model of legal education cannot be sustained. It is that it can be.

---

52 See *e.g.* Philip G Schrag, "Failing Law Schools – Brian Tamanaha's Misguided Missile" (2013) 26:3 Georgetown Journal of Legal Ethics 387 at 412 (noting that while Tamanaha bases his concerns on the financial hardships of law students and prospective law students, "[t]here is … a vastly larger group of low-income people whom the legal profession is failing: potential clients").

53 Campos, "American Law School", *supra* note 5 at 179.

54 *Ibid.*

III. The Curriculum and the Pedagogical Model

What law schools teach and how they teach it have received significant criticism for years, and both have evolved in part in response to such criticism. One line of criticism contends that law school classes do not prepare students for the actual practice of law; while the traditional, Socratic classroom may teach a student to "think like a lawyer"[55] — or at least like an appellate advocate — it does not prepare students for the pragmatic, common tasks lawyers undertake in multiple areas of practice,[56] and often devotes little time to professionalism and ethics.[57] A second line of criticism contends that the format of the traditional law school classroom, featuring professorial lecturing and those Socratic colloquies, neither prepares students for the practice of law nor constitutes effective pedagogy.[58] And a third, substantively critical line of criticism contends that law school classes too often present the law in a vacuum,

---

55 Eli Wald & Russell G Pearce, "Making Good Lawyers" (2011) 9:2 University of St Thomas Law Journal 403 at 403–407.

56 Eli Wald, "The Contextual Problem of Law Schools" (2018) 32:1 Notre Dame Journal of Law, Ethics & Public Policy 281 at 282 [Wald, "The Contextual Problem"].

57 Rebecca Flanagan, "Better by Design: Implementing Meaningful Change for the Next Generation of Law Students" (2019) 71:1 Maine Law Review 103 at 116 (warning that law students "are less likely to have the prior knowledge and life experiences necessary to make sense of the complex cognitive, ethical, and professional demands of lawyering"); see also Wald, "The Contextual Problem", *supra* note 56 at 289–90 (arguing that the "crux of this strand of the professionalism crisis at law schools is not merely that they embrace [an] individualistic, market-based client-centered model of professionalism, but rather that they fail to introduce and model any competing visions of professionalism, such as models grounded in justice, dignity, public interest, social justice, or relational self-interest"); see also Gerald P López, "Transform – Don't Just Tinker With – Legal Education" (2017) 23:2 Clinical Law Review 471 at 523–24 (arguing that in legal education, "[a]s deserving of a central place in future training is all that takes place outside of litigation, often utterly attenuated from doctrinal analyses").

58 Jamie R Abrams, "Reframing the Socratic Method" (2015) 64:4 Journal of Legal Education 562 at 566 (note 22 and accompanying text).

ignoring historical, cultural, and political context that shapes how the law is applied, potentially applied differently, and to whom.[59] This Part very briefly examines each criticism.

A number of law schools and law school classes have incorporated more practical topics to help prepare students for the actual practice of law.[60] For example, classes may include drafting exercises and negotiation exercises, to name two. The American Bar Association has mandated more of this kind of classroom experience. [61] Classes may also use simulations of live client interactions, negotiations, or other aspects of practice.[62] These classes require time and effort to develop, and likely work best when of more modest size, so they present the same cost challenges that clinical courses do. Nonetheless, the acceptance of incorporation of exercises into doctrinal classes and creation of greater numbers of classes that do not consist solely of a professor imparting

59 See Cheryl I Harris, "Critical Race Studies: An Introduction" (2001) 49:5 UCLA Law Review 1215 at 1220-21 (tracing the development of Critical Race Theory and explaining that while "Critical Legal Studies had begun the important work of critiquing the foundational premise that law, as distinct from politics, was rule-bound, objective, and neutral, as part of the effort to expose the role of the law in maintaining and legitimizing an unjust status quo[,] CRT was an intervention that sought to build upon the insights (while resisting the constraints) of liberal civil rights scholarship and Critical Legal Studies in order to develop a theoretical language that would expose the limitations of prevailing racial ideology and facilitate its disruption").

60 Klint W Alexander, "The Changing Nature of Legal Education" (December 2018), online: *Wyoming Lawyer* <digitaleditions.walsworth.com/publication/?m=10085&i=549638&p=22&ver=html5>.

61 "ABA Standards and Rules of Procedure for Approval of Law Schools 2019 — 2020" (2019) at 303(A)(3), online (pdf): *American Bar Association* <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>.

62 Becky L Jacobs, "Teaching and Learning Negotiation in a Simulated Environment" (2008) 18:1 Widener Law Journal 91 at 91 ("[c]ourses focused on negotiation theory and skill development have become curricular staples at North American law schools").

wisdom from the lectern at the front of the room both mean that legal education is moving, slowly to be sure,[63] toward a more modern pedagogy.

In part in response to the criticism that the Socratic method so well established in the legal academy is less effective than other, more experiential forms of learning, clinical law classes that permit students to represent live clients under the supervision of an experienced practitioner who is also affiliated with the law faculty are commonplace.[64] Given the importance of discussion of client needs, analysis of legal strategies and tactics, and supervision, these classes cannot be too large — which makes them more costly to offer than a large, lecture format.[65] Further, clinics are increasingly specialized, providing sophisticated legal counsel in specific practice areas such as intellectual property and immigration law, for example. Recognizing the value of clinical courses and committing to offering them has consequences for a law school's cost of operations, which in turn have consequences for students paying for their legal education. The same is true of experiential classes other than clinics, like simulation courses. Pedagogical choices in this way are tied directly to the business model discussed in Part II.

The evolution of legal education has included changes beyond the expansion of experiential learning. Law schools in recent decades have developed programming in legal research and writing, for example.[66] These courses, intended to give law students an opportunity to practice and improve skills they

63 Carol Goforth, "Transactional Skills Training Across the Curriculum" (2017) 66:4 Journal of Legal Education 904 at 904 (noting at the outset that "[l]egal education adapts slowly").

64 López, *supra* note 57 at Appendix I (describing curricular reforms at five law schools in 2007-2009).

65 Nancy B Rapoport, "Rethinking U.S. Legal Education: No More 'Same Old, Same Old'" (2013) 45:4 Connecticut Law Review 1409 at 1426.

66 Emily Grant, "Toward a Deeper Understanding of Legal Research and Writing as a Developing Profession" (2003) 27:2 Vermont Law Review 371 at 376 (describing the sharp expansion of legal research courses in the 1980s).

will need as practitioners, are resource intensive and consequently costly.[67] Also, of course, classes that help students develop an important mix of practical writing and research skills contribute to the value of the legal education provided. But these classes are consistent with shifts in the law school curriculum overall.[68]

The impact of critical analyses of the content of legal education are still emerging, though scholars have recognized the trend toward recognition of "rights and public services such as health care and education" in lieu of wholesale redistributive policies in the United States, and expansion of rights naturally entails a role for lawyers.[69] Movement toward a more assertive role on social justice for law schools has accelerated, even as controversy over the meaning of the phrase has increased, in the wake of the murder of George Floyd, an unarmed Black man, by a White police officer in 2020. This was not the first nor the last such killing in recent years, but the wanton callousness of the officer, the viral video footage of the murder, and the explosion of protest against racialized police brutality that followed all prompted a remarkable, national

---

67 Rachel Croskery-Roberts, "Ten Years In: Critical View of the Past, Present, and Future of Skills Education at UC Irvine Law School" (2020) 10:0 UC Irvine Law Review 469 at 484 (describing the impact of small increases in class sizes in legal research and writing courses, given the need for achievement of, for example, individualized feedback to students).

68 Back in 1996, the American Bar Association modified accreditation standards for law schools to require "an educational program designed to provide its graduates with basic competence in legal analysis and reasoning, legal research, problem solving and oral and written communication": "American Bar Association Section of Legal Education and Admissions to the Bar Report to the House of Delegates" (August 1996) *ABA Journal* at §302(a)(iii); "ABA Standards and Rules of Procedure for Approval of Law Schools 2020 — 2021" (2020), online (pdf): *American Bar Association* <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> ["ABA Standards and Rules"].

69 See *e.g.* Edward Rubin, "The Future and Legal Education: Are Law Schools Failing and If So, How?" (2014) 39:2 Law & Social Inquiry 499 at 508 (describing the significance of a "social justice agenda" for law schools).

grappling with racism.[70] Law schools were not untouched, but the public attention to structural racism and the backlash against reforms intended to curtail police violence all contributed to an atmosphere in which the decisions made at law schools are subject to heightened scrutiny.

Greater recognition of the role of law as either contributor to or means of opposing potential historical inequity puts pressure on law schools to tackle explicitly the troubling question of whose interests to serve: future, individual clients or the wider, more amorphous society shaped by law? That is, should lawyers zealously pursue only the narrow interests of whoever pays the bills, or do they have broader responsibilities? Rachel Moran describes two conceptions of the lawyer's role, each with implications for legal education: the expert professional and the social trustee professional.[71] The former emphasizes loyalty to the client, in the extreme to the exclusion of all other considerations, while the latter emphasizes a concomitant commitment to client representation that also enhances the greater good.[72] The social trustee model is inherently challenging, Moran notes, because "[s]triking the right balance between private interests and public values had undoubtedly been difficult – if not impossible – to achieve".[73]

Part IV explores more thoroughly the risks of responding to or ignoring demands that institutions adopt an antiracist stance. The ongoing asking of questions about what and how to teach has grown only more intensive and potentially divisive, even as recognition of the importance of the answers has spread. The current moment may provide an opportunity for law schools to

---

70 Katie Rogers, "Biden Calls Chauvin Verdict a 'Much Too Rare' Moment of Justice" (21 April 2021) *The New York Times* (placing the trial of the officer who killed George Floyd "at the center of a national reckoning on race and policing").

71 Rachel F Moran, "The Three Ages of Modern American Lawyering and the Current Crisis in the Legal Profession and Legal Education" (2019) 58:3 Santa Clara Law Review 453 at 455–56.

72 *Ibid* at 456.

73 *Ibid*.

innovate — though given a surge in law school applicants in 2020-2021, the impetus to do so may wane as the perception of a crisis fades and more typical complacence that whatever law schools are doing must be just fine, may return.

IV. Awakenings: Health and Equity

The COVID-19 pandemic that almost overnight forced law schools online in March 2020 also made more obvious the disparities in the educational experience for differently situated students. Not all students suddenly required to participate in learning activities through the Internet actually had reliable and fast enough connections to do so consistently;[74] not all students working remotely had access to quiet spaces in which to listen to class discussions or to complete reading and writing assignments. Many students who worked part time while enrolled had to juggle not only the demands of newly remote schooling but also responsibilities to care for parents, children, or other family members now isolated from the sources of support they previously relied on.[75] These challenges fell upon students regardless of enrollment, affecting kindergarten through graduate and professional students, but at every level the burdens were distributed unevenly. Inevitably, students of more modest means faced a greater number of difficult obstacles, with fewer resources to manage them.[76]

Over the same period, awareness of inequality along lines of race spread in what may have been unprecedented fashion with news coverage of repeated

---

74 See *e.g.* Niu Gao & Joseph Hayes, "The Digital Divide in Education" (February 2021), online: *Public Policy Institute of California* <www.ppic.org/publication/the-digital-divide-in-education/> (reporting that in 2019, "13% of K–12 students and college students did not have broadband at home").

75 See *e.g.* BS Russell et al, "Initial Challenges of Caregiving During COVID-19: Caregiver Burden, Mental Health, and the Parent-Child Relationship" (2020) 51:5 Child Psychiatry& Human Development 671.

76 Nicholas Casey, "College Made Them Feel Equal. The Virus Exposed How Unequal Their Lives Are" (5 April 2020) *The New York Times*.

killings of unarmed Black men by police.[77] Public attention to the conduct of law enforcement has prompted universities to review their relationships with police,[78] but concern has not been limited to disparities in that context. Colleges, universities, and law schools also face more scrutiny over their hiring practices, because of the low numbers of nonwhite members of their faculties.

Inequality along lines of race and class, then, are at the center of national, political discussions about education, and the pandemic may have opened a door to reforms previously viewed as impossible. In the undergraduate admissions context, for example, COVID-19 led to colleges and universities abandoning the use of standardized tests — a highly controversial step.[79] Whether law schools will follow suit and make permanent changes to their admissions criteria, of course, remains to be seen. Several have modified requirements to allow applicants to submit scores on the GRE, an exam used by other graduate and professional programs, in place of the standard law school admissions test, the LSAT.[80] Whatever the long-term effects, the space has opened for difficult conversations about policies and practices of the legal academy that have historically, disproportionately, and adversely affected students and faculty members who are members of communities long underrepresented at law schools. In the course of the pandemic, law schools

77 See *e.g.* Charles Blow, "Rage Is the Only Language I Have Left" (17 April 2021) *The New York Times* (chronicling police killings of Black men and describing a tracking study that found that while "[e]very year, the police shot and killed roughly 1,000 people[,] Black Americans are killed at a much higher rate than white Americans, and the data reveal that unarmed Black people account for about 40 percent of the unarmed Americans killed by the police, despite making up only about 13 percent of the American population").

78 Julia Barajas, "At Some U.S. Universities, a Time to Rethink Cops on Campus" (9 July 2020) *Los Angeles Times.*

79 See generally, Glater, "Pandemic Possibilities", *supra* note 13 (describing the move by the University of California to abandon consideration of standardized test scores in undergraduate admissions).

80 David M Klieger et al, "The Validity of GRE General Test Scores for Predicting Academic Performance at U.S. Law Schools" (2018) Educational Testing Service Research Report No RR-18-26 at 3.

changed grading practices,[81] for example, and no doubt many individual professors also modified how they conducted classroom discussions to help students better cope with the difficulties of online learning. These are changes that might help to address longstanding law school practices that have been criticized for disadvantaging students who arrive on campus from less privileged backgrounds.[82] Such changes also recognize possible ways institutions of higher education can and do support students far beyond the classroom, from addressing potential food insecurity to providing health care and mental health support.

Again, time will tell which of the progressive steps taken in response to the pandemic survive its eventual passing and change the experience of a newly normal legal education. A critical driver of any innovation will be clarity of purpose: the extent to which law school faculty and administrators believe that they should prioritize the promotion of equity across a diverse student body made up of people whose backgrounds have prepared them to varying degrees for the demands — some justified, some not — of legal education.

V. The Mission in the Moment

As the preceding discussion suggests, responding to the different challenges confronting legal education is considerably more difficult in the absence of consensus on what such an education, and the institutions that provide it, are

81 See generally, Glater, "Pandemic Possibilities", *supra* note 13 and accompanying text.

82 Meera E Deo, "Two Sides of a Coin: Safe Spaces & Segregation in Race/Ethnic-Specific Law Student Organizations" (2013) 42:1 Washington University Journal of Law & Policy 83 at 85; see also Meera E Deo, "Separate, Unequal, and Seeking Support" (2012) 28:1 Harvard Journal on Racial and Ethnic Justice 9 at 18–9 (describing studies that "indicate that legal education continues to focus on white males as the primary recipients of legal knowledge and classroom attention, with students of color often feeling 'othered' and voicing concerns that their race negatively affects how professors treat them" and suggesting that "[l]aw students of color often have higher attrition rates and lower academic outcomes than whites, as many disengage from classrooms focused primarily on white students").

supposed to do. Not surprisingly, much has been written about the goals of legal education and of law schools, both to criticize and to defend institutional and pedagogical practices. Part V.A below briefly identifies objectives typically offered, then explores the implications of those goals for developing responses to the challenges presented in Parts II, III, and IV. Part V.B then situates possible reforms in the historical moment law schools must contend with at the time of this writing, when simply espousing commitment to the rule of law — a generic, anodyne statement — may be heard as controversial.

A. The Mission

The American Bar Association, which accredits law schools in the United States, provides a statement of the objectives of a program of legal education. Standard 301 reads in full:

> (a) A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.
>
> (b) A law school shall establish and publish learning outcomes designed to achieve these objectives.[83]

This leaves room for considerable variability among institutions on the question of what law schools are to try to do, and scholars have criticized the extent to which law schools may choose to teach in such a way that graduates are less likely to become "effective, ethical, and responsible … members of the legal profession".[84] This goal does not have any obvious implications for whom a particular law school admits as a student or hires as a faculty member.[85] Indeed,

---

83 "ABA Standards and Rules", *supra* note 68 at 17.

84 *Ibid*. For example, Eli Wald has pointed out the extent to which legal education encourages competition and zealous client service over the achievement of substantive justice in the course of advocacy. Wald, "The Contextual Problem", *supra* note 56 at 289–90.

85 Standard 401 states the qualifications applicable to law school faculty:

> [a] law school shall have a faculty whose qualifications and experience enable the law school to operate in compliance with the Standards and carry out its program of legal education. The faculty shall possess a high degree of

the ABA has supported increasing experimentation and greater variety of approaches to implementing this mission statement.

Measures of institutional merit that receive considerable attention in the legal academy are somewhat distinct: factors like selectivity, enrolled students' test scores and grades, clerkship placements, postgraduate salaries, and faculty members' credentials all play a role in determining where a law school falls in the national pecking order.[86] As Bryant Garth observes:

> law schools compete according to what is valued within the semi-autonomous legal field, and law students, faculty, and deans are well-aware of the hierarchy and the terms of competition. There is differentiation among the different law schools, to be sure, but law schools tend to compete by trying to show movement in the traits that are valued within the general law school world-hiring scholars, curricular innovation, better credentialed students, higher bar passage, ability to secure corporate jobs. Sociological study suggests also that competition in what is valued in the field tends to work together to promote the prosperity of the field as a whole.[87]

In this sociological perspective, then, to the extent that excellence in the field of legal academia is perceived by the community of law scholars and law school administrators to encompass promotion of greater equity in opportunity, these institutions will pursue that goal. One implication is that those in positions to steer law schools, both deans and faculty, may enjoy an opportunity at this historical moment to effect a meaningful shift in institutional course. Of course, such initiative, taking advantage of the opportunity alluded to in the title of this Essay, is not without its own challenges. Law schools operate in a competitive environment constrained by rankings produced by media organizations, perhaps most notably *U.S. News & World Report*; the criteria used by such

---

> competence, as demonstrated by academic qualification, experience in teaching or practice, teaching effectiveness, and scholarship.

"ABA Standards and Rules", *supra* note 68 at 27.

86 Of course, the rankings by publications like *U.S. News & World Report* matter, too.

87 Garth, *supra* note 11 at 526.

publications have powerful effects on decisions at law schools and almost certainly affect decisions about admissions, the curriculum, and other aspects of the educational experience provided.[88]

B. The Moment

The horrific killings by police of unarmed Black men that have set off a wave of protest, recriminations, and efforts at reform have also enabled difficult conversations about structural inequality along lines of race at all levels of society in the United States. Law school faculty and administrators discussing law's lack of diversity have taken up the ideas of scholars and public intellectuals who have spelled out what it means to be antiracist and what the consequences are of failure to take on such responsibility.[89] The speed and scope of responses in support of racial justice by deans, faculty, and institutions may be without precedent.[90] For example, members of the faculty at Penn State Dickinson Law

88 See generally Michael Sauder and Ryon Lancaster, "Do Rankings Matter? The Effects of U.S. News & World Report Rankings on the Admissions Process of Law Schools" (2006) 40:1 Law & Society Review 105 at 110 (noting reported effects of rankings include a "dramatic increase in money spent on marketing and advertising, a much greater emphasis on LSAT scores in the admissions process, a transition from need-based to merit-based scholarships, and the transformation of the focus of career services from providing career counseling to ensuring that employment numbers are as high as possible").

89 See *e.g.* Ibram X Kendi, *How to Be an Antiracist* (New York: Random House Publishing, 2019) (defining antiracism as traditional knowledge and explaining the need for people and institutions to adopt antiracist positions in order to promote social justice); see also Nikole Hannah-Jones, "The 1619 Project" (August 2019) *The New York Times*.

90 The Association of American Law Schools has posted a list of faculty resolutions, statements by deans of law schools, and other resources on a website for law school leaders. "Law Deans Antiracist Clearinghouse Project", online: *Association of American Law Schools* <www.aals.org/about/publications/antiracist-clearinghouse/> ["Law Deans Antiracist Clearinghouse Project"].

endorsed an antiracist admissions regime, the adoption of an antiracist curriculum, and a required course on Race and Equal Protection of the Laws.[91]

More appears to be happening than just action at individual law schools. The Association of American Law Schools ("*AALS*"), of which more than 175 law schools are members, [92] now operates a "Law Deans Antiracist Clearinghouse Project" aimed at "creating a space for our collective voices as leaders of law schools to engage our institutions in the fight for justice and equality, we strive to focus our teaching, scholarship, service, activism, programming, and initiatives on strategies to eradicate racism". [93] Two law schools, Washington and Lee University School of Law and Washburn University School of Law, have adopted the program advocated by the *AALS* site.[94]

What impact these efforts will have is unclear. Abandoning practices that contribute to disproportionate exclusion of Black and brown students, as well as those that work against faculty candidates of color, will be contested. The spectacular decision of the board of trustees at the University of North Carolina to override the faculty of the institution's journalism school and offer Nikole Hannah-Jones, the visionary public intellectual, author, and prominent contributor to *The New York Times* 1619 Project, a position without tenure offers an illustration of the kind of battles sparked by efforts to hire nonwhite and explicitly antiracist teachers.[95] Many in the legal academy, like institutions

---

91 Danielle M Conway, Bekah Saidman-Krauss & Rebecca Schreiber, "Building an Antiracist Law School: Inclusivity in Admissions and Retention of Diverse Students – Leadership Determines DEI Success" (2021) Rutgers Race and the Law Review at 36–37 (forthcoming, draft as of 17 August 2021, on file with author).

92 "About AALS", online: *Association of American Law Schools* <www.aals.org>.

93 "Law Deans Antiracist Clearinghouse Project", *supra* note 90.

94 *Ibid.*

95 Katie Robertson, "U.N.C. Denies Tenure to Writer on 1619 Project" (21 May 2021) *The New York Times.*

of higher education more generally, are risk averse and quite attached to its conventions.

Just as the national dialogue over race has energized progressive advocates who for years have questioned the conduct of police and other powerful institutions, it has galvanized those who view criticism of the police as an attack on law and order.[96] The implications for the legal academy, characterized by its well-defined strata, are intriguing and potentially concerning: law school leaders, who do not necessarily land in senior positions by pursuing radical paths, almost certainly will stake out positions that they believe will be supported by their alumni and professional community. After all, one important aspect of the law school business model that this Essay has not touched on is development: philanthropy can contribute significantly to an institution's bottom line.

The likely result will be further division of the legal academy along an ideological axis, with some institutions adopting a more progressive stance and some a more conservative one. Such increasing division within the legal community, which wields outside influence in politics and culture, would not bode well for the prospect of depolarization of politics. But that is not the subject of this Essay; of greater note for my purposes is the prospect that law faculty and deans could pursue paths intended to promote equity and education. This seems a fitting objective for the legal academy.

VI. Conclusion

The discussion in this Essay has described four challenges confronting legal education: what they teach, how they teach, and the simultaneous demands of the global COVID-19 health crisis and a battle over racial justice that has facilitated conversations about whom they teach and whom they hire. These last, twin challenges also have created space for the legal academy to make changes more quickly than it would have otherwise, to achieve goals that have

96 See *e.g.* Nellie Bowles, "Abolish the Police? Those Who Survived the Chaos in Seattle Aren't So Sure" (8 August 2020) *The New York Times* (describing tensions between advocates of major police reform, including abolition, and small business owners fearful of what they fear will be anarchy).

received considerable attention but have not gotten so much traction, and to make the legal profession more accessible to a more diverse population. This Essay has argued that decisions to pursue such equity goals may be controversial and risky, but that law school deans and faculty members have an opportunity and responsibility to pursue these goals more aggressively and explicitly.

Remote Learning in Law School During the Pandemic: A Canadian Survey

Melanie Murchison, Richard Jochelson, David Ireland, Tan Ciyiltepe & Silas Koulack*

The COVID-19 pandemic has reshaped the Canadian debate regarding best practices in incorporating technology into legal education. Canadian educators have now had the chance to reflect on online pedagogy and look beyond the pandemic when we consider how technology will continue to shape legal pedagogy in the future. To this end, the authors conducted a national survey of law students aimed at better understanding the online learning experience, overall satisfaction levels with their legal education, and to thoroughly assess whether students are satisfied with an online legal education. This article presents the result of that survey. The data show that interactivity matters to students and the overall preference is for in-person learning. Analyzing the various delivery models, our study further suggests that students prefer weekly uploaded video lectures over audio only content, and power points were felt to be essential to online learning. We further learned that videoconferencing was the preferred mode of remote learning, with Zoom being the preferred platform.

This paper also sheds light on student preferences in modes of evaluation: students noting dissatisfaction with the traditional law school evaluative instruments weighted heavily at the end of a course. It was also noted that pass/fail grading during the pandemic divided the students nearly equally in terms of preference. Perhaps surprisingly for law students, our data also suggest students were not particularly concerned about their privacy in an online teaching environment. Finally, and in tune with the current social focus, improving the mental health of students was a serious issue for respondents.

* Melanie Murchison is an Instructor II at the University of Manitoba in the Department of Sociology and Criminology. Dr Murchison holds a PhD in Law from Queen's University Belfast and her dissertation studied the role of judicial activism in the Supreme Court of Canada. She is currently a volunteer organizer with Ending Violence Against Women International (EVAWI) and writes on issues related jury nullification and the Supreme Court of Canada.

Richard Jochelson is the Dean of Law at Robson Hall, Faculty of Law, University of Manitoba. He holds a PhD in Law from Osgoode Hall Law School at York University, a Master of Laws from the University of Toronto Faculty of Law, a Bachelor of Laws degree from the University of Calgary Faculty of Law (Gold Medal), and a Bachelor of Science in Zoology (with Distinction), also from the University of Calgary. Dr Jochelson has conducted research in pedagogy, having written peer reviewed works on professional orientations/practice in critical disciplines, on socio-legal approaches to teaching in law, on the use of trigger warnings in law school and on the use of technology in law school classrooms. He teaches and researches in criminal law, Charter issues in criminal law and also teaches upper year seminar courses.

David Ireland is a lawyer and Assistant Professor of Law at Robson Hall, Faculty of Law, University of Manitoba. He has practiced criminal law as both defence and Crown. Professor Ireland has also been involved in public interest legal work concerning inquests, public inquiries and human rights. At the Faculty of Law, he teaches criminal law and procedure, evidence law and advocacy. His research program interrogates the complexities of state/citizen

I. Introduction

Discussions pertaining to the merits of online learning within law school pedagogy are rich and nuanced, especially within the United States, Australia, and England.[1] In the United States, the move towards embracing online learning as a pedagogical tool was, to some, a necessary step in the age of declining numbers of law applicants and law schools shuttering their doors.[2] Other jurisdictions have fully embraced online legal teaching; England is home to one of the more well-known massive open online courses ("MOOCs") in legal education.[3] However, the Canadian perspective on this topic is not as fulsome, as law schools in Canada have largely been reluctant to use online learning in a meaningful or systematic way. In the ten years prior to the

---

interactions and aims to lead positive policy changes to improve equality and fairness in the criminal justice system.

Tan Ciyiltepe is a Juris Doctor (candidate) and Research Assistant at Robson Hall, Faculty of Law, University of Manitoba. He holds a BA in English from the University of Toronto and an MA in English from McMaster University.

Silas Koulack is a graduate of Robson Hall, Faculty of Law, University of Manitoba.

1 See generally Jennifer Ireland, "Blended Learning in Intellectual Property: The Best of Both Worlds" (2018) 18:1 Legal Education Review 139; Anne Hewitt, "Can You Learn to Lawyer Online? A Blended Learning Environment Case Study" (2015) 49:1 The Law Teacher 92; Anne Hewitt & Mathew Stubbs, "Supporting Law Students' Skills Development Online — A Strategy to Improve Skills and Reduce Student Stress?" (2017) 25:1 Research in Learning Technology 1786 (for the Australian perspective).

2 See generally Michele R Pistone & Michael B Horn, "Disrupting Law School: How Disruptive Innovation Will Revolutionize the Legal World" (2016), online (pdf): *Christensen Institute* <www.christenseninstitute.org/wp-content/uploads/2016/03/Disrupting-law-school.pdf>; Max Huffman, "Online Learning Grows Up—And Heads to Law School" (2015) 49:1 Indiana Law Review 57.

3 See "Home Webpage", online: *The Open University* <www.openuniversity.edu/>.

COVID-19 pandemic, some Canadian legal educators had implemented, or seriously considered, adopting various forms of online learning into law school curricula, with these learning modalities being touted as an adequate, if not superior, replacement to the traditional delivery method.[4] However, much like the American Bar Association's restriction on how many hours can be dedicated to online learning in an accredited curriculum in the United States,[5] the Federation of Law Societies of Canada ("FLS"), had (prior to the COVID-19 pandemic) severely limited the amount of online distance or remote learning hours a law school can utilize in Canada.[6] This FLS policy has, of course, not been strictly enforced during the pandemic. Public health orders to prevent the spread of COVID-19 forced all law classes online in early 2020. The entire 2020-2021 law school academic year was delivered online in Canada.[7]

---

4 See generally Peter Sankoff & Craig Forcese, "The Flipped Law Classroom: Retooling the Classroom to Support Active Teaching and Learning" (2015) 2015:1 Canadian Legal Education Annual Review 119; Peter Sankoff, "Taking the Instruction of Law Outside the Lecture Hall: How the Flipped Classroom Can Make Learning More Productive and Enjoyable (for Professors and Students)" (2014) 51:4 Alberta Law Review 891; Mary J Shariff et al, "Academic Innovation Committee on the JD Curriculum: Consultation Paper" (2016) 39:2 Manitoba Law Journal 241 at 351; Philip Preville, "Why Don't More Law Professors Flip Their Classrooms?" (31 March 2017), online (blog): *Top Hat* <tophat.com/blog/flipped-classroom-law/>.

5 See memorandum from Pamela Lysaght to Maureen O'Rourke (22 January 2018), online (pdf): *American Bar Association* <www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/February2018CouncilOpenSessionMaterials/C1_src_memo_re_standard_306.pdf>; Abigail Cahak, "Beyond Brick-and-Mortar: How (Cautiously) Embracing Internet Law Schools Can Help Bridge the Legal Access Gap" (2012) 2012:2 Journal of Law, Technology & Policy 495 at 506; Nina A Kohn, "Online Learning and the Future of Legal Education" (2020) 70:1 Syracuse Law Review 1 at 4.

6 See "National Requirement" (1 January 2018), c (1.2), online (pdf): *Federation of Law Societies of Canada* <flsc.ca/wp-content/uploads/2018/01/National-Requirement-Jan-2018-FIN.pdf>.

7 See Aidan Macnab, "How COVID-19 is Forcing Canadian Law Schools to Transition to Online Learning" (23 March 2020) *Canadian Lawyer Magazine*.

While much has been written about the experiences of legal academics and their motivations and desires to develop, change, or maintain their online pedagogical methods, comparatively little research exists on the impact of these shifts on law school students and whether they have improved the learning experience or overall satisfaction levels with their legal education. In this way, the disruptions of the COVID-19 pandemic to traditional law school teaching modalities proved an excellent opportunity to examine the perspectives of Canadian law school students on the transition to online learning, and to thoroughly assess whether students feel they can be successful in online centered law school education.

The authors therefore aim to provide an overview of the evolution of, and adaptation to, online learning within law schools in Canada from 2010 to 2020. We discuss the perspective of law school educators and then review the existing literature on student perspectives on online law school education. We then present new survey data on the experiences of Canadian law school students during the COVID-19 pandemic.

II. Online Learning in Law School: The Last Ten Years

With the increasing availability and societal reliance on technology, legal educators have been concerned that the traditional method of teaching law school is ill-equipped to adequately deliver quality education to changing learning habits of millennial students.[8] As the ubiquity of laptops and social media have transformed the classroom,[9] some educators have embraced technology in their law school courses in an effort to shift away from traditional

8 See generally George J Shailini, "Teaching the Smartphone Generation: How Cognitive Science Can Improve Learning in Law School" (2013) 66:1 Maine Law Review 163.

9 See *ibid* at 164; Sankoff, *supra* note 4 at 893; Nikos Harris, "The Risks of Technology in the Law Classroom: Why the Next Great Development in Legal Education Might Be Going Low-Tech" (2018) 51:3 UBC Law Review 773 at 778.

teaching methods that do not capture the attention span of millennial audiences to the same degree as they once did.[10] The limitations and shortcomings of traditional delivery methods, such as the Langdellian Case Method and the Socratic Method,[11] are not novel debates in legal pedagogy.[12] However, educators have warned that these traditional methods have amplified millennial disconnection in the law classroom.[13] Peter Sankoff, Craig Forcese and Steven Penney have noted that laptop use in law classrooms provided students with more distractions than ever before.[14] These professors were left with the undesirable task of competing for their students' attention while using the

10 See Sankoff, *ibid*; see Preville, *supra* note 4.

11 The Case Method, much like its progenitor, the scientific method, uses inductive reasoning in its approach. In the context of a law classroom, this is achieved by asking the students to read judicial decisions on their own to extract the legal principles and come to a general conclusion about the law. See Russell L Weaver, "Langdell's Legacy: Living with the Case Method" (1991) 36:3 Villanova Law Review 517 at 527. The case method is often supplemented by professor-led lectures or with the Socratic method to elicit professor-student interaction. The Socratic method accomplishes this through a series of questions posed by the professor which inevitably lead his or her students to the answer. See Joseph A Dickinson, "Understanding the Socratic Method in Law School Teaching After the Carnegie Foundation's Educating Lawyers" (2009) 31:1 Western New England Law Review 97 at 105.

12 This ongoing debate often focuses on the overuse of these traditional methods to the detriment of other key skills a law student requires in their educational development. See Shariff et al, *supra* note 4 at 315; Dickinson, *supra* note 11 at 98.

13 See Frances E Chapman, "A Conversation About Canadian Legal Education: Lakehead University and Dialogue Pedagogy" (2020) 21:1 Western Michigan University Cooley Journal of Practical & Clinical Law 1 at 16; Dale Dewhurst, "The Case Method, Law School Learning Outcomes and Distance Education" (2012) 6:1 Canadian Legal Education Annual Review 59 at 60; Sankoff, *supra* note 4 at 893; Richard Jochelson & David Ireland, "Law Students' Response to Innovation: A Study of Perspectives in Respect of Digital Knowledge Transmission, Flipped Classrooms, Video Capsules and Other Means of Classroom Dissemination" (2018) 41:1 Manitoba Law Journal 131 at 138.

14 See Sankoff, *supra* note 4 at 893; Preville, *supra* note 4.

traditional methods of teaching law.[15] For years, scholars have written about ways to recalibrate pedagogical approaches in legal education through blended classrooms,[16] such as the flipped delivery model.[17] Under this model, students receive a combination of in-person and asynchronous lessons,[18] which some suggest are better suited for millennial learning habits.[19] Indeed, Sankoff, Forcese and Penney have all adopted the flipped classroom method in order to mitigate the growing disconnection in the live lecture hall.[20] This has generated some debate and criticism of the merits of a technological revolution within legal education and whether displacing the traditional model will lead to undesirable outcomes.[21]

---

15 Sankoff, *ibid*.

16 See Ireland, *supra* note 1 at 140, who defines blended learning as a "teaching method that blends online and offline elements". Blended learning is used interchangeably with hybrid learning as both terms involve some combination of online and in-person learning within a curriculum.

17 See Sankoff, *supra* note 4 at 899, where the "term 'flipped classroom' refers to the idea that the traditional classroom is being flipped on its head with the lecture portion of the class conducted online, in a way that allows students to spend classroom time interacting with each other and the professor".

18 Synchronous and asynchronous learning styles are predicated on whether the students engage with course material concurrently or separately. For example, a traditional in-class lecture, where students engage with the course material at the same time, is considered a synchronous learning method; whereas, a weekly video lecture, to be watched by students on their own time, is an asynchronous learning method. See Marcia L Williams, Kenneth Paprock & Barbara Covington, *Distance Learning: The Essential Guide* (London: Sage Publications, 2001) at 71.

19 See Sankoff & Forcese, *supra* note 4; Preville, *supra* note 4; Harris, *supra* note 9 at 797; Gerald F Hess, "Blended Courses in Law School: The Best of Online and Face-to-Face Learning" (2013) 45:1 McGeorge Law Review 51 at 59.

20 See Sankoff & Forcese, *ibid* at 8; see Preville, *ibid*.

21 See Sankoff & Forcese, *ibid* at 4; Frank A Pasquale, "Synergy and Tradition: The Unity of Research, Service, and Teaching Legal Education" (2015) 40:1 Journal of the Legal Profession 25 at 28; Eric S Janus, "The 'Worst Idea *Ever*'—Lessons from One Law School's Pioneering Embrace of Online Learning Methods" (2020) 70:13 Syracuse Law Review 13 at 26.

Legal educators have employed many different online platforms over the years in order to supplement traditional methods of teaching law.[22] In 2012, Dale Dewhurst posited that programs such as Moodle can facilitate the ability to provide feedback to students and monitor progress much more efficiently and consistently than the traditional case method offered in person.[23] Dewhurst argued that using platforms such as Moodle (similar to Blackboard and D2L), or AutoTutor,[24] can "replicate learning outcomes of the case method".[25] Dewhurst noted that students' ability to answer questions and receive feedback through the online platform could also mitigate some of the anxieties students have reported experiencing when speaking in person.[26] Moreover, Dewhurst argued that videoconferencing could replicate the in-person environment by dividing up the larger class sizes into more manageable smaller sections.[27] A smaller group setting, he hypothesized, would encourage students to contribute to discussions because of the less intimidating size of the classes.[28] This would also alleviate some of the anxiety and stress that students experience within law school classrooms which prevent many from actively participating in the discussions spurred on by the case method format.[29] He correctly anticipated

22 See Shariff et al, *supra* note 4 at 351 ("[t]echnology such as *iclicker*, wikis, backchannel chats, online meeting rooms, Google docs, video editing and commenting tools, online videos, interactive surveys and questionnaires, *PowerPoint*, Twitter, Skype, Facebook, texting, Google Drive, online dispute resolution and closed information systems such as *D2L* … may be used effectively when used thoughtfully and deliberately and with proper preparation, training and support").

23 See Dewhurst, *supra* note 13 at 64; "Home Webpage", online: *Moodle* <moodle.org>.

24 Dewhurst, *ibid*; "Adult Education Research Group", online: *AutoTutor* <adulted.autotutor.org>.

25 Dewhurst, *ibid* at 66.

26 *Ibid*; Sankoff, *supra* note 4 at 895.

27 See Dewhurst, *ibid* at 67.

28 *Ibid*.

29 *Ibid* at 69.

what has become a commonality in the Zoom-university lecture style where educators have had the functionality of Zoom breakout rooms at their disposal.[30] These synchronous sessions, Dewhurst continued, could be recorded, providing students with the flexibility to view the classes later in the week.[31] Since 2012, many universities have adopted tools that bear a resemblance to Moodle to track students' progress and provide feedback, though, prior to 2020, few had used them as extensively as Dewhurst.[32]

Even though online learning has not grown exponentially in Canada compared to other jurisdictions, the past ten years have seen a growing contingent of legal educators that have implemented online learning into their courses. One of the most vocal proponents of online learning in Canada has been Professor Peter Sankoff. Sankoff implemented a flipped model into his evidence class at the University of Alberta nearly a decade ago, as he observed that the traditional method "fails to excite either professor or student".[33] He provided his evidence class with asynchronous lectures in order to free up class time for problem-solving tutorials.[34] The asynchronous portion had the students watch video "capsules" lasting anywhere from 10-20 minutes per video and providing students with lessons on the "basic principles" of the week's module.[35] Although the workload was "resource intensive" for Sankoff, the course was successfully shifting his students' attention away from their laptops and into an active and engaged discussion of the weekly problems.[36] Professor

30 For a discussion regarding breakout rooms, see "Enabling Breakout Rooms", online: *Zoom* <support.zoom.us/hc/en-us/articles/206476093-Enabling-breakout-rooms>.

31 See Dewhurst, *supra* note 13 at 68.

32 See *e.g.* "Introducing UMLearn" (5 May 2015) *UM Today News*; Chris Sorenson, "Quercus? U of T's New Learning Hub and Four Other New Things for the Academic Year" (27 August 2018) *U of T News*.

33 See Sankoff, *supra* note 4 at 893.

34 *Ibid* at 896.

35 *Ibid* at 898.

36 See *ibid* at 897.

Craig Forcese at the University of Ottawa is another pioneer of the flipped delivery model in Canadian legal education.[37] His own foray into this pedagogical approach was spurred on by lackluster student performance on exams and the solution to his problem came in the form of a flipped Administrative Law classroom.[38]

Much like Sankoff, Forcese provided his students with pre-recorded lectures for them to watch prior to their regular in-person class time.[39] This maintained the "narrative" style delivery found in his lectures and, much like Sankoff's course, freed up class time for problem-solving tutorials.[40] Both Sankoff and Forcese credit the success of this model to the "active learning" that takes place during the face-to-face portion of the class.[41] Forcese emphasizes that "[if] you have a passive teaching style for part of the class, and then you expect to segue into an active teaching style, it's virtually impossible".[42] Sankoff agrees with this problem plaguing law classes and he mitigates it by going "feet-first into a problem" to "extract what we need from that problem". This way, the students

37 For a sample of Professor Forcese's videos, see Craig Forcese, "Lecture Modules Used as Part of Administrative Law (Forcese)", online: *Craig Forcese* <www.craigforcese.com/administrative-law-1>.

38 See Sankoff & Forcese, *supra* note 4 at 10.

39 *Ibid*.

40 *Ibid*.

41 See Sankoff & Forcese, *supra* note 4 at 3, who state that active learning involves "peer assisted" and "problem-based learning approaches". See also Harold S Barrows, "Problem-Based Learning in Medicine and Beyond: A Brief Overview" (1996) 68 New Directions for Teaching and Learning 3 at 5–6, whose six "characteristics" are adopted by Sankoff and Forcese as learning goals in their problem-based learning styles:

> [1)] Learning is Student-Centred[; 2)] Learning Occurs in Small Student Groups[; 3)] Teachers are Facilitators or Guides[; 4)] Problems Form the Organizing Focus and Stimulus for Learning[; 5)] Problems Are a Vehicle for the Development of Clinical Problem-Solving Skills[; 6)] New Information is Acquired Through Self-Directed Learning.

42 Sankoff & Forcese, *ibid* at 12.

are "active from the get-go, they expect the activity".[43] Sankoff and Forcese's foray into flipped classrooms reiterates the point that asynchronous lectures provide students with the flexibility to consume the lectures at a time when they are ready to learn.[44]

Flipped and blended learning formats show promise in the field of legal education, and some pre-pandemic studies suggested that students' appeared to have mostly embraced the forward-thinking approach by educators. However, some pre-pandemic feedback from students and faculty also indicated that any technology inserted into a curriculum should not become the focal point.[45] In a pre-pandemic survey of first year Robson Hall law students at the University of Manitoba, most of the students expected some form of technology to be used in their classrooms but were less enthusiastic about "complete online learning environments".[46] This sentiment was echoed by the pre-pandemic perception of MOOCs and law schools that completely removed the brick-and-mortar component out of their core curriculum.[47] Even subtle adjustments to the traditional method have brought about some resistance from students in the field: Sankoff, for example, has noted that eliminating the live lecture component in a course can lead to unforeseen issues.[48] Responses in course

43 *Ibid* at 11.

44 See generally Sankoff, *supra* note 4; Sankoff & Forcese, *supra* note 4.

45 See Jochelson & Ireland, *supra* note 13 at 151. See also Janus, *supra* note 21 at 14; Shariff et al, *supra* note 4 at 351; Dyane L O'Leary, "Flipped out, Plugged in, and Wired up: Fostering Success for Students with ADHD in the New Digital Law School" (2017) 45:2 Capital University Law Review 289 at 290.

46 See Jochelson & Ireland, *ibid* at 146.

47 See Pasquale, *supra* note 21 at 26; Janus, *supra* note 21 at 26; Emma Jones, "Connectivity, Socialisation and Identity Formation: Exploring Mental Well-Being in Online Distance Learning Law Students" in Rachael Field & Caroline Strevens, eds, *Educating for Well-Being in Law: Positive Professional Identities and Practice* (London: Routledge, 2019) 103 ("[a]lthough there is a lack of data on this, there has been suggestions that distance learning does not allow students the same accesses to legal culture" at 112).

48 See Sankoff, *supra* note 4 at 898.

evaluations for Sankoff's evidence class revealed that "several students felt unequipped to contribute properly to the problem-solving process because they did not feel they possessed a strong grasp of basic concepts before jumping into a discussion of the problems".[49] Moreover, a 2010 study of 96 law students' preferences for either "online, hybrid, or traditional learning" showed that the majority preferred the traditional method to "non-traditional" learning options.[50] This is reflective of the conservative approach that is generally found in law school faculties and their student bodies.[51] Although it has been argued that blended learning is flexible enough to accommodate several different learning styles,[52] an expectation of better overall student performance may be met with disappointment. Data out of an American study comparing performance results from two separate streams of a legal research class, one with live lectures and the other, a self-paced online module, found little-to-no statistical difference in the performance of the classes.[53] Another course comparison from the United States found that a Civil Procedure class at the University of Memphis showed no improvements in student performance when switching from the traditional method to a flipped classroom.[54]

In the past ten years, there have been voices within the corpus of relevant pedagogical literature that seek to justify the use of technology in law schools to

---

49 *Ibid* at 897.

50 See Daniel P Auld, "Linkages Between Motivation, Self-Efficacy, Self-Regulated Learning and Preferences for Traditional Learning Environments or Those With an Online Component" (2010) 2:2 Digital Culture & Education 128 at 133.

51 See Jochelson & Ireland, *supra* note 13 at 137.

52 See Hess, *supra* note 19 at 59; Hewitt, *supra* note 1.

53 See Jane Bahnson & Lucy Olejnikova, "Are Recorded Lectures Better than Live Lectures for Teaching Students Legal Research?" (2017) 109:2 Law Library Journal 187 at 201.

54 See Katharine T Schaffzin, "Learning Outcomes in a Flipped Classroom: A Comparison of Civil Procedure II Test Scores Between Students in a Traditional Class and a Flipped Class" (2016) 46:3 University of Memphis Law Review 661 at 672.

better prepare students for the adoption of technology in the legal profession.[55] Legal educators, Martha Simmons and Darin Thompson, have used online platforms to teach students "online dispute resolution" ("ODR"), and modelled the use of online platforms in real world mediations between parties.[56] They argue that movements in legal pedagogy that seek to ban laptop use in classrooms are a counterintuitive measure that ignores the "technological ubiquity" of our age and believe that "Canadian law schools are well positioned to introduce ODR into the legal curriculum, even if only through experimental pilot projects".[57] The students in the pilot project were led through a "blind-bid", text-based and video mediation process.[58] Overall the educators were satisfied with the level of experiential learning that was attained during the ODR pilot project.[59] Students did have trouble with video mediation due to participating students being in different time zones or having technical issues with videoconferencing platforms. Despite this, Simmons and Thompson are optimistic that some of the challenges they faced, such as technical glitches, even issues with student participation, could be avoided with partial tweaks to the

55 See Martha E Simmons & Darin Thompson, "The Internet as a Site of Legal Collaboration Across Continents and Time Zones: Using Online Dispute Resolution as a Tool for Student Learning" (2017) 34:1 Windsor Yearbook of Access to Justice 222 at 225; see also Hess, *supra* note 19 at 59.

56 Simmons & Thompson, *ibid* at 224. ODR refers to a wide range of processes that use information communication technologies to facilitate dispute resolution. It can encompass a variety of methods and media, with a common feature being that parties are not required to share the same physical space to arrive at resolution. Consistent with the 'online' aspect of ODR, most of its processes are facilitated through the Internet. Some forms of ODR rely on human intervention, while others are automated. ODR can range from the simple day-to-day negotiations via e-mail to complex multi-party video mediations.

57 *Ibid* at 228.

58 *Ibid* at 236. The project participants hailed from the Osgoode Hall Law School at York University in Toronto, Ontario, the University of Victoria in British Columbia and the University of Leicester in England.

59 *Ibid* at 241.

project.[60] The ODR pilot project ultimately highlights a growing desire for legal educators to embrace more experiential learning environments to better prepare students for the real world, which, online learning could facilitate to some degree.[61] As such, the recent move to virtual courtrooms during the COVID-19 pandemic has seen law programs adapt to the changing legal environment in real time by dedicating classes to experiential learning modules that give students the opportunity to engage with the legal profession through real-world technology.[62]

As the past ten years indicate, there are several dominant pedagogical approaches to online learning in law school and many proponents of some form of technology occupying space that would normally be reserved for in-person learning. Prior to the pandemic, Canadian pedagogy in this area was limited to a few early adopters of the flipped classroom model and experiential learning. The COVID-19 pandemic has reshaped the Canadian debate regarding best practices when incorporating technology into legal education, as Canadian educators have had a chance to pause and reflect on pedagogy in the pandemic and have also started looking beyond the pandemic to consider how the lessons learned can shape legal pedagogy in the future.

III. Law School Pedagogy in the Pandemic

The COVID-19 pandemic forced university campuses to move all of their courses online in Canada, and the legal profession was forced to do the same.[63] There is a growing body of pandemic-related literature on legal pedagogy developing in the United States, primarily proposing "best practice" methods

60 *Ibid.*

61 See Jochelson & Ireland, *supra* note 13 at 137; see Harris, *supra* note 9 at 798.

62 See Aidan Macnab, "U of T Trial Advocacy Course Preparing Students for Virtual Courtrooms" (2 December 2020) *Law Times*.

63 See *e.g.* Kathleen Harris, "Supreme Court Goes Zoom: Court to Start Virtual Hearing During Pandemic Closure" (3 June 2020) *CBC*.

for online learning.[64] In fact, data highlight the need for protocol that will facilitate a swift transition to online learning during a large-scale disruptive event like the COVID-19 pandemic.[65] Student survey data out of Texas Tech University Faculty of Law generated many interesting responses regarding the transition to online learning in March 2020. Professor Victoria Sutton used an online survey to assess the "attitudes and obstacles experienced in the COVID-19 transition".[66] All full-time students were given the opportunity to participate in the survey for two weeks at the start of May, shortly after final exams were completed.[67] Students were provided with "five choices on a qualitative Likert scale of best to worst" to gauge whether students had a positive or negative perception of online classes after the spring 2020 transition.[68] This was undertaken with the objective to "assess the effect of the lack of time to properly design online courses".[69] Approximately half of the students selected the most neutral statement "that online courses were 'not [their] first choice for taking law courses'";[70] 36 percent of the students had a negative response ("I am less inclined to take online courses" or "[o]nline courses were a bad experience"); and 11.6 percent felt positive about online learning after the transition ("I am

64 See Seth C Oranburg, "Distance Education in the Time of Coronavirus: Quick and Easy Strategies for Professors" (2020) Duquesne School of Law Research Paper No 2020/2 ; Yvonne M Dutton & Margaret Ryznar, "Law School Pedagogy Post-Pandemic: Harnessing the Benefits of Online Teaching" (2020) Journal of Legal Education, online: *Social Sciences Research Network* <ssrn.com/abstract=3717987> [forthcoming]; Nina A Kohn, "Teaching Law Online: A Guide for Faculty" (2020) Journal of Legal Education, online: *Social Sciences Research Network* <ssrn.com/abstract=3648536> [forthcoming].

65 See generally Victoria Sutton, "Law Students' Attitudes About Their Experience in the COVID-19 Transition to Online Learning" (2020) Texas Tech University School of Law Research Paper, online: *Social Sciences Research Network* <papers.ssrn.com/sol3/papers.cfm?abstract_id=3665712>.

66 *Ibid* at 2.

67 *Ibid.*

68 *Ibid* at 3.

69 *Ibid.*

70 *Ibid* at 4.

more inclined to take online courses" or "[o]nline courses are my preferred way of learning").[71] About 38 percent of students agreed or strongly agreed that their "satisfaction" with online classes "improved from day to day and week to week;[72] however, this response was tempered by the fact that 32 percent of the students either disagreed or strongly disagreed.[73] In addition to the Likert-scale questions, 40 percent of respondents indicated they had "unreliable Internet",[74] and over three quarters of the students felt "isolated from friends, family and classmates".[75]

A year later, Sutton sent out another survey, revisiting with students in May 2021 to see if there were any attitudinal shifts in the students' perception of online school.[76] In the follow-up, the return rate for the e-mail survey was much higher than the first (42.7 percent of all law students at Texas Tech participated compared to 26 percent in the May 2020 survey).[77] In 2021, students had "a more favourable outlook on online courses" compared to 2020. There was an 8.4 percent increase in positive responses to online learning in law school ("I am more inclined to take online courses" or "[o]nline courses are my preferred way of learning").[78] On the other end of the spectrum, there was a 5.7 percent increase in negative responses ("I am less inclined to take online courses" or "[o]nline courses were a bad experience").[79] Indeed, student responses moved

71 *Ibid.*

72 *Ibid.*

73 *Ibid* at 5.

74 *Ibid* at 2.

75 *Ibid* at 3.

76 See generally Victoria Sutton, "Perceptions of Online Learning and COVID-19 Countermeasures Among Law Students in a One-Year Follow-up Study" (2021) Texas Tech University School of Law Research Paper 1 at 1, online: *Social Sciences Research Network* <papers.ssrn.com/sol3/papers.cfm?abstract_id=3865262>.

77 *Ibid* at 1.

78 *Ibid* at 3.

79 *Ibid.*

slightly closer to the poles in 2021 as neutral responses dropped by about 14 percent when compared to the previous survey (48 percent down to 34 percent), suggesting that some students' opinions of online legal education may have crystallized as the school year progressed.[80] Moreover, the perception of online law school was markedly different between 1L, 2L and 3L students when the data above were adjusted to show differences in responses between the groups.[81] The data showed that 1Ls preferred the online delivery method significantly more than their upper-year peers, as not a single 3L student stated that online classes "are [their] preferred way of learning law".[82] Interestingly, thirty percent of the 2L students stated that "[o]nline courses were a bad experience" and that they "would not want to repeat" online learning, whereas just under 20 percent of the 1Ls also felt the same way.[83]

Whether online learning will continue in law schools post-pandemic is yet unknown, but it certainly seems probable that some elements of online learning may remain in a post-pandemic world. Dean Heather Gerken of Yale Law School admits that some pedagogical approaches developed during the pandemic will continue:

> I expect the changes in law school pedagogy to stick. That is not to say that classes will remain online when the pandemic subsides. But the pandemic led to many collective conversations about pedagogy. We have all thought a great deal harder about structuring class discussions, adapting to different learning styles, varying the pace of class, and conveying information in new and engaging ways. We discovered that flipped classrooms can sometimes work, and that they are certainly superior for the training sessions supplied by academic affairs, career development offices, and the like. Finally, the regular introduction of visitors was for some an act of desperation—an effort to make

80 *Ibid.*

81 *Ibid.*

82 *Ibid.*

83 *Ibid.*

> yet another Zoom class feel livelier. But it made us realize that technology gives us a means of bringing the world into our classrooms.[84]

Gerken's sanguine reflection on a year where learning was restricted to online methods of delivery is echoed by some faculty members across Canada in their own reflections on the precarious year faced by legal educators.

Many law faculties and legal educators in Canada have shared some of the adjustments that they have had to make to their law classes during the pandemic. Some law schools have adjusted their curricula to include courses that teach trial advocacy skills for online videoconferencing.[85] The course at the University of Calgary, for example, will "cover electronic filing and service of documents, electronic discovery and exchange of documents, pre-trial questioning of parties and witnesses using virtual technology and electronic hearing/trial".[86] Tenille Brown at Lakehead University Faculty of Law added "walking tours" to her property classes, along with assignments that encourage and facilitate groupwork,[87] while Blair Major at Thompson Rivers University Faculty of Law found that a "bare-bones" teaching of his administrative class, followed by a review of this material, could foster a more in-depth discussion once the nuts and bolts start to make sense to the students.[88] The summer of 2020 provided some professors with the opportunity to test out different technological tools at their disposal such as "discussion forums" and "in-class polls and quizzes" in an attempt to find the optimal delivery method of course

---

84 Heather K Gerken, "Will Legal Education Change Post-2020?" (2021) 119:6 Michigan Law Review 1059 at 1062.

85 See Macnab, *supra* note 62; Zena Olijnyk, "University Calgary Law School E-Litigation Course Points to a Future of Conducting Law Virtually" (20 November 2020) *Canadian Lawyer*.

86 Olijnyk, *ibid*.

87 See Tenille E Brown, "Thought of a Newly Appointed Assistant Professor: Learning About Place in the Time of the Pandemic" (2020) 25:4 Lex Electronica 60 at 61.

88 See Blair A Major, "Making Something New: Legal Education in a Pandemic" (2020) 25:4 Lex Electronica 93 at 95.

material to keep students actively engaged while learning the law online.[89] However, some professors expected more from students in spite of the challenges that were faced during the pandemic, to the dismay of their colleagues.[90] This led to harsher grading of exams due to the increased time allotment during finals.[91]

On the other end of the spectrum, legal educators have called for pedagogical reform after having ample time to reflect on the traditional learning methods that are ingrained into faculties across Canada.[92] Along with the 100 percent final exam, numerical grades are being scrutinized by law school professors, who are questioning their usefulness.[93] During the pandemic, many schools moved away from numerical grading to a pass/fail or credit/no credit evaluation model when schools initially moved online to finish the winter semester. Gemma Smyth reports that some faculty members seemed to embrace this model while some students felt that the pass/fail system was "opaque".[94] The University of New Brunswick Faculty of Law instituted a "hybrid approach" which combined the traditional numerical grading model with the pass/fail model, which some found to be a problematic solution to exceptional circumstances.[95]

The common refrain is that COVID-19 forced educators to reassess their delivery methods. Moreover, educators are seeking to make classes universally

89 See Nicole O'Byrne & Alden Spencer, "Leaving the Classroom Behind? Lessons Learned from Designing an Online Law and Film Webinar Series" (2020) 25:4 Lex Electronica 104 at 106.

90 *Ibid.*

91 *Ibid.*

92 See Jeffrey Meyers, "Accommodate Us All Please: A Case Against the Status Quo" (2020) 25:4 Lex Electronica 54 at 58; Major, *supra* note 88 at 97.

93 See *ibid.* See also Gemma Smyth, "Law School Assessment Revisited" (2020) 25:4 Lex Electronica 134 at 135.

94 See Smyth, *ibid* at 136.

95 See Jason MacLean, "How Not to Think in an Emergency" (2020) 25:4 Lex Electronica 140 at 142.

accessible to all students.[96] Some professors believe that the pandemic shutdown and transition online created an opportunity to "build back better" and provide an equitable pedagogical curriculum for every law student.[97] According to Anne Lavesque, this could be accomplished by implementing "universal design" into legal curricula.[98] Lavesque explains that "universal design means considering 'the differences between students and differences that characterize groups of individuals when making design choices to avoid creating barriers'".[99] Ruby Dhand echoes Lavesque's recommendation insisting that "[o]ften, the primary barrier to inclusion and accessibility for law students with disabilities is attitudinal".[100]

Despite the tumultuous transition from in-person learning to strict online delivery of legal education, educators were able to leave the pandemic tumult with fresh perspectives on the future of legal pedagogy. Part IV will provide the students' perspective in this dialogue centred around legal education online. The next section will look at a 2021 survey conducted out of the University of Manitoba Faculty of Law (Robson Hall) which asked students a variety of questions related to their experiences with online learning during the COVID-19 pandemic.

---

96 Anne Lavesque, "Universal Design in Legal Education in a Time of COVID-19" (2020) 25:4 Lex Electronica 168 at 169, citing "Guidelines on Accessible Education" (28 September 2004) at 9, online (pdf): *Ontario Human Rights Commission* <www.ohrc.on.ca/sites/default/files/attachments/Guidelines_on_accessible_education.pdf>. See also Ruby Dhand, "The Covid-19 Pandemic: Accommodations and Legal Education" (2020) 25:4 Lex Electronica 175 at 179.

97 Lavesque, *ibid* at 173.

98 *Ibid* at 169.

99 *Ibid* [footnotes omitted].

100 Dhand, *supra* note 96 at 176.

IV. Summary of the Online Law Student Survey

Comparatively, this survey, and the surveys conducted by Jochelson and Ireland at Robson Hall in 2020 and by Sutton at Texas Tech in 2020 and 2021, had similar objectives. The aim was to assess law students' perception of online learning, and the ways in which the transition to online learning impacted these students. The surveys teased out the fluctuating attitudes of law students as the COVID-19 pandemic progressed, worsened, and subsequently affected an entire school year. While the students at Texas Tech did not have a significant majority preferring either online or in-person delivery models after a full year of distance learning,[101] the goal of our study is to determine how students in Canadian law schools in 2021 felt about their experiences and to see if they had a stronger preference for one delivery mode over the others. This paper provides an analysis of the quantitative data received from the survey and compares the responses received by year of law school attended, to determine whether there were statistically significant relationships between a student's perspective on remote learning and their most recent year of law school attended. While our goal was to let the data guide the analysis without prejudging or expecting any specific answer, we did hypothesize that first-year students would have less difficulty overall in transitioning to the online environment. This hypothesis was based on the fact that first-year students would be less familiar with the rigors of law school and would not have experienced an in-person legal environment, whereas third-year law students would have had the most in-person law school experience and would have more difficulty transitioning.

An anonymous 88-question, online survey was created to understand how Canadian law school students felt about remote learning; the transition to online courses; their experiences with different types of online delivery formats; their views on interaction with peers and instructors; assessment types; and support received during remote learning. No incentives were provided for participation and all students were advised that participation in the survey was voluntary. The survey questions dealt with a range of issues, including the students' "thoughts

101 Sutton, *supra* note 76 at 3.

on the move to online learning"; the type of asynchronous lectures and technology preferred; the evaluation methods that should be implemented for online learning; questions about mental health, accessibility, financial costs; and concerns about "experiential and practical work" during the 2020-2021 school year. The survey was conducted on a 5-point Likert scale where students were given a statement and asked to select either *strongly disagree* (1)*, disagree, neutral*, *agree*, or *strongly agree* (5). Additional open-ended response questions were asked of the students but are not included for the purpose of this paper. The survey was made accessible on the Manitoba Law Student Association website and students across Canada were provided access to the survey via a link in an email to their law school email address (when their administration agreed to pass on the link), beginning on February 23, 2021. Simultaneously, the links were distributed through Facebook and Twitter posts that used the hashtags #CNDLawSchool and #Covid19. Completed surveys were received beginning February 23, 2021 and ending on April 12, 2021 by students who had experienced a full year of classes online.[102] 422 responses were obtained from students attending 13 different Canadian law schools, in addition to one student response from a U.S. law school, which was excluded for the purposes of this analysis. There are currently 3916 law students in Canada, so our survey has captured approximately 10 percent of Canadian law students.[103]

The law school with the largest number of participants was Robson Hall at the University of Manitoba ("UM"), with just over a third of respondents attending (35.96%), while many responses were also recorded from the University of Calgary ("UC") (17.47%) and the University of Alberta ("UA") (13.36%). Several responses were also recorded from the University of New Brunswick ("UNB") (8.56%), Dalhousie ("DAL") (6.85%), Thompson Rivers University ("TRU") (5.48%), the University of Western Ontario ("UWO")

102 Olijnyk, *supra* note 85.

103 Bernise Carolino, "Canadian Law Schools Added 316 Students and 35 Tenured Faculty Over Five Years, Says FLSC Update" (28 November 2019) *Law Times*.

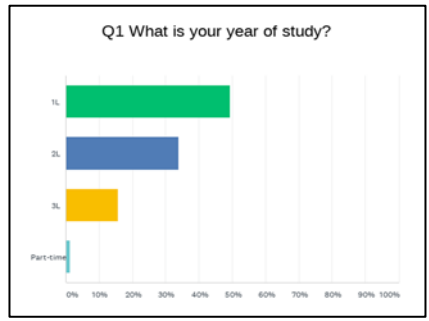
(5.14%), and the University of Saskatchewan ("USASK") (2.74%). The remaining schools (York University, University of Ottawa, Lakehead University, McGill University and Queen's University) accounted for less than 2 percent each:

Table 1

Participants by School	
Robson Hall at the University of Manitoba	35.96%
University of Calgary	17.47%
University of Alberta	13.36%
University of New Brunswick	8.56%
Dalhousie	6.85%
University of Saskatchewan	2.74%
York University, University of Ottawa, Lakehead University, McGill University and Queen's University	2% (each)

The students were asked to identify what year of law school they were in during the 2020-2021 school year (1L, 2L or 3L) and whether they were part time or full time. No other demographic information on the students was obtained due to limitations placed by the University ethics office. Only five students of 422 reported attending law school part-time (1.18%), while 98.82 percent reported they attended full time. Graph 1 indicates that 50 percent of survey respondents were in 1L, 34.21 percent were in 2L and 15.79 percent were in 3L.

Graph 1



The remaining 87 questions asked of survey respondents were divided into seven categories: general ideas about law school online (13 questions); teaching format (16 questions); preferred interfaces (7 questions); level of interaction (10 questions); evaluation (16 questions); accessibility (11 questions); and resources and mental health needs (14 questions). Each category had a mix of closed ended 5-point Likert scale questions, which required students to respond to a declarative statement by selecting, from left to right: "*strongly disagree*" (1), "*disagree*" (2), "*neutral*" (3), "*agree*" (4) and "*strongly agree*" (5) and open-ended response questions, which allowed students to elaborate on their experiences and provide suggestions for improvement more fully.

In order to analyze the different survey questions, and to determine whether the students' year of law school had any effect on their responses, a cross-tabulation (crosstab) was conducted. This method is particularly useful for this study as it provides a table depicting the relationship between two categorical variables, as were examined here. We then used Pearson's Chi Square with the standard 0.05 confidence level to determine statistical significance — meaning that if statistical significance is achieved, then there is a less than five percent chance the relationship observed is due to sampling error.

V. Discussion and Results

A. General Ideas About Law School Online

Overall, the survey revealed that students seemed to strongly favour in-person delivery methods over online learning, and did not have high levels of confidence in professors' abilities to transition to an online model, or in their own ability to maintain the standards they had set for themselves. Seven out of 12 Likert-scale questions achieved statistical significance at a 95 percent confidence level (p = 0.05). The questions achieving statistical significance were "I am confident with my professors' abilities to develop an online law school format"; "[i]t is essential that my online classes have a participation component"; "I would prefer to have all lectures uploaded as early as possible so I can watch them at my convenience"; "I would prefer to have lectures uploaded weekly"; "I prefer online seminars to in person seminars"; "[i]t is essential that my online classes have interactivity with my professors"; and "[i]t is essential that my online classes have interactivity with my peers". These results are represented below in Table 2:

Table 2

Variables	Total Mean	Mean 1L	Mean 2L	Mean 3L	Min	Max	Statistically Significant P = .05
I can learn effectively in an online format	2.91	2.99	2.85	2.74	1	5	No
I am confident in my abilities to keep up with online law school	2.98	3.01	2.95	2.94	1	5	No
I am confident in my professor's abilities to develop online law school	2.89	3.04	2.84	2.43	1	5	Yes
I prefer online lectures to in person lectures	2.15	2.19	2.07	2.00	1	5	No

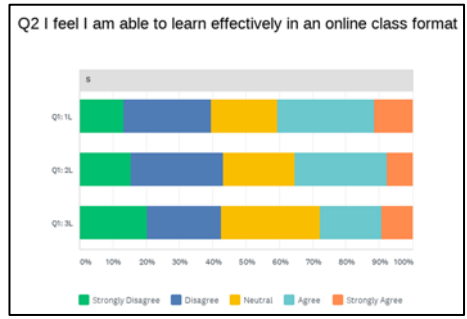
I prefer online seminars to in person seminars	2.13	2.13	2.08	2.07	1	5	Yes
It is essential that my online classes have interactivity with professors	3.84	3.97	3.67	3.78	1	5	Yes
It is essential that my online classes have interactivity with peers	3.57	3.82	3.28	3.48	1	5	Yes
It is essential that my online classes have a participation component	2.69	2.95	2.38	2.60	1	5	Yes
I would prefer to have all lectures uploaded as early as possible so I can watch them at my convenience	3.87	3.93	3.71	4.04	1	5	Yes
I would prefer to have lectures uploaded weekly	3.28	3.29	3.22	3.43	1	5	Yes
If all lectures were uploaded at the beginning of the semester, I feel confident that I could stay up to date	3.13	3.16	3.03	3.19	1	5	No
If all lectures were uploaded weekly, I feel confident that I could stay up to date	3.58	3.57	3.50	3.78	1	5	No

Students were split as to whether they felt they were able to learn effectively in the online format. 41.09 percent of students disagreed or strongly disagreed with the statement "I feel I am able to learn effectively in an online format",

while 37.30 percent of students agreed or strongly agreed and 21.62 percent of students were neutral.

When broken down by year of law school currently attended, 3L students were the most likely to strongly disagree with the statement (20.37%, to 15.38% in 2L, and 13.19% in 1L), or to be neutral (29.63%, compared to 21.54% of 2L and 19.78% 3L) (Graph 2). 1L students were the most likely to agree, or strongly agree with the statement (40.66%, compared to 35.38% of 2L and 27.78% of 3L). The weighted average of this question also declined by year of law school, reaching 2.99 for 1L, 2.85 for 2L and 2.74 for 3L, though the results were not statistically significant.

Graph 2

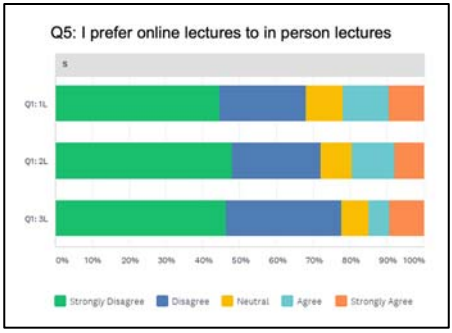


Students strongly preferred in-person lectures, with just over 70 percent of students disagreeing or strongly disagreeing that they preferred online lectures or seminars to in-person ones, which supports some of the pre-pandemic data that law students prefer in-person classes over online classes.[104] As can be seen below in Graph 3, this effect was more pronounced in upper-level students, with 77.78 percent of third year students indicating they disagreed or strongly disagreed, compared to 72.09 percent of second year and 68.14 percent of first year students, though this difference did not achieve statistical significance. The

104 See Auld, *supra* note 50.

weighted average also declined, indicating more disagreement with the statement by year of law school attended (1L = 2.19, 2L = 2.07 and 3L = 2.00).

Graph 3

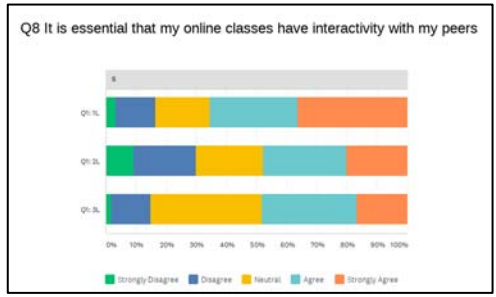


Students also answered "I am confident in my abilities to keep up with an online law school format" in the affirmative more frequently the earlier they were in their law school career, though the results were not statistically significant.

When asked to indicate whether they "prefer online seminars to in-person seminars", close to 69 percent of the students that answered either disagreed or strongly disagreed. Students thought interactivity with professors was highly important, as 65 percent agreed or strongly agreed with the question "it is essential that my online classes should have interactivity with my professors", while only 13 percent of students disagreed or strongly disagreed.

However, students tended to value interactivity with their peers slightly less (56%). Graph 4 shows us that this was particularly true for 2L and 3L students but not for 1L students, who had a strong preference for interactivity with peers. This was statistically significant.

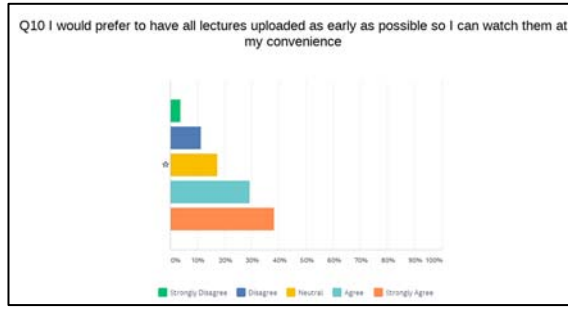
Graph 4



Interestingly, students did not consider a participation component to be an essential aspect of online learning within law school (over 50% either disagreed or strongly disagreed). This tends to go against professors' expectations of creating a participatory environment to make up for the lack of available face-to-face interaction.

Graph 5 shows student responses to the asynchronous component of their online courses had mixed results. It was clear that students preferred to have "all lectures uploaded as early as possible so [they] can watch them at [their] convenience" (67% either agreed or strongly agreed). This speaks to the flexibility that asynchronous lectures can provide students which has been observed by educators in the field.[105]

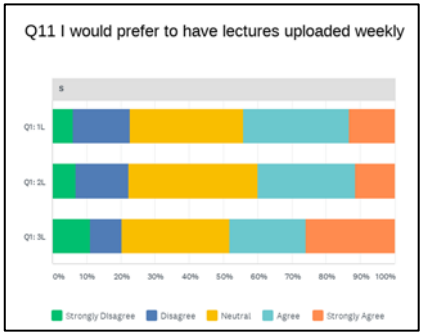
Graph 5



105 See Sankoff, *supra* note 4 at 902.

Surprisingly, only 43 percent of students felt that they could keep up with the asynchronous material if they were all uploaded at the beginning of the semester, hinting that too much flexibility could be troublesome for some students. However, students agreed that if the lectures were uploaded weekly, they would feel "confident" that they would "stay up to date" with them, even though only 43 percent of the students agreed that they generally prefer weekly uploads, while 35 percent were neutral. When broken down by year, 3L students were significantly more volatile as 25.93 percent strongly agreed with having all lectures uploaded weekly (a statistically significantly higher amount than their 1L and 2L peers) but were also most likely to strongly disagree with having lectures uploaded weekly (11.11% compared to 6.92% for 2L and 6.08% for 3L) (Graph 6).

Graph 6

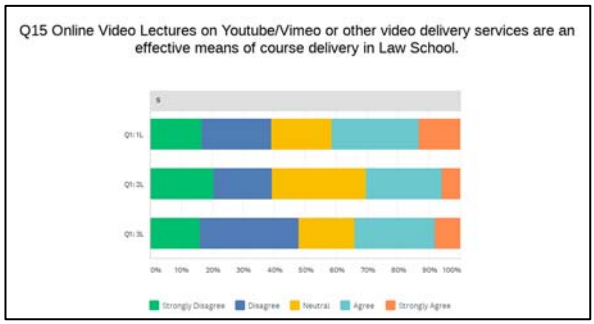


B. Questions About Lecture Format

Technology was an important component to the online delivery of legal education for Canadian law schools in the past year. Educators had many tools available to them as they geared their law classes and syllabi for a full year of online learning. There was no overwhelming majority when asked to comment on whether "YouTube/Vimeo or other video delivery services are an effective means of course delivery in Law School" (37% disagreed/strongly disagreed, 23% remained neutral, and close to 27% agreed/strongly agreed). When broken down by year of law school attended, 2L students were the most likely to

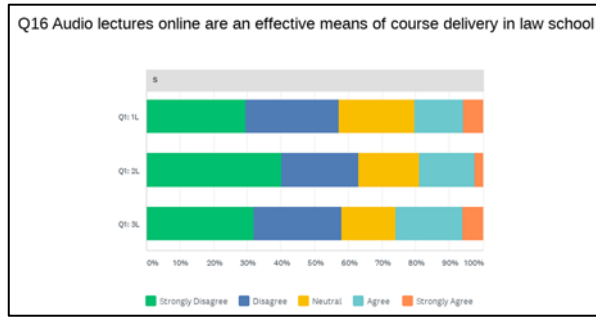
strongly disagree that online lecture videos are an effective means of course delivery and 3L students were most likely to disagree with the statement entirely with more than 47 percent (Graph 7). No cohort expressed more than 45 percent (1L) agreement with online video lectures being an effective means of course delivery. The difference between the level of strong agreement reached statistical significance between 1L (13.22%) and 2L (5.74%) students.

Graph 7



Students did clearly prefer a video method to an audio one, as 59 percent of the students disagreed or strongly disagreed that "[a]udio lectures online are an effective means of course delivery in law school". This was particularly pronounced for 2L students, as more than 40 percent strongly disagreed with the statement, in addition to 22.95 percent disagreeing — the largest cohort of disagreement within any year. 3L students were the most favourable to audio lectures with 26 percent agreeing or strongly agreeing that they were effective, as can be seen in Graph 8.

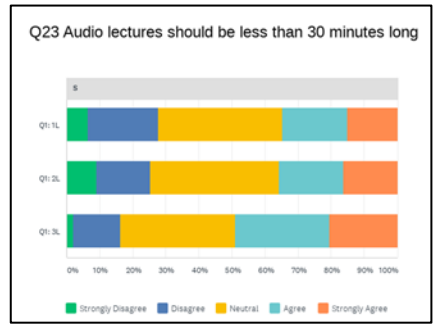
Graph 8



Podcasts were also viewed unfavourably and had nearly identical responses to audio lectures. However, statistical significance was achieved between 1L and 2L students in the category of strongly disagree (27.91% to 40.16%, respectively) and disagree (29.65% to 18.03% respectively).

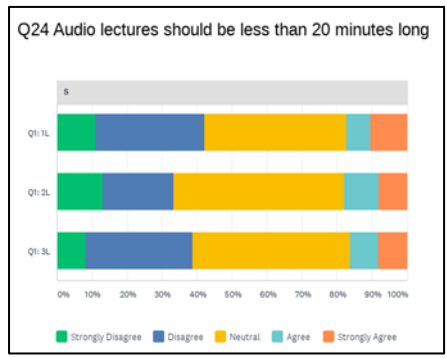
Narrated PowerPoints received mixed reviews but were preferred slightly (mean of 3) over audio lectures and podcasts (mean of 2.9). The differences between year of school attended was not statistically significant. The June 2021 survey indicates that a pedagogical approach that incorporates a visual component for asynchronous lectures will likely be more effective than any type of audio recording on its own. Students of all levels consistently agreed that audio recordings on all platforms should be "kept to less than 50 minutes long". However, students were more apt to be neutral regarding keeping recordings shorter than 30 (Graph 9), with the caveat that 3L students were more likely to strongly agree with keeping audio recordings to under 30 minutes than their 1L or 2L peers, though the difference was not statistically significant.

Graph 9



Most students in all levels were also neutral about audio lectures being shorter than 20 minutes long (Graph 10), though 1L students disagreed with the statement significantly more than their 2L peers (11.49% to 3.25%), a result which did achieve statistical significance at the p=.05 confidence level.

Graph 10



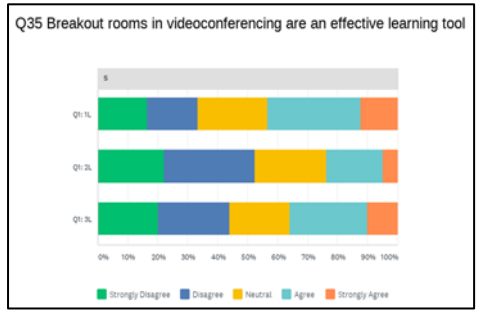
C. Questions About Videoconferencing

When asked about whether videoconferencing is an "effective means of course delivery in law school", close to 47 percent of the respondents either agreed or strongly agreed. There was little difference between the year of law school attended, though 3L students were the least likely to agree or strongly agree with the statement.

When asked which video platform they preferred, over 61 percent of students preferred Zoom over other videoconferencing platforms. 1L students were the most likely to agree or strongly agree with Zoom being their preferred platform while 2L students were the least likely to agree, with the results being statistically significant (3.51% of 1L students disagreed, while 11.48% of 2L students disagreed). Students in all years disliked Microsoft Teams (though 3L students were slightly more likely to prefer this platform compared to their peers, a result failing to achieve statistical significance) and greatly disapproved of Cisco Webex, with less than 2 percent agreeing or strongly agreeing that it was the best platform for online course delivery.

With regard to "Breakout Rooms" being an "effective learning tool", 41 percent of students that answered disagreed or strongly disagreed with this statement, while 23 percent were neutral, and 36 percent of students agreed or strongly agreed. As can be seen in Graph 11, the results here varied significantly by year as 1L students were far more receptive to breakout rooms than their 2L or 3L peers. This result achieved statistical significance on the disagree, agree and strongly agree variables respectively. 2L students were the least likely to believe breakout rooms were an effective learning tool, with only 23.78 percent of students agreeing or strongly agreeing.

Graph 11



The trend of statistical significance continued as students were asked whether "breakout rooms should be used extensively for class discussions" with 54 percent disagreeing or strongly disagreeing and 22 percent falling in the

neutral category. Once again, 2L students were the least likely to see value in using breakout rooms, as 34.71 percent strongly disagreed, compared to 21.05 percent of their more favourable 1L peers, and only 10.74 percent agreed, compared to 22.81 percent of 1L students.

When asked if breakout rooms should be abolished altogether, 37 percent of students ultimately disagreed or strongly disagreed that breakout rooms should not be used at all in classrooms with close to 33 percent agreeing. Breaking from the previous pattern, 3L students were the most likely to desire the abolishment of breakout rooms, though the results were not statistically significant with 44 percent of students agreeing or strongly agreeing, compared to 41.8 percent of 2L and 33.33 percent of 1L students.

These responses suggest that breakout rooms may have a place within the online classroom but should not be used as a central focus outside of perhaps in first year, echoing the 2016 report from the Academic Innovation Committee out of the University of Manitoba above.[106]

D. Questions About Distance and Remote Learning

Unsurprisingly, 80 percent of students disagreed that they would be comfortable learning the course material with the syllabus, readings and posted class notes but without videoconferencing and video lectures, with 1L students feeling the least comfortable, and 3L students feeling the most comfortable, though the results were not statistically significant aside from a large difference in neutral feelings between 1L (3.59%) and 2L (9.32%) students.

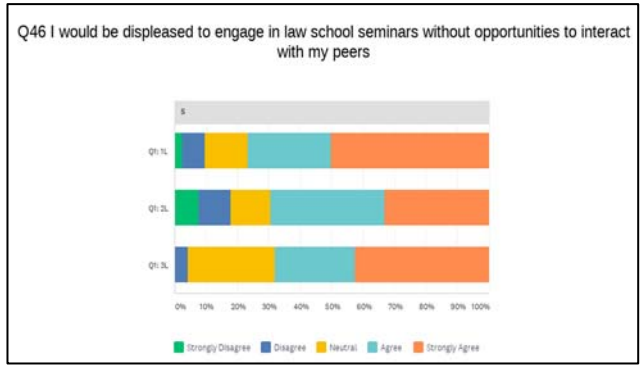
More than 75 percent of the students that responded felt that videos of some type, whether live or recorded, are an essential component to learning the law online and would react negatively if they were not used as a pedagogical tool. 2L students reacted most negatively and least neutrally, and 3L students reacted the least negatively and the most neutrally, results that achieved statistical significance. This reaffirms the findings above that a visual component is likely to be valued highly by students taking online courses. The survey also found

106 Shariff et al, *supra* note 4.

that students seem to value PowerPoints much more than podcasts or audio lectures and would react less negatively if the latter two were discontinued as teaching tools. There were not statistically significant differences between the different cohorts. This demonstrates that a blended model for online law school classes that incorporates videoconferencing, video lectures, podcasts and PowerPoints would be significantly preferable to students.

When asked about their perspectives on interaction with others, 83 percent of all students agreed or strongly agreed that opportunities to interact with professors were important to them and there was little difference between the cohorts. Interaction with peers was also rated as highly important, although slightly less so (4.0 for peers, compared to 4.3 with professors). In this area there were numerous differences between cohorts as only 4.26 percent of 3L students disagreed that they would be displeased with no opportunity for interaction with peers and no 3L students strongly disagreed with that question (Graph 12). This is in comparison with a combined 17.8 percent disagreement or strong disagreement for 2L students and 9.55 percent disagreement in 1L students. 3Ls were the most likely to be neutral on peer engagement. Both results achieved statistical significance. Overall, 1L students were the most likely to agree or strongly agree with the statement, though this difference was not statistically significant.

Graph 12

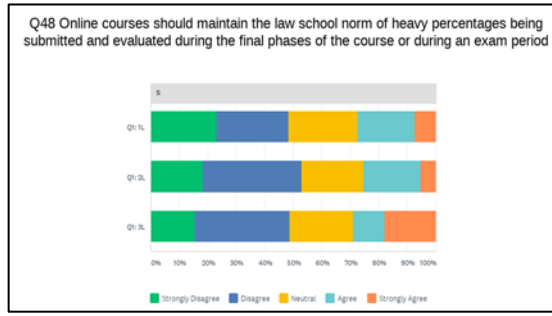


It is quite clear that students highly value the socialization that occurs within law school and would prefer to nurture this aspect of law school as much as possible while online. In the original 2020 survey (which occurred early in the pandemic), the importance of interaction was rated much lower (3.3/5 for peer interaction compared to 4.0 for interaction with professors), possibly suggesting a shift in students' priorities as the pandemic has progressed.

E. Evaluation

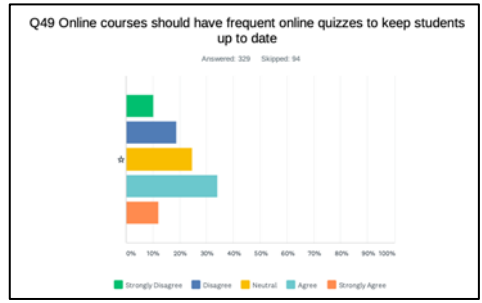
There were several questions on the topic of law school evaluation methods during online learning. Students expressed mild disagreement with the idea that "[o]nline courses should maintain the law school norm of heavy percentages of evaluation occurring within the final phase of the course/during the exam period" (2.7/5). In Graph 13 we see 3L students were the most in favour of keeping the traditional assessment model with 17.78 percent of students strongly agreeing with the statement; a statistically significant difference from both 2L (5.22%) and 1L (7.27%). This is likely due to 3L students feeling more comfortable with this assessment method, due to more frequent exposure and less negative anticipation.

Graph 13

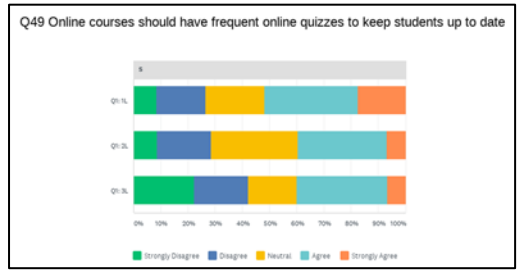


Graph 14a speaks to the fact students seemed more open to the idea of "frequent online quizzes to keep students up to date" (46% either agreed or strongly agreed with only 29% disagreeing or strongly disagreeing). 3L students, continuing the pattern from previous questions, were statistically significantly, the most likely to strongly disagree with this idea (22.22%) compared to 8.62 percent of 2Ls and 8.43 percent of 1Ls (Graph 14b). This trend reverses for the "strongly agree" category, where 17.47 percent of 1L students supported frequent online quizzes, compared to 6.90 percent and 6.67 percent for 2Ls and 3Ls respectively. The data indicates that close to half of the students surveyed — and more than half of first-year and second-year students — may have been worried about staying on track during the lengthy school year of online classes and would have embraced low-stakes evaluation methods from the educator to stay on track. In fact, 55 percent of the students that answered would be open to these quizzes being counted toward their final grade, again with the majority of these being first-year and second-year students.

Graph 14a



Graph 14b



There seems to be very little positive support toward courses that are predominantly evaluated through final essays or exams as only 10 percent of the students that answered this question either agreed or strongly agreed with this suggestion. Close to 46 percent of students would ultimately prefer a mix of "written, or online quizzes including a host of other options like 'essays, memoranda, multiple choice, true false [*sic*], and/or matching exercises'". This, however, comes with a caveat as 35 percent of the responses were neutral, which was consistent across all cohorts. On the topic of attendance and participation, students seem to favour less stringent rules. 55 percent of students that responded either disagree or strongly disagree that attendance and participation should be mandatory within law school classes online, a result that was similar across all years. A similar number of students also disagree or strongly disagree that attendance and participation should be "part of the marks for online

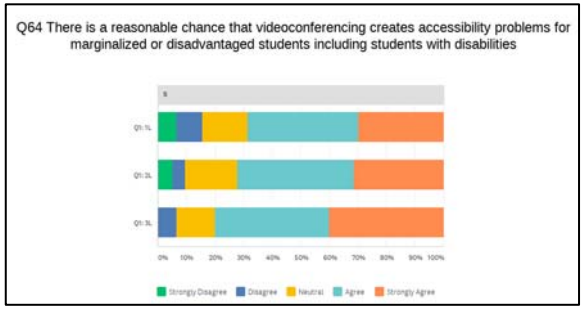
courses", though 3L students were least likely to desire participation or attendance grades, though the result did not achieve statistical significance.

A pass/fail evaluative method had close to an equal distribution as 39 percent of the students either disagreed or strongly disagreed while 41 percent agreed or strongly agreed (21 percent felt neutral) that the method should be implemented into law school curricula while online. Students slightly leaned closer to disagreeing with a permanent move to the pass/fail grading scheme or an option for students to choose between the traditional grading method and pass/fail, but none of the questions about pass/fail grading achieved any statistically significant differences between cohorts.

F. Accessibility Issues

Students overwhelmingly agreed with statements saying that there was a reasonable chance that videoconferencing and video lectures created "accessibility problems for marginalized or disadvantaged students including students with disabilities" (with students slightly more concerned about videoconferencing — 3.9/5 compared to 3.7/5 for video lectures). As can be seen in Graph 15, these results demonstrated a statistically significant difference between cohorts, as 3L students were the most concerned regarding these issues.

Graph 15



Students also believed podcasts and traditional distance tools such as posted PowerPoints, syllabi, and readings to be problematic (3.6/5 and 3.5/5

respectively), with 3L students again being statistically significantly the most likely to agree that both created accessibility concerns.

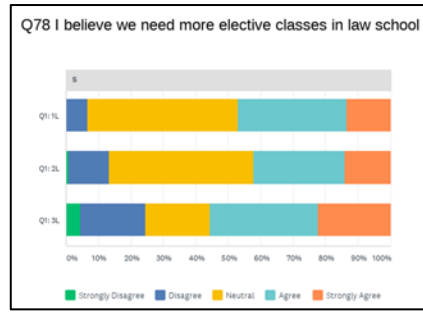
In terms of evaluation, students believed there was a reasonable chance that online quizzes and exams created accessibility problems (3.8/5 for both) with 3L students again demonstrating the most concerns on these topics (both achieved statistical significance). Online take home assignments and podcasts were thought to bring fewer accessibility issues, rating a neutral 3/5, and 1L students were statistically significantly far more likely to disagree with these statements than their 2L or 3L peers. Required participation marks were also expected by students to cause accessibility problems (3.6/5).

Although some students worried about privacy issues in online courses, the general body was not particularly concerned (2.6/5). Students had a neutral response when asked if they were concerned "what others may see or hear during online videoconferencing (3.1/5), with 3L students disagreeing or strongly disagreeing most frequently (46.67% compared to 35.65% of 2L students and 39.39% of 1Ls).

G. General Questions About Law School

Most students agreed that they were satisfied with the selection of mandatory courses required in law school (3.1/5), with few students desiring more mandatory classes in law school (2.4/5). Indeed, the data suggests that it is not the doctrinal courses that are at issue but that it is the workload that may be exacerbating anxiety amongst the student body. Most students were neutral (42%) about the statement "I believe we need more elective classes in law school", although overall students agreed with the sentiment (3.5/5). Graph 16 outlines that 3L students were the least likely to be neutral and the most likely to support the introduction of more elective courses in law school, though there was more polarization as more 3L students also strongly disagreed with the statement. All results for this question showed a statistically significant difference from each other.

Graph 16



Mental health was another topic covered by the survey and students' responses and comments provided a clear picture that online learning can have a serious effect on students' well-being. Student comments revealed that many struggled daily with their mental health and emphasized that online learning in conjunction with the isolation that students experienced exacerbated this daily struggle. 70 percent of the students that answered felt that online classes had "a detrimental effect" on their mental health, with 48 percent of students strongly agreeing. This was again, most frequently seen in 3L students as more than 82 percent agreed or strongly agreed with the statement — a statistically significant difference from their 2L and 1L peers.

Other important comments from students addressed the financial implications of law school and the workload that is expected of students online. Many students were displeased with the cost of tuition for online learning as they found that the quality of learning and teaching online was not comparable to in-person learning methods. Several students were displeased with paying for campus services that were not being used because of the COVID-19 mandates, including Moot Court (2.9/5), and the library (3.4/5). Furthermore, a strong majority of students responded that they were unable to maintain their "hobbies and interests" during the school year highlighting the nexus between assigned workload, hobbies and interests, and overall mental health.

H. Summary of Results

The results we have shared in this paper are subject to a major caveat. All students answered during the pandemic lockdown in Canada. Undoubtedly the results are influenced by the context of engaging in remote learning while being unable to spend significant time outside of one's domicile.

During the heart of the pandemic, our results show that interactivity matters to students, though forced participation is not their preference. Mainly, despite a 1L adaptability towards remote learning, student preferences lean towards in-person learning. Students favoured weekly uploaded video content. Across each year of study, students favoured in-person learning opportunities. Video lectures in asynchronous format did not rate strongly for student preferences but did rate more strongly than various audio options. PowerPoints were felt to be essential. Videoconferencing was the preferred mode of remote learning, and indeed seen as essential, while Zoom was the preferred platform. Breakout rooms were a useful tool for students although just as many students did not prefer these fora. Certainly, the use of breakout rooms for extensive discussion was not countenanced by the majority. Professor interaction was an aspect of law school that seemed germane to most students as was peer interaction.

Evaluation results echo previous findings, that students find evaluative instruments weighted heavily at the end of a course to be unappealing, and though no one form or evaluation, including participation grades, were popular, mixed mode evaluation throughout a year is preferred, although many students remain neutral on questions of evaluation. Pass/fail grading during pandemic learning divided the students nearly equally in terms of preferences.

Accessibility issues were seen in nearly all questions that pertained to modes of remote law teaching, and students were surprisingly not as concerned about privacy as many in the legal teaching community may have feared. Mental health, unsurprisingly, was a serious issue for students. It remains to be seen if some of these issues abate as society opens up even as some distance learning may continue.

VI. Conclusion

It has been a fraught year for law educators and students. The pivot to online learning was sudden and work intensive for all parties. The reactions collected during the heart of the pandemic reflect a largely dissatisfied student body, struggling with mental health challenges, during a once in a lifetime world crisis. The students desire in-person learning and they desire the interactivity of law school. Perhaps, as society returns to some semblance of normalcy, these learning preferences will abate.

Educators can take note, though, that it is possible to use remote tools to augment whatever state of play becomes routine in our new normal. The use of Zoom and the fostering of online interactivity may still play a relevant role when an instructor is travelling, at home with a cold or when bringing in guest speakers from across the world. Issues pertaining to mental health and accessibility will not entirely recede as we transition back to the in-person classroom. The anxiety and punitive nature of heavy end-of-term evaluation will likely remain.

The lessons learned may affect how we engage in office hours or small-group meetings going forward. Videoconferencing may provide us with effective supplemental or alternative teaching as we move forward. Law remains a human discipline, where people matter, where interaction matters and where in-person learning is preferred. It is for a different study to evaluate whether remote or in-person modes of instruction lead to better learning outcomes. Regardless of how one interprets our results, the pandemic law instruction season was difficult for students. More studies will be needed to assess how remote technologies will assist during the return to normal as we emerge from pandemic learning.

Redux: Towards an Empowering Model of Legal Education

Camille A Nelson*

This article seeks to imagine a post-pandemic opportunity for law schools. The author posits that despite the challenges presented by the pandemic years, which were largely navigated through crisis management, law schools, and higher education more generally, might emerge fortified to better serve society. Through this reboot, or redux, law schools have an opportunity to reimagine a new path forward. This project urges the creation of more inclusive, transdisciplinary, tech-incorporating, empowering, and entrepreneurially motivated law schools. Such law schools would look to the future, instead of being moored to the past. Importantly, recalibrations, or recommitments, would be driven by a mission to enhance access to legal services, and thereby to better serve the interests of justice.

* Dean and Professor of Law at University of Hawai'i at Mānoa William S Richardson School of Law. The author wishes to thank research assistants Joe Udell, Siena Schaar, Micah Miyasato, and Nicole Lam, who offered incredibly helpful research support under the supervision of Cory Lenz, the Reference and Instructional Services Librarian, who himself offered valuable insights. I am particularly grateful for their expert support with *The Canadian Guide to Uniform Legal Citation*.

I. Introduction

Having entered the space of higher education leadership in 2010, I was struck by the tales told by senior deans about the good old days of 'deaning'. While deaning is definitionally fraught for reasons that will be mentioned later, including multiple overlapping constituencies, often at odds with each other, the last ten years in higher education administration have interwoven numerous moments of societal upheaval upon the challenge of deaning.[1] The totality of these moments, crises, and constraints has provided lessons in leadership during times of change and tumult, lessons which I believe inure to the benefit of legal education specifically, with an ultimate through line benefit to society more broadly.

The societal backdrop of the last decade has fueled greater law school innovation, the entry of more diverse talent into student bodies, staff, and faculties, and has certainly infused the decanal ranks with more diverse talent, as well.[2] During this time there has been a growing realization that business as

1 See Gerald T McLaughlin, "The Role of the Law School Dean as Institutional Veteran" (2000) 31:4 University of Toledo Law Review 675; R Lawrence Dessem, "Top Ten Reasons to be a Law School Dean" (2001) 33:1 University of Toledo Law Review 19; and Margaret Raymond, "Work and Life and Death: A Law School Dean's Perspective" (2017) 48:2 University of Toledo Law Review 303.

2 See "Gateway to Legal Education Aims to Help Diversify Legal Field" (10 April 2018), online: *Mitchell Hamline School of Law* <mitchellhamline.edu/news/2018/04/10/gateway-to-legal-education-aims-to-help-diversify-legal-field/>; "ABA to Honor UH Law Center's Pre-Law Pipeline

usual is not a sustainable path forward, certainly not for law schools, and likely not for the universities of which many law schools are a part.[3] Disruption has been frequent and has forced some changes that were likely long overdue.[4]

---

for Accomplishments in Diversity" (17 January 2019), online: *University of Houston Law Center* <www.law.uh.edu/news/spring2019/0117Pipeline.asp>; and Karen Sloan, "'It's the Moment for This': an Unprecedented Number of Black Women are Leading Law Schools" (13 May 2021) *Law.com*. See also Bernise Carolino, "University of Ottawa Launches Legal Technology Lab" (14 October 2020) *Law Times* ("[t]he lab aims to come up with technology-based solutions which will address the challenges of lawyers in their work, of citizens in seeking access to justice, of firms in meeting the demands for cost-effective services and of the legal sector in Canada"); Sarah Kent, "Digital Law and Innovation Society Hopes to Shape Future of Law and Technology" (27 June 2020), online: *University of Alberta Faculty of Law* <www.ualberta.ca/law/about/news/2020/6/digital-law.html> ("students will have the chance to work with experts in legal tech, pursue digital law projects, and be on the front lines of creating change, all while taking UAlberta Law courses with a digital law focus"); "Professor Ngai Pindell Named New Dean of Allard Law" (21 July 2021), online: *Peter A Allard School of Law* <allard.ubc.ca/about-us/news-and-announcements/2021/professor-ngai-pindell-named-new-dean-allard-law>; and Michael Bennaroach, "Donna E. Young Appointed Founding Dean of Faculty of Law" (16 December 2019), online: *Ryerson University* <www.ryerson.ca/news-events/news/2019/12/donna-e-young-appointed-founding-dean-of-faculty-of-law/>.

3 See Richard Susskind, "Tomorrow's Lawyers" (2013) 39:4 Law Practice 34; and Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford, NY: Oxford University Press, 2008). See also Brian Z Tamanaha, *Failing Law Schools* (Chicago: the University of Chicago Press, 2012). But see Philip G Schrag, "Failing Law Schools - Brian Tamanaha's Misguided Missile" (2013) 26:3 Georgetown Journal of Legal Ethics 387 (critiquing Brian Tamanaha's book *Failing Law Schools*, analogizing it to a "nuclear weapon" and "an attack on the very structure of modern legal education" at 387); and Michael Simkovic & Frank McIntyre, "Populist Outrage, Reckless Empirics: a Review of Failing Law Schools" (2013) 108:1 Northwestern University Law Review Online 176, online (pdf): *Northwestern University Pritzker School of Law* <scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1025>.

4 See Ray Worthy Campbell, "Law School Disruption" (2013) 26:3 Georgetown Journal of Legal Ethics 341 at 341–42 (explaining how Brian Tamanaha's book

It is my sense that we would do well to learn lessons from this tumult and innovate towards an empowering law school model that embraces the future more than the past. To do otherwise is to jeopardize professional opportunities for our graduates, to further the perception of removal from societal imperatives pressing for change, and to plant the seeds of our own obsolescence.[5] In sum, to

---

Failing Law Schools misses the ways some of the most disruptive changes, such as effective online learning, that has enormous implications for institutional finances and missions, also creates opportunities for law schools to be better than ever, at lower costs); Lorne Sossin, "Law School as Social Innovation" (2017) 48:2 Victoria University of Wellington Law Review 225 at 230–34 (describing various social innovation initiatives that reflect attempts by law schools in Canada to embrace potential disruption, of new technologies, new models of dispute resolution, or new narratives of law, aimed at "allowing more people to access legal knowledge, advice and services, in more accessible and helpful ways" at 235); and Christian Sundquist, "The Future of Law Schools: Covid-19, Technology, and Social Justice" (2020-2021) 53:1 Connecticut Law Review Online 1, online (pdf): *University of Connecticut* <connecticutlawreview.law.uconn.edu/wp-content/uploads/sites/2747/2021/03/The-Future-of-Law-Schools-Covid-19-Technology-and-Social-Justice.pdf> ("[l]aw firms have greatly expanded the ability of lawyers to work remotely over the last few years, reducing the costs of maintaining physical office space while promoting flexibility for its attorneys and staff", a trend that "will undoubtedly be accelerated as law schools similarly transition to online teaching methodologies in the wake of the COVID-19 pandemic" at 17). See also Jordan Furlong, "The Way We've Always Done It Is Wrong" (19 January 2022) *Law21* (to locate relevant posts, use the key term *disruption* or the equivalent in the search box).

5 See David M Becker, "Some Concerns about the Future of Legal Education" (2001) 51:4 Journal of Legal Education 469; Melissa Harrison, "Searching for Context: a Critique of Legal Education by Comparison to Theological Education" (2002) 11:2 Texas Journal of Women and the Law 245; Robert R Kuehn & Peter A Joy, "An Ethics Critique of Interference in Law School Clinics" (2003) 71:5 Fordham Law Review 1971; Julie Macfarlane, "Bringing the Clinic into the 21st Century" (2009) 27:1 Windsor Yearbook of Access to Justice 35; W Bradley Wendel, "Should Law Schools Teach Professional Duties, Professional Virtues, or Something Else: a Critique of the Carnegie Report on Educating Lawyers" (2011) 9:2 University of St Thomas Law Journal 497; Paul Horwitz, "What Ails the Law Schools" (2013) 111:6 Michigan Law Review 955; Lee Stuesser, "The Future for Canadian Law

remain relevant, and hopefully reemerge more salient, law schools should continue to center their societal role in furthering democratic ideals towards access to justice and social uplift, and broaden their aperture and understanding of how that might be achieved in ways that are efficient and expert, inclusive, innovative, technologically accessible, and enriched, as well as transdisciplinary.

I think a reconceptualization of 'where justice lives' allows for an appreciation that within every course or class there are engaging and inspired legal possibilities for substantive justice, legal process, and thereby for access to and the delivery of inclusive justice.[6] Furthermore, the role and place of technology and innovation in legal pedagogy, practice, and our profession is an important part of each of these conversations, as is an acknowledgment that lawyers must also humbly appreciate that our profession is not self-contained.[7] The more we can

---

Schools" (2013) 37:1 Manitoba Law Journal 155; and Melissa Gismondi, "Why Universities Are Failing to Prepare Students for the Job Market" (13 October 2021) *CBC News*.

6 See "School of Law, Racial Bias, Disparities and Oppression in the 1L Curriculum: a Critical Approach to the Canonical First Year Law School Subjects" (28-29 February 2020), online (pdf): *Boston University School of Law* <www.bu.edu/law/files/2019/12/BU-Symposium-Schedule-February-26th-.pdf>.

7 See Alan M Dershowitz, "The Interdisciplinary Study of Law: a Dedicatory Note on the Founding of the NILR" (2008) 1:1 Northwestern Interdisciplinary Law Review 3 at 5:

> The law has varied over time in its emphasis on particular disciplines. There was a time when psychology was at the forefront, then sociology and now economics. To every discipline there is apparently a season, but there is no season for law shorn of other disciplines. Law without interdisciplinary input is like a beautiful wine decanter without the wine. Today's law student must be familiar with developments not only in the social sciences, but in the hard sciences as well.

See also Ben W Heineman Jr, "Lawyers as Leaders" (2007) 116:1 Yale Law Journal Forum, online: *Yale Law Journal* <www.yalelawjournal.org/forum/lawyers-as-leaders>:

> We also need lawyers who can understand the methods of thinking and analysis taught in business and public policy schools. Law, business, and public policy schools offer complementary perspectives from which to view public- and private-sector problems … Ultimately, we need lawyers who have a great leader's ability to define problems comprehensively and

understand our clients and their situations, businesses (both for-profit and not-for-profit), contexts, and circumstances, the better we can represent, evaluate, counsel, advise, negotiate, and advocate for them.[8] Hence, a hearty infusion of an awareness of politics, economics, psychology, business, and historical insights, in addition to cultural competence and EQ support, can only help our students better serve and support their future clients.[9]

And in so doing, it is my firm belief that those whose thoughts and voices have not previously carried, those with quiet voices and those for whom disability prevents or limits vocalized speech, can make a significant difference in society if we empower and support them through recognition of their gifts, skills, and leadership potential.[10] Given the leadership roles that lawyers are privy

---

> comprehensibly; to integrate different perspectives into solutions; and to forge agreement on a solution and then implement it in a way that makes a difference.

But see Randy Kiser, "Why Lawyers Can't Jump: the Innovation Crisis in Law (205)" (4 October 2020) *Legal Evolution*.

8 See "Model Rules of Professional Conduct: Preamble & Scope" (2021), online: *American Bar Association* <www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/>.

9 I always found the introduction to contracting law, a foundational contracts law casebook, refreshing in its acknowledgement of law as informed by numerous disciplines: "Contracting Law: Fifth Edition" (2022), online: *Carolina Academic Press* <cap-press.com/books/isbn/9781594609893/Contracting-Law-Fifth-Edition#>:

> The fifth edition of *Contracting Law* continues the clear explanations of contract doctrine, engaging cases, and thought-provoking cultural and historical materials that have made this casebook a favorite of students and professors … The fifth edition augments the cultural material with notes and questions showing the social contexts for specific contract doctrines.

10 See Stuart Pixley, "Lawyering with Challenges: Disability and Empowerment" (2015) 23:1 *The Professional Lawyer* 1, online (pdf): *American Bar Association* <www.americanbar.org/content/dam/aba/administrative/professional_responsibility/the_professional_lawyer_lawyering_with_challenges_disability_and_empowerment.pdf> ("[t]he diversity movement advocates that organizations must do for people with disabilities what it does for all of its employees: create a safe,

to take on throughout society, law schools must commit to empowering a diverse cadre of our students through the building of their capacity for leadership in, and through, the law.[11] We have an opportunity to recalibrate the societal positioning of law schools. We can be centers of innovative and capacious thinking and learning in a rapidly changing society, and increasingly connected world, where the decisions made today have massive consequences for the quality of life of those who come behind us, and where the technologies of justice, as well as the justice of technologies, will be an important part of the conversations that we hope enhance professional opportunities for our students and graduates.

II. The Past and Present

Legal education has experienced a remarkable amount of innovation over the last few decades.[12] It is important to acknowledge this fact. For example,

---

empowering place where people can bring their 'A game'. And a message that we have a valuable 'A game' to bring is the most important message of all" at 5); and Bjarne P Tellmann, "Mentoring and Diversity" (14 December 2017), online (blog): *National Disability Mentoring Corporation* <ndmc.pyd.org/guest-blog-mentoring-and-diversity/>.

11 See Deborah L Rhode, *Lawyers as Leaders* (Oxford, NY: Oxford University Press, 2013); and Anthony C Thompson, *Dangerous Leaders: How and Why Lawyers Must be Taught to Lead* (Stanford: Stanford University Press, 2018). To address this need we recently launched the Island Leadership Lab at the University of Hawai'i at Mānoa William S Richardson School of Law: see "New Island Leadership Lab Launched at Law School to Empower Hawai'i's Next Generation of Leaders" (13 September 2021), online (blog): *University of Hawai'i at Mānoa: William S Richardson School of Law* <www.law.hawaii.edu/article/new-island-leadership-lab-launched-law-school-empower-hawai%E2%80%98i%E2%80%99s-next-generation-leaders>; and Jayna Omaye, "New University of Hawaii Law School Initiative Touts Diversity, Inclusion" (13 September 2021) *Yahoo Finance*.

12 See Robert M Lloyd, "Investigating a New Way to Teach Law: a Computer-Based Commercial Law Course" (2000) 50:4 Journal of Legal Education 587; Lisa A Kloppenberg, "'Lawyer as Problem Solver:' Curricular Innovation at Dayton" (2007) 38:2 University of Toledo Law Review 547; and Sari Graben,

experiential legal education has been embraced to a much greater extent, efforts towards diversity and inclusion are increasingly spoken of, if not acted upon, more schools have attempted to forge national and international relationships and partnerships, and legal tech capacity building is proliferating.[13] These steps forward are noteworthy, especially as both legal education and the profession are not traditionally regarded as beacons of disruptive innovation.[14]

As a profession, in practice and in the academy, we are traditionalist and conservative by design. Our legal foundation in *stare decisis*, "to stand by things decided",[15] mandates our adherence to the past through a system of precedent necessitating the incorporation of historical notions as we chart a future course. To step back and interrogate this premise is to reveal the challenges and ironies, if not the very shaky footing on which we attempt to stand and propel ourselves forward.

At many turns, it is revealed that much of the law was not intended to be accessible or inclusive, nor was it even contemplated that diversity would be a

---

"Law and Technology in Legal Education: a Systemic Approach at Ryerson" (2021) 58:1 Osgoode Hall Law Journal 139.

13 See Constance Blackhouse, "The Changing Landscape of Canadian Legal Education" (2001) 20:1 Windsor Yearbook of Access to Justice 25; Joseph A Rosenberg, "Confronting Cliches in Online Instruction: Using a Hybrid Model to Teach Lawyering Skills" (2008) 12:1 SMU Science and Technology Law Review 19; Michele Pistone, "Law Schools and Technology: Where We Are and Where We Are Heading" (2015) 64:4 Journal of Legal Education 586; Sossin, *supra* note 4; and Rosa Kim, "Globalizing the Law Curriculum for Twenty-First-Century Lawyering" (2018) 67:4 Journal of Legal Education 905.

14 See Faisal Bhabha, "Towards a Pedagogy of Diversity in Legal Education" (2014) 52:1 Osgoode Hall Law Journal 59; William D Henderson, "Innovation Diffusion in the Legal Industry" (2018) 122:2 Dickinson Law Review 395; and Hilary G Escajeda, "Legal Education: a New Growth Vision: Part I - the Issue: Sustainable Growth or Dead Cat Bounce: a Strategic Inflection Point Analysis" (2018) 97:3 Nebraska Law Review 628.

15 See Timothy Oyen, "Stare Decisis" (March 2017), online: *Cornell Law School Legal Information Institute* <www.law.cornell.edu/wex/stare_decisis>.

worthy goal.[16] While this is true of many disciplines, our profession is to be duly critiqued for our shortcomings, especially given the lofty language that pervades

---

16 See Derrick Bell, "Foreword: The Civil Rights Chronicles" (1985) 99:1 Harvard Law Review 4 at 39–57 (hypothesizing that the US Supreme Court would accept a law school's argument that the "maintenance of a predominantly white faculty … is essential to the preservation of an appropriate image, to the recruitment of faculty and students, and to the enlistment of alumni contributions" and find that "neither title VII nor the Constitution prohibits it from discriminating against minority candidates when the percentage of minorities on the faculty exceeds the percentage of minorities within the population" at 46); John Hagan, Marie Huxter & Patricia Parker, "Class Structure and Legal Practice: Inequity and Mobility among Toronto Lawyers" (1988) 22:1 Law & Society Review 9 at 50–53 (analyzing the composition of different groups within the legal profession in Toronto and finding some "evidence of progress for women and Jews … [in spite of] the increasingly apparent bad record of the past" at 52); Richard H Chused, "Hiring and Retention of Minorities and Women on American Law School Faculties" (1988) 137:2 University of Pennsylvania Law Review 537 (explaining that on law school faculties, "minority professors in general, and black professors in particular, tend to be tokens if they are present at all" and women are hired in numbers "significantly behind the national pace" at 539); Chris Tennant, "Discrimination in the Legal Profession, Codes of Professional Conduct and the Duty of Non-Discrimination" (1992) 15:2 Dalhousie Law Journal 464 at 469–70 (describing the exclusion of women, aboriginal people, and racial and ethnic groups from the legal profession in Canada); Mark D Walters, "Let Right Be Done: a History of the Faculty of Law at Queen's University" (2007) 32:2 Queen's Law Journal 314 at 348–63 (detailing the law school's efforts from 1977-1992 to move away from the "remarkably homogenous-looking group of men" of its law faculty and student body to "[reflect] the diversity of Canadian society" at 349); CBA Working Group on Racial Equality in the Legal Profession, "Racial Equality in the Canadian Legal Profession: Presented to the Council of the Canadian Bar Association" (February 1999) at 2, online (pdf): *Canadian Bar Association* <www.cba.org/Equality/Publications-Resources/Reports> (acknowledging that systemic racism is widespread within the profession and noting the significant under-representation of Aboriginal persons in the legal profession); and Allison E Laffey & Allison Ng, "Diversity and Inclusion in the Law: Challenges and Initiatives" (2 May 2018), online: *American Bar Association* <www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiatives/> (stating that the "legal profession remains one of the least diverse of any profession" and that the

much of our constitutional jurisprudence about fundamental freedoms, human rights, equality, and justice.[17] This language, which might even have seemed ironic at the time, certainly begs such criticism by contemporary standards.[18] Without delving deeply into the limits posed by foundational doctrine in numerous areas, including tort and contract law, constitutional and property law, let alone criminal law and procedure, it is a worthy endeavor to posit the ways in which the law must evolve to be truly inclusive and accessible, let alone empowering for all.[19]

---

numbers for racial and ethnic diversity in the legal field "paint an even bleaker picture").

17 See Colleen Sheppard, "Constitutional Recognition of Diversity in Canada" (2006) 30:3 Vermont Law Review 463 (describing the "scope and tenor of the modern recognition of cultural and group-based pluralism in Canadian constitutional law" at 472).

18 See *Canadian Bill of Rights*, SC 1960, c 44, preamble:

> [A]ffirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions.

It is also worth noting that human rights in Canada were not protected in the written constitution until 1982 through the *Charter of Rights and Freedoms*: see *Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; and Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada 1900-1950* (Toronto: University of Toronto Press, 1999).

19 See Clinton G Wallace, "Tax Policy and Our Democracy" (2020) 118:6 Michigan Law Review 1233 at 1245, n 60 (noting that despite the reputation as a more socially progressive government, Canada is equally reliant on the tax code, similar to the US, but much less outwardly focused on helping those who do not have housing); Donna J Martinson & Caterina E Tempesta, "Young People as Humans in Family Court Processes: a Child Rights Approach to Legal Representation" (2018) 31:1 Canadian Journal of Family Law 151 (elaborating on the need for legal representation for children in family court proceedings consistent with the *Canadian Charter of Rights and Freedoms*, the United Nations *Convention on the Rights of the Child*, and other human rights instruments); Paul Harpur & Michael Ashley Stein, "Universities as Disability Rights Change Agents" (2018) 10:2 Northeastern University Law Review 542 at 555, n 76 (noting that the Committee on the Rights of Persons with

The challenge is that for law, traditional legal discourse has often openly favored white propertied heterosexual men who comprise but a well-to-do sliver of our society.[20] Not only were women, First Nations and Indigenous people, and people of color not equitably represented in much jurisprudence and legal reasoning, but many other people were also excluded from the legal canon, including working-class people, people who are not able-bodied, and LGBTQ people. This is compounded by the ongoing difficulty in many areas of the law to recognize the intersecting realities of our identities, which somehow still proves confounding in the law.[21]

Disabilities recommended that Canada adopt policies on inclusive and quality education throughout its territory); Shannon Hutcheson & Sarah Lewington, "Navigating the Labyrinth: Policy Barriers to International Students' Reporting of Sexual Assault in Canada and the United States" (2017) 27:1 Education & Law Journal 81 (exploring how the "legal process can be difficult for international students to navigate, especially concerning the role that cultural capital plays in understanding policies such as Title IX, the *Canadian Human Rights Act*, and the *Canadian Charter of Rights and Freedoms*" at 81); and Susan Ursel, "Building Better Law: How Design Thinking Can Help Us Be Better Lawyers, Meet New Challenges, and Create the Future of Law" (2017) 34:1 Windsor Yearbook of Access to Justice 28 at 55–58 (describing how design thinking can be applied to improve access to different aspects of the legal system, *e.g.* online dispute resolution and access to justice services).

20 See Lucinda M Finley, "Breaking Women's Silence in Law: the Dilemma of the Gendered Nature of Legal Reasoning" (1989) 64:5 Notre Dame Law Review 886; and Charles C Smith, "Who is Afraid of the Big Bad Social Constructionists – or Shedding Light on the Unpardonable Whiteness of the Canadian Legal Profession" (2008) 45:5 Alberta Law Review 55.

21 See Shira Galinsky, "Returning the Language of Fairness to Equal Protection: Justice Ruth Bader Ginsburg's Affirmative Action Jurisprudence in *Grutter* and *Gratz* and Beyond" (2004) 7:2 New York City Law Review 357 ("[a]ffirmative action stands at the intersection … of two classes of rights (civil and economic), though once and still set apart by politicians, jurists, and scholars, commonly relate to promotion of the health and welfare of humankind" at n 122); Maneesha Deckha, "Is Culture Taboo – Feminism, Intersectionality, and Culture Talk in Law" (2004) 16:1 Canadian Journal of Women and the Law 14 ("just as 'women' invoked only a fraction of female experiences, these non-gendered categories took male experiences as their referent, resulting in a discursive slippage that stranded 'different' women at the intersections of

Such jurisprudential alienation is not a matter of evolving terminology around civil and human rights discourse, rather it is a foundational anchoring of much legal doctrine to exclusive notions not meant to respect all people. For instance, axiomatic to legal analysis is the doctrinal reasonable man standard.[22] Although we have evolved to say 'the reasonable person', the doctrine as originally framed was an exclusive framework for analysis, definitionally constructed in opposition to inclusive multi-gendered wisdom and knowledge. It has nonetheless underpinned much of our jurisprudence until fairly recently.

As we train the next generation of legal leaders, I think it is crucial to know our histories, with all its failings and fault lines, to ensure that we embrace a better future, one in which ensuring inclusive justice is not a radical proposition. We should learn from our past and not let it moor us to exclusive conceptualizations of law as it once existed. As we move to an empowering model of legal education, acknowledgment and awareness of our history, legal history in particular, is part of the puzzle as we unpack the present moment and chart a more uplifting and inclusive course.

So, while our evolution towards more expanded and diverse jurisprudential thinking is, in my estimation, welcome, the fabric of much of our legal thinking is interwoven with exclusionary threads that are still being teased out. An

---

gendered and non-gendered categories" at 36); Iyiola Solanke, "Putting Race and Gender Together: a New Approach to Intersectionality" (2009) 72:5 Modern Law Review 723 ("[i]ntersectionality highlights that anti-discrimination laws have posited discrimination as a zero-sum game: if one form, then not the other. However, discrimination is not zero-sum at all: it is often not just one or the other ground but can be many together acting in addition or intersecting" at 748); Aisha Nicole Davis, "Intersectionality and International Law: Recognizing Complex Identities on the Global Stage" (2015) 28:1 Harvard Human Rights Journal 205; and Thomas A Mayes, "Understanding Intersectionality between the Law, Gender, Sexuality and Children" (2016) 36:2 Children's Legal Rights Journal 90.

22 See *e.g.* Cynthia Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* (New York: New York University Press, 2003).

essential part of this analysis begs the lack of diversity of our judiciary as well.[23] While Canada prides itself on its multiculturalism,[24] like the United States, there is much work that can be done to diversify the judicial ranks, as well as to build diverse pipelines to the bench, the bar, and the legal academy.[25] This is where we are, and it shows who we are, despite our protestations otherwise. I think there is a role for law schools in the building of this diverse pipeline to all areas, which holds the specter of inclusive and empowered justice.

III. The Voice of the Law School, Not the Show

Over the last ten years, I have experienced increased engagement and activism amongst our student bodies. More and more they expect their university and

---

23 See "Statistics Regarding Judicial Applicants and Appointees" (28 October 2020), online: *Office of the Commissioner for Federal Judicial Affairs Canada* <www.fja-cmf.gc.ca/appointments-nominations/StatisticsCandidate-StatistiquesCandidat-2020-eng.html>; and Ian Burns, "Judicial Diversity Stats Show Move in Right Direction but More Needs to be Done: Observers" (7 December 2020) *The Lawyer's Daily* (acknowledging the increase of women judges appointed but noting the disparity of judges representing "indigenous people, racialized communities and candidates with disabilities").

24 Learn about Canadian multiculturalism on the Government of Canada website. Unlike notions of the American melting pot, Canada prides itself on citizens' retention of their unique identities. See "Multiculturalism" (6 May 2021), online: *Government of Canada* <www.canada.ca/en/services/culture/canadian-identity-society/multiculturalism.html> ("[d]iscover the significance of multiculturalism in Canada — ensuring that all citizens keep their identities, take pride in their ancestry and have a sense of belonging").

25 See Roderick A Macdonald & Thomas B McMorrow, "Decolonizing Law School" (2014) 51:4 Alberta Law Review 717 (proposing the future of the law school in Canada turns on a separation from the US model to one that embraces indigenous and international approaches to the law); Peter Devonshire, "Indigenous Students at Law School: Comparative Perspectives" (2014) 35:2 Adelaide Law Review 309 (arguing that a wider inclusion of indigenous students in law schools "fulfills a need for non-European insights in legal education" at 314); Jeffery G Hewitt, "Decolonizing and Indigenizing: Some Considerations for Law Schools" (2016) 33:1 Windsor Yearbook of Access to Justice 65; and Sossin, *supra* note 4.

law school leaders to take a stand and to speak out publicly on the pressing issues of the day, whether that means speaking or writing about Deferred Action for Childhood Arrivals ("DACA") rulings and policies, denouncing police brutality, condemning hate crimes, commenting on the insurrection and acrimonious election cycle, or mobilizing support for students distressed about judicial confirmations, to name but a few examples. In sum, there is an expectation on the part of some students, and faculty, that law schools, through their leadership, take a public stand on contemporary issues. This may flow from increased societal polarization, especially political, at the precise time that student bodies are becoming more representative of the population more generally.

With increased diversity comes a diversity of demands and expectations. Over the last few years, I have come to think that a key missing ingredient in the diversity and inclusion equation is empowerment. It is my sense that this is part of the push around 'voice'. With the addition of a diverse cadre of students and faculty, and with their empowerment, one can and should expect a corresponding expectation that the law school's voice be inclusive of the concerns and experiences of those who have traditionally been excluded. And so, for example, the expectations of our students of color about the law school voice as it pertains to the spate of police killings or shootings of unarmed people of color, and Black people in particular in an age of the Black Lives Matter movement, should not be a surprise.

This positioning of the law school, whether through voice or advocacy, however, is not uncontested or without its landmines.[26] Certainly, the law school and university missions should be furthered. Indeed, these missions often provide helpful roadmaps in such circumstances. But, as we are in a time of heated polarization, leaders who do boldly take such positions should not be

---

[26] See Donald Lazere, "Chemerinsky and Irvine: What Happened?" (24 September 2007) *Inside Higher Ed*; and Katie Robertson, "Nikole Hannah-Jones Denied Tenure at University of North Carolina" (19 May 2021) *The New York Times*. See also Asheesh Kapur Siddique, "Campus Cancel Culture Freakouts Obscure the Power of University Boards" (19 May 2021) *Teen Vogue*.

surprised to hear from myriad constituencies, including students who have differing opinions on the issues (and who view the announcement, writing, or stance as offensive, biased, or inappropriate), faculty who share the views of the aforementioned students, alumni who allude to, or plainly threaten to, withhold funding support based upon the positions taken, and of course university leadership concerned about all of the above, as well as possible funding cuts to public institutions if legislators are offended.[27] These are appropriate matters for consideration; hence my earlier statement about multiple overlapping constituencies. However, there are moments that will call for the dean, provost, and president to speak up, lest their silence be viewed as complicity, acquiescence, or approval of the matter at hand.

It will further be important, in many cases when the 'voice of the law school' is demanded by some constituencies, for a dean not to get ahead of the provost or president in their framing of such unit-level voice. I have occasionally been urged by irate students to 'get a message out', one that I knew would have ultimately been unhelpful to the law school if it were perceived as 'jumping the gun', or not waiting our turn, as it were, to allow time for the university leadership to first frame their sense of an issue for the entire university. Thereafter, I have been able to craft and share my message which can layer upon, and piggyback on, the voice of the university writ large. Nonetheless, even when continuing to center the societal role of the law school in furthering democratic ideals, it may prove impossible to please all of the people in the myriad constituencies whom a dean or university leader seeks to keep in a good and positive place. This aspect of charting our future is fraught in an increasingly polarized space, but thankfully there are some areas that are, at least at first glance, less controversial.

---

27 See Bill Chappell, "Univ. of Alabama Returns $21.5 Million Gift; Donor Urged Boycott Over Abortion Law" (7 June 2019), online: *National Public Radio* <www.npr.org/2019/06/07/730671823/univ-of-alabama-rejects-21-5-million-gift-donor-urged-boycott-over-abortion-law>; and Nick Roll, "UNC Board Bars Litigation by Law School Center" (11 September 2017) *Inside Higher Ed*.

IV. Innovating or, at Least, Iterating

I have elsewhere discussed the ways in which the markets for legal education, legal practice, and demands for justice are misaligned.[28] We have before us an opportunity in both legal education and practice to work towards furthering justice, whether that be in the criminal legal system or tax reform, for those in our society for whom the provision of, and access to, legal services is cost or time prohibitive. Query how further intentional innovation might better calibrate the demand and supply lines towards enhanced access to legal services, and thereby access to justice:

> Technological innovation has been taking place for a long time. But the pace has quickened, and the opportunities for global connection and information-sharing are vast. Technological innovation holds the promise of enhanced access to services, goods and the sharing of expertise between people the world over. I posit that such innovation also holds the promise of much greater access to justice. …
>
> Importantly, from my perspective, a critical part of this technological revolution should aim to ensure the delivery of legal services to those most in need. As others and I have said elsewhere, the supply and demand curves for legal services are misaligned given that there is a persistent demand for—yet a limited supply of—affordable legal services. It is my hope and expectation that the ongoing technological revolution will help to bridge this justice gap.[29]

While we have heard complaints that there are too many lawyers, we have simultaneously heard complaints that most people cannot access or afford a lawyer.[30] I think that if we can create technology to figure out if there is an

---

28 Camille Nelson, "Law Schools Can't Sleep Through the Technological Revolution" (7 November 2013), online (blog): *ABA Legal Rebels* <www.abajournal.com/legalrebels/article/law_schools_cant_sleep_through_the_technological_revolution>.

29 *Ibid.*

30 See Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants" (May 2013), online (pdf): *National Self-Represented Litigants Project (NSRLP)*

available handy person in our area to install a doorbell, or to book a dog-sitter, or to order and have a meal delivered through an app, surely there must be more we can do, perhaps with a little help from our friends in tech, to figure out which lawyer might be able to draft a will, or contest an eviction in our area for a set

---

<representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf> (more than 90% of respondents, across Alberta, British Columbia and Ontario, cited the "inability to afford to retain, or to continue to retain, legal counsel" as the number one reason for self-representation (at 39)); Jeffrey J Pokorak, Ilene Seidman & Gerald M Slater, "Stop Thinking and Start Doing: Three-Year Accelerator-to-Practice Program as a Market-Based Solution for Legal Education" (2013) 43:1 Washington University Journal of Law & Policy 59; and Ilene Seidman, "The Bad Business of Ignoring the Justice Gap" (18 February 2016), online (blog): *ABA Legal Rebels* <www.abajournal.com/legalrebels/article/the_bad_business_of_ignoring_the_justice_gap>. See also "The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans" (June 2017), online (pdf): *Legal Services Corporation* <lsc-live.app.box.com/s/6x4wbh5d2gqxwy0v094os1x2k6a39q74> (nearly one in five Americans, or more than 60 million, including 19 million children, have family incomes below 125% of the Federal Poverty Level ("FPL"), which corresponds to USD $30,750 per year or less for a family of four (at 16); 44% of Americans with family incomes below 125% of FPL identify as white, 28% as Hispanic, 21% as black, 4% as Asian, 1% as American Indian, 8% as another race, and 4% as two or more races (at 18); 71% of low-income households have experienced at least one civil legal problem in the past year (*e.g.* issues of health, finances, rental housing, children and custody, education, income maintenance, and disability), 54% of these households have faced at least two civil legal problems, and about 24% have faced six or more in the past year alone (at 21–22); while "low-income Americans seek professional legal help for only 20% of their civil legal problems, they receive inadequate or no professional legal help for 86% of the civil legal problems they face in a given year" (at 30); and the most common reasons for low-income Americans not seeking help include the following: they decide to deal with the problem on their own (24%), they do not know where to look for help or what resources might be available (22%), they do not perceive their civil legal problems to be legal (20%), and they are concerned about the cost of seeking such help (14%) (at 33–34)).

fee.[31] And I think those examples are but the tip of the iceberg. I leave it to those much savvier than I to further explore the myriad ways in which innovative uses of technology might be harnessed to: improve access to legal services and the time taken to deliver those services; push expansion of the venues for the delivery of such services, including virtual and design improvements to the entire system in ways that enhance diagnostics of the challenges (legal and otherwise); and

---

[31] See Gina Jurva, "Legal Tech and the Future of Civil Justice: Digital Tools for Underrepresented Communities" (2 March 2021) *Thomson Reuters* (discussing how legal tech has helped *pro se* parties by fostering online legal advice via chatbot, technology to automate court filings, and apps such as LegalZoom, TurboTax, and Rocket Lawyer to help individuals complete legal documents, but noting "legal tech for underrepresented groups is still a tiny drop in the bucket relative to the need for access"); Bernise Carolino, "Legal-Tech Platform Promoting Access to Justice for Marginalized Communities Presented at Conference" (12 May 2021) *Law Times* (describing Mouthpiece Law, a legal technology platform developed by three students at Queen's Faculty of Law that "seeks to offer the general public cost-effective solutions to access legal services"); and Stanford University Legal Design Lab, "Eviction Innovations: Initiatives to Address the Eviction Crisis" (2021), online: *Eviction Innovations* <evictioninnovation.org/> (highlighting new websites, apps, document-assembly tools, data initiatives, and other tech efforts to improve services and policy-making around evictions). *Cf.* Kriston Capps, "Landlords Are Using Next-Generation Eviction Tech" (26 February 2020) *Bloomberg* ("[t]enant advocates say that programs such as ClickNotices or eWrit Filings … are essentially helping landlords funnel tenants into rent court, regardless of the merits of the case"); "Richard Susskind – How Technology Will Change Justice: Ralph Baxter sits down with Professor Richard Susskind OBE to discuss Richard's latest book, Online and the Future of Justice" (8 January 2020) at 00h:30m:02s, online (podcast): *Legal Talk Network* <legaltalknetwork.com/podcasts/law-technology-now/2020/01/richard-susskind-how-technology-will-change-justice/>:

> We often say of neurosurgeons, that people don't want neurosurgeons, they want health, I think it's true of courts. People don't want physical courtrooms and lawyers and judges and traditional process, there are a whole bundle of things they want, but they want an end of their dispute, and I think this is going to require a social movement to bring about the kind of change that's necessary, and what's at stake is so incredibly important that we increase access to justice for all.

improve efficiency, effectiveness, and fairness in the provision of access to justice.[32]

Making space for such entrepreneurial thinking is a part of the way that law schools must innovate to empower the next generation of legal leaders to make a difference. This was part of my thinking as we worked to launch and build important initiatives at the schools at which I previously served as dean. We created the previously named Law Practice Technology and Innovation Institute at Suffolk University Law School[33] (now called the Institute on Legal Innovation and Technology), including corollary programs and opportunities for students. At Washington College of Law, we developed the strategy to design, launch, and fortify innovative programs and opportunities for students — some of which

---

32 See "Digital Justice Initiative" (2021), online: *American Bar Association* <www.americanbar.org/groups/diversity/racial_ethnic_justice/projects/digital-justice-initiative/> (discussing how community-level data collected from apps "can be utilized to track priority benchmarks to decrease the frequency of investigative stops lacking reasonable basis"); Sandy North, "How We're Learning More About Ways to Improve Access to Justice Across the U.S." (12 December 2020) *A2J Lab*; "Using Gamification of Access to Justice to Train Artificial Intelligence: David Colarusso Talks About the Learned Hands Project" (1 February 2019), online (podcast): *Legal Talk Network* <legaltalknetwork.com/podcasts/digital-edge/2019/02/using-gamification-of-access-to-justice-to-train-artificial-intelligence/> (explaining how a machine learning game "identifies text classifiers for developing a new taxonomy that can be used to connect people with public legal help resources"); and Darrell Malone, "Tubman Project Boston" (29 November 2018), online (blog): *Darrell K. Malone Consulting* <dkmalone.com/2018/11/29/the-tubman-project/> (describing the winning solutions for preventing income from becoming a barrier to justice through open-source legal technologies that leverage data machine learning, *e.g.* "present[ing] a provable and third-party validated alibi even without a human witness by leveraging" the Google Maps app).

33 I am delighted to see the strengthening of these innovations: "Institute on Legal Innovation and Technology" (2017), online: *Suffolk University Boston* <sites.suffolk.edu/legaltech/>.

were framed under the moniker of the Tech, Law and Security Program,[34] with other opportunities flowing through the Masters in Legal Studies Degree and the Intellectual Property programs. These initiatives all involved entrepreneurial approaches to legal education.[35]

Like leaders at a number of other law schools throughout Canada and the US, I have tried to lean into the future of our profession by considering innovation of curricula, programmatic opportunities, certificate programs, extracurricular, and professional opportunities that enhance the ability of our students to compete in a rapidly changing practice and world.[36] It is not easy work to scale such recalibration or redux internally at the school level. Deans and leaders in higher education have set talent pools, expert in many areas, but few schools have existing depth in these future-facing curricular, which means that even in times of fiscal constraint, if a school is to lean into the future of the profession and the practice, the dean must often look to external sources for expertise, or invest in internal leaders who are willing and able to grow into these

---

34 "Tech, Law & Security Program" (2021), online: *American University Washington College of Law* <www.wcl.american.edu/impact/initiatives-programs/techlaw/>.

35 "Master of Legal Studies (MLS) Online" (2021), online: *American University Washington College of Law* <www.wcl.american.edu/academics/degrees/mls-online/>.

36 See "J.D. Certificate Program in Legal Innovation + Technology" (2022), online: *Chicago-Kent College of Law* <www.kentlaw.iit.edu/academics/jd-program/certificate-programs/legal-innovation-and-technology>; "Course Catalog: Innovation in Legal Education and Practice" (2022), online: *Harvard Law School* <hls.harvard.edu/academics/curriculum/catalog/index.html?o=69245>; "Center for Law, Technology and Society" (2022), online: *University of Ottawa* <techlaw.uottawa.ca/>; "2022 Legal Innovation Conference" (2022), online: *University of Alberta* <www.ualberta.ca/law/about/legal-innovation.html>; and "IP Innovation Clinic" (2022), online: *Osgoode Hall Law School* <www.iposgoode.ca/innovation-clinic/about/>. See also "Innovation, Law, and Technology" (2022), online: *University of Toronto Faculty of Law, Global Professional Master of Laws (GPLLM)* <gpllm.law.utoronto.ca/programs/innovation-law-and-technology>.

new innovative areas of opportunity. I very much hope that when I am finishing serving as dean, that I will be one of those faculty members facing forward and leaning into how trans-disciplinarity, technology, and innovation might inform not only my teaching but my areas of doctrinal interest, and can further access to justice therein, despite the inevitable and daunting work of getting 'up to speed'. In terms of legal pedagogy, we can take solace from what we have learned from embracing technologies that we once thought of as foreign, far-fetched, or foolhardy.

At the time of this writing, we are in the midst of a prolonged COVID-19 pandemic. The pandemic forced innovation in unprecedented ways in society generally.[37] Studying and working through this pandemic has revealed the fallacy in previously held beliefs that remote work and distance learning were definitionally unworkable or suboptimal.[38] Necessity may well have proven to be the mother of invention in this milieux as, within a matter of weeks, classrooms, courts, and conventions were flipped online.[39] Many businesses,

---

37 See The Economist, "How COVID-19 is Boosting Innovation" (10 March 2021) at 00h:19m:03s, online (video): *YouTube* <youtu.be/zPyOnZpeFnQ>; Johnathan Cromwell & Blade Kotelly, "A Framework for Innovation in the COVID-19 Era and Beyond" (17 February 2021) *MIT Sloan Management Review*; Sonja Marjanovic, "The COVID-19 Crisis has Sparked Innovation and Offers Lessons We Must Not Forget" (1 April 2020), online (blog): *RAND Corporation* <www.rand.org/blog/2020/04/the-covid-19-crisis-has-sparked-innovation-and-offers.html>; and Rachel Bergen, "How the COVID-19 Pandemic is 'Driving Innovation' in Canada and Around the World" (29 March 2020) *CBC News*.

38 See Paul Fain, "Takedown of Online Education" (16 January 2019) *Inside Higher Ed*; and Louis Mosca, "Working From Home: Don't Allow it!" (29 June 2017) *Forbes*.

39 See Andy Thomason, "U. of Washington Cancels In-Person Classes, Becoming First Major U.S. Institution to Do So Amid Coronavirus Fears" (6 March 2020) *The Chronicle of Higher Education*; and Scott Jaschik, "Colleges Go Online to Avoid COVID-19" (7 September 2021) *Inside Higher Ed*. See also Del Atwood, "COVID-19 Impacts on Courts in Canada" (2021) 60:3 The Judges' Journal 24; and David Freeman Engstrom, "Post-COVID Courts" (2020) 68:1 UCLA Law Review 246.

from retail stores to restaurants, quickly pivoted online and/or adjusted their *modus operandi* to what I have sometimes referred to as the new abnormal. And higher education was, and is, no exception.[40]

The pandemic forced adoption of online learning platforms, and remote teaching and working.[41] Even the most ardent pre-pandemic naysayers and skeptics about these possibilities and platforms adjusted, sometimes reluctantly, at other times enthusiastically, and worked to deliver the highest caliber education possible to our students in the circumstances. I do not want to be read as pollyannish in my aspirations about the possibilities provided by technology in higher education, but I do think that despite some of the challenges, there are also opportunities, including increased access to education, with corollary reduced transactional costs associated with relocation, travel, accommodation, cost of living, and so forth.[42]

---

40 See Jason Openo, "Education's Response to the COVID-19 Pandemic Reveals Online Education's Three Enduring Challenges" (2020) 46:2 Canadian Journal of Learning & Technology 1; and Sundquist, *supra* note 4.

41 See Doug Lederman, "Will Shift to Remote Teaching Be Boon or Bane for Online Learning" (18 March 2020) *Inside Higher Ed*; "The Coronavirus Spring: the Historic Closing of U.S. Schools (a Timeline)" (1 July 2020) *EducationWeek*; Laura Stone, Jeff Gray & Caroline Alphonso, "Ontario to Close All Public Schools for Two Weeks After March Break" (13 March 2020) *The Globe and Mail*; and Alexandra Mae Jones & John Vennavally-Rao, "Canada's Workforce Having to Adjust to Working From Home" (16 March 2020) *CTV News*.

42 See James McGrath & Andrew P Morriss, "Online Education & Access to Legal Education & The Legal System" (2020) 70:1 Syracuse Law Review 49 at 51–52 (supported by several datasets, the authors show how online legal education can solve two problems: (1) making legal education accessible to between 41 million and 155 million more Americans who currently live in areas outside a reasonable commuting distance to existing law schools and (2) more evenly distributing access to legal services in the US, since unsurprisingly the fewest number of lawyers per capita live in the same areas lacking access to legal education); Sean Gallagher & Jason Palmer, "The Pandemic Pushed Universities Online. The Change Was Long Overdue" (29 September 2020) *Harvard Business Review* (highlighting the significant enrollments and cost-savings of institutions using technologies to disrupt traditional degree markets

V. Lessons from Remote Work and Online Education

There is much that has been discussed and written over the course of the ongoing pandemic about the future of work, remote work, and expectations for the reimagining of post-pandemic work-life.[43] Pre-pandemic, I recall being asked to opine on telework requests that were often tinged with concern on the part of supervisors about whether the employee in question would continue to work effectively and diligently. In many ways, the pandemic has exposed the fallacy of a blanket presumption that employees who work outside of the workplace at home will slack off and not do their work. Indeed, I think many people have worked just as hard, if not harder than ever before, with resultant fatigue. No doubt some of those who were not strong workers and who were less than stellar employees may have struggled and perhaps sunk to the level of ineffectiveness that was feared. But, for the vast swath of employees, in my experience, that has not been the case. Indeed, I think the ongoing pandemic and its workplace fallout has, hopefully, created space for us to reconsider how best to go forward in ways that empower and support our students, staff, and faculty.

My conclusion is that we may need to move away from both our notions of one-size fitting all of our students, staff, and faculty, and also from our historic attachment to brick and mortar conceptualizations of a law school, to a

---

and noting that the "100 largest players have nearly 50% of student enrollment"); Trevor Fairlie, "This is How Law Schools Should Embrace Technology" (21 January 2019) *Canadian Lawyer*; Pistone, *supra* note 13; and Abigail Cahak, "Beyond Brick-and-Mortar: How (Cautiously) Embracing Internet Law Schools Can Help Bridge the Legal Access Gap" (2012) 2012:2 University of Illinois Journal of Law, Technology & Policy 495 ("[o]nline law schools cater to a unique market … these programs are in high demand by hopeful students that fall outside the law student norm" at 526).

43 See *e.g.* Susan Lund et al, "What's Next for Remote Work: an Analysis of 2,000 Tasks, 800 Jobs, and Nine Countries" (23 November 2020), online: *McKinsey & Company* <www.mckinsey.com/featured-insights/future-of-work/whats-next-for-remote-work-an-analysis-of-2000-tasks-800-jobs-and-nine-countries>.

reimagined conceptual space, with a brick and mortar component, that provides greater access and empowerment for our community members over both space and time — meaning that they can learn and work from where they are situated if they want, and at a time that works best for them and theirs, as appropriate and feasible. Certainly, such an innovative model is not without its concerns. Notably, how do we prevent increased isolation and wellness concerns, already so prominent an aspect of all education during the pandemic,[44] as well as how do we ensure both some in-residence aspect to community building, at the same time that we strive to better understand how to optimize global community building, including virtually?

While I know it is not an easy possibility to consider, this potential model may be empowering for many people traditionally not centered within settings of (legal) education. For instance, not only might such flexibility in work and study allow for greater access for people with family responsibilities, mobility, or other physical challenges because of our built environments, as well as for those who are seeking to avoid the time and energy costs of relocation or commuting, let alone those concerned with the environmental impact of the same, but reconceptualizing our law schools space to include remote and virtual work and study also potentially allows for some greater inclusion, engagement, and empowerment of those shut out from traditional models of brick and mortar legal education, and physically demanding work.

As such, I wish to emphasize a way in which online education and remote work can also increase access by bringing educational and work possibilities to people whose ability to ambulate or move to be 'in-residence' in a classroom or workspace, whether that is physical, financial, health-related, distance prohibitive, familial-bound, and otherwise constrained, for instance by military

---

44 See D Benjamin Barros & Cameron M Morrissey, "A Survey of Law School Deans on the Impact of the COVID-19 Pandemic" (2021) 52:2 University of Toledo Law Review 241; and Changwon Son et al, "Effects of COVID-19 on College Students' Mental Health in the United States: Interview Survey Study" (2020) 22:9 Journal of Medical Internet Research 1.

commitments, prevents them from accessing a (legal) education.[45] These circumstances should be recognized as providing opportunities, especially for students who would not otherwise be able to access legal and other types of educational opportunities if they were required to physically attend the campus. I think most institutions of higher education have missions or orientations that are supportive of increased access, but few have fully embraced the possibilities for increased access presented through an interweaving of technological know-how and delivery platforms throughout the enterprise to ensure the most inclusive and empowering models of access possible. There is opportunity here that has been highlighted by the pandemic. There are additional revelations as well.

While the cost-prohibitive concern about access to justice has been discussed for some time, the time prohibitive dimension of accessing legal services is seldom explored.[46] Even in the design of our system, it is often hard to physically navigate the 'places where justice lives', from taking time off work, using public transit to and from, or finding and paying for parking at courthouses or near legal offices or firms, to navigating the complex spaces of court offices where documents must be filed or fees paid, let alone waiting in court to be heard, it is no wonder that many people find themselves negatively wrapped up in the legal system for failure to keep appointments, appearances, submit appropriate

---

45 See Stephen L Nelson, Jennifer L Robinson & Anna M Bergevin, "Administrative Dream Acts and Piecemeal Policymaking: Examining State Higher Education Governing Board Policies Regarding In-State Tuition for Undocumented Immigrant Students" (2014) 28:3 Georgetown Immigration Law Journal 555; Jonathan D Glater, "To the Rich Go the Spoils: Merit, Money, and Access to Higher Education" (2017) 43:2 Journal of College and University Law 195; Darcel Bullen & Lorne Sossin, "A Flex Time JD: New Approaches to the Accessibility of Legal Education" (2017) 95:1 Canadian Bar Review 91; Sherley E Cruz, "Coding for Cultural Competency: Expanding Access to Justice with Technology" (2019) 86:2 Tennessee Law Review 347; and McGrath & Morriss, *supra* note 42.

46 See Ab Currie, "Nudging the Paradigm Shift, Everyday Legal Problems in Canada" (2016) at 17–8, online (pdf): *Canadian Forum on Civil Justice (CFCJ)* <cfcj-fcjc.org/a2jblog/nudging-the-paradigm-shift-everyday-legal-problems/>.

documentation, or to pay fines and fees. These challenges, constraints, and impediments further undermine their ability to positively navigate the legal system and achieve fair outcomes.[47] Importantly, they also undermine trust and faith in the legal system, let alone its credibility.

I think that if judges, practitioners, and law school leaders embrace the best of the innovations achieved during these most challenging of times, we could reaffirm a more accessible and equitable future. Instead of hastily turning away from innovations scaled up due to COVID-19, and returning to the way things were, we should strive to build and expand upon the innovative possibilities born of necessity during the pandemic to envision an experience in the law for our clients, students, attorneys, employees, and judges, that is as empowering and accessible as it is effective and efficient. We should not deceive ourselves in thinking that a return to the status quo is a return to perfection. If truth be told, the pandemic has forced many enterprises to address matters that should have been addressed decades ago. I am sure that we have also learned, sometimes surprising, lessons from the pandemic and that there are now revealed greater alternative ways to navigate the structural impediments barring greater access to legal support and services, and that technology, while not a panacea, can be helpful.

---

47 See Trevor CW Farrow et al, Everyday Legal Problems and the Cost of Justice in Canada, Canadian Forum on Civil Justice, 2016 CanLIIDocs 350, <canlii.ca/t/2b02>; "State Bans on Debtors' Prisons and Criminal Justice Debt" (2016) 129:4 Harvard Law Review 1024; Tonya L Brito, "Producing Justice in Poor People's Courts: Four Models of State Legal Actors" (2020) 24:1 Lewis & Clark Law Review 145 ("[e]xamples that have come to light in recent years include … the pattern of municipalities imposing exorbitant and burdensome fees and fines on poor residents-including for parking" at 149); and Alicia L Bannon & Douglas Keith, "Remote Court: Principles for Virtual Proceedings during the COVID-19 Pandemic and Beyond" (2021) 115:6 Northwestern University Law Review 1875 ("[e]ven under normal circumstances, self-represented litigants face substantial obstacles in navigating the court system, from parsing 'legalese' on forms to following often-cumbersome procedural steps" at 1897).

These lessons should also recognize that for many people, being able to take the time to find and locate an appropriate attorney, or provider of legal support or services, presupposes knowledge that a legal question or problem is looming, and that the law, therefore, is an operative frame.[48] As challenging as navigating the existing legal system is, it is often also an impediment for many people to realize the role of the law, and thus that legal assistance might be helpful and may offer some remedy or recourse. In this way, if we ask a foundational question, which is to say, 'are legal problems always recognized as such', I think another opportunity for law school leaders and practitioners to further access to legal services is unearthed in ways that might combine transdisciplinary humility on the part of attorneys. Specifically, in many cases I think we would do well to have teams of leaders — lawyers, plus social workers, financial advisors, cultural practitioners, psychologists, and public health officials, for example — working together to deconstruct and diagnose the problems presented by those we seek to better serve. I am increasingly concerned that rigid disciplinary boundaries result in an insistence on self-contained approaches to the delivery of services when more expansive notions of who should be involved in a matter might best serve the ends of justice. The 'we don't know what we don't know' approach is not helpful if we truly strive to support and empower our students and clients.

So how might law school leaders harness technology, innovative transdisciplinary approaches to experiential learning, and the delivery of legal services to help in reconceptualizing spaces where people need help? Traditionally, the model is that people in need of legal services come to us; the lawyers stay put in their offices, while the clients come to them. But are there

---

48 See Legal Services Corporation, *supra* note 30 at 33–34 (finding that about 20% of low-income Americans do not perceive their "civil legal problems to be legal" and do not seek legal help); and "Justice Needs and Satisfaction in the United States of America" (2021) at 175, online: *Institute for the Advancement of the American Legal System* <iaals.du.edu/sites/default/files/documents/publications/justice-needs-and-satisfaction-us.pdf> (not considering a lawyer necessary to solve their problem was the most common reason Americans did not seek the advice of a lawyer when faced with a legal problem).

opportunities for law schools to be a part of a more decentralized vision of how law is delivered to the masses?

When we consider the myriad ways in which healthcare is delivered, we should acknowledge the healthcare providers who make house-calls, the proliferation of urgent care and walk-in clinics, the delivery of healthcare services through medical pop-ups, let alone the proliferation of remote care during the pandemic, that supplemented hospital, hospice, and doctor's office visits.

Might we as lawyers similarly support people in need of legal care closer to where their legal needs originate? What can be extrapolated from the experiences of healthcare and medical providers in the delivery of their professional services? Again, I think that law schools, especially those that are a part of large research universities, are particularly well situated to consider and offer some insights and possibilities. For instance, through the provision of satellite and remote legal services, might teams of law students in transdisciplinary cohorts, under the supervision of faculty in experiential classes, gain valuable training at the same time that they support people in need when they or their loved one's health is jeopardized, where their housing is inadequate, or water contaminated, where goods are not delivered or defective, and where they or their items are held, seized, or destroyed?

This question of legal innovation and how law schools can help begs the question of whether legal support can also be provided in the spaces where these problems are often encountered — in hospitals and clinics, city halls, housing complexes, in stores, schools, and malls, and so too libraries, places of worship, and post offices, and not just during business hours. Such presence could be physical, but it could also be remote or virtual, and it need not be offered within the same time zone, thereby opening up further possibilities for working people to receive legal support without having to risk losing pay.[49] For instance, law schools, lawyers, and the bench might contemplate whether we could provide cross-jurisdiction support, whereby someone on the east coast, or in the

---

[49] See Sartha Rai, "Seven Reasons Why Bangalore Still Tops the Offshoring League" (5 July 2010) *TechRepublic*; and Diana Farrell, "Smarter Offshoring" (June 2006) *Harvard Business Review*.

Midwest, for example, could just as easily call or zoom with a lawyer in their jurisdiction, or receive help from a lawyer or law student in a jurisdiction further west, where it was still 'business hours'. At this junction, as we contemplate the role of law schools and law students, it is again important to emphasize the interdisciplinarity of the law.[50] Not only are those providing legal services and support issues spotting and problem-solving, but it is important to recall that lawyers are called to be representatives, advocates, counselors, negotiators, and evaluators. And as I mentioned above, we should also contemplate how the provision of more wholistic support and services to our clients and those in need may call for a more transdisciplinary cohort model of service provision.

This possibility recognizes both the legal issue spotting, at which law students and lawyers become proficient, even when the potential client does not see the problem as a legal one. But it also furthers the possibility of access to timely legal services and support in a place, space, and time more convenient to the client, whether that is telephonic, app-based, or in-person legal assistance, as need be. The goals are to further access the delivery of legal services and support, at the same time that our students' legal training is enhanced by real-world experiential services. In this way, the demand and supply lines might move that much closer together through innovations such as these.

VI. Conclusion

If this is easy, why has it not been done in a sweeping way? I must acknowledge some challenges that are baked into many of our law schools. The structure of many law schools means that to be able to lift such initiatives requires that resources must either be recalibrated, and/or new resources found.[51] This

---

50 See Susan Dianne Brophy & JC Blokhuis, "Defining Legal Studies in Canada" (2017) 12:1 Journal of Commonwealth Law and Legal Education 1 at 12.

51 See Kiser, *supra* note 7 (stating that the legal profession lacks innovation because of a tendency to "package minor changes as major innovations", a misunderstanding of the "elements and origins" of innovation, and a propensity to encourage behavior that quashes innovation); Mark A Cohen, "Innovation Is Law's New Game, But Wicked Problems Remain" (21 May 2018) *Forbes* (arguing that for all the changes made in the legal profession, access to justice

reprioritization and budgetary realignment takes time to work through in the academic calendar, through committees, and often through faculty governance, and sometimes through the larger university as well.

Unlike other enterprises, much of the talent pool at universities and colleges is fixed, through tenure, with faculty having a fair bit of autonomy in the performance of their duties toward fulfilling teaching, scholarly, and service requirements, or otherwise where people were often hired to perform different tasks and responsibilities more aligned with past priorities.[52] Meaning, either one has to hope that one has a group of energized entrepreneurially minded faculty and administrators willing to take on more work for no more compensation (or a modest stipend if the dean can muster the finances), which is sometimes the case and sometimes not, or plans and strategies need to be made and approved to hire new talent to lift, staff, and scale the project, program, or innovation. That is frankly why we tend to see more innovation at schools that are wealthy and well-endowed. They have the money to do so and can therefore be more nimble.

For the rest of us leading at schools that are more resource-constrained, we need to seek external funding support (through fundraising and grant writing for example), diversify our revenue-generating opportunities, and strategically reprioritize our budgetary and financial systems to better map to future-facing initiatives, innovations, and opportunities. Importantly, our mindset as academics and those who work at academic institutions can also be more

---

and general dissatisfaction of clients with their attorneys remain two troubling issues yet to be resolved); and Scott Jaschik, "New Push for a Shift in Promotion and Tenure" (30 September 2020) *Inside Higher Ed* ("recognizing innovation and entrepreneurial achievements among the criteria for higher education faculty promotion and tenure").

52 See Theresa Shanahan, "A Discussion of Autonomy in the Relationship Between the Law Society of Upper Canada and the University-Based Law Schools" (2000) 30:1 Canadian Journal of Higher Education 27 at 43; and Sara Dillon, "On Academic Tenure and Democracy: the Politics of Knowledge" (2019) 52:4 UIC John Marshall Law Review 937.

inclined to entrepreneurial thinking.[53] Again, this is a big ask when faculty, staff, and administrators are under-resourced, and already have a great deal on their plates. Ultimately though, such a mindset shift will not only better prepare our students, and situate them more competitively for future-facing opportunities, but it will also ensure that law schools, and the universities of which many are a part, remain relevant, stay true to their missions, and contribute in more meaningful ways to support the communities of which they are a part.

In sum, part of what law schools must come to terms with is their societal positioning. While this may sound grandiose and unnecessarily lofty, it is at bottom a simple question of contribution. Certainly, the work of legal academics as public intellectuals is not to be taken lightly, especially in an increasingly complex and polarized world.[54] Having legal academics who research, write, dialogue and lecture about the pressing issues of the day is very important to the ongoing work of a civil society, and is important to a thriving constitutional democracy. So too is the work of legal academics as professors who teach in the classroom, and courtroom. Those professors who are truly excellent teachers are to be celebrated, just as all teachers should be.

I mean to emphasize here the institutional mission-driven work of law schools in removing roadblocks to justice. Ideally, our work is much larger than ourselves. In empowering the next generation of legal leaders and entrepreneurs, law schools should also ensure that a part of such innovative thinking includes encouraging problem-solving around the structure of the law, the delivery of justice, including its interdisciplinary dimensions, and the ways in which

---

53 See Todd Davey & Victoria Galan-Muros, "Understanding Entrepreneurial Academics – How They Perceive Their Environment Differently" (2020) 39:5 Journal of Management Development 599; and Megan Bess, "Grit, Growth Mindset, and the Path to Successful Lawyering" (2021) 89:3 UMKC Law Review 493.

54 See Eric Merkley, "Anti-Intellectualism, Populism, and Motivated Resistance to Expert Consensus" (2020) 84:1 Public Opinion Quarterly 24; and Eric Merkley & Peter John Loewen, "Anti-Intellectualism and the Mass Public's Response to the COVID-19 Pandemic" (2021) 5:6 Nature Human Behavior 706.

technology, access, and empowerment enhances these possibilities in service of our clients, communities, and inclusive justice.

Mythology in Legal Education: Fostering Reconciliation and Improving Mental Health

Christopher Nowlin*

This article contends that two superficially unrelated problems with Canada's legal system have a deep and common source. Having largely excluded Indigenous beliefs from law-making processes in the past, Canadian courts must now find practical ways to incorporate Aboriginal perspectives in Aboriginal rights litigation. This is a matter of legal education writ large. Canada's legal system is also currently grappling with problematically high rates of depression and malaise among its practitioners. A common denominator to these two problems is the fact that a mechanistic view of nature brought to North America centuries ago by Europeans concertedly displaced and largely eradicated the nomadic ways of life of Indigenous peoples and the mythic belief systems associated with their ways of life. The Europeans entrenched a highly rationalistic, mechanical and productive system of living while they physically ruined or destroyed much of the surrounding natural ecology and marginalized Indigenous worldviews, all in the interests of socio-economic expansion and scientific progress. Canada's legal system is slowly coming to terms with the emotional and psychological damage that its behaviour caused Indigenous people and is causing its own practitioners. This article proposes that an educational ounce of mythology could well be worth a pound of cure.

* MA, LLM, PhD. Instructor in the Department of Criminal Justice and the Department of Aboriginal Studies at Langara College in Vancouver, British Columbia. Practicing member of the Law Society of British Columbia, specializing in criminal appeals.

I. Introduction

This article addresses two seemingly diffuse challenges that press upon the Canadian legal system. One is the difficulty of incorporating what is called 'the Aboriginal perspective' into Aboriginal rights litigation, a "crucial" obligation that has been placed upon courts for at least 25 years.[1] The other is a troublesome sense of malaise among Canada's legal practitioners or what a recent report identifies as "alarming rates of anxiety, depression, substance use and burnout" among lawyers and law students.[2] Both problems are complex but this

1 See *e.g. R v Sparrow*, [1990] 1 SCR 1075, 46 BCLR (2d) 1 at paras 40, 69 [*Sparrow* (1990)].

2 "Report from the 2019 Annual Conference: The Practice of Well-Being: Exploring the Legal Regulator's Role" (2019), online (pdf): *Federation of Law*

article contends that they share at least one deep root. The Canadian legal system and the broader society in which it is ensconced hold tightly to a mechanistic view of nature. This view conceptually and actually disconnects individuals from the natural world in ways that leave individuals with a feigned sense of self-control and a private feeling of being lost. By contrast, some or many Indigenous peoples in Canada maintain some semblance of a holistic view of nature, as reflected in their mythologies and spirituality, and thereby feel connected to their natural surroundings. However, their views or knowledge have been "delegitimated" and "concealed from public view", as John Borrows proposes.[3]

This acculturated divide in thinking about nature is very deep. For this reason, this article does not offer unduly optimistic possibilities for bridging it, but it does contend that if socio-cultural and legal reconciliation between Indigenous peoples and non-Indigenous people in Canada is a *genuine*, mutual aspiration,[4] and if Canada's legal system *sincerely* wants its practitioners to find value, meaning or fulfilment in their work, these expectations will remain unfulfilled until Canada's legal educators and practitioners question their mechanistic understanding of nature.

To expose how deep the root of the problem extends, Part II of this article discusses how a mechanistic view of nature came to displace animism and how more recently the Industrial Revolution socially implemented or reified the mechanistic view, which prevails to this day. Eurocentric socio-industrial expansion into North America directly affected *nature* because of *a way of perceiving nature*. It transformed the landscape by developing it, and by concomitantly marginalizing Indigenous beliefs and relationships to the land.

Societies of Canada <flsc.ca/wp-content/uploads/2021/05/2019ConferenceREPORTEFin.pdf> ["Report from the 2019 Annual Conference"].

3 John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 31.

4 The Supreme Court of Canada has observed that the "grand purpose" of section 35 of the *Constitution Act, 1982* is "[t]he reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship": *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10.

Complicit in this process, the Canadian legal system "weakened ancient connections to the environment".[5] The prosecution of Beverly and Nicole Manuel for obstructing a highway is discussed, to show that Canadian law purports to consider and recognize Aboriginal law, but that the Rule of Law in Canada remains the Rule of *Canadian* Law.

Part III of this article proposes that legal education is wedded to a mechanical view of nature, which is linked to the rationalism demanded of all public higher education in Canada. Law school prepares students for the practice of law to a limited extent because it provides them with the specialized information needed to represent clients who will rely upon their specialized knowledge. However, formal legal education is not obviously or systemically concerned with the mental health aspects of legal practice. Law students who wish to become lawyers to *help* other people become disillusioned and demoralized in practice by the labyrinthine obstacles that impede this modest goal or they acquire a real distaste for having to 'help' clients whose conduct offends their own personal sense of morality. Law school does not prepare students for such realities, but it could lay the groundwork for *different* realities. It could emphasize that the highly mechanical dispute resolution system in place in Canada is an unwelcome, 'alternate' dispute resolution system to Indigenous peoples who hold a spiritual view of nature. It could attempt to offer some of the practical wisdom that comes from mythology alongside its curricula of specialized knowledge.

Part IV of this article addresses the malaise of legal practitioners. It proposes that the intellectually mechanistic foundation of the profession and associated processes have a psychologically deleterious influence on practitioners and others. At a recent conference addressed to the mental health of Canadian lawyers, a presenter suggested that Indigenous lawyers might find it challenging to find 'their space' in Canada's legal profession because the legal system has oppressed Indigenous peoples.[6] This article tackles the cause underlying this

5 Borrows, *supra* note 3 at 30.

6 "Report from the 2019 Annual Conference", *supra* note 2 at 3.

symptom. It proposes that the mental health of Indigenous and non-Indigenous lawyers alike depends at least partly on the willingness and capacity of Canada's legal system, including its legal education system, to give ground to a holistic view of nature. For at least a millennium the belief that humankind can control nature has been strengthened by the constant destruction of nature. More recently, as humankind becomes trapped in one extreme weather event after another — whether a tsunami, a flood, a drought or forest fire — such presumptuousness is being sorely tested.

II. How a Mechanistic View of Nature Emerged from a Mythic View of Nature

A. Contrasting Worldviews

In 1988, lawyers for the Gitksan and Wet'suwet'en chiefs who claimed Aboriginal title in a British Columbia Superior Court, gave an extensive opening address. They claimed therein that the Gitksan and Wet'suwet'en world view is of a "qualitatively different order" than that of the French and English people whose ancestors travelled across the Atlantic Ocean to North America centuries earlier.[7] In particular, Stuart Rush and his co-counsel submitted:

> [t]he Western world view sees the essential and primary interactions as being those between human beings. To the Gitksan and Wet'suwet'en, human beings are part of an interacting continuum which includes animals and spirits. Animals and fish are viewed as members of societies who have intelligence and power, and can influence the course of events in terms of their interrelationship with human beings.[8]

This article relies mostly upon this Gitksan and Wet'suwet'en worldview as representative or at least reflective of the kind of *animistic* mentality that can be contrasted to a mechanistic worldview. It is the animistic aspect of the Gitksan and Wet'suwet'en belief system that is implicitly absent from a 'Western'

---

7 See *e.g.* Stuart Rush et al, "Gitksan and Wet'suwet'en Address" (1988) 1 CNLR 16 at 24.

8 *Ibid.*

worldview in which the most important relationships are those between human beings, as Rush and his colleagues put it.

Western mythology was itself once animistic (and totemistic), but it eventually became anthropocentric.[9] According to Yuval Harari, "Animism (from '*anima*', 'soul' or 'spirit' in Latin) is the belief that almost every place, every animal, every plant and every natural phenomenon has awareness and feelings, and can communicate directly with humans".[10] Theodore Reik observes that animism is a belief system in which "the whole of nature, including inanimate objects, has a will and a soul".[11] It was "common among ancient foragers",[12] and can involve the worship of a natural creation such as a tree, from whom the worshipper believes that he or she descended.[13] Like the ancestors of the Gitksan and Wet'suwet'en peoples, the Haida people who inhabit the Haida Gwaii archipelago off the coast of British Columbia also hold an animist view of nature. John Vaillant observes:

> the Haida's world is capable of changing form and function as whim or circumstance dictate. Thus, a rock is never just a rock, and a crab is always more than a crab. Mountains can take the form of killer whales, and a canoe can open its mouth and tear out the throat of a grizzly bear. Virtually every rock, reef, island and inlet in the archipelago has some supernatural association …[14]

What Vaillant calls the 'supernatural' dimension or character of animism is a scientific construction based on a view of nature that does not countenance animate beings and inanimate objects changing their forms and characteristics — *i.e.* ontologically mutating — in ways that defy mechanistic explanations.

---

9 See *e.g.* Theodor Reik, *Myth and Guilt: The Crime and Punishment of Mankind* (New York: George Braziller, 1957) at 164, 210–11.

10 Yuval Noah Harari, *Sapiens: A Brief History of Humankind* (Toronto: Signal, McClelland & Stewart, 2016) at 60.

11 Reik, *supra* note 9 at 164.

12 Harari, *supra* note 10 at 60.

13 Reik, *supra* note 9 at 164.

14 John Vaillant, *The Golden Spruce* (Toronto: Vintage Canada, 2005) at 56–57.

The eponymous golden spruce tree of Vaillant's *The Golden Spruce*, which the Haida people called K'iid K'iyaas (or Elder Spruce Tree), was itself believed to be "a human being who had been transformed".[15]

In some early human societies, animism was gradually replaced with totemism, in which certain animals (the "most powerful, feared, and admired") are worshipped and deified as 'personifications' of tribal ancestors.[16] Trees are especially revered in totemic belief systems. As Reik explains, "every form of religion" and "the folklore of all people" identify trees with human life.[17] "The sacred tree is in the earliest stages [of human history] not a symbol, but is instinct with divine life".[18] It is a "totemistic god".[19] Reik explains:

> [w]e have heard that native tribes of Australia and Africa do not hesitate to call a tree or a plant their ancestor. They consider them children of nature, not only equal to but superior to themselves. To modern man who considers himself the crown of creation the concept of God as a big tree is entirely alien … To recognize in a tree a god was familiar to the primitive tribes, 'familiar' also in the sense that they considered themselves descendants of this tree god.[20]

In both animistic and totemic belief systems, humankind is *vulnerable*, not powerful. The security and well-being of humankind is believed to depend upon the wills of animals and other powerful spirits. So, for example, in 1986, the British Columbia Court of Appeal learned that salmon in Salish mythology are "a race of beings that … had … established a bond with human beings requiring the salmon to come each year to give their bodies to the humans who, in turn,

15 *Ibid* at 18.

16 Reik, *supra* note 9 at 164, 210.

17 *Ibid* at 136. See also Vaillaint, *supra* note 14 at 147–48.

18 Reik, *ibid* at 136–37.

19 *Ibid* at 141.

20 *Ibid* at 144.

treated them with respect shown by performance of the proper ritual".[21] This myth reflects an ethos of what Marianne and Ronald Ignace call reciprocal accountability.[22] In the Secwépemc tradition, salmon and other animals are believed to help out human beings by "letting themselves be caught".[23] Even so, there is never a point at which the Secwépemc people become confident of their capacity to control nature, so they maintain an ethos of carefulness toward nature, for the sake of both their own and nature's sustainability. In one Secwépemc tale, Coyote catches far too many fish than he needs to get through the winter. He hangs all the fish on a line but the great weight of the fish impedes his ability to walk underneath his catch. So, Coyote throws a fish into the river, but it springs to life and swims away. In turn, all the other salmon throw themselves into the river and swim away and Coyote is left with no fish to feed him through the winter.[24] The conservationist ethos is clear: overfishing, greed and waste lead to scarcity and human socio-economic insecurity.

In contrast to such a view, Garrett Hardin surmised in 1968 that an American plainsman who might have cut out the tongue of an American bison 150 years earlier, for dinner, only to "discard the rest of the animal", was not "in any important sense being wasteful".[25] Here, Hardin identifies a purely utilitarian and mechanical view of the bison, in sharp contrast to the traditional Secwépemc belief that some animals such as salmon are human kin — *kindred spirits*, as the expression goes — making it immoral to waste the meat of animals that have to be killed for human survival.[26] To the Western plainsman, the value

---

21 *R v Sparrow* (1986), 36 DLR (4th) 246, 9 BCLR (2d) 300 (BCCA) at para 19. This is the British Columbia Court of Appeal's paraphrase of Dr. Wayne Suttles' evidence [*Sparrow* (1986)].

22 Marianne Ignance & Ronald E Ignace, *Secwépemc People, Land, and Laws* (Montreal: McGill-Queen's University Press, 2017) at 206, 210.

23 *Ibid* at 204–205.

24 *Ibid* at 203.

25 Garrett Hardin, "The Tragedy of the Commons" (1968) 162 Science 1243 at 1245.

26 See Ignace & Ignace, *supra* note 22 at 204–205.

of the bison fluctuates depending upon accessibility and need, nothing more. Hardin comments that, in light of the scarcity of bison today, "we would be appalled at such behaviour",[27] thus making the morality of the waste contingent upon supply, not the nature of the slain animal. No sense of ontological relationship or connection to the bison *is felt*.

Lawyers in the *Delgamuukw*[28] trial told the presiding justice that he could expect to hear evidence of how thousands of years ago in what is now British Columbia, humans had failed "to observe the proper respect for salmon and mountain goats and the spirits of these fish and animals".[29] For example, according to the Gitksan oral tradition (ada'ox), a "giant grizzly bear" ripped through a forest, sending trees into a nearby lake and causing the lake level to rise rapidly.[30] As Susan Marsden paraphrases the belief, the mountain collapse, a subsequent landslide near Temlaxam, and subsequent climate change over 3,000 years ago were "an expression of displeasure on the part of the spirit world".[31] The Anishinabek people share a similar animistic understanding of nature in which animals and plants talk to one another. Borrows observes that the Anishinabek people "attribute some of their society's afflictions to a misbalance between humans and animals".[32]

---

27 Hardin, *supra* note 25 at 1245.

28 *Delgamuukw v British Columbia*, [1991] 3 WWR 97, 79 DLR (4th) 185 (BCSC) [*Delgamuukw* (1991)].

29 Rush et al, *supra* note 7 at 25.

30 *Ibid* at 34.

31 See Susan Marsden, "The Gitk'a'ata, Their History, and Their Territories Report Submitted to the Gitk'a'ata" (January 2012) at 17, online (pdf): *Impact Assessment Agency of Canada* <www.ceaa-acee.gc.ca/050/documents/57088/57088E.pdf> and see *ibid* at 25. Remarkably, such an Indigenous belief ascribes *human* fault or *guilt* for events that a century ago the scientific community would have believed were beyond human control. Today the scientific consensus is that human beings could have caused or expedited climate change by mismanaging the planet's natural resources.

32 Borrows, *supra* note 3 at 49–50.

In some early human societies, distinctively human forms of deities eventually replaced animal or totemic forms, but the transition was not necessarily direct or immediate. Syntheses are discernible in mythologies that contain human-animal figures, such as Thoth in Egyptian mythology, Chiron (the Centaur), Pan or the satyrs of Greek mythology.[33] In the Secwépemc tradition, the original inhabitants of the earth, *stsptékwle*, have "characteristics of both men and animals".[34] With such myths, in which humans physically merge with animals and thereby acquire animal strength and prowess, human fear of the natural world is giving way to a fantasy of superhuman or at least extra-human control of the natural world, which is when a mechanistic view of nature becomes evident. A mechanistic view is perfectly reflected, for example, in Hesiod's poems, which were composed circa 700 BC. The Titan Prometheus cleverly steals from Zeus a "gleam of weariless fire" in a fennel stalk or in a hollow read and gives it to mortal men, in *Theogeny* and *Works and Days*, respectively.[35]

B. The Agricultural Revolution & Cosmic Law

Well after early humankind had domesticated or learned to make fire and to channel its power for survivalist purposes — possibly 300,000 years ago[36] — it remained vulnerable to a myriad of naturally perilous conditions, both climatic and animalistic, as many societies still do. In Secwépemc lore, 'the Old-One' sends Coyote to travel the world "troubled with great winds, fires and floods", to "put it to rights", and among other things, Coyote introduces salmon into

33 Reik, *supra* note 9 at 210–11. Reik observes that only 8,000 years passed from animism, to totemism, to the worship of a superhuman deity, "a mere fraction of the time during which Homo sapiens inhabited this planet" (*ibid* at 310).

34 James Teit, "The Shuswap" in Franz Boas, ed, *Memoirs of the American Museum of Natural History*, vol 2, part 7 (New York: GE Stechert & Co, 1909) 443, reproduced in Ignace & Ignace, *supra* note 22 at 31.

35 See Mark A Morford & Robert J Lenardon, *Classical Mythology*, 2nd ed (New York: Longman, 1977) at 45, 47. According to Aeschylus, Prometheus is born from Themis, the goddess of earth and personification of justice (*ibid* at 37, 44).

36 Harari, *supra* note 10 at 13.

the rivers so that the earth inhabitants have "fishing places".[37] In this tale, the ancestors of the story-tellers acquired the ability to sustain themselves on fish, and to gain a modest 'upper hand' on nature by the extraordinary powers of a mythic Coyote. With time, observational discernment, and mechanical ingenuity, different human societies acquired ever-greater *self*-control over perilous nature.[38]

Astronomical observations from Mesopotamia led to an awareness of cosmic regularity or periodicity, which in turn taught agrarian societies the most effective and productive times for planting and harvesting.[39] For Robert Taylor, celestial patterns or cosmic 'order' provided the earliest "lawbooks or code" for agrarian societies that wished to endure and to thrive.[40] Thus, during the agricultural revolution, which can be dated to about 9500-8500 BC,[41] humankind remained connected and attuned to the natural world or at least to the solar system. Human societies relied on natural celestial and seasonal rhythms for their own survival, but Harari argues that forager societies, which might have been animistic, probably remained more socio-economically secure.[42]

By the time positive law is revealed to Moses, as reported in the Pentateuch (written circa 1,000 BC),[43] the law has no connection to a cosmic deity, such as Shamash, the Babylonian Sun God, who gave the law to King Hammurabi,[44] or to an animistic deity such as Thoth, the Egyptian Moon God with the head

---

37 Teit, *supra* note 34, reproduced in Ignace & Ignace, *supra* note 22 at 31.

38 Harari, *supra* note 10 at 54–55, 77.

39 Robert D Taylor, "Reclaiming Our Roots: Law and Mythology," (1991) 29:2 Duquesne Law Review 271 at 277–78.

40 *Ibid* at 277, 278, 283, 284.

41 See Harari, *supra* note 10 at 87. See also *ibid* at 276–77.

42 Harari, *ibid* at 58, 62.

43 Reik, *supra* note 9 at 323.

44 Taylor, *supra* note 39 at 283–85; and René A Wormser, *The Story of the Law* (New York: Simon and Schuster, 1962) at 6.

of an ibis, who was believed to be the ultimate judge of human conflicts.[45] The God of the Old Testament orders humankind to "subdue" the earth and "have dominion over the fowl of the air, and over every living thing that moveth upon earth".[46] This God is also unlike the Sun deity worshipped by Biano, a Peublo Indian, who told Carl Jung that his people practiced their religion daily to help their father across the sky, failing which "in ten years the sun would no longer rise".[47] Jung realized that this belief connected Biano's people to nature and accounted for "the enviable serenity of the Pueblo Indian".[48] By contrast, Biano told Jung that Caucasians "think with their heads" and are "always uneasy and restless".[49] Positive law in the Pentateuch is generally divorced from nature and natural law, both in terms of its intellectual roots and in the sense that it provides prohibitions exclusively in relation to human conduct. This is unlike Anishinabek environmental law[50] and the positive law of the Secwépemc people, which includes "practical resource management regimes" that are sustained "by a system of spiritual beliefs and sanctions".[51]

C. The Mechanization of the Natural World in Western Thought

In the mid-17th century, which roughly demarcates the beginning of the Enlightenment, the Jesuit — and legally-educated René Descartes — was sure that humankind could mark itself off from "beasts" on account of its reason or

45 Wormser, *ibid* at 6.

46 Genesis 1:28.

47 Carl Jung, *Memories, Dreams, Reflections*, revised ed, translated by Richard Winston & Clara Winston (New York: Vintage Books, 1965) at 250–52.

48 *Ibid* at 250–53.

49 *Ibid* at 248.

50 See Borrows, *supra* note 3 at 16–20.

51 Ignace & Ignace, *supra* note 22 at 209–10.

"good sense".[52] He disagreed with "the ancients, that animals speak, although we do not know their language" and was certain that animals had "no intelligence at all".[53] In his view, animals had "entirely different" souls than human beings had, and functioned more akin to clocks, "composed only of wheels and springs".[54] This mechanistic view of animal nature may be starkly contrasted to the animistic view held by the Gitksan, Wet'suwet'en and Musqueam peoples in British Columbia, and by the Anishinabek people in Ontario, in which animals are spirits that are capable of judgment, as discussed above. It is also in stark contrast to Jung's belief that "all warm-blooded animals" have "souls like ourselves" and share an "instinctive understanding" with humankind.[55]

Remarkably, Descartes understood that human beings suffered from "a number of disorders, both of mind and body", and he made it his life-long goal to attain a knowledge of medicine comprised of "all the remedies which nature has provided", to liberate humankind from such illnesses and disorders.[56] However, he had an ulterior motive for improving the mental and physical health of humankind, which was to enable humankind to become "as it were, the lords and masters of nature".[57] This ulterior motive has been a guiding aspiration, if not fantasy, of scientific research to this day — it is also God's edict

52 René Descartes, *Discourse on Method*, translated by Arthur Wollaston (Middlesex: Penguin Books, 1960) at 11–12, 37–38. This book was originally published in 1637.

53 *Ibid* at 81.

54 *Ibid*. See also *ibid* at 82.

55 Jung, *supra* note 47 at 67.

56 Descartes, *supra* note 52 at 85. Descartes maintained a holistic view of *human* nature in which "the hands of God" or "animal spirits" guide the movements of the human body, which he believed were "far better ordered [than animal organs], with a far more wonderful movement, than any machine that man can invent" (*ibid* at 79).

57 *Ibid* at 84–85.

in the Old Testament, as indicated above — but it is not necessarily conducive to mental health.

In the early decades of the 17th century, Puritans crossed the Atlantic Ocean to convert Indigenous peoples to Christianity[58] while Jesuit missionaries in New France endeavoured to convert non-literate Indigenous peoples such as the semi-nomadic "Algonkian" tribes to the Christian religion and to agriculture.[59] Some Indigenous peoples such as the Hurons were already "agricultural, maize-growing Indians",[60] but the Jesuits had limited success attempting to convert others to this way of life. As George Stanley remarks, some Indigenous peoples regarded the labour needed to clear and cultivate the land with "antipathy" and preferred "the lost joys and freedom of the chase".[61] Many generations later, Alexis de Tocqueville similarly observed that Indigenous peoples in America "found themselves obliged to live ignominiously by labor, like the whites. They took to agriculture and, without entirely forsaking their old habits or manners, sacrificed only as much as was necessary to their existence".[62] More poignantly, de Tocqueville observes:

> [a]fter having led a life of agitation, beset with evils and dangers, but at the same time filled with proud emotions, [the Indian] is obliged to submit to a wearisome, obscure, and degraded state. To gain by hand and ignoble labor the bread that nourishes him is in his eyes the only result of which civilization can boast, and even this he is not always said to obtain.[63]

---

58 See *e.g.* John M Barry, *Roger Williams and the Creation of the American Soul* (New York: Viking, 2012) at 157, and Nathaniel Philbrick, *Mayflower* (New York: Viking, 2006) at 191.

59 George FG Stanley, "The First Indian 'Reserves' in Canada" (1950) 4:2 Revue d'histoire de l'Amérique française 178 at 178–79.

60 *Ibid* at 192.

61 *Ibid* at 183.

62 Alexis de Tocqueville, *Democracy in America*, vol 1 (New York: Random House, 1945) at 358.

63 *Ibid* at 360–61.

Put more bluntly, Harari proposes that a "forager economy provided most people with more interesting lives than industry or agriculture do". He emphasizes that a painting from circa 1200 BC depicts an Egyptian farmer in a "hunched position" who, "like the ox" pulling his plough, "spent his life in hard labour oppressive to his body, his mind and his social relationships".[64] Lawyers who overwork in isolation through the weekends, slouched behind their desks in the sterile isolation of their law offices,[65] would do well to note that their agrarian ancestors not only *chose* to live as they did, but purposely marginalized the alternative and arguably more 'interesting' way of life of the forager and hunter and gatherer.

The intellectual conversion that the Jesuits sought to achieve, away from animistic, totemistic and paganistic beliefs, toward faith in a monotheistic Deity incarnated by Jesus of Nazareth, also involved a physical conversion away from an immediate relationship with nature, to a physically mediated, more sanitized and secure relationship with nature. Jung neatly contrasts these bi-polar worldviews when he observes that his mother's "Christian surface" could be contrasted with the "deep ground" in which she was rooted, a paganism that "connected [her] with animals, trees, mountains, meadows, and running water".[66] The Jesuits in New France wished to pull Indigenous peoples away from this type of raw embeddedness in and connectivity to nature, which was often a hard sell, though near the mid-17th century mark Father Druillettes evidently persuaded the Abenaki to "forsake their pagan manitous" in favour of Christian beliefs.[67]

At this time, English immigrants to the Eastern shores of the 'New World' were toppling thick forests and exporting lumber back to England, Spain, and the West Indies. By 1675, "hundreds of sawmills" were already

64 Harari, *supra* note 10 at 56, 106.

65 See "Report from the 2019 Annual Conference", *supra* note 2 at 2. The Report notes "overwork" and "neglect of other areas of one's life and poor self-care" as problems associated with lawyers' poor mental health (*ibid*).

66 Jung, *supra* note 47 at 90.

67 Stanley, *supra* note 59 at 185–86.

operating in New England and Atlantic Canada.[68] John Locke had led Englishmen to believe that they could transform nature's raw elements, including land, into their own private property, by laboriously harnessing or mechanically cultivating resources into something socio-economically *productive or useful*. He wrote: "the grass my horse has bit, the turfs my servant has cut, and the ore I have dug in any place where I have a right to them in common with others, become my property without the assignation or consent of anybody".[69] This logic is an historical precursor to what is known in Canadian Aboriginal rights litigation today as the development rationale or justification, which is discussed below.

When European adventurers finally reached what is now British Columbia both by inland routes and the Pacific Ocean, much of the planet's oceans "had already been explored and mapped" by seafarers such as James Cook.[70] Technological ingenuity had given European hunters, trappers and voyageurs significant control over nature's resources. The non-literate Indigenous peoples who were living in the region held animistic and totemic beliefs, but the Europeans who entered their hunting and fishing grounds regarded animals foremost as commercial goods and only secondarily as sources of their *own* survival. The Europeans destroyed nature's creatures and ecology without compunction. A "cruel" international sea otter trade along the North Pacific coast had almost run the species into extinction.[71] Vaillant suggests the Haida people who participated in the "heady" and "destabilizing" trade had otherwise viewed the otter as a "spirit relation" and once the animal was nearly exterminated, "the Haida were reduced to selling carvings to passing sailors and

68 Vaillaint, *supra* note 14 at 84.

69 John Locke, "An Essay Concerning the True Original, Extent and End of Civil Government" in Saxe Commins & Robert N Linscott, eds, *Man and the State: The Political Philosophers* (New York: Random House, 1947) 57 at 73. Locke's essay was originally published in 1689. See also Barry, *supra* note 58 at 160.

70 EJ Hobsbawm, *The Age of Revolution* (London: Cardinal, 1962) at 19. See also *Delgamuukw* (1991), *supra* note 28 at paras 140–41, 175–86.

71 *Delgamuukw* (1991), *ibid* at paras 180, 690.

trading potatoes with former enemies".[72] The idea that nature was "organic",[73] which is logically consistent with the animism of some of the Indigenous people whom the Europeans encountered, had no relevance to the predominantly mechanistic approach to nature that had become deeply inculcated in the Western mind. If there was any doubt about this, the Industrial Revolution firmly dispelled it.

D. The Industrial Revolution

In the 1780s, the English economy suddenly acquired an exponential productive capacity in the cotton and slave trade.[74] The slaves were treated commercially like Descartes' clocklike animals, composed of "wheels and springs" with "entirely different" souls from humans.[75] The international cotton trade showed that "natural connections" among humankind had been severed in the service of "power accumulation and expansion".[76] In 1800, England produced millions of tonnes of coal, an "astronomic" level that engendered the railway, and two decades later such systems were underway in Europe and the USA.[77] Multinational industrialization continued to sever any spiritual or mythic connection that existed between peoples and the cosmos, and the applicable law or lack thereof was complicit in this achievement. Hobsbawm writes:

> both Britain and the world knew that the Industrial Revolution launched in these islands by and through the traders and entrepreneurs, whose only law was

72 Vaillant, *supra* note 14 at 91–92.

73 Max Oelschlaeger, *The Idea of Wilderness: From Prehistory to the Age of Ecology* (New Haven: Yale University Press, 1992) at 129.

74 Hobsbawm, *supra* note 70 at 43, 49–51, 53.

75 Descartes, *supra* note 52 at 81–82.

76 See Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, 1968) at 157.

77 Hobsbawm, *supra* note 70 at 60.

> to buy in the cheapest markets and sell without restriction in the dearest, was transforming the world. Nothing could stand in its way.[78]

On a much less visible scale — indeed, on a microscopic scale — scientific knowledge about gases and chemistry was further distancing humankind spiritually or emotionally from nature. The English chemist, Humphry Davy, wrote:

> [t]he composition of the atmosphere and the properties of the gases, have been ascertained; the phenomena of electricity have been developed; the lightnings have been taken from the clouds; and, lastly, a new influence has been discovered, which has enabled man to produce from combinations of dead matter effects which were formally occasioned only by animal organs.[79]

Thus, scientific and technological capabilities of some European societies had led some Europeans to believe that Descartes' wish could be fulfilled — that they could control nature *and that it was not the other way around*. The hubris in this belief, which was sheer fantasy when Hesiod wrote the myth of Prometheus, had reached frightening dimensions when Mary Shelley wrote *Frankenstein* (subtitled *The Modern Prometheus*). Her well-known 1818 novel need not be summarized here, but Laura Crouch makes the astute observation that:

> Mary Shelley replaced Davy's dream of the great parent, Science, providing community among her children, which would lead to great social change, with a vision of the isolated scientist. While working on his project, Frankenstein found he could not write to his family, even though he knew they would be worried by his silence. …

78 *Ibid* at 68–69.

79 Humphry Davy, "A Discourse Introductory to a Course of Lectures on Chemistry" in John Davy, ed, *The Collected Works of Sir Humphry Davy* (London: Smith, Elder, 1839) 307 at 321. See also Laura E Crouch, "Davy's 'A Discourse, Introductory to a Course of Lectures on Chemistry': A Possible Scientific Source of 'Frankenstein'" (1978) 27:1 Keats-Shelley Journal 35 at 39.

> Scientific study had not made Frankenstein a happy man, full of an insatiable curiosity and hopeful of improving the world. Rather, he soon became surfeited with his knowledge and lost his hope. His study led to his destruction.[80]

Lawyers will readily recognize the same isolationist or segregationist tendencies of their demanding schedules and the confidentiality of their files. They will also admit that the highly specialized knowledge that they apply in their law office research dens does not often lead to an emotionally rewarding result, as is discussed in Part IV of this article.

It is with *Frankenstein* in mind that American and British determination to expand their respective societies by industrializing the North American frontier in the early 19th century, at almost any cost, is best understood. In 1830, U.S. President Andrew Jackson publicly eschewed a conservationist mentality by proposing that a "good man" would prefer an "extensive Republic, studded with cities, towns, and prosperous farms, embellished with all the improvements which art can devise or industry execute", and "occupied by more than 12,000,000 happy people", to a country "covered with forests and ranged by a few thousand savages".[81] The English Crown north of the American border broadly shared this mentality. In 1830, Lieutenant Governor Sir John Colborne of Upper Canada enforced a "civilization" policy that financially coerced Indigenous peoples into a "sedentary, agricultural, European way of life".[82] Animism, paganism, and foraging were to be eliminated.

To recall, forests figured prominently in mythology since time immemorial. Even the dense forests that once covered what is "rural Europe" today were held

---

80 Crouch, *ibid* at 43.

81 Andrew Jackson, "President Jackson's Message to Congress 'On Indian Removal'" (6 December 1830), online (pdf): *National Park Service* <www.nps.gov/museum/tmc/MANZ/handouts/Andrew_Jackson_Annual_Message.pdfwww.nps.gov/museum/tmc/MANZ/handouts/Andrew_Jackson_Annual_Message.pdf>; also reproduced in Thomas King, *The Inconvenient Indian: A Curious Account of Native People in North America* (Toronto: Anchor Canada, 2013) at 87.

82 *Restoule v Canada (Attorney General)*, 2018 ONSC 7701 at para 106 [*Restoule*].

to be "sacred" by the tribespeople who inhabited them.[83] Yet, to the Lockean mentality, they existed only to be destroyed. Upon approaching a settlement that he had started in Upper Canada on April 17, 1833, Thomas Need first felt "sorrow" at the sight of felled trees along a shoreline, but upon seeing a waterfall and lake beyond the clearing, he shared the "exultant feelings of the choppers, as one after another the noblest among these ancient lords of the soil groaned under the stroke of the axe, trembled for a few seconds, and fell".[84] Need alluded to the mythic significance of the trees as 'ancient lords of the soil', not dissimilarly from the belief of Indigenous peoples of Australia and Africa that their ancestral trees were "superior" to themselves,[85] but Need's self-interest in building a settlement sufficed to topple the forest in an act of mythic regicide.

Mining was another pressing concern of European socio-industrial expansionists. In 1845, the Government of the Province of Canada issued licences to mining companies in territories that the Anishinaabe peoples claimed as their own, without first securing a treaty with the Anishinaabe people. In 1846, Chief Shingwaukonse felt the need to write to an English Governor General, "I see Men with large hammers coming to break open my treasures to make themselves rich & I want to stay and watch them and get my share".[86] He saw no choice. He complained in 1848, that the miners had mined "without consultation, had burned the forest and driven the game away, and had forbade the Indians to cut timber on certain tracts".[87] Thus, as Jung elegantly observes, what Europeans call "colonization, missions to the heathens, spread of

83 Hobsbawm, *supra* note 70 at 85.

84 Thomas Need, *Six Years in the Bush: Or, Extracts from the Journal of a Settler in Upper Canada, 1832-38* (London: Simpkin, Marshall & Co, 1838) at 56–57. For Vaillaint, "North American immigrants" such as Need "were a restive people" who "cut the forest the way they breathed the air—as if it were free and infinite": Vaillant, *supra* note 14 at 89.

85 See Reik, *supra* note 9 at 144.

86 See *Restoule*, *supra* note 82 at para 126.

87 *Ibid* at para 129. This is the court's paraphrase of Chief Shingwaukonse's position.

civilization, etc., has another face — the face of a bird of prey seeking with cruel intentness for distant quarry — a face worthy of a race of pirates and highwaymen".[88] Hobsbawm observes that British "government policy was firmly committed to the supremacy of business" and to this extent was prepared to topple the "gods and kings of the past",[89] including the "ancient lords of the soil".[90] Vaillant observes that "[t]he European settlers of North America *mastered their environment* as no one had before … logging the continent faster than anyone else in history".[91] The concept of "forest conservation" was "anathema" in British Columbia and by the 1880s the "problem of the day" was how to turn the region's "infinity of trees, and the land on which they stood, into something *productive*".[92]

E. The 20th Century Mechanization of Work

At the outset of the 20th century, productivity in manufacturing was so highly prioritized by state and corporate interest alike that many citizens found themselves economically bound to machines for several hours a day to make their living. European peasants migrated "into the towns and factories where their muscles were increasingly needed" in the mid-19th century,[93] and a similar domestic migration occurred later in America. Theodore Dreiser conveyed how the "single mechanical movement" of a shoe-leather hole-punching machine that Carrie Meeber operated for one morning in Chicago had become "absolutely nauseating".[94] Henry Ford was soon producing automobiles by assembly line. A lathe operator at his plant described his experience as "a form

88 Jung, *supra* note 47 at 248.

89 Hobsbawm, *supra* note 70 at 68–69.

90 Need, *supra* note 84 at 57.

91 Vaillant, *supra* note 14 at 87 [emphasis added].

92 *Ibid* at 93.

93 Hobsbawm, *supra* note 70 at 187.

94 Theodor Dreiser, *Sister Carrie* (New York: Penguin Classics, 1981) at 39. Dreiser's book was originally published in 1900. See also Harari, *supra* note 10 at 56.

of hell on earth that turned human beings into driven robots".[95] In 1920, the Czech playwright, Karel Čapek, fictively likened the new mechanical working class to robots, arguably ushering in the very first public use of the word "robot".[96] In his play, a female visitor to a robot factory urges the Head of the Physiological and Experimental Department to modify the latest models of robots with a chemical so that they "acquire souls, launch a revolution, destroy and recreate mankind".[97] In *This Side of Paradise*, Eleanor Savage tells Amory Blaine, "the only thing that separates horses and clocks from us" is that human beings "can't go tump-tump-tump without going crazy".[98] Such writers as Dreiser, Fitzgerald and Čapek elegantly depicted the soul-destroying effect of the increasing mechanization of the wider economy.

F. The Mid-20th Century Tragedy of the Commons

By the mid-20th century mark, the landscape and waterways of America had become so polluted from industrialization and concomitant human population growth, that human beings could no longer enjoy the same degree of access to clean air and water that their forefathers took for granted. John Kenneth Galbraith largely blamed the post-WWII political-economic prioritization of goods produced for private consumption over public services for this predicament, suggesting that a demand for "a nontoxic supply of air" should not

95 Charles Madison, "My Seven Years of Automotive Servitude" (1980) 19(4) Michigan Quarterly Review 445 at 454.

96 Karel Čapek, *R.U.R. (Rossum's Universal Robots)* (Mineola: Dover Publications, 2001). Karel's brother Josef is credited with coining the word "robot", to connote serfdom or drudgery: Dan Halpern, "Robots and Hopes", Book Review of *Cross Roads* by Karel Čapek, translated by Norma Comrada and *Karel Čapek — Life and Work* by Ivan Klíma, translated by Norma Comrada (11 November 2002) *The New Republic* at 35–36.

97 Robert Pynsent, "Tolerance and the Karel Čapek Myth" (2000) 78:2 The Slavonic and East European Review 331 at 348.

98 F Scott Fitzgerald, *This Side of Paradise* (New York: Dover Publications, 1996) at 177.

involve a "revolutionary dalliance with socialism".[99] The problem was not insignificant. It broached "social unhealth".[100] Soon, human connections to nature would be severed in irreversible ways. As Hannah Arendt observed, "no remedy can be found to undo what has been done".[101]

Ten years later, Garrett Hardin observed that "the law, always behind the times," had not managed to prevent American citizens and businesses from routinely polluting and ruining one another's common waterways and lands.[102] Lax environmental laws had allowed private property owners to pollute waterways, land and air spaces to the point where large numbers of people (including the property owners themselves) no longer enjoyed liberal access to clean water, soil and air. Too many people had consciously acted on the logic that their personal contributions to environmental waste or degradation could not adversely affect everyone, including themselves, or they acted upon the gambler's mentality that Shelley depicted in *Frankenstein*, being that the rewards of manipulating nature might well be worth the risks. People erroneously assume that they are disconnected from nature when they waste and ruin natural resources, and in turn pollute the natural environment, as if such behaviour could *never* have naturalistic implications *for themselves*.

The horrors of this mechanistic view of nature are being increasingly felt in this century. On September 11, 2020, the Governor of California stood amidst the smoke-filled and charred ruins of Butte County and desperately impressed

---

99 John K Galbraith, *The Affluent Society* (Boston: Houghton Mifflin, 1958) at 252.

100 *Ibid* at 251.

101 See Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958) at 238. Similarly, Harari observes that the Agricultural Revolution wrought such influential socio-economic changes to previous modes of life that there was "no going back": see Harari, *supra* note 10 at 98–99, 110.

102 Hardin, *supra* note 25 at 1245. See also Joseph L Sax, "Takings, Private Property and Public Rights" (1971) 81:2 The Yale Law Journal 149 at 150 ("[t]he abandon with which private resource users have been permitted to degrade our [American] natural resources may be attributable in large measure to our limited conception of property rights" (at 155)).

upon his attentive public that "the extreme droughts, the extreme atmospheric rivers, [and] the extreme heat" afflicting the state[103] was a sure indication that Mother Nature "bats last and bats one thousand".[104] Governor Gavin Newsom was expressing *humility* before "the powers in nature", consistent with the Aboriginal perspective in which humankind is vulnerable, not powerful, in relation to nature.[105] Mother Nature made herself *felt* in California, just as she did in British Columbia on July 29, 2021, when the small town of Lytton experienced the hottest day in Canada's recorded history, just shy of 50 degrees Celsius,[106] and burned down the next day.[107] So many human beings have failed to act as if their behaviour was interconnected to and dependent upon nature that the consequences of industrialization are now being painfully felt. Is it not high time, therefore, to second-guess what Galbraith sarcastically called "the American genius"?[108]

G. Conservation vs Development

Arguably, nearly every step taken in Canada's pre and post-confederation political-legal history has involved concerted ruination of the natural ecology and greater emotional alienation or spiritual separation of people, Indigenous and non-Indigenous alike, from their natural surroundings.[109] Of course, some

103 Don Thompson, "'The Debate is Over': Amid Wildfires, California Governor Calls for Climate Change" (11 September 2020) *Global News*.

104 Don Thompson, "Amid Ashes, California Governor Fires Away on Climate Change" (11 September 2020) *The Washington Post*.

105 See Ignace & Ignace, *supra* note 22 at 205.

106 "Canada Weather: Dozens Dead as Heatwave Shatters Records" (30 June 2021) *BBC News*.

107 Vjosa Isai, "Heat Wave Spread Fire That 'Erased' Canadian Town" (12 July 2021) *The New York Times*.

108 Galbraith, *supra* note 99 at 253.

109 See Borrows, *supra* note 3 at 31. In *Mikisew Cree First Nation v Canada (Minister of Heritage)*, 2005 SCC 69 at para 24, the Supreme Court of Canada observed that "[t]he post-Confederation numbered treaties were designed to open up the Canadian west and northwest to settlement and development".

Indigenous peoples themselves have at times been "implicated in serious environmental destruction".[110] Even so, the unwavering and inchoate project of non-Indigenous population growth and industrialization, which continues unabated today, has reached such a troublesome point that some Indigenous leaders see no realistic choice but to become partners with the Eurocentric beast that devoured their cultures.[111]

Despite overwhelming evidence that industrial development, human population growth and economic or commercial growth — *not environmental conservation* — have been the top priorities of duly elected federal and provincial governments for over a century, Chief Justice Antonio Lamer observed in 1996 that conservation is of "overwhelming importance to Canadian society as a whole".[112] This proposition, which defies credulity, was intended to install a principled constraint on the exercise of Aboriginal fishing rights. A year later, Chief Justice Lamer declared that "the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia" and even "the settlement of foreign populations to support those aims" could also justifiably restrict Aboriginal title.[113] This pro-development rationale permits federal and provincial governments to restrict the exercise of Aboriginal rights and title if they can justify doing so on the basis of the greater socio-economic interests served by industrialization and non-Indigenous population growth. Jim Reynolds dates such logic broadly back to the 16th century, to Thomas More's *Utopia* (1516), and later to Emerich de Vattel's *The Law of Nations* (1758).[114] In Canadian law, then, industrial-scale

110 Borrows, *ibid* at 33.

111 See Christopher Nowlin, "Indigenous Capitalism and Resource Development in an Age of Climate Change: A Timely Dance with the Devil?" (2020) 17:1 McGill Journal of Sustainable Development Law 71 at 91.

112 *R v Gladstone*, [1996] 2 SCR 723, [1996] 9 WWR 149 at para 74.

113 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 66 BCLR (3d) 285 at para 165. La Forest J agreed (*ibid* at para 202) [*Delgamuukw* (1997)].

114 James Reynolds, *Aboriginal Peoples and the Law: A Critical Introduction* (Vancouver: Purich Books, 2018) at 8–9.

natural resource development *and* ecological conservation can override or restrict Aboriginal rights, even though pre and post-federation law in Canada has largely prioritized industrial development over conservation.

H. Canada's Rule of Law Lacks an Aboriginal Perspective

Indigenous people who attempt to resist the tide of non-Indigenous industrial development by means considered illegal according to Canadian law quickly learn that the Canadian legal system has little patience for the Aboriginal perspective, despite lip service to the contrary. In 2001, Beverly and Nicole Manuel participated in a blockade on one side of a public highway near Kamloops, British Columbia, protesting the establishment of the Sun Peaks ski resort. In defence of their actions, the Manuels, who are both members of the Secwépemc (Shuswap) Nation, claimed that they had a duty to protect the lands that the Creator had bestowed upon their people.[115] They were concerned that commercial developments were imperilling "the land, and the plants and animals inhabiting the region".[116] Their Nation claimed ownership of the lands through which the Sun Peaks Road traversed, but the federal government had rejected their land claim in 1996 and Nicole Manuel knew this.[117] She also knew that her Nation's land claim remained "unadjudicated and unconfirmed in law (taking into account all of Canadian law, including the aboriginal perspective, aboriginal legal systems, and Canadian common law and criminal law)", and that it "conflicted with established common law property rights".[118] She also knew that no negotiating or judicial process of "reconciling" her Nation's "beliefs in their title to the land with the assertion of Crown

115 *R v Manuel*, 2008 BCCA 143 at paras 2, 9 [*Manuel* (2008)].

116 *Ibid* at para 2.

117 *Ibid* at paras 27, 33.

118 *Ibid* at para 58.

sovereignty" was underway or complete when she and her mother blocked the Sun Peaks Road.[119]

Even so, the Manuels were entitled to be honestly mistaken about property ownership and, by implication, they were entitled to believe honestly that the government's rejection of their land claim in 1996 was not legally authoritative or binding on the land title issue. The trial judge had rejected their colour of right defence on the basis that it was moralistic, not legalistic, even though the Manuels believed that they owned the land in question and relied partly on legal documents dating back to 1862 to ground their belief.[120] As Justice Levine described their position:

> they honestly believed that, *in accordance with aboriginal law*, they had a legal right to block Sun Peaks Road. Nicole Manuel testified that her understanding of the laws of her people, which she described as "natural laws" and the "laws of the Creator", imposed a duty on her and her people to take care of and preserve the land.[121]

The BC Court of Appeal agreed that the Manuels' beliefs "in their people's title to the land and the law of the Creator" are beliefs about their "legal rights" and that their "aboriginal perspective", which is "at the root of aboriginal law", is "part of Canadian law".[122] However, the court considered this fact irrelevant to the central issue of whether the Manuels *honestly* held their beliefs.

The court concluded for various reasons that the Manuels did not honestly believe that they were entitled to block the road. Most significantly, the court emphasized that the Manuels were familiar with *Delgamuukw* and would have understood, therefore, that "the attendant uncertainties and the processes for reconciliation" encouraged therein did not include "self-help" remedies such as

---

119 *Ibid* at para 60.

120 See *ibid* at paras 24–28, 30, 36, 52. And see *R v Manuel*, 2007 BCCA 178 at para 4 [*Manuel* (2007)].

121 *Manuel* (2007), *ibid* at para 3 [emphasis added].

122 *Manuel* (2008), *supra* note 115 at para 53. See also *Manuel* (2007), *ibid* at paras 9, 12–3.

blocking a road.[123] Of course, *Delgamuukw* is *Canadian* common law, not Aboriginal law, and nowhere suggests or implies that Indigenous people must first attempt to engage the government in negotiations before they can sincerely maintain a belief that they own a particular tract of land or territory.[124] The Court of Appeal in the Manuels' case expressly dismissed the insinuation that lower courts had applied "one system of law over another",[125] meaning Canadian law over Aboriginal law — Canadian law that preferred industrial development over Aboriginal law that preferred stewardship — *but this is precisely what had occurred*.

According to the court, "Canadian law" includes "aboriginal, common, and criminal law",[126] but in fact Canadian law mostly *excludes* Aboriginal law from its ambit,[127] with exceptions made for Indigenous adoption and marriage customs, and for sentencing, as is discussed below. Ultimately, the court reasoned that the Manuels' self-help behaviour *undermined* "the rule of law",[128] even though the very same logic could be applied to the Crown's acquisition of the land in dispute — that the Crown had *helped itself* to the land in violation of the rule of law. This latter proposition was implicit in the Manuels' defence. The court sent a clear message to Indigenous peoples that their spiritually based sense of obligation to protect the land is not relevant to Canada's Rule of Law if

123 *Manuel* (2008), *ibid* at para 62. So, the court concluded that there was no reasonable doubt that the Manuels acted without colour of right (*ibid* at paras 58, 63).

124 The court partly found the Manuels' belief insincere because they knew that their Nation had not yet attempted reconciliation as encouraged by *Delgamuukw*: *ibid* at para 60. See *Delgamuukw* (1997), *supra* note 113 at para 186.

125 *Manuel* (2008), *ibid* at para 58.

126 *Ibid* at para 62.

127 In 2019 Justice Church observed, "[w]hile Wet'suwet'en customary laws clearly exist on their own independent footing, they are not recognized as being an effectual part of Canadian law": *Coastal GasLink Pipeline Ltd v Huson*, 2019 BCSC 2264 at para 128.

128 *Manuel* (2008), *supra* note 115 at para 62.

it is acted upon in a way that conflicts with Canada's non-Indigenous, legislative system of governance. However, this Canadian Rule of Law cannot be isolated from what Justice David Gibson calls the "arrogance" of the Eurocentric law makers who endeavoured to eradicate the kind of mythical-ethical understandings of land held by such Indigenous peoples as the Anishinabek and Secwépemc people.[129] The obligation of Canada's courts to heed the Aboriginal perspective remains *pro forma* in the face of statute law created by predominantly non-Indigenous federal and provincial governments.

III. The Mechanistic Approach of Legal Education: Preparing for Disillusionment

A. The Rationalistic Nature of Epistemic Humility

Thirty years ago Taylor proposed that legal education in America could benefit from a course in Law & Mythology.[130] He had spent many hours over decades counselling lawyers who had become "unhappy with lawyering as a way of life" and discerned that one of the root causes of such malaise was that "judges, lawyers, and legal educators" were largely "cut off from the mythological soil in which culture in general and law in particular have grown".[131] Taylor therefore proposed that "mythological nutrients are essential both to a healthy psyche and to experiencing in one's vocation a sense of energizing adventure, instead of banal and debilitating routine".[132] At about this time, J.C. Smith did in fact offer a course on law and mythology at the University of British Columbia. The core required reading for his course was his recently published *Psychoanalytic Roots of Patriarchy*.[133]

---

129 See *R v Morrisseau*, 2017 ONCJ 307 at paras 94–95 [*Morrisseau*].

130 Taylor, *supra* note 39 at 272.

131 *Ibid.*

132 *Ibid.*

133 Joseph C Smith, *Psychoanalytic Roots of Patriarchy: The Neurotic Foundations of Social Order* (New York: New York University Press, 1990).

This article agrees with Taylor that law students (and post-secondary students generally) would benefit by some form of education about mythology, but with the broader heuristic objective in mind of demonstrating the epistemological limits of *rationalism*. Taylor correctly notes that "lawyers are by training and education hyper-rationalists",[134] but the same can be said generally of any student who has received a post-secondary education. Whether a student is enrolled in a liberal arts or social sciences program, he or she is trained and expected to be ultra-rationalistic. Irrational arguments and exam answers in economics, history or political science are not typically praised. Success in college and university depends greatly upon a student's ability to be logical, which is also a critical aptitude required of a law student and a litigator.

Ideally, formal education in North America, including legal education, is expected to be self-aware or, more pointedly, self-doubting, much like Descartes was, *to a point*. Vicki Jackson recognizes the need for "epistemic humility" in *knowledge* institutions such as universities.[135] Her suggestion is that prevailing knowledge always stands to be tested by further inquiry and, in turn, by further knowledge. Similarly, for Harari, a hallmark of modern science is that it accepts "that the things that we think we know could be proven wrong as we gain more knowledge." [136] Of course, such reasoning makes the very concept of 'knowledge' problematic. If new knowledge (*e.g.* Galilean) displaces old knowledge (*e.g.* Ptolemaic), then the old knowledge was a mistaken *belief*, not knowledge. Such concessions lead toward Socratic wisdom, which does not result in greater knowledge, but an awareness of one's own ignorance and a feeling of wonderment. Yet, knowledge institutions today aspire to be "organs

134 Taylor, *supra* note 39 at 272.

135 Vicki C Jackson, "Knowledge Institutions in Constitutional Democracies: Preliminary Reflections" (2021) 7:1 Canadian Journal of Comparative and Contemporary Law 156 at 159, 215.

136 Harari, *supra* note 10 at 279.

of epistemic objectivity"[137] that are open to "*reasoned* challenges to current views of knowledge".[138] Their epistemic humility remains safely *one-sided*.

Bill Bryson safely concludes from interviews with leading international scientists: "we live in a universe whose age we can't quite compute, surrounded by stars whose distances from us and each other we don't altogether know, filled with matter we can't identify, operating conformance with physical laws whose properties we don't truly understand".[139] Further scientific research and rational inquiry into these grand mysteries could result in greater enlightenment, but could equally result in greater humility. For Jung, "the rationalistic picture of the universe is invalid, because incomplete".[140] It should be no surprise, then, that when rationalists struggle with questions of human origins, purposes and destinations, their writings invariably tend to take on a "mythic dimension".[141] Jack Goody and Ian Watt rightly observe that "the illogical and mythical nature of much of Western thought and behaviour is evident to anyone contemplating our past or our present".[142]

It was precisely the mythical understandings of nature and of humankind's relationship to natural creatures held by Indigenous peoples in North America that Cartesian rationality and Christian theology earnestly strived to eradicate. There was little epistemic modesty in this hugely successful colonial endeavour, which in turn established Eurocentric knowledge institutions that remain fervently committed to rationalism, objectivity, and 'truth'. Rush and his colleagues expressed concern in the *Delgamuukw* trial that the spiritual explanation for certain natural events offered by the Gitksan and Wet'suwet'en people would be undervalued in court as "mythical" and not "scientific" or

137 *Ibid* at 203.

138 *Ibid* at 215 [emphasis added].

139 Bill Bryson, *A Short History of Nearly Everything* (London: Black Swan Books, 2004) at 299.

140 Jung, *supra* note 47 at 305.

141 See Smith, *supra* note 133 at 52.

142 Jack Goody & Ian Watt, "The Consequences of Literacy" (1963) 5:3 Comparative Studies in Society & History 304 at 320–21.

causal, such that "Indian reality" would be "denied or devalued".[143] This is precisely what the hyper-rationalistic assumptions of higher education do: they *devalue mythic belief systems*, except from ethnographic and anthropologic perspectives. Overtly mythic beliefs are considered interesting and worth studying for comparative purposes, but as sources of *accurate* information about history or the natural world they are presumed to hold little if any epistemic value.

B. The Lawyer's Divided Self

Derek LaCroix, the executive director of the Lawyers Assistance Program of British Columbia, observes that Canadian students enter law school purportedly to "help others".[144] Surely there is a grain of truth to this observation but it states only part of the case. Some individuals enter law school to assist others whereas some or many lawyers enter law school to earn significant incomes and to enjoy the social status and power that many lawyers enjoy. For those individuals who wish to help others, it is significant that presenters at a Canadian conference observed that lawyers "sometimes experience a sense of disconnect between their personal values and their work, which can lead to well-being challenges".[145] Douglas Litowitz notes the same problem among American lawyers. They either repress their "internal sense of morality" or they superficially split their "*true-inner-layman-self*" from their "*false-outer-lawyer-self*" by telling themselves, for example, "[t]he law is just a job, but it isn't *me*".[146] Both forms of attempts to smooth over the inner conflict will not put an end to the mental unwellness produced by the inner conflicts.

Realistically, barristers seldom find themselves in the highly romanticised situation of helping a virtuous David defeat an immoral and menacing Goliath.

---

143 Rush et al, *supra* note 7 at 25.

144 Derek LaCroix, "Meaning, Values and the Practice of Law" (2021) 79:3 The Advocate 399 at 399.

145 "Report from the 2019 Annual Conference", *supra* note 2 at 3.

146 Douglas Litowitz, *The Destruction of Young Lawyers: Beyond One L* (Akron: Akron University Press, 2006) at 141.

In some or many cases they will find themselves doing precisely the opposite: 'helping' Goliath to keep David at bay. In such cases it is difficult for lawyers to believe privately, except with a guilty conscience, that they have *helped* anyone. Litowitz describes this predicament well. In light of certain experiences he had as a corporate lawyer, in which his firm took ethically contrasting positions on different files, he mused aloud to his colleague, "[d]oesn't it seem a little hypocritical to think of ourselves as *protectors*, when we are also *attackers*"?[147] His colleague quickly rationalized by a "sleight of hand" that his firm consistently protected clients.[148] For Litowitz, such a rationalization was an attempt to smooth over the divided lawyer's self. This self is divided between the "false lawyer-self" who "speaks in legalese while the true self looks on helplessly in shame at what the other half of its personality is doing".[149] Indeed, lawyers whose *personal* conscience extends beyond their *professional* ethics rationalize their inner moral doubts in terms of abstract matters of rights and justice, yet this private ambivalence can eventually be soul destroying.

Law school is partly accountable for the inevitable disillusionment that broadly conscientious individuals experience in the practice of law because it does not necessarily concern itself with the realistic life of legal practice. Jerome Frank was an especially harsh critic of the lack of realism in America's system of legal education. He surmised in 1949 that "a majority" of professors in most American law schools had "never met and advised a client, negotiated a settlement, drafted a complicated contract, consulted with witnesses, tried a case in a trial court or assisted in such a trial, or even argued a case in an upper court."[150] LaCroix correctly observes that law students are trained to be 'objective' and to apply the law "without regard for personal values".[151] Litowitz broaches this point by emphasizing that law students learn law from "the

147 *Ibid* at 143.

148 *Ibid.*

149 *Ibid* at 23.

150 Jerome Frank, *Courts on Trial* (New York: Atheneum, 1969) at 227. Originally published in 1949.

151 LaCroix, *supra* note 144 at 399.

perspective of a reviewing court".[152] With a similar concern in mind, Frank urged that the cases taught in law school be studied "in the light" of such disciplines as "history, ethics, economics, politics," and notably for this article, "psychology and anthropology". [153] Students learn legal principles de-contextualized from the problematic and in some cases profoundly troubling social situations that led to the case whose principles they must memorize. Textbook criminal law highlights cases in which the State has violated the constitutional due process rights of presumptively innocent persons, but defence lawyers soon learn that the world of criminal law is *realistically* a very violent and menacing social realm in which innocent people are harmed and traumatized by their clients, often indefensibly. Defence lawyers learn to rationalize the fact that they *generally* do everything in their professional capabilities to keep harmful people at liberty among potential victims.

What matters to students is the *ratio* of the case — the discreet *point of law* that must be applied to all similar fact-patterns. Learning the picayune nature of the common law does not prepare a student for the adversarial tumult of litigation, in which a modicum of professional bullying is considered completely acceptable. A great memory ensures success in class, but an aptitude for ring-fighting is prized in the real world of legal practice. Law professors need not concern themselves with the latter type of mettle. They must ensure that students can recite the formal mechanics of law — the *rules* for filing papers on time (civil and criminal procedure, and limitations periods), and the prevailing doctrines of substantive law. If legal educators were to tell their students that the practice of law will not resemble anything like the education they are currently receiving — that they might well find legal practice distasteful or depressing, as Taylor, LaCroix, and the Report from the 2019 Conference are reporting — fewer students would probably choose to write the bar exams and to become

152 Litowitz, *supra* note 146 at 21. Frank made a similar observation decades earlier, that American law students "study, almost entirely, upper court opinions": Frank, *supra* note 150 at 227.

153 Frank, *ibid* at 239.

lawyers. Perhaps this eventuality would cause enough concern to engender institutional reform and a mentally healthier legal system all around.

C. Practical Intelligence (or Wisdom) and Mythology

Students attend post-secondary educational institutions for a wide variety of reasons, extending from a wish to develop technological knowledge that can be applied toward a career, to a wish to learn about the world for the mere sake of learning about the world. In most if not all cases, however, students wish to *connect* themselves in a fulfilling way to their broader society. This aspiration is not restricted to certain law students. It is arguably a universal human predicament and wish that stems from an organic sense of existential insecurity in relation to one's wider environment, precisely the existential condition of early humankind that engendered mythology. James Hollis observes that human beings are "the animal that suffers disconnect from meaning", and that because of this natural condition, the human cognitive or somatic system doggedly "forges new connections" from prior interactions.[154] At least in the past, these connections were deeply mythical. They were not formed by an *accurate* understanding of one's natural or social world, and they are not likely to be formed in the future by a university education that promises a greater understanding of these worlds through scientific research and rationalism. Smith astutely observes: "[i]t is impossible to seek meaning in life or for life without entering the realm of myth and mythic thought".[155]

Jung aptly imagines that an individual who seeks meaning to his or her life "is constantly looking around for external rules and regulations which can guide him in his perplexity", and he casts "a good deal of the blame" for this situation on "education" that "promulgates the old generalizations and says nothing about the secrets of private experience".[156] For him, man could not readily become "conscious of his uniqueness and his limitation" because his era "concentrated

154 James Hollis, *Living an Examined Life* (Boulder: Sounds True, 2018) at 4–5.

155 Smith, *supra* note 133 at 65.

156 Jung, *supra* note 47 at 330.

exclusively upon extension of living space and increase of rational knowledge at all costs".[157] Arguably, the fears, insecurities, anxieties and desires that privately afflict individuals are more determinative of individual mental health than the formal education, training and accreditations that students receive in post-secondary education. Higher education, including law school, can improve any student's life by providing for a remunerative career and creating valuable social relationships, but it will not necessarily teach or even strive to teach what Socrates called "practical intelligence".[158] The latter is more encompassing than formal education because it must discern what type of education is most conducive to an individual's mental health and what social relationships will be most existentially fulfilling *for the individual*. These are pressing and most difficult decisions for many people and they will have to be informed as much by intuition or instinct as by reason or common sense. When "reason fails" to guide individuals, they will make or find new connections to "cope with and accept reality",[159] and these connections will be drawn unconsciously or consciously from stories derived from mythologies. Smith observes, "we do not find the meaning of life, but rather give a meaning to life".[160] In his view, it is best that individuals be made aware of the mythical influences upon their decisions so that they may be more discerning in their existential choices.[161]

157 *Ibid* at 325.

158 See Plato, "Socrates' Defense (Apology)" in Edith Hamilton & Huntington Cairns, eds, *Plato: Collected Dialogues*, translated by Hugh Tredennick (Princeton: Princeton University Press, 1961) 3 at 8.

159 Smith, *supra* note 133 at 67.

160 *Ibid.* See also Jung, *supra* note 47 at 341, 347.

161 *Ibid.*

IV. The Malaise of Lawyers in a Mechanistic Legal System

A. The Mechanical Condition of Unhappiness

LaCroix recently reiterated a seemingly implacable problem with the Canadian practice of law. There appears to be no "meaning" or "sense of fulfillment" in practicing law for many young lawyers, who report a "sense of isolation" in the practice, "with little or no possibility of a fulfilling and healthy life".[162] Evidently, lawyers suffer "significantly higher" rates of "major clinical depression and of alcoholism" than other professional Canadians.[163] A 2019 report noted "alarming rates of anxiety, depression, substance use and burnout in the legal profession, with similar results among law students".[164] Taylor has similarly observed that many American lawyers either suffer unhappiness in private or eventually emerge from "their closets of pain", desirous to understand "the many complex roots of their unhappy state of affairs".[165] Litowitz has observed that there is "morose quality" to the lives of American lawyers, who have "given up any hope for an interesting and fulfilling life".[166]

By now it should be evident that the emotionally burdensome monotony of weekly and largely sedentary office 'work' is simply part of a greater historical and larger socio-economic shift away from hunter-gather and forager economies. By the turn of the 20th century, agricultural mass production had a new urban cousin in mechanical and industrial mass production, which was soul destroying. The modern legal profession is *deeply* ensconced in this mass-productive, mechanical socio-culture, which is devoted primarily to ever-greater productivity of goods. As Litowitz observes: "[l]aw firms have become factories

162 LaCroix, *supra* note 144 at 399–400.

163 *Ibid* at 399.

164 "Report from the 2019 Annual Conference", *supra* note 2 at 1.

165 Taylor, *supra* note 39 at 272.

166 Litowitz, *supra* note 146 at 18.

and legal services have become commoditized".[167] LaCroix similarly observes that Canadian lawyers complain of "churning out work product for clients like a machine", and that the need for "volume, speed and uniformity of work product" has eroded legal professionalism in Canada.[168] This mechanical socio-culture is the 'successful' product of a concerted, multi-century Eurocentric effort to demolish and to eradicate alternative modes of human living regarded as unproductive, nomadic, superstitious, pagan, or primitive. Harari writes: "on the whole foragers seemed to have enjoyed a more comfortable and rewarding lifestyle than most of the peasants, shepards, labourers and office clerks who followed in their footsteps".[169] Eurocentric colonists *were not careful about what they wished for*.

Critically, evolutionary psychologists maintain that over millennia the human brain adapted to "a life of hunting and gathering", and has not yet come to evolutionary terms with the sedentary, mechanistic life of a mass production society.[170] Harari aptly observes that "our current post-industrial environment, with its mega-cities, aeroplanes, telephones and computers … makes us feel alienated, depressed and pressured".[171] By all indications, lawyers experience all too often this kind of depression and pressure because Harari rightly recognizes that human beings "*subconsciously* still inhabit" the world of the forager or hunter-gather.[172] This is the world that preoccupied Jung. It is a *spirited* world, not a mechanical world, which tends to suppress the former.

The secular and mechanistic world of positive law in North America is presumptively rationalistic. This is why the Canadian legal system is unable to receive or to incorporate Indigenous mythology into Aboriginal rights litigation except insofar as it serves a rational or logical purpose, such as informing a court

167 *Ibid* at 81. See also *ibid* at 75.

168 LaCroix, *supra* note 144 at 400.

169 Harari, *supra* note 10 at 56.

170 See *ibid* at 45.

171 *Ibid.*

172 *Ibid* [emphasis added].

about an Indigenous claimant's culture.[173] Unlike Indigenous legal systems that are ethically informed by spiritual and even animistic beliefs, Canada's legal system will steadfastly reject any transgression of logic into a spiritual realm, even though the concept of "logic" evidently derives from "logos, whose first and proper meaning was fabula, fable, carried over into Italian as favella, speech".[174] So, Canada's legal system may pride itself on its enforcement of rationalism, epitomized by an indeterminate concept of the Rule of Law, but for this very reason it can never find itself at harmony or peace with nature — environmental or human — because neither human society nor the natural word is ultimately rational. Jung observes:

> [t]he predominantly rationalistic European finds much that is human alien to him, and he prides himself on this without realizing that his rationality is won at the expense of his vitality, and that the primitive part of his personality is consequently condemned to a more or less underground existence.[175]

This observation reflects Harari's observation that 21st century humans *subconsciously* wish to and indeed *need* to forage, in the sense of breaking free from an oppressively orderly and rational existence. Their *vitality* depends upon doing so. Jung's observation perfectly explains why some lawyers tend to go 'crazy', to use Eleanor Savage's expression in *This Side of Paradise*, in the face of the hierarchically conservate constraints of Canada's legal system. The system resists fluidity and is embarrassed by vivaciousness.

---

173 See *Sparrow* (1990), *supra* note 1 at paras 40, 69; and *Sparrow* (1986), *supra* note 21 at para 19.

174 See Giambattista Vico, *The New Science of Giambattista Vico: Unabridged Translation of the Third Edition (1744) with the Addition of "Practic of the New Science"*, translated by Thomas Goddard Bergin & Max Harold Fisch (Ithaca: Cornell University Press, 1984) at 127. This book was originally published in 1725.

175 Jung, *supra* note 47 at 245.

B. Reconciling Rationalism with Mythology

Taylor's observation that unhappy lawyers have little footing in the "mythological soil" of their culture[176] directly conforms to Jung's broader suggestion that when "man was still linked by myth with the world of the ancestors, and thus with nature truly experienced and not merely seen from outside", humankind would have been less likely to be "divided against themselves".[177] For Jung, a divided self is largely a function of human acculturation to a world that has concertedly abandoned or rejected mythic thinking.[178] Again, the agricultural revolution and its trans-Atlantic missionaries generally wrought such a rejection of the mythologizing mentality. Having physically severed its connection to nature — by choosing the symmetry of agriculture and machines over the meandering routes of the forager and hunter and gather — humankind distanced its brain both physically and intellectually from nature, thereby making itself "neurotic".[179]

The antidote, which is much easier identified than achieved, is to bridge the divide between the intellect and the *anima* (or the 'soul' or 'spirit') — or to "integrate" reason and unconscious life.[180] In early human societies mythology did this job. Animistic, totemistic and anthropocentric myths kept the fabrics of the intellect and the soul (or spirit) woven together by bringing a sense of security, *intellectually*, to viscerally perilous and anxious life. Mythology tends to play a "freeing and cathartic" effect on the human mind.[181] Lawyers take great pride in the power of their *brains* to memorize legal points and to convince judges that their arguments are cleverer than those of their professional adversaries, but such demonstrations of rationalism do not bear on the *emotional* health of legal practitioners. As Jung understands: "[i]n the living psychic

176 Taylor, *supra* note 39 at 272.

177 Jung, *supra* note 47 at 144.

178 *Ibid* at 143–44.

179 *Ibid.*

180 *Ibid* at 302. See also Smith, *supra* note 133 at 66.

181 Reik, *supra* note 9 at 204.

structure nothing takes place in a merely mechanical function; everything fits into the economy of the whole, relates to the whole".[182] This is precisely why conscientiously troubled young lawyers pause to ask, "[w]hat good am I doing"?[183] Their mechanical and rational lives *as lawyers* are troubling to them because *as people* they feel an emotional longing for connection with their broader social ecology. Rationalism and doctrinairism dominate Canada's legal system, yet they are also "the disease of our time",[184] according to Jung. The wish of young lawyers to do 'good' reflects their longing to *connect morally* with others in a society guided by an ethos of care and stewardship, not rationalistic rules that promise mastery and control over nature.

So, LaCroix surmises that some non-pecuniary fulfilment could be found in the practice of law if "the culture of law shifts to one in which we respect and support each other and our individual differences".[185] This article agrees, but it proposes that the shift must be more extensive and less anthropocentric, and that legal education should play its rightful part. The shift must involve a re-evaluation of the heightened importance that prevailing North American culture ascribes to human rationality and its mechanistic view of nature.[186] David Gunkel recognizes in *The Machine Question* that "the discipline of philosophy" has "only recently" begun "to approach nonhuman animals as a legitimate subject of ethics".[187] Organic nature in general, which includes

182 Jung, *supra* note 47 at 246. See also Smith, *supra* note 133 at 66.

183 LaCroix, *supra* note 144 at 400.

184 Jung, *supra* note 47 at 300.

185 *Ibid* at 401.

186 Rosi Braidotti similarly proposes that "a new, subtler, and more complex relationship to our planetary dimension is now needed and that a more egalitarian relationship to nonhuman others is called for": Rosi Braidotti, "Posthuman Critical Theory" (2017) 1:1 Journal of Posthuman Studies 9 at 10.

187 David J Gunkel, *The Machine Question: Critical Perspectives on AI, Robotics, and Ethics* (Cambridge, Mass: MIT Press, 2012) at 109.

sentient creatures and the human psyche, has been undervalued and damaged for centuries. For Smith:

> [t]he parts of reality which have been repressed through patriarchal culture are our links with the earth and nature, and the similarities and identifications with other animal species and forms of life. To try to understand our relationship to nature we must use a holistic form of thought rather than modes of thought suitable for differentiation only. These holistic approaches will inevitably be mythic.[188]

The type of change encouraged by LaCroix therefore implicates a broader, epistemic change. Rush and his colleagues wished to see this type of change in the *Delgamuukw* trial when they asked the court to take seriously the animistic beliefs of the Gitksan and Wet'suwet'en peoples; that human beings are "part of an interacting continuum which includes animals and spirits".[189] Realistically, a Canadian court will never question its prevailing hyper-rationality and mechanistic view of nature *at an adjudicative stage*, but remarkably it will apply a holistic worldview of nature (involving a spiritual aspect) to the sentencing of Indigenous peoples, consistent with principles of restorative justice. In sentencing an Indigenous offender for mischief, Justice David Gibson observed that "[t]he arrogance of the law makers who formulated [racist] policies blinded them to the richness of the [Indigenous] traditions they sought to end and the unique wisdom they contained" and he agreed on the need "to bridge the Rule of Law and Natural Law".[190] This kind of bridge is missing from legal education and the adjudicative dimension of Canada's legal system. It was not extended to the Manuels.

The Canadian Collaborative Mental Health Initiative ("CCMHI") notes that Indigenous peoples once believed in "a link between people, creatures, and all things created by the Great Spirit", and that humankind is obliged to "take

188 Smith, *supra* note 133 at 66.

189 Rush et al, *supra* note 7 at 24.

190 *Morrisseau*, *supra* note 129 at paras 94–95.

care of the earth – not to control it".[191] Borrows similarly notes, "the water, wind, sun, and stars" and "fish, birds, plants, and animals" are all part of a union that he and his Anishinabek ancestors have with the land, but that such a form of citizenship is being "slowly diminished".[192] This is to put it mildly. With animistic, naturalistic, and empathetic bonds well and purposely severed, the acculturated trade-off for human mental health has been profound. The cultural genocide of Indigenous peoples identified by Harold Cardinal in *The Unjust Society*[193] has had reverberations for the wider non-Indigenous society that purposely destroyed nature to accommodate a highly mechanized, industrialized, and rationalistic existence. Individuals who must make their way in social realms, including the domain of law and justice, which demand rationality and denigrate mythology, are bound to have difficulty finding 'meaning' in them. The lack of meaning and sense of fulfillment that lawyers convey to LaCroix reflects a systemic problem in North America. Arguably, alienation is "the normal condition of human existence", yet is worth attempting to redress.[194]

The recipe for restoring mental health in the well-cemented predicament of mythic alienation today is not to reinvigorate the role of religion into a largely secular mode of life.[195] It is more nuanced and more difficult than this. As a therapeutic modality for Indigenous peoples, the CCMHI encourages the use of a Medicine Wheel that focuses holistically on the mind, body, emotions and *spirit* of people suffering mental health challenges.[196] In its discussion of the

---

191 Bill Mussell & Neasa Martin, "Pathways to Healing: A Mental Health Toolkit for First Nations People" (2006) at 3, online (pdf): *Shared Care* <www.shared-care.ca/files/EN_PathwaystoHealing.pdf>.

192 Borrows, *supra* note 3 at 138, 140.

193 See *ibid* at 138–39 and Harold Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: Hurtig, 1969) at 139.

194 Christopher Lasch, *The Revolt of the Elites and the Betrayal of Democracy* (New York: W W Norton & Co, 1995) at 244.

195 See Jung, *supra* note 47 at 347–48.

196 Mussell & Martin, *supra* note 191 at 11. See also David Danto & Russ Walsh, "Mental Health Perceptions and Practices of a Cree Community in Northern

spirit, the CCMHI critically observes: "[s]piritual growth is connected to the land, each other, and the community".[197] Again, a critical factor in the current malaise of North Americans, not simply Indigenous peoples, is an acculturated disconnection of everyday human life from nature. No amount of medication can restore this connection. Recently, David Danto and Russ Walsh researched the importance of the medicine wheel to healing Aboriginal communities.[198] Most persons who participated in their study (various community leaders and mental health service providers in northern Ontario Indigenous communities) emphasized the importance of land and having a connection to land as a means of strengthening spiritual health.[199] Generally the participants "characterized their relationship to the land in spiritual terms".[200] The participants also identified the importance of land to mental health.[201] As for emotional health, Danto and Walsh wrote, "[p]articipants also conveyed that community members are healthy owing to their spiritual connectedness".[202]

If reconnecting Indigenous people to the land, physically, intellectually, and spiritually has mental health and emotional benefits for such people, there is no reason to believe that the same types of reconnections would not benefit non-Indigenous peoples. The legal primacy given to commercial and industrial development in Canadian law needs to be re-considered. From its agrarian roots through its manufacturing and industrial forms, resource development systemically marginalized nomadic ways of life and wrought alienation. "Unfortunately", Jung writes, "the mythic side of man is given short shrift

---

Ontario: A Qualitative Study" (2017) 15:1 International Journal of Mental Health Addiction 725 at 728.

197 Mussell & Martin, *ibid* at 12.

198 Danto & Walsh, *supra* note 196 at 728.

199 *Ibid* at 732–33.

200 *Ibid* at 732.

201 *Ibid* at 732–33.

202 *Ibid* at 733.

nowadays. He can no longer create fables".[203] Theory and evidence seem at the very least to suggest that an improvement in the mental health of lawyers will require North American culture to accept that the mechanistic worldview to which it and its legal system tenaciously cling *is part of the problem*. North America's enlightened secular society has convinced itself, though not very convincingly, that it prefers the "wintry blasts of modern critical thinking" to the "naïve faiths of the past".[204]

The pressing problem addressed by this article is not the *correctness* of a belief system. It is not knowledge *per se*. It is mental health. If legal education in the 21st century wishes to promote the mental health of prospective practitioners it would highlight for its students that the practice of Canadian law is fundamentally mechanistic, being exclusively committed to rationalism, scientific methodology, and positivism, and that the legal system has therefore tended to be more exploitative of nature than protective of it. Institutionally, the legal system *thrives on damage(s)* and *pain and suffering*, without which the market for civil and criminal lawyers evaporates. Perhaps this simple fact should concern legal educators who would like to see less pain and suffering in their world. Jung rightly proposes, "[t]he more the critical reason dominates, the more impoverished life becomes".[205] Lasch similarly observes that the "self-image of modernity" is "so proud of its intellectual emancipation that it makes no effort to conceal the spiritual price that has to be paid".[206] An increasingly scientifically minded society does not necessarily become a more mentally healthy society.

Thus, a 21st century mechanistic society, including its legal system, may defensibly maintain its constitutional separation of church and state, but if it genuinely wants its populace to be mentally healthy, it must take seriously the proposition that its mechanistic institutions and economic practices, which are geared so heavily toward efficiency and productivity, tend to damage the human

203 Jung, *supra* note 47 at 300.

204 See Lasch, *supra* note 194 at 239.

205 Jung, *supra* note 47 at 302.

206 Lasch, *supra* note 194 at 240.

soul. Against the backdrop of increasing climate change or global warming, the following observation by Lasch seems prescient:

> [i]n an age that fancies itself as disillusioned, this is the one illusion—the illusion of mastery—that remains as tenacious as ever. But now that we are beginning to grasp the limits of our control over the natural world, it is an illusion … the future of which is very much in doubt, an illusion more problematical, certainly, than the future of religion.[207]

Borrows makes the same point when he observes, "[i]ncreasing alienation from our natural and social environments has nearly overwhelmed our ability to effectively function in the places we choose to live".[208] Arguably, the ancestors of Indigenous peoples in North America who held animistic and other mythic beliefs were better connected in this respect.

V. Conclusion

This article has demonstrated that two superficially unrelated problems with Canada's legal system have a deep, common source, and by implication, a common means for betterment. Canada's legal system is currently grappling with a bad conscience in relation to Indigenous peoples, while its own practitioners are afflicted by disturbingly high rates of professional depression and malaise. A system that wants to help people and to attain the respect of the public it serves *clearly has a destructive tendency*. When Canada's legal system subjugated Indigenous legal systems several generations ago, it showed by example that it preferred a society guided and directed by a mechanistic view of nature, not a holistic, organic or spiritual view. The ambitious masters of nature chopped down and toppled their oldest ancestors — the great forests of North America — without compunction. The magnificent axe of the mythic American Paul Bunyan proved to be far mightier than Lady Justice's Roman sword. Indigenous people were given the ultimatum of contributing to the agrarian and industrial destruction of their mythic kin or of relocating their spirited lives in

207 *Ibid* at 246.

208 Borrows, *supra* note 3 at 3031.

remote places. The Europeans wished to get increasingly in control of and away from perilous and obtrusive wilderness, so fur bearing animals were trapped or shot to extinction, mountainsides were blasted asunder with dynamite, and entire forests were flattened.

Now, in this century, as the entire planet faces dangerous rates of atmospheric warming directly correlated with the Industrial Revolution, Canada's courts find themselves coincidentally obligated to consider Indigenous mythologies in which animals, the land, and spirituality play significant roles in human accountability and legal responsibility. This mandate provides a golden, *if not critical*, opportunity for Canada's legal education system in general to do some serious soul-searching in class. Law schools can ask themselves in non-patronizing tones what they might learn about the natural geneses of mythologies across cultures that could facilitate or enable restorative justice, well beyond the narrow confines of Indigenous sentencing practices, to the natural environment and to the quality of life of students who will become lawyers. What myths teach about human vulnerability, insecurity and anxiety in the face of an ever-daunting natural world provide an important counterweight to prevailing but ever-tenuous beliefs about human control over nature. More balance in this respect could have transformative effects on the future of environmental law, Aboriginal rights, and the mental health of lawyers themselves.

The Surveillant University: Remote Proctoring, AI, and Human Rights

Teresa Scassa*

Exam surveillance (also known as proctoring or invigilation) has traditionally been carried out by human proctors who supervise exams in a shared physical space, such as a classroom. More recently, universities have adopted technological tools for exam surveillance — in part to address the use by students of their computers to write exams, and in part to serve the growing trend in online and distance learning. In March 2020, the global COVID-19 pandemic drove learning online suddenly and on an unprecedented scale, leading to a significant boost in demand for remote proctoring services.

Remote proctoring during the pandemic has generated considerable controversy. Students have launched petitions, have sought injunctions to prevent its use, and have taken to social and other media to express their distress over its impacts. Many have maintained that remote proctoring violates privacy rights, and that it raises serious issues of discrimination against women, racialized persons, and differently-abled persons.

This paper explores the privacy and human right issues raised by remote proctoring. It proposes a necessity and proportionality approach to guide universities in their decision-making processes around the implementation of technological tools such as remote proctoring.

---

* Canada Research Chair in Information Law and Policy, University of Ottawa, Faculty of Law. I gratefully acknowledge the research assistance of Mohamed Jelassi, Elena Hassani, Tina Sun, and Ali Zankar. Thanks also to Charles Sanders for his comments on an earlier draft of this paper. This research has been supported by the Scotiabank Fund for AI and Society at the University of Ottawa, and the Canada Research Chairs program.

I. Introduction

Exam surveillance (also known as proctoring or invigilation) is a common practice in universities around the world. Traditionally, it is carried out by human invigilators or proctors who supervise the writing of an exam in a shared physical space, such as a classroom. The proctors may include the instructor or staff hired specifically for this function. More recently, universities have adopted technological tools for exam surveillance — in part to address the use by students of their computers to write exams, even in conventional settings, and in part to serve the growing trend in online and distance learning. In March 2020, the global COVID-19 pandemic drove learning online suddenly and on

an unprecedented scale,[1] leading to a significant boost in demand for remote proctoring.[2] This has brought to the forefront concerns over such technologies.

Remote proctoring during the pandemic has generated considerable controversy. Students have launched petitions against remote proctoring,[3] sought injunctions to prevent its use,[4] and taken to social and other media to express their distress over its impacts.[5] An instructional technologist in Canada

---

1 A May 2020 crowdsourced survey led by Statistics Canada showed that 17% of respondents had some of their courses moved online as a result of the global pandemic, while 75% had all of their classes moved online: "COVID-19 Pandemic: Academic Impacts on Postsecondary Students in Canada" (14 May 2020), online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/45-28-0001/2020001/article/00015-eng.htm>.

See also Terence Day et al, "The Immediate Impact of COVID-19 on Postsecondary Teaching and Learning" (2021) 73:1 The Professional Geographer 1, online: <doi.org/10.1080/00330124.2020.1823864>; Albert Fox Cahn et al, "Snooping Where We Sleep: The Invasiveness and Bias of Remote Proctoring Services" (11 November 2020) at 3, online (pdf): *Surveillance Technology Oversight Project* <static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/5fa5a6089dac8b491dfeabe9/1604691464606/Snooping+Where+We+Sleep.pdf>.

2 The exact degree of uptake is difficult to assess. Kimmons and Veletsianos provide some data including a small sample survey, promotional statements by proctoring companies and their own Google-search based analysis. Their conclusion is that the use of such services is "increasingly ubiquitous", but they also observe that it is difficult to tell how far the usage penetrates within individual universities that have adopted these services. See Royce Kimmons & George Veletsianos, "Proctoring Software in Higher Ed: Prevalence and Patterns" (23 February 2021), online: *Educause* <er.educause.edu/articles/2021/2/proctoring-software-in-higher-ed-prevalence-and-patterns>.

3 See *e.g.* Jason Kelley, "Students Are Pushing Back Against Proctoring Surveillance Apps" (25 September 2020), online: *Electronic Frontier Foundation* <www.eff.org/deeplinks/2020/09/students-are-pushing-back-against-proctoring-surveillance-apps> [Kelley, "Students Are Pushing Back"].

4 See C/13/684665 / KG ZA 20-481 (2020), Rb. Amsterdam (NL) [Rb. Amsterdam].

5 See #ProcterrorU, online: *Twitter* <twitter.com/ProcterrorU>.

is facing a lawsuit over his attempts to publicize the inner workings of one remote proctoring service.[6] Many have raised concerns that remote proctoring breaches privacy and data protection rights, and that it raises serious issues of discrimination against women, racialized persons, differently-abled persons and those with non-conforming gender identities.

This paper explores the privacy and human rights issues raised by remote proctoring and analyzes them through a necessity and proportionality lens. Although remote proctoring is used in many forms of education, training, and certification, the focus of this paper will be on its use in universities. The goal is to provide a normative framework to guide universities in their adoption of technological tools such as remote proctoring. Part II sets the context through a discussion of the impact of the COVID-19 pandemic on the rapid and widespread adoption of remote proctoring in universities around the world. Part III identifies different types of remote proctoring. Part IV examines remote proctoring through a necessity and proportionality lens. As part of this analysis, it also considers the different impacts of remote proctoring on data protection, privacy and human rights. The paper concludes with an assessment of the necessity and proportionality of remote proctoring solutions and the place for remote proctoring in the university context.

II. Remote Proctoring and the Pandemic

Online education is not new. Dendir and Maxwell note that it grew steadily between 2002 and 2016.[7] They observe that in 2016 close to 30% of students

---

6 See Monica Chin, "An Ed-tech Specialist Spoke Out about Remote Testing Software — and Now He's Being Sued" (22 October 2020), online: *The Verge* <www.theverge.com/2020/10/22/21526792/proctorio-online-test-proctoring-lawsuit-universities-students-coronavirus>; Joe Mullin, "Student Surveillance Vendor Proctorio Files SLAPP Lawsuit to Silence A Critic" (23 February 2021), online: *Electronic Frontier Foundation* <www.eff.org/deeplinks/2021/02/student-surveillance-vendor-proctorio-files-slapp-lawsuit-silence-critic>.

7 Note that 2016 was the last year in which data were available to them. Seife Dendir & R Stockton Maxwell, "Cheating in Online Courses: Evidence from

in the US were enrolled in at least one online course.[8] Even prior to the COVID-19 pandemic, they described this form of distance learning as "a mainstay of higher education in the future".[9] Remote proctoring is also used for high school online learning, employee skills training,[10] and professional certification and qualification.

The announcement by the World Health Organization of a global COVID-19 pandemic in March 2020 led to a sudden shift from in-person to online learning in many countries. University students, already in mid-semester, were asked to stay home, and courses were quickly moved to online platforms. The timing led to a sudden need to provide for the online administration of final exams, and many universities quickly adopted one of a number of different remote proctoring solutions.[11] Available options included: Respondus, Proctorio, Examity, ExamSoft, ProctorU, Verifient, and Honorlock. According to a survey by Educause in April 2020, 77% of responding universities[12]

Online Proctoring" (2020) 2 Computers in Human Behaviour Reports 100033, at 1, online: <doi.org/10.1016/j.chbr.2020.100033>.

8 *Ibid.*

9 *Ibid.*

10 There is a considerable uptake in the corporate sector of remote and online learning for employee skills training. See Bobby Chernev, "29 Astonishing E-learning Statistics for 2021" (3 October 2021), online: *Techjury* <techjury.net/blog/elearning-statistics/#gref>; and Chang Chen, "Distance Learning Statistics and Growth of Online Education in 2020" (4 March 2021), online: *Otter AI* <blog.otter.ai/distance-learning-statistics>.

11 According to data gathered by the Electronic Frontier Foundation, "ProctorU claims to have proctored 6,280,986 exams during the pandemic; Proctorio reports 20,000,000; ExamSoft reports over 75 million tests proctored total in June 2021, compared to 61 million in October 2020". See Jason Kelley, "A Long Overdue Reckoning for Online Proctoring Companies May Finally Be Here" (22 June 2021), online: *Electronic Frontier Foundation* <www.eff.org/deeplinks/2021/06/long-overdue-reckoning-online-proctoring-companies-may-finally-be-here> [Kelley, "Long Overdue Reckoning"].

12 A total of 312 institutions responded to the survey. The overwhelming majority were based in the US (294). See Susan Grajek, "EDUCAUSE COVID-19 QuickPoll Results: Grading and Proctoring" (10 April 2020), online: *Educause*

indicated that they had either already subscribed or planned to use online proctoring services as part of their pandemic response.[13] The survey also noted that the rapid adoption of these services meant that in many cases "institutions are spending money they don't have to acquire products they don't fully understand".[14]

Perhaps unsurprisingly, the sudden shift to online proctoring raised concerns and anxiety among students, who were also dealing with the challenges of both the pandemic and the shift to online learning. The sudden change meant that there was little time for universities to make choices, communicate information to students, or mitigate some of the issues raised by online proctoring. There were, in fact, a broad range of issues. Not only did accommodations need to be made for students with a range of disabilities, but also not all students had adequate internet service or quiet spaces for exam writing. Privacy was another important concern. Students also raised human rights issues, including adverse impacts of some forms of remote proctoring on women, differently-abled individuals, and racialized students. There were also issues of integrating remote proctoring with existing disciplinary codes of practice, and the potential procedural fairness issues this might engender.

The sudden shift to remote monitoring also led to resistance by students who felt blindsided by this change in practice and whose concerns included privacy, human rights, and fairness. One example of resistance was an attempt by students at the University of Amsterdam to obtain an injunction to stop the use of online proctoring at that university.[15] In the United States, the civil society organization EPIC filed a complaint about online proctoring with the Attorney

---

Review <er.educause.edu/blogs/2020/4/educause-covid-19-quickpoll-results-grading-and-proctoring>. See footnote 32 below for references to additional petitions.

13 Grajek, *ibid*.

14 *Ibid*.

15 Rb. Amsterdam, *supra* note 4. This attempt failed for reasons that will be discussed below.

General of the District of Columbia.[16] A letter from a group of US Senators demanded information regarding remote proctoring services.[17] There have also been numerous petitions from students seeking to compel their universities to reconsider online proctoring.[18]

Not all professors were comfortable with the remote proctoring solutions adopted by their universities.[19] Another form of resistance — or at least of avoidance of the issues raised by online proctoring — was a change in evaluation methods. Many professors chose to alter their modes of evaluation in order to avoid the need for exams that would have to be remotely monitored in some

---

16 The Electronic Privacy Information Center, "Complaint and Request for Investigation, Injunction, and Other Relief" (2020), online (pdf): *Office of the Attorney General of the District of Columbia* <epic.org/privacy/dccppa/online-test-proctoring/EPIC-complaint-in-re-online-test-proctoring-companies-12-09-20.pdf>.

17 Richard Blumenthal, "Blumenthal Leads Call for Virtual Exam Software Companies to Improve Equity, Accessibility & Privacy for Students Amid Troubling Reports" (3 December 2020), online: *Richard Blumenthal* <www.blumenthal.senate.gov/newsroom/press/release/blumenthal-leads-call-for-virtual-exam-software-companies-to-improve-equity-accessibility-and-privacy-for-students-amid-troubling-reports>.

18 See *e.g.* Kelley, "Students Are Pushing Back", *supra* note 3; Daniel J. Rowe, "COVID-19: Concordia University Students Petition Against Final Exams Proctored Via Webcam" (5 April 2020), online: *CTV News* <montreal.ctvnews.ca/covid-19-concordia-university-students-petition-against-final-exams-proctored-via-webcam-1.4882522>; and Kirat Walia, "Students Continue Fight to Remove Proctortrack, Months after Petition Began" (8 November 2020), online: *Western Gazette* <westerngazette.ca/news/students-continue-fight-to-remove-proctortrack-months-after-petition-began/article_303e674a-0813-11eb-a287-97bc2a05baa0.html>.

19 See *e.g.* the letter from the University of California Santa Barbara Faculty Association to the University's Board of Governors which raises concerns about UCSB's adoption of ProctorU services; and the Letter from UCSB Faculty Association to Henry Yang, Chancellor (13 March 2020), online (pdf): *The Council of UC Faculty Associations* <cucfa.org/wp-content/uploads/2020/03/ProctorU_2020-1.pdf>.

way.[20] Some universities, faculties, and departments also expressly chose not to adopt these solutions or, as the pandemic progressed, to discontinue their use.[21]

As experience grew with widespread use of online proctoring for university courses, so too did news coverage of problems with the services.[22] These included data breaches, allegations of racism, gender bias, ablism, and the degrading of students through surveillance. As will be discussed in greater detail below, while the concerns raised are serious and real, their incidence varies greatly depending upon the remote proctoring solution chosen by the university and the manner of implementation.

Remote proctoring in some form or another may be here to stay. Not only does its use predate the pandemic, but there is also considerable speculation that university education may be irreversibly changed by the widespread experience

---

20 See *e.g.* Grajek, *supra* note 12.

21 The faculties of law and engineering at the University of Ottawa decided that their professors would not use the Respondus exam surveillance service contracted for by the university. See Fulcrum Editorial Board, "Implementing Respondus is a Flawed and Lethargic Solution to Curbing Academic Fraud" (17 July 2020) *The Fulcrum*. In early 2021, York University announced that it was stepping away from the use of remote proctoring. See Sakeina Sayed, "York Says Goodbye to Most Online Proctoring Software" (9 March 2021), online: *Excalibur* <www.excal.on.ca/news/2021/03/09/york-says-goodbye-to-most-online-proctoring-software>. Similarly, the University of Illinois indicated that it would end the use of one particular remote proctoring service, while continuing to explore other possible options. See Monica Chin, "University Will Stop Using Controversial Remote-testing Software Following Student Outcry" (29 January 2021), online: *The Verge* <www.theverge.com/2021/1/28/22254631/university-of-illinois-urbana-champaign-proctorio-online-test-proctoring-privacy> [Chin, "University Will Stop"].

22 See *e.g.* Drew Harwell, "Cheating-detection Companies Made Millions during the Pandemic. Now Students are Fighting Back" (12 November 2020) *Washington Post* [Harwell, "Cheating-detection"]; Todd Feathers, "Schools Are Abandoning Invasive Proctoring Software After Student Backlash" (26 February 2021), online: *Vice* <vice.com/en/article/7k9ag4/schools-are-abandoning-invasive-proctoring-software-after-student-backlash>; and Kelley, "Students Are Pushing Back", *supra* note 3.

gained by faculty and students with online learning tools and technologies. The new, post-pandemic normal may include a much greater proportion of online learning opportunities for university-level students[23] accompanied by ongoing use of remote proctoring services.[24] Remote proctoring services have also been adopted for continuing education and training; they are used by certification bodies and in other professional contexts where distributed forms of evaluation make more sense than mass sit-down examinations in a prescribed location.[25]

---

23 One US-based source reports that 33% of post-secondary institutions will continue to use remote and online learning post-pandemic. See Cherney, *supra* note 10. The World Economic Forum suggests that in those countries where internet access is more widely available, online learning tools could be increasingly integrated with traditional classroom learning in universities post-pandemic. See Cathy Li & Farah Lalani, "The COVID-19 Pandemic has Changed Education Forever. This is How" (29 April 2020), online: *WEForum* <www.weforum.org/agenda/2020/04/coronavirus-education-global-covid19-online-digital-learning>. Research is emerging that suggests that online learning has positive value in the university context. See *e.g.* Marwa Mohamed Zalat, Mona Sami Hamed & Sarah Abdelhalim Bolbol, "The Experiences, Challenges, and Acceptance of E-learning as a Tool for Teaching during the COVID-19 Pandemic among University Medical Staff" (26 March 2021), PLOS ONE 16(3): e0248758, online: <doi.org/10.1371/journal.pone.0248758>. See also Lindsay Mackenzie, "Students Want Online Learning Options Post-Pandemic" (27 April 2021), online: *Inside Higher Ed* <www.insidehighered.com/news/2021/04/27/survey-reveals-positive-outlook-online-instruction-post-pandemic>; and Alexandra Witze, "Universities Will Never Be the Same after the Coronavirus Crisis" (2020) 582 Nature 162.

24 Li & Lalani, *ibid*; Barbara B Lockee, "Online Education in the Post-COVID Era" (2021) 4 Nature Electronics 5; John Nworie, "Beyond COVID-19: What's Next for Online Teaching and Learning in Higher Education?" (19 May 2021), online: *Educause* <er.educause.edu/articles/2021/5/beyond-covid-19-whats-next-for-online-teaching-and-learning-in-higher-education>; and Nora Caplan Bricker, "Is Online Test-Monitoring Here to Stay?" (27 May 2021) *The New Yorker*.

25 For example, Honorlock promotes the use of its services for certification programs. See online: *Honorlock* <honorlock.com/certifications/>. See also "CSI Launches Computer-based Exams and Remote Proctoring" (14 December 2021), online: *Moody's Analytics* <www.moodysanalytics.com/about-us/press-

This type of use may continue. Thus, although the urgency of pandemic adoption may pass, there will still be a need to consider whether, and how best to adopt and implement online proctoring technologies.

III. What is remote proctoring?

At its simplest, remote proctoring is exam invigilation carried out at a distance, where students and invigilators are not in the same physical space. A 2020 Educause survey identified four specific categories of remote proctoring. These categories can be used alone or in combination. They are:

- *Passive monitoring of software* used on students' computers
- *Active restriction of software* on students' computers
- *Passive video surveillance* of students (direct monitoring by webcam)
- *Active video surveillance* of students (live proctors remotely using video cameras)[26]

The first category involves surveillance of students' activities only to the extent of noting whether a student uses other applications on their computer while they are writing an exam. The second category does not involve surveillance *per se*; rather, software is temporarily installed on the student's computer which blocks their ability to access anything other than the program required for completing the exam. These technologies were already in use at many institutions prior to the pandemic. They have been used to prevent

releases/2020-12-14-csi-launches-computer-based-exams-and-remote-proctoring>; and "Remote Proctoring", online: *Association of Energy Engineers* <www.aeecenter.org/remoteproctoring>. The California Bar Association uses remote proctoring for its exam, which has led to controversy. See Jason Kelley, "ExamSoft Flags One-Third of California Bar Exam Test Takers for Cheating" (22 December 2020), online: *Electronic Frontier Foundation* <www.eff.org/deeplinks/2020/12/examsoft-flags-one-third-california-bar-exam-test-takers-cheating>.

26 Adapted from Grajek, *supra* note 12.

cheating where students are writing computerized exams in traditional in-person exam settings.[27]

The next two categories of remote proctoring involve actual video surveillance of the exam-taker. The third category involves the student writing their exam with their web camera on; a recording is made throughout the exam period. Such recordings typically include audio and visual elements. In order to determine whether a student has cheated, someone must watch the video to look for any anomalous or problematic activity. Since reviewing videos is time- and labour-intensive, video surveillance may be combined with artificial intelligence ("AI") in order to automate the analysis of the videos to detect suspicious activity. A number of remote proctoring companies offer AI-enabled proctoring either exclusively[28] or as part of a menu of remote proctoring choices.[29]

The final category, active video surveillance, involves the student writing an exam with their web camera enabled and with a human monitoring the process in real-time. This can be implemented in multiple ways. For example, a professor could require all students to write their exam while on a platform such

---

27 There have also been controversies with these technologies, as some students object to having to install software that interferes with their computer — even if temporarily. See *e.g.* Sonia Dubiansky, "Students Speak Out on Controversial Lockdown Browsers for Online Courses" (28 October 2020) *Technician*; and Sydney Thompson, "Lockdown Browser Causes Concern among Students" (22 September 2020), online: *The Carolinian* <carolinianuncg.com/2020/09/22/lockdown-browser-causes-concern-among-students/>.

28 Note that ProctorU has discontinued its fully automated proctoring services, moving to human review. See "ProctorU Will Become the Largest Test Security Provider to Use Trained Human Proctors for Every Test Session" (24 May 2021), online: *ProctorU* <www.proctoru.com/industry-news-and-notes/proctoru-to-discontinue-exam-integrity-services-that-rely-exclusively-on-ai>.

29 For a sense of the scope of these choices, see "Examsoft, Proctorio, ProctorU Responses to Senate Letter" (2022), online: *Electronic Frontier Foundation* <www.eff.org/document/proctoring-companies-responses-senate-letter> [EFF, "ProctorU Responses"].

as Zoom with their web cameras on. The professor (or his or her designates) then watches the multiple windows to look for suspicious activity. This is closer to in-class proctoring since the proctor shifts their gaze from one student to another; no one is under constant direct surveillance for the full duration of the exam. This type of surveillance does not require the services of a proctoring company. Another implementation of active surveillance is more invasive; this involves one-to-one surveillance. The student writing the exam leaves his or her camera on, and they are watched for the duration of the exam by an invigilator — typically supplied by a proctoring company. In either case, the proctoring session can be recorded or not; the recording of a session raises more privacy and data protection issues.

As noted earlier, implementations of remote surveillance can mix and match from the different categories. Thus, it is possible to have passive video surveillance combined with active restrictions on students' computers.[30] It is also possible, with the active surveillance model, to have a recording of the exam session made for later consultation, should it be necessary.

It is also important to note that AI-enabled proctoring goes beyond the observation that human surveillance provides. AI-enabled services may offer keystroke monitoring (*e.g.* measuring the rhythm and typing speed of the student to detect anomalies), as well as face detection, the monitoring of eye movements, and background sound analysis.[31] Remote proctoring services that rely upon AI to detect behaviours linked to cheating have proven to be the most controversial.[32] Cahn et al describe AI-enabled remote proctoring technologies

---

30 For an example of the suite of services available through Proctorio, see "Online Proctoring" (2022), online: *Proctorio* <proctorio.com/products/online-proctoring> ["Online Proctoring"].

31 See EFF, "ProctorU Responses", *supra* note 29.

32 Popular petition website Change.org features numerous student petitions against the use of remote proctoring services. For a sample from different countries, see "Stop Proctoring Exams Through Proctorio at UIUC" (2021), online: *Change.org* <www.change.org/p/uiuc-stop-proctoring-exams-through-proctorio-proctoru>; D Anon, "Stop CSUF from Using Invasive Programs like Proctorio" (2021), online: *Change.org* <www.change.org/p/california-state-

as "exquisitely suspicious, flagging a wide range of innocent behaviors for investigation".[33]

Another feature of remote proctoring is identity verification. Identity verification is typically also part of in-person exam proctoring since a student having someone else take an exam for them is a known cheating behaviour.[34] Remote proctoring companies often carry out identity verification by requiring the student to provide a valid identity document (either by holding it up to the camera or by sending a scanned image) which is then matched against the

university-fullerton-stop-csuf-from-using-invasive-programs-like-proctorio>; Katrina Martin, "Stop the Use of Online Proctoring Exams of the University of Minnesota" (2021), online: *Change.org* <www.change.org/p/amy-klobuchar-stop-the-use-of-online-proctoring-exams-at-the-university-of-minnesota>; ANUSA Environment Officer, "Tell ANU: Students Say NO to Proctorio" (2020), online: *Change.org* <www.change.org/p/australian-national-university-tell-anu-students-say-no-to-proctorio>; Students of University of Canberra (UC), "No Proctorio at the University of Canberra" (2020), online: *Change.org* <www.change.org/p/university-of-canberra-no-proctorio-at-the-university-of-canberra>; David Walsh, "UBC Must Ban Proctorio, University-wide" (2021), online: *Change.org* <www.change.org/p/the-university-of-british-columbia-ubc-must-dissociate-from-proctorio-at-the-highest-level>; Sam Hunter, "Ban Surveillance Software Proctorio from Warwick University" (2021), online: *Change.org* <www.change.org/p/warwick-university-ban-surveillance-software-proctorio-from-warwick-university>; and Sebastian Dumbrava, "Stop the Use of Privacy-Invading Exam Proctoring Software – Delft University of Technology" (2020), online: *Change.org* <www.change.org/p/delft-university-of-technology-stop-the-use-of-privacy-invading-exam-proctoring-software-delft-university-of-technology>.

33 Cahn et al, *supra* note 1 at 3.

34 For example, the University of Sydney characterizes this behaviour as "Contract Cheating". See "Academic Dishonesty and Plagiarism" (2 February 2021), online: *University of Sydney* <www.sydney.edu.au/students/academic-dishonesty/contract-cheating.html>. See also Ashley Wadhwani, "Student, Impersonator Arrested for Alleged Cheating during Final Exams at SFU" (18 December 2019) *Victoria News*; and Charlotte Drewitt & Chris Herhalt, "Alleged Exam Cheating Scam is Rare but Not Anything New" (19 December 2014), online: *The Record* <www.therecord.com/news/waterloo-region/2014/12/19/alleged-exam-cheating-scam-is-rare-but-not-anything-new>.

student's face as seen on their camera. Identity verification systems may or may not involve a particular category of facial recognition technology — one that matches a face to a single image (as opposed to a face with a database of images).[35]

In addition to the diversity of remote proctoring tools and techniques, there are also different university-level implementations which raise their own concerns. As will be discussed below, a university can purchase an institutional licence, or students can be required to register directly with the company in order to write their exams. The latter choice pushes the cost of proctoring onto the student, which also means that the student must provide credit card information and other personal data to the company, raising their personal risk in the case of data breach.[36] In the latter implementation, students are also left with the one-size-fits all privacy policies of the service providers. University-level implementation can provide greater privacy protection if the university negotiates its own terms, including providing for data localization.[37]

---

35 For example, Proctorio requires students to hold up identity documents to be recorded on camera. The instructor then matches the image on the identity document to the image of the test-taker. It also offers a "live" identity verification system where an employee compares the ID with the face of the test-taker prior to the start of the exam. See EFF, "ProctorU Responses", *supra* note 29. ExamSoft uses facial recognition technology to verify identification. See "Online Proctoring", *supra* note 30.

36 See *e.g.* ProctorU experienced a significant data breach, which has led to the filing of a class action lawsuit. See Kirsten Errick, "Students Sue Online Exam Proctoring Service ProctorU for Biometrics Violations Following Data Breach" (15 March 2021), online: *Law Street Media* <lawstreetmedia.com/tech/students-sue-online-exam-proctoring-service-proctoru-for-biometrics-violations-following-data-breach>.

37 See *e.g.* "Privacy" (2021), online: *Western Remote Proctoring* <remoteproctoring.uwo.ca/privacy>.

IV. A Necessity and Proportionality Approach to Online Proctoring

Remote proctoring has raised privacy and human rights concerns in many countries[38] where it has been adopted. Rather than ground this paper's analysis in the laws of one particular jurisdiction as they apply to remote proctoring, or attempt a comparative analysis across the diverse laws of different countries, this paper instead uses a 'necessity and proportionality' framework to guide inquiries into the legitimacy of the adoption and implementation of online proctoring.[39] The necessity and proportionality framework, developed in international human rights law, has also been adopted as part of the analysis of both privacy[40] and human rights[41] issues in countries around the world. It offers a normative

---

38 In addition to Western countries, Proctorio indicates that its services are used in India, Nigeria, the Philippines, Ethiopia, Kenya, South Korea, Ghana, China, Indonesia, Mexico, and Colombia. EFF, "ProctorU Responses", *supra* note 29.

39 The EFF, for example, has used a necessity and proportionality framework to consider communications surveillance issues. They did so because of the relevance of overarching human rights frameworks and the cross-jurisdictional nature of many of the issues. See "Necessary and Proportionate: International Principles on the Application of Human Rights Law to Communications Surveillance" (May 2014), online (pdf): *Electronic Frontier Foundation* <www.ohchr.org/documents/issues/privacy/electronicfrontierfoundation.pdf>.

40 See *e.g.* Canada's privacy commissioners adopted the necessity and proportionality framework to guide their analysis of issues such as privacy and facial recognition technology. See *e.g.* "Draft Privacy Guidance on Facial Recognition for Police Agencies" (10 June 2021), online: *Office of the Privacy Commissioner of Canada* <priv.gc.ca/en/about-the-opc/what-we-do/consultations/gd_frt_202106>. See also Daniel J Therrien, "Incorporating Privacy into Statistical Methods — Necessity and Proportionality" (2 March 2020), online: *Office of the Privacy Commissioner of Canada* <www.priv.gc.ca/en/opc-news/speeches/2020/sp-d_20200303> [Therrien, "Incorporating Privacy"]. Necessity and proportionality also underpins European approaches to data protection: "Necessity and Proportionality" (2022), online: *European Data Protection Supervisor* <edps.europa.eu/data-protection/our-work/subjects/necessity-proportionality_en>.

41 See *e.g.* in Canada, s 1 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK),

framework for universities in choosing to adopt and implement remote proctoring.

Typically, a necessity and proportionality analysis is part of an inquiry into the constitutionality of a law or measure adopted by a government.[42] It may also be applied in other contexts where there is an evaluation of the appropriateness of measures adopted, typically by governments or their agencies. For example, privacy commissioners in Canada have used necessity and proportionality as a lens through which to assess the adoption and implementation of facial recognition technologies by police services.[43]

Universities are generally not organs of the state, although they may receive considerable state funding, charters or degree-granting status from the state, and may also be subject to other public-sector governance mechanisms.[44] Using a necessity and proportionality framework in the context of universities and their decisions to adopt remote proctoring solutions is not a suggestion or conclusion that they are state actors in a constitutional law sense. Universities are unique communities with many public dimensions. They set the rules that govern their programs and campuses. Institutions of higher learning have a degree of social and moral responsibility not shared by private sector actors. They are expected to lead in terms of ethics, diversity and inclusion, intellectual honesty, and

---

1982, c 11, permits the justification of a limit on a *Charter* right or freedom set out in it. The Supreme Court of Canada has interpreted this as essentially a two-stage inquiry which largely maps onto necessity and proportionality. See *R v Oakes*, (1986) 1 SCR 103 (SCC) at paras 69–70 [*Oakes*]. New Zealand's *Bill of Rights Act 1990* adopts a similar approach in s 5. Article 52(1) of the *Charter of Fundamental Rights of the European Union* incorporates necessity and proportionality. It reads: "[…] [s]ubject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

42 See *Handyside v United Kingdom* (1976), ECHR 5, 1 EHRR 737 [*Handyside*].

43 See Therrien, "Incorporating Privacy", *supra* note 40.

44 See *e.g.* in Canada, most universities are subject to provincial public-sector data protection legislation.

freedom. In this context, necessity and proportionality is an appropriate framework by which to assess decisions to adopt remote proctoring solutions.

A further reason to adopt a necessity and proportionality framework is to avoid the fragmenting of legal issues raised by remote proctoring into 'baskets' defined by the legal siloes that have evolved in many jurisdictions. For example, some remote proctoring issues are data protection issues, but data protection laws only address one piece of a larger picture. Similarly, while framing the issues as discrimination captures significant problems with remote proctoring; other issues remain. Fragmented legal regimes often push those seeking remedies towards one recourse or another, depending upon what best fits the complainants' particular facts. The analysis below takes a more comprehensive approach in which the bundle of privacy and human rights issues raised by remote proctoring is considered and weighed against the necessity urged by adopters of these technologies.

The necessity and proportionality analysis in this context requires the posing of two main questions:

A. Is the adoption of remote proctoring necessary; and
B. Is the measure chosen proportional to the demonstrated need?

A. Necessity

The necessity inquiry considers whether the party introducing the measure can demonstrate that it was introduced because it was necessary to achieve a sufficiently pressing and important objective. The party adopting the measure is not required to demonstrate that it is necessary in the sense of indispensable.[45] It must be reasonably necessary in the circumstances. In the case of the rapid shift to online learning during the pandemic, one issue is whether a necessity analysis should also take into account the public health crisis. For example, public health guidance in Canada during the COVID-19 pandemic specifically suggested that remote proctoring could be one mitigation strategy adopted by

[45] See *e.g. Handyside*, *supra* note 42 at paras 48–49.

universities seeking to implement social distancing.[46] The pandemic context could therefore factor into the necessity analysis. Nevertheless, remote proctoring was used before the pandemic and likely will be afterward. Thus, it is also relevant whether remote proctoring can be justified as necessary in relation to online university-level instruction more generally.

A key justification for the introduction of remote proctoring is the need to ensure academic integrity in student evaluations. Cheating, which has been defined as "any action taken before, during or after the administration of a test or assignment, that is intended to gain an unfair advantage or produce inaccurate results",[47] can have an adverse reputational impact on universities.[48] Academic integrity is an important concern for universities. Dyer et al note that "academic integrity is a core tenet of the fabric of higher education".[49] Most universities have adopted rules regarding academic integrity and have procedures in place to enforce them, thus demonstrating their awareness and concerns regarding cheating. Baijnath and Singh underscore the risks that cheating poses to the reputation of institutions and the integrity of higher education.[50]

---

46 "Guidance for Post-secondary Institutions during the COVID-19 Pandemic" (24 July 2020), online: *Government of Canada* <www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/guidance-documents/covid-19-guidance-post-secondary-institutions-during-pandemic.html>.

47 Gregory J Cizek, "Ensuring the Integrity of Test Scores: Shared Responsibilities" (Paper delivered at the annual meeting of the American Educational Research Association, Vancouver, 2012), cited in Jarret Dyer, Heidi Pettijohn & Steve Saladin, "Academic Dishonesty and Testing: How Student Beliefs and Test Settings Impact Decisions to Cheat" (2020) 4:1 Journal of the National College Testing Association 1 at 3.

48 Dyer et al, *ibid* at 4. See also Narend Baijnath & Divya Singh, "Examination Cheating: Risks to the Quality and Integrity of Higher Education" (2019), 115:11/12 South African Journal of Science 26, online: <doi.org/10.17159/sajs.2019/6281>.

49 Dyer et al, *ibid* at 3.

50 Baijnath & Singh, *supra* note 48.

Cheating clearly adversely impacts universities. It can also affect society if it undermines the quality of education or casts doubt on the credentials of graduates. Students may also fear that cheating by others will devalue their own achievements, giving cheaters unfair advantages both before and after graduation. Cheating at university may lead to less well-prepared or competent employees.[51] Dyer et al suggest that students are often more focused on getting jobs than performing well in them, noting that many students commented that getting good grades was more important to their futures than actual knowledge.[52] The impacts of university-level cheating are such that Dyer et al have warned that "it is imperative that universities and colleges not only hold accountable those students who are caught cheating, but also take steps to systemically limit the prevalence of cheating".[53]

Although the research on cheating at university is uneven,[54] and primarily based on self-reporting, the results suggest that there is actually a strong basis for concern. For example, based on research conducted at North American universities between 2002 and 2005, Donald McCabe found that approximately 21% of graduate and undergraduate students had engaged in a serious form of cheating on tests or exams.[55] The same study found that one in

---

51 Dyer et al, *supra* note 47 at 5; Aurora AC Teixeira & Maria F Rocha, "Cheating by Economics and Business Undergraduate Students: An Exploratory International Assessment" (2010) 59:6 Higher Education 663.

52 Dyer et al, *supra* note 47 at 17.

53 *Ibid* at 5.

54 McCabe notes that there is no consensus as to what cheating is, particularly when it comes to assignments. Seeking advice from former students in a course or from tutors on how best to complete an assignment might be seen as good preparation by some and as cheating by others. Donald L McCabe, "Cheating among College and University Students: A North American Perspective" (2005) 1:1 International Journal for Educational Integrity 7. See also Peter Ashworth, Philip Bannister & Pauline Thorne, "Guilty in Whose Eyes? University Students' Perceptions of Cheating and Plagiarism in Academic Work and Assessment" (1997) 22:2 Studies in Higher Education 187.

55 The data in this study was collected by surveys over a three-year period from students at 67 US and 16 Canadian campuses. See McCabe, *ibid*.

twenty students reported using electronic devices to cheat. McCabe hypothesized that this understates the problem and that it is likely to grow over time. A 2020 study found that 62% of the undergraduate students surveyed admitted to cheating at least occasionally.[56] The same study showed a sharp increase in cheating in non-proctored as compared to proctored exam environments.

Cheating is prevalent in online learning; in fact, some research indicates that it occurs at greater levels in that context. Dyer et al note that "[w]ith the advent of online learning, that ability for students to engage unseen with faculty has grown, as has the ability for students to cheat and rarely get caught".[57] In a pre-pandemic article, Srikanth and Asmatulu suggest that cheating is widespread in online courses, and that measures are not in place to detect it.[58] Hylton et al link cheating in online exams to the opportunities they present to use "unauthorized resources".[59] Bilen and Matros posited that rates of cheating would rise dramatically with the COVID-19 shift to online learning.[60] Dendir and Maxwell carried out an experiment in two online courses that were identical except for the use of online proctoring in one and no proctoring in the other. They found strong evidence of cheating in the unmonitored course based on outcomes after using a regression analysis to account for possible confounding factors.[61] Researchers in Bulgaria have hypothesized that the face-to-face setting for exams may seem more formal and serious than online equivalents, perhaps

---

56 Dyer et al, *supra* note 47.

57 Dyer et al, *ibid* at 4.

58 Madhulika Srikanth & Ramazan Asmatulu, "Modern Cheating Techniques, Their Adverse Effects on Engineering Education and Preventions" (2014) 42(2) International Journal of Mechanical Engineering Education 136.

59 Kenrie Hylton, Yair Levy & Laurie P Dringus, "Utilizing Webcam-based Proctoring to Deter Misconduct in Online Exams" (2016) 92 Computers & Education 53 at 53.

60 Eren Bilen & Alexander Matros, "Online Cheating Amid COVID-19" (2020), online (pdf): *Social Science Research Network* <ssrn.com/abstract=3691363>.

61 Dendir & Maxwell, *supra* note 7.

contributing to a higher rate of cheating in online contexts.[62] There is evidence that some students may use online subscription services to assist them in cheating on remote examinations.[63] In research involving over 734 students, Dyer et al determined that not only were the opportunities for cheating different in online environments, the perceptions of students as to the seriousness of cheating online were also different.[64] Dyer et al highlight the importance of online proctoring, stating that "[i]n no situation is an institution more vulnerable to scandal and controversy related to academic dishonesty than in online education".[65]

Dyer et al note that rates of reported cheating increase in non-proctored exams. In fact, they report from a qualitative study that "if an exam was not proctored, it was assumed that students would use all resources at their disposal".[66] Dyer et al concluded that "[t]he lack of proctoring was essentially considered permission to collaborate and use whatever resources students had available".[67] They caution that "[f]aculty and staff should not make the egregious mistake of believing an honor code, signed statement of integrity, verbal acceptance of syllabi expectations, or other tacitly communicated acceptance is alone enough to sway academic dishonesty in online courses".[68]

---

62 Peytcheva-Forsyth et al, "The Impact of Technology on Cheating and Plagiarism in the Assessment —The Teachers' and Students' Perspectives" (2018), online (pdf): *AIP Conference Proceedings* <doi.org/10.1063/1.5082055>.

63 Susan Adams, "This $12 Billion Company Is Getting Rich Off Students Cheating Their Way Through Covid" (28 January 2021), online: *Forbes* <forbes.com/sites/susanadams/2021/01/28/this-12-billion-company-is-getting-rich-off-students-cheating-their-way-through-covid/?sh=5d441d1d363f>.

64 Dyer et al, *supra* note 47.

65 *Ibid* at 20.

66 *Ibid* at 16.

67 *Ibid*.

68 *Ibid* at 19.

Faucher & Caves also suggest that reduced surveillance creates cheating opportunities.[69]

Data regarding cheating and its impacts is relevant to the necessity analysis. Interestingly, the issue of necessity with respect to online proctoring was assessed in the context of an application for a preliminary injunction to stop the University of Amsterdam from engaging an online proctoring service to monitor exams from the start of the COVID-19 pandemic.[70] When university education shifted to fully online, the University of Amsterdam contracted with the service Proctorio for online proctoring. Students objected to the use of this service and their central legal grounds for objection related to privacy.

In considering the necessity of online proctoring, the court noted both the situation created by the pandemic (with courses moving to entirely online offering and evaluation) and the need for proctoring to prevent and detect academic fraud. The court emphasized the need to protect the quality of the education and the value of the degree offered. It noted that preventing academic fraud was an ongoing concern of the institution, as demonstrated by its regulations and procedures relating to academic integrity. It observed as well that there were multiple opportunities for cheating in non-proctored online exam environments.

It is important to note that the court's necessity inquiry addresses, but is not limited to, the pandemic context. Academic integrity is a pressing issue for colleges and universities. Cheating occurs in both in-person and online contexts, although the evidence suggests that it may be even more problematic in online-learning. While the pandemic created an unprecedented shift to online learning, the necessity element will be present in online learning even after the pandemic. What may change is the urgency of adoption; with more time to reflect on

---

69 Dina Faucher & Sharon Caves, "Academic Dishonesty: Innovative Cheating Techniques and the Detection and Prevention of Them" (2009) 4:2 Teaching and Learning in Nursing 37; see also Dendir & Maxwell, *supra* note 7.

70 Rb. Amsterdam, *supra* note 4.

options, there should be a greater burden on universities at the proportionality stage.

Overall, it would be difficult to challenge the necessity of the adoption of measures to address cheating in online courses since there is considerable evidence that cheating is a real issue and that universities already take steps to either prevent it or impose penalties when it occurs. It is perhaps also important to note that in-person exams have long been proctored in universities. This reflects both on the perceived necessity of some form of proctoring and the general acceptance of at least this level of monitoring. Of course, there are significant differences between in-person proctoring and remote surveillance technologies. While a necessity analysis might justify some form of proctoring it does not follow that all forms can be justified. The most important questions, therefore, are most likely to arise in assessing the proportionality of measures taken to address the problem in the online context. These issues are considered next.

B. Proportionality

Once the necessity of a measure has been assessed, the next step is to determine whether it is proportional to the demonstrated need. In other words, one can ask whether it has been properly adapted to the circumstances and minimally impairs the rights at issue. The proportionality analysis acknowledges that necessity alone cannot drive policy or practice; there must also be a careful tailoring of the measures adopted to the demonstrated need. As the Supreme Court of Canada noted in *R v Oakes*:

[t]here are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: [citation omitted]. Third, there must be a proportionality between the effects of

the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".[71]

There is no one-size-fits-all proportionality analysis for remote proctoring. This is largely because there is no single type or implementation of this service. This means that proportionality will have to be assessed on a case-by-case basis, taking into account the nature of the service adopted, and the way in which it is implemented by the university, including any alternatives provided to students.

The analysis that follows begins by assessing the rights and interests that are impacted. Overall, remote proctoring may impact a number of different rights and interests that include but go beyond data protection and privacy. The assessment of the rights affected is followed by a consideration of implementations of remote proctoring.

1. Rights and Interests Implicated by Remote Proctoring

Remote proctoring implicates privacy and data protection rights as well as other human rights, particularly the right to be free from discrimination. Privacy and data protection rights are often conflated in the discussion of remote proctoring. Data protection governs how governments or organizations collect, use, and disclose personal information, and it is a particular subset of privacy. Privacy rights in this context relate to the autonomy and dignity of students who are subject to surveillance.

i. Data Protection

Data protection is recognized as a right in article 8 of the *Charter of Fundamental Rights of the European Union*.[72] The human right requires that personal data:

> be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone

---

71 *Oakes*, *supra* note 41.

72 26 October 2012, 2012/C 326/02 (EU).

> has the right of access to data which has been collected concerning him or her, and the right to have it rectified.[73]

Not all jurisdictions have established data protection as a fundamental right. Nevertheless, data protection laws are common in many countries outside the EU, including Canada,[74] Australia,[75] New Zealand,[76] and the United Kingdom.[77] While there is no overarching national data protection law in the US, there is a growing patchwork of state laws that may apply to public or private universities,[78] establishing certain norms for the collection and use of personal data.

Data protection laws do not outlaw the collection and use of personal data; rather they set the rules and conditions under which these practices may take place, recognizing that for some products or services, personal data collection is required. In order to assess the impact of remote proctoring on data protection rights, it is important to consider what data are collected by the university and/or the proctoring service, using what means, and at what stages of the process. In the first place, many remote proctoring services convert the entire exam writing process into data of various kinds, including audio and video recordings, key-stroke data, data about perceived anomalies, and so on. Other important considerations include how the data are stored, how they may be accessed and by whom. Data retention and data security measures are also relevant.[79] It

---

73 *Ibid*, art 8(2).

74 In Canada, data protection laws are found at the provincial and federal level for both public and private sector data. For the federal, private sector, see *e.g. Personal Information Protection and Electronic Documents Act*, SC 2000, c 5; and for the public sector in Ontario, see *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31.

75 *Privacy Act 1988*, 1988/119 (AU).

76 *Privacy Act 2020*, 2020/31 (NZ).

77 *Data Protection Act 2018*, UK Public General Acts, 2018, c 12.

78 For a helpful catalogue of such laws, see "State Student Privacy Laws" (2022), online: *Student Privacy Compass* <studentprivacycompass.org/state-laws/>.

79 A class action lawsuit launched in relation to the ProctorU data breach claims that biometric data dated as far back as 2012, notwithstanding the company's

should be noted that there is already a lucrative secondary market for data about students,[80] making data protection issues increasingly important in a context in which students may have little choice but to surrender sensitive[81] personal data in the online proctoring context.

In the EU, the *General Data Protection Regulation* ("*GDPR*")[82] also provides certain rights with respect to automated decision systems or AI-enabled decision making. As a general principle, *GDPR* article 22(1) provides that "[t]he data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her". There are exceptions to this general rule, but these are subject to protections being put in place for the individual. In some applications of remote proctoring, AI is used to flag suspicious conduct or activity during proctoring. The impact on rights may be different depending on whether each flagged incident is reviewed by a human decision-maker, or whether it automatically triggers a disciplinary response. Most implementations of remote proctoring services provide for

---

claims that it kept videos no more than two years. See the class action compliant from the United States District Court for the Central District of Illinois, Urbana Division, in "Thakkar, Gonigam, and Kohlenberg v ProctorU Inc." (12 March 2021), online: *Docket Alarm* <www.docketalarm.com/cases/Illinois_Central_District_Court/2--21-cv-02051/Thakkar_et_al_v._ProctorU_Inc/1>. See also concerns raised about ExamSoft security in Becca Salamacha, "Pennsylvania Bar Applicants Request Investigation after Exam Software Data Breach" (10 September 2020), online: *Jurist* <www.jurist.org/news/2020/09/pennsylvania-bar-applicants-request-investigation-after-exam-software-data-breach>.

80 See *e.g.* N Cameron Russell et al, "Transparency and the Marketplace for Student Data" (2019) 109:3 Virginia Journal of Law and Technology 107.

81 Sensitive personal data includes financial data for those students who pay directly for proctoring services, as well as biometric data, and scans of identity documents.

82 *(EC) 679/2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC*, [2016] OJ, L 119/1.

human review — usually by the instructor — before disciplinary procedures are initiated, although the practice may vary.[83]

Compliance with the requirements of data protection law is only one element in addressing proportionality concerns. Since remote proctoring impacts rights beyond data protection, compliance with data protection norms may be necessary, but not sufficient to establish proportionality. This is important since many universities in jurisdictions that require privacy or data protection impact assessments have carried out personal data impact assessments.[84] However, compliance with data protection law should not be the end of the necessity and proportionality assessment.

ii. Privacy

Privacy rights relate to basic human dignity and autonomy and are implicated in remote proctoring in a number of ways depending on the implementation. The experience of being under constant, direct surveillance has been cited by some as a distressing and disruptive aspect of some forms of remote proctoring.[85]

---

83 Note that ProctorU announced an end to its AI-only services in part because it determined that instructors frequently acted on alerts without reviewing them. See EFF, "ProctorU Responses", *supra* note 29.

84 See *e.g.* Meike Davids, "Data Protection Impact Assessment (DPIA): Proctoring" (2020), online (pdf): *University of Twente* <www.utwente.nl/remote-exams/students/proctoring/dpia-proctoring.pdf>. PIAs have also been carried out at Canadian universities. See *e.g.* Trudi Wright, "Privacy & Information Security Impact Assessment Report: Online Proctoring: Respondus" (2020), online (pdf): *McMaster University* <secretariat.mcmaster.ca/app/uploads/PIA-Report-Online-Proctoring-Respondus.pdf>.

85 See *e.g.* Simon Coghlan, Tim Miller & Jeannie Paterson, "Good Proctor or "Big Brother"? Ethics of Online Exam Supervision Technologies" (2021) 34 Philosophy & Technology 1581; Monica Chin, "Exam Anxiety: How Remote Test-proctoring is Creeping Students Out" (29 April 2020), online: *The Verge* <www.theverge.com/2020/4/29/21232777/examity-remote-test-proctoring-online-class-education>; and Anushka Patil & Jonah Engel Bromwich, "How It Feels When Software Watches You Take Tests" (29 September 2020) *New York Times*.

Students have experienced anxiety at the fact that physical movements including head and eye movements or changes in typing speed might be interpreted as cheating.[86] Some remote proctoring services do not allow bathroom breaks or allow them only after a certain amount of time has passed.[87] Such issues adversely impact the dignity of students who must share information about their need to go to the bathroom, justify using the facilities outside of the prescribed time periods, or who are forced to urinate into inappropriate receptacles.[88]

Students have also expressed concerns about remote proctoring services that create recordings not just of the student and their actions, but also their private spaces. These recordings can be viewed and reviewed by others.[89] Particularly during the pandemic where students have had little choice but to write remote exams from home, the recording of intimate spaces may be unavoidable. In addition to recording, some remote proctoring services involve continual live-proctoring of students. In these circumstances, students are observed one-on-one in real time by proctors. This can be even more intrusive in terms of privacy,

---

86 Harwell, "Cheating-detection", *supra* note 22.

87 See *e.g.* Staci Zaretsky, "Law Students Forced To Urinate While Being Watched By Proctors During Remote Ethics Exam" (18 August 2020), online: *Above the Law* <abovethelaw.com/2020/08/law-students-forced-to-urinate-while-being-watched-by-proctors-during-remote-ethics-exam/>.

88 Harwell, "Cheating-detection", *supra* note 22.

89 In its FAQs for faculty on the use of Respondus Monitor, the University of Ottawa responds to the question "[c]an a teacher view all the videos, even those where there was no suspicious activity report?" with "[a]bsolutely", followed by information on how to access videos. See "Respondus FAQ for Instructors and Students: Instructors FAQ" (2022), online: *University of Ottawa Teaching and Learning Support Services* <uottawa.saea-tlss.ca/en/transition-to-remote-teaching/respondus-faq#instructors> ["Respondus FAQ"].

as students may feel not just watched in real time, but also judged and assessed.[90] Women in particular, have expressed concerns over this form of proctoring.[91]

iii. Discrimination

The right to be free from discrimination is also implicated in online proctoring in a number of ways. As noted earlier, there can be gendered dynamics to surveillance; women may be far more uncomfortable about continual online surveillance. There are reports that some women have run into difficulties with requirements to remove head coverings at the identification phase; in one case, a Muslim woman reportedly had to postpone an exam because a female proctor was not available to verify her identity (a process that required her to remove her head covering).[92]

Some students may have disabilities or medical conditions that lead to movements or behaviours being flagged by proctors — or by AI analysis — as suspicious.[93] This can include atypical eye movements or movements of the

---

90 See *e.g.* Daniel Woldeab & Thomas Brothen, "21st Century Assessment: Online Proctoring, Test Anxiety, and Student Performance" (2019) 34:1 International Journal of E-Learning and Distance Education 1.

91 See *e.g.* Emily Blobaum, "Melissa Vine: A Proctor Sexually Harassed Me While I Was Taking the LSAT" (18 April 2021), online: *Fearless* <fearlessbr.com/a-proctor-sexually-harassed-me-while-i-was-taking-the-lsat>; and Coghlan et al, *supra* note 85.

92 Aishah Hussain, "BPTC Student 'Forced to Defer' Exams over Fears She'd Have to Remove Headscarf for Male Invigilator" (14 August 2020), online: *Legal Cheek* <www.legalcheek.com/2020/08/bptc-student-forced-to-defer-exams-over-fears-shed-have-to-remove-headscarf-for-male-invigilator/>. Note that Proctorio indicates that its response to concerns over identity verification and headscarves or facial coverings is to provide rapid access to human support services. See EFF, "ProctorU Responses", *supra* note 29.

93 See Lydia XZ Brown, "How Automated Test Proctoring Software Discriminates Against Disabled Students" (16 November 2020), online: *Center for Democracy and Technology* <cdt.org/insights/how-automated-test-proctoring-software-discriminates-against-disabled-students/>. The requirements that diabetics may have for glucose testing or snacks during exam taking can raise flags. See *e.g.* Joe Patrice, "Bar Examiners Ask Applicants To

head, restlessness, or other non-mainstream physical movements.[94] Some universities address this issue by allowing students to request accommodation prior to the exam, but students have objected to having to submit medical documentation and request accommodation for conditions that do not impact their ability to perform the evaluation, but rather that trigger the technology used to surveil it.[95] Students who need frequent bathroom breaks may also run into difficulties.[96] In a survey carried out in the early days of the pandemic, Grajek noted that "26% of institutions use some products that don't meet their accessibility standards, and 8% did no accessibility vetting at all".[97] In a study of the impact of online proctoring on students who struggled with anxiety issues, Woldeab and Brothen concluded that these technologies adversely impacted the performance of these students relative to their peers.[98] They found that live, one-on-one proctoring created the most anxiety.[99]

Racial discrimination is also an issue. There are reports that some Black students have been required to change their exam writing location or lighting because face-detection software could not function properly otherwise.[100] Being

---

Kindly Stop Being Diabetic For A Couple Days" (3 September 2020), online: *Above the Law* <abovethelaw.com/2020/09/bar-examiners-ask-applicants-to-kindly-stop-being-diabetic-for-a-couple-days/>.

94 Blumenthal, *supra* note 17; and Harwell, "Cheating-detection", *supra* note 22.

95 Chaelin Jung, "Big Ed-Tech Is Watching You: Privacy, Prejudice, and Pedagogy in Online Proctoring" (6 December 2020), online: *Brown Political Review* <brownpoliticalreview.org/2020/12/big-ed-tech-is-watching-you-privacy-prejudice-and-pedagogy-in-online-proctoring/>.

96 Harwell, "Cheating-detection", *supra* note 22; and Zaretsky, *supra* note 87.

97 Grajek, *supra* note 12.

98 Woldeab & Brothen, *supra* note 90.

99 *Ibid* at 8.

100 Harwell, "Cheating-detection", *supra* note 22; Rebecca Walsh, "Incident Highlights Issues with ProctorU Online Testing" (3 October 2020), online: *University of Utah* <attheu.utah.edu/facultystaff/incident-highlights-issues-with-proctoru-online-testing/>; Avi Ascher-Schapiro, "Online Exams Raise Concerns of Racial Bias in Facial Recognition" (17 November 2020), online: *Christian Science Monitor*

asked to move or change lighting — often just prior to the start of an exam — can be stressful and upsetting, and could impact exam performance. AI-enabled proctoring software also raises concerns over the now common bias issues with respect to Black faces.[101] It would be important to understand whether skin colour is linked to an increased rate of flagging of suspicious conduct in those online proctoring systems that use AI.[102] However, transparency issues mean that there is little available data other than anecdotal accounts.

Remote proctoring can have adverse impacts on students with low socio-economic status, living in remote or rural locations, or facing other constraints such as child care obligations or close-quarter living spaces.[103] As Cahn et al

---

<www.csmonitor.com/Technology/2020/1117/Online-exams-raise-concerns-of-racial-bias-in-facial-recognition>; and Shea Swauger, "Software That Monitors Students during Tests Perpetuates Inequality and Violates Their Privacy" (7 August 2020), online: *MIT Technology Review* <www.technologyreview.com/2020/08/07/1006132/software-algorithms-proctoring-online-tests-ai-ethics/>. Issues of AI and discrimination are increasingly well documented. See *e.g.* Virginia Eubanks, *Automating Inequality* (New York: St. Martin's Press, 2017); Safiya Umoja Noble, *Algorithms of Oppression: How Search Engines Reinforce Racism* (New York: New York University Press, 2018); and Cathy O'Neil, *Weapons of Math Destruction* (New York: Crown Publishing, 2016). A student researcher documented specific issues with the facial detection software used by Proctorio. See Todd Feathers, "Proctorio Is Using Racist Algorithms to Detect Faces" (8 April 2021), online: *Motherboard* <www.vice.com/en/article/g5gxg3/proctorio-is-using-racist-algorithms-to-detect-faces>; and Drew Harwell, "Federal Study Confirms Racial Bias of Many Facial-recognition Systems, Casts Doubt on Their Expanding Use" (19 December 2019) *Washington Post* [Harwell, "Federal Study"].

101 Harwell, "Federal Study", *ibid.*

102 Affect recognition tools, for example, may incorporate bias. See Kate Crawford, *Atlas of AI* (New Haven: Yale University Press, 2021) at 177. See also Lauren Rhue, "Emotion-reading Tech Fails the Racial Bias Test" (2019), online: *The Conversation* <theconversation.com/emotion-reading-tech-fails-the-racial-bias-test-10840>.

103 The digital divide — linked not just to socio-economic status but also to geographic location — is a factor for remote proctoring and for online education more generally. See *e.g.* Li & Lalani, *supra* note 23. However, while

note, "[a]cademic surveillance technology requires reliable and high-speed Internet access, up-to-date computer hardware including a functioning webcam and microphone, and a testing environment with sufficient space and quiet".[104] As noted earlier, such students may have more difficulty finding appropriate private spaces in which to write their exams, including spaces where external noise will not trigger exam flags.[105]

2. An Implementation of Remote Proctoring that Minimally Impairs Privacy and Human Rights

The proportionality part of a necessity and proportionality analysis focuses on the measures chosen to address the necessity, and the extent of their impact on human rights. This evaluation takes into account alternative means to address the problem that might have a less adverse impact on human rights. The overall issue here is whether the response is proportionate to the need. It is possible to have implementations that address data protection, privacy and human rights concerns as well as implementations that leave these concerns unmitigated. The implementation chosen by a university may therefore determine the outcome of a necessity and proportionality analysis.

Although surveillance is an accepted part of in-person exam proctoring, there are significant differences between in-person surveillance and some implementations of remote proctoring. In-person proctoring is rarely one-on-one and usually involves a general surveillance of students by one or more proctors who either sit at the front of the room or occasionally patrol it. In such a context, no student is subject to constant surveillance. In-person proctoring also does not involve recording and storing images of students, nor does it involve AI-enabled analysis of students' movements. Further, in-person surveillance occurs in spaces provided by the university — typically classrooms.

---

some forms of distance learning can accommodate poor or unstable internet access (for example, asynchronous learning models), remote proctoring solutions often require real-time audio and video monitoring.

104 Cahn et al, *supra* note 1 at 9.

105 Harwell, "Cheating-detection", *supra* note 22.

It does not take place in a student's private space and does not involve the filming or recording of that space. There is, therefore, no simple analogy between in-person and remote proctoring.

The proportionality assessment may be impacted by issues of urgency.[106] In other words, the sudden onset of pandemic-related shutdowns in mid-semester placed universities in a situation in which they were scrambling to move courses and evaluations online. Most of these courses and their evaluations had not been designed for this context, and universities sought quick solutions to the problem of proctoring a large number of now-online exams. This context is considered by the court, for example, in the case of the University of Amsterdam.[107] Once the urgency has passed, however, there may be a need to reconsider solutions adopted at a time of crisis. It is arguable, therefore, that after that first disrupted semester, there was more time to plan and adapt courses for subsequent semesters of teaching. In fact, one can see reconsiderations of the measures adopted in a number of universities.[108]

One implementation issue is whether remote proctoring is mandatory or optional for students. Some universities made online proctoring optional for students during the pandemic.[109] However, to be truly optional, alternatives

---

106 See *e.g.* Liz Hicks & Sangeetha Pillay, "Proportionality, Rights and Australia's COVID-19 Response: Insights from the India Travel Ban" (16 August 2021), online (blog): *Australian Public Law* <auspublaw.org/2021/08/proportionality-rights-and-australias-covid-19-response-insights-from-the-india-travel-ban>; and Eric C Ip, "Courts, Proportionality and COVID-19 Lockdowns" (23 September 2021), online (blog): *International Association of Constitutional Law* <blog-iacl-aidc.org/2021-posts/2021/9/23/courts-proportionality-and-covid-19-lockdowns-f2apb>.

107 See Rb. Amsterdam, *supra* note 4.

108 See *e.g.* Sayed, *supra* note 21; and Chin, "University Will Stop", *supra* note 21.

109 See *e.g.* the University of Ottawa allows students to refuse to use Respondus Monitor. See "Respondus FAQ", *supra* note 89. In such cases, the instructor must offer alternatives to the student. It is unclear what those alternatives might be. For a strong view opposing opt-out solutions. See Derek Newton, "Research: Students May 'Opt Out' Of Online Test Monitoring, With Big Catch" (30 September 2020), online: *Forbes*

must be safe and realistic. Options that require the students to take health risks (for example, taking public transit before vaccines are available in order to write an exam in-person on campus), travel long distances, or occasion serious additional burdens to arrange, may not be fair — although the evaluation of fairness might be affected by how carefully the remote proctoring options are implemented. In other words, if the university has taken steps to ensure that remote proctoring options are minimally invasive and that safeguards are in place to protect student rights, there may be less of an onus to provide in-person alternatives or make them highly user-friendly.

Implementation of online proctoring is also key to determining the impact on data protection rights. In some cases, students must create their own accounts with online proctoring service providers. In doing so, they enter into a contractual relationship with the service provider in which they are subject to the standard terms and conditions, including those relating to privacy.[110] Under such arrangements, students may be required to provide the company with payment and account information. They may also be required to keep a scan of an identity document on file for identity verification purposes. This data is collected and stored by the company according to its terms of service, and may be used in different ways, again, subject to 'take-it-or-leave-it' terms and conditions. Such implementations have been adopted at some schools in the US.[111]

<forbes.com/sites/dereknewton/2020/09/30/research-students-may-opt-out-of-online-test-monitoring-with-big-catch/>. However, 'opt-out' does not necessarily mean no monitoring. Students might be given options involving alternative modes of proctoring, including in-person on-campus proctoring.

110 Cahn et al, *supra* note 1 at 14–5, discuss the broad and unsatisfactory terms of some of these privacy policies.

111 See *e.g.* the menu of costs for students using remote proctoring at the University of Illinois, Springfield in "Center for Online Learning, Research and Teaching, Examity Pricing Guide" (1 July 2020), online: *University of Illinois, Springfield* <www.uis.edu/colrs/teaching/technologies/examity-online-video-proctoring>; see also "ProctorU Fees" (9 December 2021), online: *Athabasca University* <registrar.athabascau.ca/exams/proctoru_fees.php>.

By contrast, some universities have chosen to purchase a campus-wide licence.[112] This eliminates the need for students to create their own accounts with the service provider, although they will still have to provide ID for identity verification. Implementations can also be enhanced in jurisdictions that have privacy frameworks applicable to universities. For example, since most Canadian universities are governed by provincial public sector data protection laws, universities have been legally obliged to ensure that their contracts with the service providers address the collection, use, and disclosure of student personal data in a legally compliant manner.[113] The same is true for universities and *GDPR* compliance in the EU.[114] Some implementations may address data localization requirements.[115] They may also place strict limits that allow access to and use of data only by designated university personnel. These implementations offer greater data protection for students than direct contractual agreements between students and the company.

In short, implementation should take into account data protection considerations, including what data are collected, using what means, and at what stages of the process. How these data are stored and accessed, and to whom access is provided, is also important. Data retention should be considered, as well as security measures to ensure that students are protected against data breaches. A further consideration is whether AI is used to analyze collected data

---

112 See *e.g.* the pricing schedule for campus-wide licences for Respondus in "Respondus 4.0 – Pricing + Free Trial" (2022), online: *Respondus* <web.respondus.com/he/respondus/pricing>.

113 See *e.g.* Queen's University in Ontario states in its student FAQs: "The terms Queen's has negotiated are more stringent than, and take precedence over, the information posted publicly about Proctortrack on Verificient's website". See "Frequently Asked Questions (FAQs) – Proctortrack" (2022), online: *Queen's University* <www.queensu.ca/registrar/students/examinations/exams-office-services/remote-proctoring> ["FAQs – Proctortrack"].

114 See *e.g.* the privacy impact assessment carried out by University of Twente in compliance with *GDPR* requirements in Davids, *supra* note 84.

115 See "FAQs – Proctortrack", supra note 113. See also Davids, *ibid*.

and whether students' data may be subject to secondary uses by the proctoring company for training their AI or developing new products and services.

Privacy issues relating to dignity and autonomy may also be mitigated by implementations of remote proctoring that avoid intensive surveillance methods, such as video recording, live one-on-one proctoring, or AI-enabled tools to detect suspect behaviours. York University, for example, has recently announced that it is shifting to the use only of active restrictions on computers (browser lockdown), barring exceptional circumstances.[116]

Another implementation issue relates to how remote proctoring services are integrated with university disciplinary procedures.[117] In principle, AI-enabled services use technology to flag suspicious incidents. Some services allow for calibration by universities in order to identify which behaviours will trigger alerts. Typically, the proctoring services flag issues, leaving it up to the university to determine how they will be addressed. In many implementations, for example, it is left to the course instructor to review flagged incidents. In theory, this creates a 'human-in-the-loop' for decisions about which incidents merit discretionary intervention. However, there is mounting evidence that many instructors do not review the flags that they receive.[118] A review system should also require safeguards to ensure that access to flagged videos is limited only to those with a valid reason to view them and that there are procedures in place for

---

116 Sayed, *supra* note 21.

117 Jason Kelley, Bill Budington & Sophia Cope, "Proctoring Tools and Dragnet Investigations Rob Students of Due Process" (15 April 2021), online: *Electronic Frontier Foundation* <www.eff.org/deeplinks/2021/04/proctoring-tools-and-dragnet-investigations-rob-students-due-process>.

118 See *e.g.* Kelley, "Long Overdue Reckoning", *supra* note 11. In their announcement of discontinuing of AI-only proctoring, ProctorU revealed that "only about 11% of test sessions tagged for suspicious activity by AI tools are reviewed by the school or testing authority". See EFF, "ProctorU Responses", *supra* note 29. They also indicated that an independent review at the University of Iowa showed that only 14% of instructors actually reviewed flags. A failure to review removes the 'human-in-the-loop'. ProctorU indicated that it now plans to provide human review by trained proctors.

safe destruction once they are no longer needed. Professorial discretion can raise its own issues, and the closed environment in which such discretion may be exercised could be problematic. In an implementation in which the professor of a course views flagged videos, the professor's own biases or past interactions with students may influence his or her decision-making about whether a video clip reveals conduct that should be sent for further review or discipline. The potential for racialized, gendered, or other biases to impact outcomes (combined also with the potential for algorithmic bias in the AI flagging process) suggests that universities might wish to implement measures to safeguard against disciplinary results that replicate such biases. Assuming the legitimacy of the adoption of AI-enabled tools in the first place, a university should collect and audit data regarding flagged incidents, including those sent for discipline, those dismissed, and the disciplinary outcomes. They should analyze these data for patterns that indicate bias or other systemic flaws both in the AI and in the human oversight.[119] It is becoming increasingly difficult to ignore the growing body of literature about AI and bias.[120] Transparency is also a recurring issue with the implementation of AI.[121] Both should be of concern in the university context.

---

119 This practice is recommended, *e.g.* in Canada's *Directive on Automated Decision Making*, which was designed to apply to ADM systems adopted by the federal government. Although not applicable to universities, the Directive is an example of how safeguards can be built around technologies that play a role in decision-making about individuals. Clause 6.2.3 of the directive requires "[d]eveloping processes to monitor the outcomes of Automated Decision Systems to safeguard against unintentional outcomes and to verify compliance with institutional and program legislation, as well as this Directive, on a scheduled basis". See Canada, Treasury Board of Canada, *Directive on Automated Decision-Making* (Policies, directives, standards and guidelines), April 2021 update, online: <www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32592> (Government of Canada).

120 See *e.g.* O'Neil, *supra* note 100; Eubanks, *supra* note 100; and Noble, *supra* note 100.

121 Transparency is a concern at the level of both algorithms and data (see *e.g.* Frank Pasquale, *The Black Box Society* (Cambridge, Mass: Harvard University Press, 2015). Recognizing that algorithmic transparency may not always be possible, there can be other forms of transparency including with respect to

The process by which a matter proceeds from an incident being flagged to its resolution is also important. Giving students an opportunity to respond to flagged incidents prior to a disciplinary proceeding might help to mitigate some of the human rights concerns raised about live and AI-enabled monitoring. While this may allow students to avoid being subject to the stress of defending themselves in full disciplinary proceedings, it is nevertheless traumatic (and stigmatizing) to be asked to explain oneself after one's monitored behavior is flagged as anomalous.[122]

A further implementation issue relates to adaptability and responsiveness to complaints and concerns. For example, Canada's Western University issued a statement reaffirming its commitment to providing remote proctoring solutions for those instructors who felt it was necessary for their courses. However, they also indicated that they carefully chose their service provider and, in response to concerns expressed by faculty and students, had worked with the company "to implement new functionality that further enhances data security and privacy".[123] Taking a different approach, York University announced that it would end the use of remote proctoring — save for exceptional circumstances[124] — as a response to concerns raised by students over privacy and equity.[125] The

---

results, and audits of outcomes. See *e.g.* Mike Ananny & Kate Crawford, "Seeing without Knowing: Limitations of the Transparency Ideal and its Application to Algorithmic Accountability" (2016) 20:3 New Media and Society 973.

122 Harwell, "Cheating-detection", *supra* note 22; see also Sam Skolnik, "Ninety Percent of Suspected Cheaters Cleared by California Bar" (30 December 2020), online: *Bloomberg Law* <news.bloomberglaw.com/business-and-practice/ninety-percent-of-suspected-cheaters-cleared-by-california-bar>.

123 "Update on Remote Proctoring Vendor Selection - September 17, 2021" (17 September 2021), online: *Western Remote Proctoring* <remoteproctoring.uwo.ca/statement>.

124 These circumstances include "courses where there is a requirement for proctored tests or exams by an accreditation body or professional association, or has learning outcomes that cannot be assessed without online proctoring". Sayed, *supra* note 21.

125 Sayed, *ibid.*

University of California Berkeley has also banned the use of third-party proctoring services with one small exception: it allows professors to use Zoom to remotely monitor students writing exams.[126]

An overarching proportionality issue is whether it is appropriate at all to use AI-enabled remote proctoring. This is an interesting issue. AI, in theory, allows for greater efficiency and cost savings (closer surveillance of each student at less cost than hiring individual one-on-one proctors). It may also promise a greater ability to detect suspicious behaviours, especially as new modes of cheating may be facilitated at a distance. However, as noted above, it presents a range of serious data protection, privacy, and human rights issues. The seriousness and scale of these issues make such implementations difficult, if not impossible, to justify on a necessity and proportionality analysis. In the university context — where important institutional goals encompass equity, diversity and inclusion — AI-enabled remote proctoring, at least in its current forms and implementations, may simply pose too many unacceptable risks to be an appropriate solution.

A proportionality analysis considers less intrusive alternatives to the measures adopted. Just as there are different possible implementations of remote proctoring solutions, there are also alternatives to remote proctoring.[127] During the pandemic, some professors altered their modes of evaluation to avoid the use of remote proctoring services. Others developed banks of exam questions that could be used to administer unique tests to each student. It was also possible for professors to ask a class to write their exam using Zoom with cameras on so that the professor could, while using the Zoom gallery view function, roughly simulate in-person exam proctoring.[128] Some professors shifted to modes of

---

126 "Remote Proctoring FAQ" (2022), online: *Berkeley Center for Teaching and Learning* <teaching.berkeley.edu/remote-proctoring-faq>.

127 See *e.g.* the University of Windsor directed its faculty to consider alternatives to exam-based evaluations. See "Remote Online Proctoring and Online Assessment" (2022), online: *University of Windsor* <www.uwindsor.ca/openlearning/503/online-exam-proctoring>.

128 Such a solution addresses some concerns with remote proctoring, although it still allows for 'intrusion' into private student spaces, and does not resolve issues raised by poor or unreliable internet access.

evaluation other than examinations. The extent to which universities have supported professors in developing and implementing alternate modes of evaluation is a proportionality consideration.

V. Conclusion

This paper has applied a necessity and proportionality analysis to the adoption of remote proctoring services by universities with a view to assessing such adoptions through a more holistic human rights lens. Data protection alone is an insufficient lens through which to consider the impacts of the adoption and use of technologies of remote surveillance — and ones with AI components — in the university context.

The necessity part of the analysis demonstrates that universities have a real concern about cheating. The problem is long-standing, has evolved with technology, and can manifest itself in new ways in the online context. Cheating harms the reputations of universities, and can adversely impact students who do not cheat, as well as society more broadly where higher-education credentials cannot be fully trusted. The rapid shift to online evaluation driven by the COVID-19 pandemic also added urgency to the necessity analysis. In many cases, solutions had to be found rapidly, pushing universities towards remote proctoring services. An important question is whether, once the urgency of a mid-semester shift to online learning has passed, solutions justified on an emergency basis are still acceptable.

Universities have long used in-person proctoring to control cheating in exam settings, making remote proctoring seem like a logical step in the online exam context. However, there is no easy equivalence between in-person and remote proctoring. Remote proctoring technologies collect vast quantities of data, raising data protection and data security issues. The constant, direct surveillance of students writing exams has also prompted significant anxiety among students. AI tools have raised concerns about bias and discrimination. Such technologies also rely on student access to adequate internet and computing equipment, creating inequities along the digital divide. The poor integration of the

technological tools with university disciplinary processes also raises significant due process concerns.

Although there is a body of literature on cheating in universities to support the necessity part of the argument, reports of the privacy and human rights impacts of these technologies are currently largely anecdotal. That said, the anecdotes are mounting and are highly compelling. There is clear evidence of resistance by students and faculty. Some universities have already moved away from remote proctoring either altogether or by limiting the circumstances for use and the technological tools that will be used. One remote proctoring company has also abandoned AI-only proctoring services, noting the importance of a 'human-in-the-loop' and the inability to rely upon university instructors to perform that role.

A proportionality approach typically examines particular implementations to see if they minimally impair human rights. There is a vast range of potential implementations of online proctoring. An examination of these implementations requires consideration not just of the types of technological tools adopted, but also the ways and contexts in which they are used, how student concerns are accommodated, and how the systems are integrated with university disciplinary processes. Any implementation should also give serious attention to alternatives to remote proctoring, and to the university's role in supporting innovations in course evaluation that could improve evaluation methods and avoid the imposition of technological surveillance tools. Implementations should also include transparency and accountability mechanisms. Universities should collect data that will allow them to determine if these systems are fair and equitable in their implementation.

The rapid adoption of remote surveillance technologies in universities during the pandemic risks normalizing surveillance. To a large extent, examining these services through privacy impact assessments and adjusting data protection requirements also risks normalizing the surveillance. Universities must be accountable more broadly for these types of technologies and must undertake to recognize and address the full range of harms they may cause. As institutions of higher learning — many of which have explicitly expressed commitments to

the principles of equity, diversity, and inclusion — universities must play a role in questioning the impacts of the adoption of these unproven and potentially harmful technologies.

Where Do We Go From Here?* International Students, Post-Pandemic Law Schools, and the Possibilities of Universal Design

Carole Silver**
Swethaa S Ballakrishnen***

Following on our earlier research on the experiences of international students, this article uses the recent global pandemic as a revealing lens to revisit structural inequalities in American law schools. Over the years, law schools have simultaneously encouraged international student enrollment and functioned in ways that have marginalized these students. We suggest that this dissonance between postured inclusion and the actual experience of exclusion these students endure highlights important ways in which law schools' commitments to equity and inclusion more generally can appear more performative than substantial. We argue that the pandemic has made stark inequalities that have always existed, and that despite its devastating consequences, this period offers new insights that could help reshape the future of legal education. Focusing on specific teaching and learning innovations (e.g. virtual learning), we begin to deliberate on the ways that law schools can better address inequality as they resume in-person activities. Ultimately, we caution that as law schools emerge from the pandemic, they ought to resist the urge to return to their old normal ways of doing equity. Instead, by concentrating on the differential needs of diverse students, there might be an opportunity for a collective shift to avoid recementing past embedded inequalities.

---

* The question in the title is taken from Andrew Lloyd Webber & Tim Rice, "You Must Love Me", soundtrack (Warner Brothers, 1996) (for the film adaptation of the musical Evita).

** Professor of Global Law and Practice at Northwestern Pritzker School of Law.

*** Assistant Professor of Law and co-director of the Center on Empirical Research on the Legal Profession (CERLP) at University of California Irvine School of Law.

[See acknowledgements at the end of this article.]

I. Introduction

Although market instability is not traditionally associated with the incapacitation of educational institutions,[1] the current COVID-19 crisis may have put in motion a range of 'long haul' effects for students and schools alike to contend with. While the impacts during this time have been innumerable across educational contexts,[2] we use this article to trace the ways in

1 Crisis studies usually show that education is the most resilient institution during times of instability. While reductions in income and increases in tuition prices could have negative effects on enrollment, growing unemployment usually has the opposite effect by reducing the foregone costs of attending school. Research on the great recession, for example, suggests that college attendance levels increased during the recession, especially in the states most affected in terms of rising unemployment and declining home values, but it was part-time enrollment that grew while full-time enrollment declined, see Jeffrey R Brown & Caroline M Hoxby, eds, *How the Financial Crisis and Great Recession Affected Higher Education*, 1st ed (Chicago: University of Chicago Press, 2014).

2 COVID-19 is no doubt, as scholars from the Abdul Latif Jameel Poverty Lab (J-PAL) show, "exacerbating the learning crisis", but it also allows for a new framework to transform these systems especially as they affect parents, teachers, and students. On the possibilities this offers schools, see Radhika Bhula & John

which law schools have had to deal with a set of interconnected unpredictabilities, especially around recruitment and retention of their international students. International students are a useful demographic to observe and learn from for several reasons. Over the last 20 plus years, these students have grown to be a substantial proportion of all law students,[3] and their enrollment has more than doubled in terms of numbers and rate of proportionate representation within the larger student population in law schools.[4] This growth is significant not only because it has changed the composition of students, but because it has altered the financial dependencies of schools on these students and, more centrally, their rhetoric about being globally committed organizations.[5] International students often pay full tuition

---

Floretta, "A Better Education for All During – and After – the COVID-19 Pandemic" (16 October 2020) *Stanford Social Innovation Review*.

3 We use this general statement about proportionality because more specific figures on the proportion and rate of growth of international students in US law schools are unavailable. See *infra* at notes 21 and 61. For more on the dearth of reported data about LLM programs, see also Carole Silver, "What We Know and Need to Know about Global Lawyer Regulation" (2016) 67 South Carolina Law Review 461.

4 Carole Silver & Swethaa S Ballakrishnen, "Sticky Floors, Springboards, Stairways & Slow Escalators" (2018) 3 UC Irvine Journal International, Transnational, and Comparative Law 39 at 49–50 [Silver & Ballakrishnen, "Sticky Floors"].

5 Curricular reform around internationalization was identified in a study by the ABA Section of Legal Education and Admissions to the Bar in 2012, see Catherine L Carpenter, ed, *A Survey of Law School Curricula: 2002-2010* (Chicago: American Bar Association, Section of Legal Education and Admissions to the Bar, 2012) at 74. These reforms include mandatory courses on issues related to international, transnational or global legal matters at a handful of law schools, see *e.g.* Harvard Law School's requirement of an upper level international and comparative law course, "J.D. Degree Requirements Quick Reference" (2022), online: Harvard Law School <www.hls.harvard.edu/dept/registrar/registration-information/jdreferenceguide/>; and the University of Michigan Law School also requires an international or comparative law course prior to graduation, "Degree Requirements & the Degree Audit Report (DAR)" (2020), online (pdf): University of Michigan Law School

for legal education, particularly in LLM degree programs, often without aid or loans from their United States law schools.[6] At the same time, beyond financial

<www.law.umich.edu/currentstudents/registration/Documents/JD%20Regulations%20-%20Current.pdf>. Law schools also focus on globalization through journals and moot court opportunities, N William Hines, "Ten Major Changes in Legal Education Over the Past 25 Years" (November 2005) *AALS News*. See generally Carole Silver, "Globalization and the Monopoly of ABA-Approved Law Schools: Missed Opportunities or Dodged Bullets?" (2014) 82:6 Fordham Law Review 2869 (describing the ABA's regulatory stance with regard to central issues relating to globalization in US legal education) [Silver, "Globalization and Monopoly"]; and Carole Silver, "Getting Real About Globalization and Legal Education: Potential and Perspectives for the U.S." (2013) 24 Stanford Law and Policy Review 457 (describing the substantial influence of globalization on curricular reform in law schools at 469) [Silver, "Getting Real"].

6 In an earlier study of international LLM graduates who earned their degrees in the late 1990s and 2000, Silver found that a full 40% of her sample "relied exclusively on personal and family resources to pay for the LLM . . .". Carole Silver, "Agents of Globalization in Law" (2009) Law School Admission Council Grants Report No 09-01 at n 45; this was consistent with findings about sources of support for international students in higher education generally at that time, according to the Institute for International Education [Silver, "Agents of Globalization in Law"]. Moreover, this reliance on only personal or family savings did not differ based on the student's home country, Silver, "Agents of Globalization in Law", *ibid* at 7. Only 2% of respondents in Silver's study relied exclusively on their US law school's funding for tuition, Silver, "Agents of Globalization in Law", *ibid*. More recently, law schools have had to invest in attracting international students to their LLM programs, although the amounts provided in funding are substantially lower than what is invested for JD students on a per-student basis. See generally Carole Silver, "Coping with the Consequences of 'Too Many Lawyers' Securing the Place of International Graduate Law Students", (2012) 19:2 International Journal of the Legal Profession 227 at 230 (describing these findings) [Silver, "Coping with the Consequences"]. For a more current analysis of the importance of international students to the funding of higher education generally, see Karin Fischer & Sasha Aslanian, "Fading Beacon" (2 August 2021) *The Chronicle of Higher Education*:

> [t]he chief motivation for American colleges to attract students from abroad has shifted over time: It began as an act of benevolence, became a tool of diplomacy, then evolved into an important part of their business model. . . . [According to Professor Liping Bu of Alma College, "When I came here, in

dependency, international students afford us an important lens into understanding the experiences of precarious students more generally[7] and, with this, the hostility of institutions that house them. In particular, this period of

---

> the '80s, foreign students were sponsored by these universities. And now it's foreign students' money in the universities that provide scholarships for American students'] . . . International students not only helped hold tuition down and make up for lost state support. They also provided a financial windfall for college towns and for the American economy as a whole. The US Department of Commerce estimates international students' financial impact is $44 billion a year. Higher education has become one of the United States' largest service exports, equal to annual exports of soybeans, corn, and textile supplies combined. From 2006, when enrollments from abroad began to climb, to their all-time high, of nearly 1.1 million in 2018, the number of international students in America more than doubled;

Julia Wang, "The Burden of Being Asian American on Campus" (15 August 2016) *The Atlantic*:

> [s]tudying in the U.S. has a big price tag. This has led to a disproportionate representation of the wealthy and elite from China on American campuses. Public universities, suffering from a loss of funding after the 2008 financial crisis, have looked to international, and particularly Chinese, students for a full-tuition boost to their budgets. . . . While some financial aid is available to international students, there are vastly fewer funds, and most universities are not need-blind in their admissions processes for applicants from abroad;

and Bianca Quinlantan & Lauraine Genota, "Colleges Beg Biden to Save International Student Enrollment" (29 May 2021) *Politico* ("[s]tudents from abroad often pay the full sticker price on tuition and fees, making them desirable to admit").

7 Swethaa S Ballakrishnen & Carole Silver, "Language, Culture, and the Culture of Language: International Students in U.S. Law Schools" in Meera Deo, Mindie Lazarus-Black & Elizabeth Mertz, eds, *Power, Legal Education, and Law School Cultures* (England: Routledge, 2020) at n 25 (a third year international JD student, Emily Ye, for example, explained the importance of including an international LLM from the Caribbean on a panel about marginalized voices on campus, who spoke:

> about the foreign student and LLM experience. I think having her on the panel that I was a part of really brought in another layer of marginalized voices, because she was bringing forth to all the professors the fact that there are students from different places who have a different perspective to bring to the classroom, that sometimes aren't invited to bring it, so they feel awkward, or they feel like it's unnecessary, and so they just don't say anything.)

[Ballakrishnen & Silver, "Culture of Language"].

instability helps highlight anew the ways in which schools' commitments to equity and inclusion might be more performative integration than substantial commitment and performed reality. In unpacking the possibilities and precarities that legal education has inherited from this pandemic, we ask whether there is 'hope' of returning to normal and if normal was ever hopeful to start with. Instead, we offer that this time has new insights into existing and persistent structural inequities that could offer a new turning point for legal education. At the same time, we feel compelled to caution that any institutional amnesia that schools return to once normal feels accessible could have great costs.

This inquiry follows a strain of our research that has focused on this inequality inherent in the international law student experience.[8] In earlier work, we describe, from the student perspective, the unique difficulties of being a non-model student in the law school context, where the model or ideal student is one who holds American citizenship and for whom the cultural references replete in US law classrooms are innate.[9] On the one hand, we suggest that there is a sense among international students that they are similar to their domestic peers in that all opportunities are at least theoretically available to them and that the temporary nature of their presence does not shape curricular or career search decisions.[10] On the other hand, beyond functional factors like grades and visas, the everyday experiences of international students in these elite spaces are rife with affective distancing and hurdles that compromise their sense of

---

8 Silver & Ballakrishnen, "Sticky Floors", *supra* note 4; Ballakrishnen & Silver, "Culture of Language", *supra* note 7; Swethaa S Ballakrishnen & Carole Silver, "A New Minority? International JD Students in U.S. Law Schools" (2019) 44:3 Law & Social Inquiry 647 at 669–70 [Ballakrishnen & Silver, "New Minority"]; and Silver, "Getting Real", *supra* note 5.

9 Ballakrishnen & Silver, "New Minority", *ibid* at 669–70; and Ballakrishnen & Silver, "Culture of Language", *supra* note 7 at 203–10.

10 But see Ballakrishnen & Silver, "Culture of Language", *supra* note 7 at 216–7 (describing certain curricular choices as reflecting what a 2L Korean international JD student described as the goal of avoiding "play[ing] a catch-up game with other students who were . . . born and raised in an environment where they . . . would just have a more . . . fundamentally solid knowledge of the system to begin with . . .").

belonging.[11] Compounding the marginalization experienced by these students are differences in organizational factors, such as variations in degree programs and institutional resources for support.[12]

The period since the beginning of the pandemic has both brought to keen light and exacerbated many of these existing concerns. With increasingly unreliable cues from national and international institutions managing risk, schools were anxious about losing their international students during the pandemic when international travel was prevented by travel restrictions, embassy closures and general fear. This is understandable, especially given the nature of these student enrollments. Our research shows,[13] for example, that international students account for a larger proportion of the student body than particular other underrepresented minorities in many highly ranked schools, and that even outside of this elite group, this pattern remains noticeable, particularly in schools with a strong international reputation or located in a major metropolitan area.[14] For certain law schools, even during the 2020-2021 academic year when the pandemic was in full swing, international students were a significant segment of the student population, and in fact were a larger group proportionate to the aggregate student body than Black, Asian or Latinx students.[15] These demographics are important because they highlight the ways in which practical institutional responses to a major demographic within its population helps articulate its larger vocalized cultural commitments.

We continue our focus here on inequality and international law students by using preliminary lessons from COVID-19 and the related experience with online legal education as a framework for helping law schools reconsider their

---

11 Ballakrishnen & Silver, "Culture of Language", *supra* note 7.

12 Silver & Ballakrishnen, "Sticky Floors", *supra* note 4; and Silver, "Getting Real", *supra* note 5.

13 Silver & Ballakrishnen, "Sticky Floors", *supra* note 4; Ballakrishnen & Silver, "New Minority", *supra* note 8; and Ballakrishnen & Silver, "Culture of Language", *supra* note 7.

14 See *infra*, Table 1.

15 *Ibid*.

approach to equity and inclusion in the particular context of the international student population. We frame our inquiry using comparative insights from before the pandemic and by focusing on questions of change in experience. For instance, we ask: did the different and unequal experiences of international students when law school was conducted in-person, prior to the pandemic, transfer over once life and legal education shifted to being virtual because of the pandemic? Did that shift to online classes and learning entirely undermine the value of law school for international students? Some have read our earlier research as suggesting that international students *should* (and perhaps would) wait out this period of online learning rather than lose the opportunity of in-person interaction and the chance to soak up US law school culture. But perhaps there are ways that a virtual learning environment might enable marginalized students to experience law school differently, and in turn, with more similarity to the experience of others in an online class, including the ideal law student. Finally, this article starts to deliberate on the lessons that law schools could take from the experiences of teaching and learning online in order to better address inequality once law schools resume in-person activities. What would it look like, we ask, to develop alternate coordinates of law school capital and credentials given these new hierarchies and structures? Particularly, could law schools rethink the inequities inherent in their activities and structures, and help re-establish corollary meanings attributed to legal education by students and potential employers, among others, to develop alternative models of value and assessment?

In engaging in this inquiry, we hope to be able to shed light on the ways in which these institutional spaces routinely exclude students that they initially were not conceived to include, often while alluding to the very commitments to globality and diversity that they act in dissonance from. Part II begins by framing our findings of international students before the onslaught of the pandemic. We highlight the demographic shifts in this category of students over the last several decades and show how many of the structural inequalities that were made more drastic by the pandemic existed well before its attack. We end by suggesting that these students deserve our attention not just because they are a growing subset

with institutional implications, but because their interchangeability implicates both their own experience as well as the experience of others who are seen to fit their category. In Part III, we consider how the pandemic both revealed and reinforced existing inequalities while also offering a new environment — online learning — for students to navigate. We suggest that this new space of exchange allowed for, what was on the face of it, a more inclusive system of participation while simultaneously reinforcing feelings of exclusion for those students least capable of handling its precarity. Students, for example, expressed the opportunities that online learning offered in aberration to the traditional classroom dynamic as an effective entry point for participation (recordings were made available, and, as one student offered, the 'blue hand' was simply easier to raise than a real hand), but these new ways of counting participation did not make up for the ways in which these students continued to be structurally isolated by the administration. From time differences for class schedules to visa paperwork, lack of proximity made these students feel even more isolated than they might have in other circumstances, resulting in a reckoning about the value and meaning of a virtual credential. In Part IV, we consider how the experiences of the pandemic could lay the groundwork for reconceiving legal education to offer more opportunity for different kinds of students who otherwise have not, and likely cannot, gain from the pre-pandemic version. We suggest that these inequalities that the pandemic has made stark have always existed and that the pandemic could offer us a new way of thinking about the future of legal education that could build more universally equitable choices. We conclude with a warning about reverting to the pre-pandemic norm in lieu of navigating the way forward by embracing the incorporation of universal design principles into legal pedagogy and planning more agentically.

II. Pre-Pandemic Lessons: Looking Back without Rose-Colored Glasses

To focus on international law students may convey a sense of homogeneity, but international students vary in important ways that shape how they experience

law school in the US and how they can use it to gain an advantage.[16] These differences include the obvious, such as home country and the degree program they pursue in the US, for example. Moreover, their experiences prior to beginning their US legal studies can prime them for different experiences and consequences arising from their US credentials. In fact, our research shows that these variations are not just structural or categorizable. While schools are likely to categorize students as technically international based on their documents, the experiences of students are predicated on factors well beyond how they are coded. Factors that contribute to these differences include, for example, a range of experiential attributes like whether they studied in the US or outside of their home country; non-education-based experiences with the US and third countries; their confidence and experience working and studying in English; familiarity with US popular culture and civic history; and their career aspirations, among other things. The many permutations of these characteristics and experiences give us a variance and texture to understanding the cohorts of international students present in these institutions. It also reveals the stickiness of the stereotypes that are traditionally attributed to them, and the problematic assumptions made by institutions to categorize them for efficiency.

In earlier work, we have used the difference between the JD and LLM degrees to analyze, as well as complicate, this question of institutional categorization and its dissonance with lived experience.[17] The one-year LLM degree continues to house the lion's share of international students enrolling in US law schools. After completing a first degree in law at home or in another country, students pursue the LLM for a variety of reasons, including that it is perceived as a valuable experience and credential in their home countries.[18] This value stems from a host of potential gains and experiences, from improving their ability and confidence about working in English, learning about a particular area of law, and being eligible to sit for a US bar exam, all of which are seen as

16 Ballakrishnen & Silver, "New Minority", *supra* note 8.

17 Silver & Ballakrishnen, "Sticky Floors", *supra* note 4; Ballakrishnen & Silver, "New Minority", *supra* note 8.

18 Silver & Ballakrishnen, "Sticky Floors", *ibid* at Figure 1.

important by home country employers, global law firms and the international and US-based clients of both. As one LLM graduate recently wrote, looking back on her year in the US for the LLM many years later, she learned: "US Law, but perhaps even more meaningful: the importance of and sensibility for cultural differences in anything I do, as well as . . . how important it is to find the right words and gestures in every situation".[19]

But for a variety of reasons, including regulation and rankings, the LLM program is inherently marginal in US law schools. The regulatory framework governing law schools relegates the LLM to a second class status vis-à-vis the JD.[20] US News & World Report's rankings — arguably the most influential force structuring the internal hierarchy of law schools[21] — reinforce this by excluding LLMs from its ranking of law schools.[22] These same forces have allowed a lack of disclosure about the LLM — enrollment patterns, job

---

19 Marion Welp, "When a circle closes" (July 2021), online: *LinkedIn* <www.linkedin.com/feed/update/urn:li:activity:6824320234040635393/> (an LLM graduate looking back on her experience in the US for the LLM).

20 By "regulatory framework" we refer to the rules adopted by the Council of the American Bar Association's Section of Legal Education and Admissions to the Bar, which is authorized by the Department of Education to create and oversee the regulatory and monitoring framework for US law schools.

21 Wendy Espeland & Michael Sauder, *Engines of Anxiety* (New York: Russel Sage Foundation, 2016).

22 Some of the quandary surrounding the LLM stems from the policy implications that derive from its regulatory position, while others reflect the LLM's exclusion from the ranking regime of US News. The ABA Council does not regulate LLM programs; rather, it 'acquiesces' in their existence as long as they do not undermine the integrity of the JD degree. Moreover, LLM students are not considered part of the US News & World Report ranking system in assessing law schools, which enables schools to create an off-the-books system for LLMs that funds the law school but does not 'count' against it in terms of rankings. Combined, these two factors provide a basis for law schools to justify different treatment for LLM and JD students, including resources devoted to each on a variety of matters, from scholarships to clinical seats to career advisors. Indeed, one might argue that to do anything else would be foolhardy, given the importance of US News. Silver, "Globalization and Monopoly", *supra* note 5.

outcomes and more — to become acceptable, too.[23] As Samvar Gupta, an LLM graduate, commented: "[s]o long as the academic institutions focus on the JD course for purposes of school ranking and for purposes of accreditation, [the] LLM is just money making project for most schools . . . ".[24]

These structural factors also impinge on the experiences of students in an LLM program. That same sense of marginality that characterizes the degree program seeps into the interpersonal experiences of students. LLM graduate Mateo Serrano, for example, described the interaction with JD students as:

> always kind of distant. And again, … they were intimidating at the beginning. They ignored us completely, like if we didn't [exist]. … [W]e were taking the same classes … and I was looking at them, and they just are looking at you like [you] are made of glass. They just don't see you. Again, that was obviously

---

23 See *e.g.* "Statistics" (2022), online: American Bar Association <www.americanbar.org/groups/legal_education/resources/statistics/> (disclosing overall enrollment for non- and post-JD programs only sporadically, undifferentiated by degree, and without student demographic information that would parallel JD disclosure); and "509 Required Disclosures" (2022), online: American Bar Association <www.abarequireddisclosures.org/> (standard 509 disclosure does not reflect LLM or other non-/post-JD degree students).

24 I0611. Interviews with international law students and graduates, and with their employers and law firm hiring partners practicing with elite national and international law firms, were conducted as part of our ongoing research (separately and together) exploring globalization, legal education and the legal profession. Interviewees are referred to by a pseudonym derived from lists of common given and surnames in the interviewee's home country. American names were assigned to interviewees who used American names. Interviews are cited by reference to a numerical code in the format of "I0611," where "I" refers to interviews conducted with a single interviewee, "G" to those conducted in a small group. The next two digits refer to the year when the interview was conducted (2006) and the last two digits reflect the numerical code for the particular respondent (*e.g.* "11"); where a single respondent was interviewed multiple times, a letter following the interview number indicates which of the interviews is being referenced (*i.e.* I1933A would indicate this is the first of the interviews for respondent 33, and that it was conducted in 2019); page references to interview transcripts are indicated following a comma, where relevant [Interviews].

> intimidating … And then one of these JD students told me, like, you know, what he said, 'It's not because they are not friendly, they don't know how to communicate with you guys; they don't know what you are doing, and what's it all about.' So … they are busy focusing on their studies, and I understand, … but still, it doesn't prevent anybody from keeping the relationship of their classmates. But again, I found actually a big gap between JD students and LLM students.[25]

Even the ability of students to get jobs in the US and interact in this way with others in the legal profession is constrained. The job search experiences of international LLMs often results in frustration and a sense of further marginalization. From the perspective of law schools, this is a rational consequence of both regulatory oversight by the Section of Legal Education and the rankings' focus on job outcomes.[26] But international students — whether in the LLM or JD program — see opportunities to practice in the US as a way to deepen the value of their education, at a minimum. One LLM graduate described that: "[i]f you . . . do . . . a global analysis of two years here [in the United States], one working in a law firm and one studying here, I would say

---

25 Carole Silver, "States Side Story: 'I like to be in America:' Career Paths of International LLM Students" (2012) 80:6 Fordham Law Review 2383 at n 68 (quoting Mateo Serrano, I0861) [Silver, "States Side Story"]. The cluelessness of JD students was confirmed in a study conducted through the Law School Survey of Student Engagement that asked JDs about their perceptions of and experiences with international LLMs. Thirty percent of the respondents indicated that they "were not sure whether their school offered a graduate program in which foreign law school graduates could enroll. By the time [of the survey] even first-year students had completed nearly an entire academic year in law school". Silver, "Getting Real", *supra* note 5 at 479. LLMs shared this frustration; Samvar Gupta described his sense of exasperation with the in-class experience: "[i]n some respects the LLMs were like UFOs. They did not intensively participate in any course because they either lacked the depth or the confidence", Interviews, *ibid*, I0611 at 9.

26 See note 22, *supra*; Silver, "States Side Story", *ibid* at 2414, n 100.

that 70% of importance is working here".[27] Central to the value of international legal education is the *potential* for geographic mobility, and that potential is one of the attractions that US law schools promise.[28] In part, this is made possible by liberal bar rules of particular US jurisdictions that accept the LLM as sufficient for bar eligibility, which distinguishes the US from many other countries.[29]

But while the potential for working in the US is established through state regulation, operationalizing it is challenging. For JDs, there are elaborate structures and entire offices in place to help them find post-graduation employment. They include on-campus interviewing by law firms and even firm-hosted receptions, often held at law schools. For the most part, these structures are unavailable to LLMs.[30] While these activities and resources are not generally intended to include LLMs, occasionally LLMs attend. Mingxia Lai, a recent international LLM graduate, described her experience:

> I went to a lot of receptions, especially law firm receptions, even though they were not for LLMs. But I really want to stay [in the US], so I will try everything. . . . I was invited to [law firm name]'s reception in NY, and was the only [law school name] Chinese student invited. That was the first official reception for LLMs that I attended. I was so nervous. Everyone was trying to attract the

---

27 Carole Silver, "The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession" (2002) 25:5 Fordham Journal of International Law 1039 at 1059 [Silver, "Case of the Foreign Lawyer"].

28 Silver, "Agents of Globalization in Law", *supra* note 6 at 18. Indeed, the frustration of this potential was one reason that the Trump rhetoric was devastating to the market for international students in fields well beyond law.

29 For general information on the eligibility of lawyers educated in one country to qualify in another, see "International Trade in Legal Services, IBA Global Cross Border Legal Services Report" (2022), online: International Bar Association <www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/BIC_ITILS_Map>.

30 Comments from LLM students and graduates about their frustration with the lack of equivalence in law school career search opportunities have been a consistent theme over the course of our research on international legal education, see *e.g.* Silver & Ballakrishnen, "Sticky Floors", *supra* note 4 at n 41.

> partner's attention in a short time. I learned a lot about how to do it, by watching and practicing from very little things. You don't need to wait for a partner to talk to you, you can start the conversation.[31]

Another LLM student, Qiang Bai, commented on the paths he saw as leading to the possibility of a US-based job:

> US law firms, they don't post internships or entry-level positions on their website. They just do OCI's, which is not available for LLM students. So, the only way I have left is only two ways. First, to seek a referral, which some of my previous professors or people I have encountered, they referred me to some firms, but then there is just no word. Second, I just send emails to HR's and people I've talked with during network events at school.[32]

LLMs have described hiring recruiting agencies to help them with jobs, among other things,[33] tactics that are quite unusual for JDs, and tactics that do not always help these students because of the relative ways in which they are perceived by their prospective employers.[34]

---

31 Interviews, *supra* note 24, I1550.

32 *Ibid*, I1552.

33 Silver & Ballakrishnen, "Sticky Floors", *supra* note 4 at 60.

34 The LLM degree is viewed with skepticism by certain prospective employers, who see it as a potentially weak preparation for their work environments. This stems at least in part from the flexibility of the degree, which in turn harkens back to the lack of regulatory oversight mandating a particular curriculum. That flexibility is seen as an asset by many LLM students and law schools, but it can be seen as a liability in assessing the degree, particularly in comparison to the JD, which has such strong signaling with regard to curriculum. For example, the comments of a global law firm managing partner, explaining why his firm preferred JD graduates to LLMs, highlights the ambiguity that the LLM can convey: his firm, he said, sought to hire lawyers "[t]rained in the US. Really trained in the US, not as an LLM where they kind of went to class, didn't learn very much but got a degree, not to belittle the LLM programs but it's way different from somebody that's in a JD program at a top tier law school"; Carole Silver, "The Variable Value of US Legal Education in the Global Legal Services Market" (2010) 24:1 Georgetown Journal of Legal Ethics 1 at 48. See also Carole Silver, "Winners and Losers in the Globalization of Legal Services: Situating the Market for Foreign Lawyers" (2005) 45:4 Virginia

These limitations, along with the consequence of growth of the LLM being a reduction in its ability to serve as a mark of distinction for graduates, contextualize the shift of a growing number of international students interested in law to opt for the JD degree over the LLM. As mentioned earlier, our research suggests that the division between these two degree paths is less distinct than it appears. Certain international students described intentionally pursuing the one-year LLM as a testing ground for their plans to earn a JD, for example,[35] while others transferred from an LLM to a JD once they were in the US. At the same time, though, there also exist a cohort of students for whom the LLM was not an option because they had earned their undergraduate degree in the US, for example, and saw themselves as more or less committed to the JD path, because they would have to repeat undergraduate studies to earn a qualifying law degree at home in order to satisfy the LLM admission criteria. These trajectories and international enrollment patterns are further explored below.

A. International Student Enrollment Trajectories

While it is not possible to know how LLM programs were affected by the pandemic because of the lack of disclosure of LLM enrollment by the Section of Legal Education, disclosure requirements governing JD programs allow us to track the rise of international JD students. Generally, until about the time of Donald Trump's election, international student enrollment had been on the rise in US law schools, mirroring the larger trend that ran throughout higher education in the US.[36] At the same time, however, competition for international students, both in law school and generally, was heating up. In the law school context, much of this competition was aimed at the LLM graduate student population, coming particularly from other English-speaking common law

Journal of International Law 897 at 912–3 (LLM does not do the same job of filtering and certification as the JD).

35 Silver & Ballakrishnen, "Sticky Floors", *supra* note 4 at 61.

36 *Ibid* at 40.

jurisdictions.[37] But the fluidity in the choice of degree program that we describe above, including applicants considering the LLM as a path to the JD, suggests that these forces also shape JD enrollment. And by 2016, when the pattern of increasing enrollment in the law school context had levelled off (Figure 1), the policies and rhetoric of the Trump administration made the work of US law schools and others in higher education harder to keep up, much less advance, in drawing additional international students to their programs.

Prior to this, the rise of international law student enrollment was particularly significant for law schools with elite reputations, as reflected in the US News rankings.[38] Despite the rhetoric and policies of the Trump administration dampening the enthusiasm of international students in US higher education generally, including in legal education, law schools continued to court international students, and they continued to comprise an important and relatively stable segment of new law students. Figure 1 shows the overall enrollment of international JD students, identified according to the need for a visa (reported as "non-resident" or "non-resident alien" in the ABA data). It shows a fall-off at the end of the Trump administration, particularly in the fall of 2020 when the COVID-19 pandemic made travel extremely challenging. But in the first years of the Trump administration, overall enrollment by

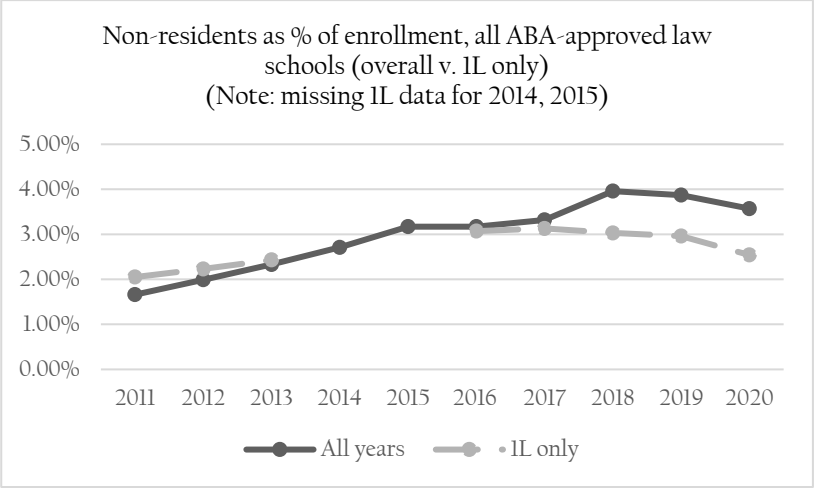
---

37 On competition for international law students, see Silver, "Coping with the Consequences", *supra* note 6. On competition in higher education for international students, see Benjamin Mueller, "Western Universities Rely on China. After the Virus, That May Not Last" (16 April 2020) *New York Times*; and OECD, "Education at a Glance 2018: OECD Indicators" (2018), online (pdf): OECD Publication <www.oecd-ilibrary.org/docserver/eag-2018-en.pdf?expires=1643316646&id=id&accname=guest&checksum=68892D9D795932274688A4B43EEF30C6>. For statistics on the proportion of international students enrolled in specific countries, see Project Atlas, "A Quick Look at Global Mobility Trends" (2020), online: Institute of International Education <www.//iie.widen.net/s/rfw2c7rrbd/project-atlas-infographics-2020>.

38 Ballakrishnen & Silver, "New Minority", *supra* note 8.

international JDs actually increased.[39] At the same time, first-year (1L) international JD enrollment was flat for much of the period from 2016 through 2019, falling off in approximately the same proportion as overall enrollment in the fall of 2020.[40]

Figure 1: Non-resident enrollment in ABA-approved law school JD programs, comparing all years to only 1Ls (2011-2020)



39 According to the Institute for International Education ("IIE"), this follows the overall enrollment trend of international students at the undergraduate level in the US, too, which peaked in the 2017-2018 academic year. Graduate enrollment peaked in 2016/2017, "Academic Level" (2021), online: Open Doors <www.opendoorsdata.org/data/international-students/academic-level/>.

40 This contrasts with overall trends in international enrollment in higher education during this period. According to the Institute for International Education IIE, new international student enrollment at the undergraduate level declined beginning in the 2016/2017 academic year and has continued declining since; graduate enrollment also dipped at the same time but has since stabilized, "New International Student Enrollment" (2020), online: Open Doors <www.opendoorsdata.org/data/international-students/new-international-students-enrollment/>.

The impact of Trump's rhetoric fell especially hard on Chinese students,[41] who also accounted for the largest group of LLM students and the second largest group of JDs.[42]

We have written elsewhere about the increasing importance of international students in the overall diversity of the law student population, which is particularly significant for highly-ranked law schools.[43] Indeed, as Figure 2 highlights, international students (identified as "non-resident" based on the source of data from the Section of Legal Education, which takes visa status as definitive) accounted for a larger proportion of the aggregate student body at a group of 20 highly-ranked law schools than did Black students beginning in the fall of 2014. This dynamic shifted, however, in the fall of 2020, when Black students accounted for a slightly larger proportion of the enrollment at these elite law schools compared to international students. We can only conjecture the reason for this change in enrollment pattern, but difficulty with travel and obtaining visas because of the pandemic, on top of the overall negative impact of the Trump administration on international higher education enrollment, may explain this shift.

---

41 Karin Fischer, "Is This the End of the Romance Between Chinese Students and American Colleges?" (11 March 2021) *The Chronical of Higher Education.* See also Swethaa S Ballakrishnen, Carole Silver, Anthony Park & Steven Boutcher, "Asian and Asian American Post-Pandemic Professional Identities" (working paper on file with authors).

42 Silver & Ballakrishnen, "Sticky Floors", *supra* note 4 at 54, Figure 4. Information on home countries was obtained from visa data shared by Neil Ruiz, then of the Brookings Institution. See Ballakrishnen & Silver, "New Minority", *supra* note 8 at 658.

43 See Ballakrishnen and Silver, "New Minority", *ibid*.

Figure 2: Enrollment at 20 Highly-Ranked Law Schools, comparing proportion of Asian, Black, Latinx and Non-Resident ("NR") students (aggregate years in school) (2011-2020)

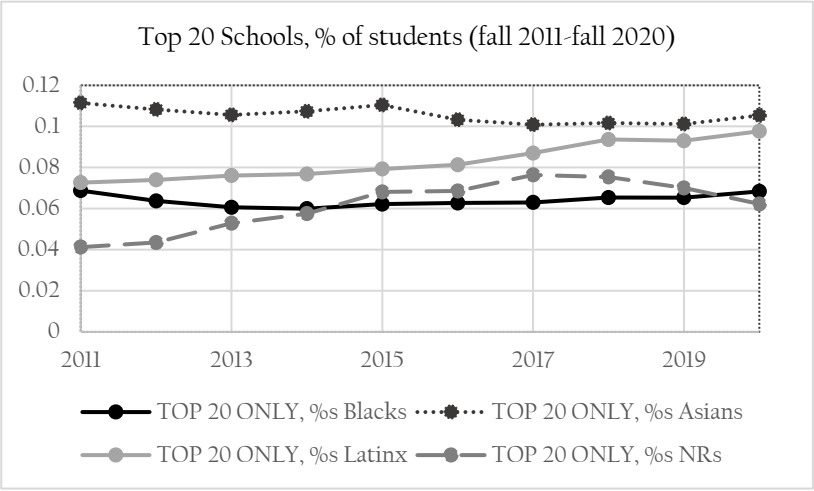
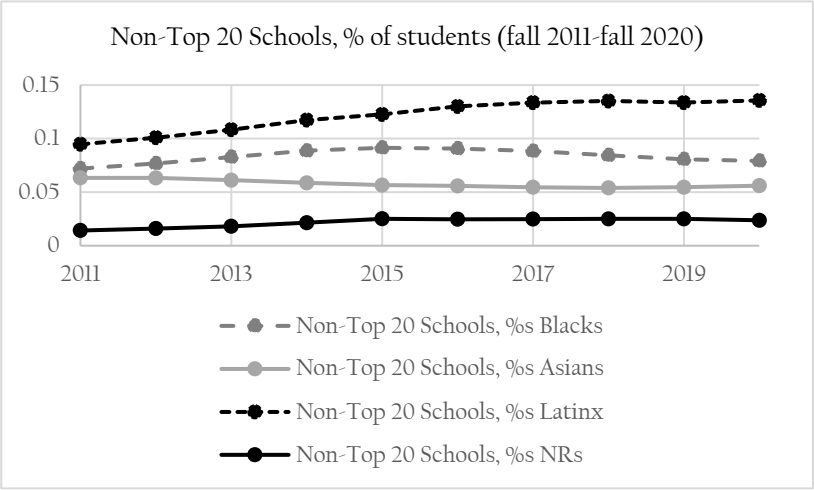


Figure 3, below, shows data comparable to Figure 2 but focuses on the law schools outside of the Top-20 ranking category. International students comprise a smaller proportion of this group's enrollment, and they do not equal or exceed, in the aggregate, other minority groups. But their presence has been remarkably stable as a proportion of enrollment, comprising between 2.52% and 2.47% of the student body from the fall of 2015 through the fall of 2019, before dropping a bit to 2.37% in the fall of 2020.

Figure 3: Enrollment at Schools Outside the Top-20, comparing proportion of Asian, Black, Latinx and Non-Resident ("NR") students (aggregate years in school) (2011-2020)



Aggregating the data masks important trends. In the fall of 2020, international students accounted for a larger proportion of the student population than Black, Latinx or Asian students at nearly 20% (19.29%) of all of the law schools, spanning various ranking tiers and characteristics. This is the case at eight of the 12 law schools that are part of public Big-Ten universities, seven schools in the Top-20 group and 24 additional law schools.[44] Table 1 offers some insight into the mix of schools where international students contributed in this way to the school's diversity during the 2020-2021 academic year. There are various reasons that we highlight the schools below, including the relationship of the law school to its university and the reputation of the latter as being an important host of international students (Minnesota, Indiana and Wisconsin, among others), aggressive courting of the international student population, and the importance of location and proximity to the border or to an international city (for example, North Dakota and Brooklyn). That is, the

44 Where the number of non-residents was exactly equal to — but did not exceed — the number of Black, Latinx or Asian students, we did not count the school for purposes of the analysis described in the text.

reasons why these schools are listed below reflect their own histories and strengths.

Table 1: Enrollment details, comparing numbers of non-resident ("NR"), Black, Asian and Latinx students, for 15 sample law schools (2020)

USN rank		# NR	Black	Asian	Latinx
4	Columbia	166	111	181	85
3	Harvard	175	139	190	180
13	Cornell	99	37	65	84
16	Washington University in St. Louis	72	60	49	29
27	George Washington	116	120	216	46
29	Emory	95	54	75	68
29	Wisconsin	28	28	21	70
29	Iowa	28	19	16	45
41	George Mason	12	8	27	35
43	Indiana (Maurer)	39	26	22	39
46	U. Arizona	44	9	10	48
72	Case Western	23	33	25	15
81	Brooklyn	71	45	103	121
126	Santa Clara	27	17	148	166
147 - 193	University of North Dakota	34	3	4	11

These enrollment figures highlight that even during the height of the lockdown during the pandemic, international students were a steadfast presence in US law schools. Some may have been residing in the US prior to the pandemic and opted to stay or simply decided not to leave (even assuming this

was an option).[45] Others could have enrolled while outside of the US given the reliance on online education during this period. Overall, they reflect the important role of international students, which is a trend going well beyond law schools. In fact, prior to the pandemic, one business school obtained insurance: "to protect against the loss of tuition revenue from any significant drop in Chinese student enrollment".[46]

We highlight these data because they are central to the ways in which the changing demographics of these students might have reflected not just on particular students in specific kinds of programs, but rather, more generally on students that are perceived as international and in ancillary programs because of their reception within these environments. All of the factors we highlight in this Part II resulted in these students moving across categories not only for their own mobility but also in ways that were hard to distinguish from the perspective of those receiving them. As a result, despite some level of vagueness in the numbers of students across these programs, the general demographics of these students complicated the kinds of seamless similarities in how they were received. In other work[47] we suggest that because of the constant movement and immigration that predicates this mobility, there is a certain "interchangeability bias"[48] that

---

45 Elizabeth Redden, "A Bleak Picture for International Enrollment" (26 May 2020) *Inside Higher Ed* (describing that international students who were in the US for high school might have remained here to begin college).

46 Marc Ethier, "Illinois Insures Itself Against Chinese Student Drop-Off, Poets and Quants" (29 November 2018) *Poets and Quants*.

47 Ballakrishnen et al, *supra* note 41.

48 Interchangeability — *i.e.* the experience of Asians being mistaken for another Asian in their organization or in a similar position — is not only an extraordinarily common experience in US culture, it is both dignity-stripping and capable of having longer term implications on professional plateaus for these actors. According to Jeff Yang, "an Asian American culture critic[] . . . '[Mix-ups] stem[] from this different place where people tend to collectivize us in their imagination", Brian X Chen, "The Cost of Being an 'Interchangeable Asian" (6 June 2021) *New York Times,* according to Yang:

> [i]f one requirement to ascend in your career is to be distinguishable to people in power, it may come as no surprise, then, that Asian Americans – who make up 7 percent of the U.S. population and are the fastest-growing racial group

necessarily mires the fates of all students perceived as Asian, regardless of their histories. Moreover, international identity itself is socially constructed in addition to legal status, as we have explored elsewhere, and this can lead both to confusion in the reception of students by others, as well as affecting the self-perception of students who hold US citizenship while also having international backgrounds, whether reflecting where they attended primary or secondary school or where their parents resided, among other things.[49] No matter what their background was, then, and no matter how they hoped the program they were in would reshape their identity, for the most part, this visibility of being international was sticky. This encompasses both students perceiving that their international background somehow constrains them (whether in terms of curricular or career choices or their greater comfort with international friends) and that those they interact with see them as different (whether based on names, race or otherwise).[50] It is this stickiness that makes these trends important not just for those who are in fact international students, but also the implicated others who might be seen as being a part of this category.

> – are the least likely group to be promoted in the country, according to multiple studies. Even in Silicon Valley, where people of Asian descent make up roughly 50 percent of the tech workforce, a rare few rise to the executive level; most peak at middle management. The problem is especially acute for women.

49 Ballakrishnen & Silver, "New Minority", *supra* note 8. Our interviews of students who identify as international included US citizens and green card holders. Students who were citizens described a variety of reasons for their status and relationship to the US during childhood and adolescence, might have been born in the US but not spent substantial time here subsequently. See Ballakrishnen & Silver, "New Minority", *supra* note 8 at 661–62 for examples from our interviews, and Silver & Ballakrishnen, "Sticky Floors", *supra* note 4 for a general discussion of the important factors to an international student's experience in law school.

50 Ballakrishnen & Silver, "Culture of Language", *supra* note 7.

III. Pandemic Reveals and Reinforcements: How Everything and Nothing Changed in March 2020

The onslaught of the pandemic had several direct and logistical implications for all students, and these were heightened for students whose lives were already riddled with precarity. International students complicated this balance because they were, for the most part, both less and more precarious than other minorities in this context.[51] While this is not a subset of students who have been defined by their economic disadvantage,[52] their position gets more complicated during a time like the pandemic when distance and presence, and prejudice of otherness[53] more generally, gets amplified. These students seemed to be last on

---

51 Among the factors that reflected resources available to students were access to a reliable internet connection, a quiet place for attending class online and for studying, privacy during exams and safety. See Heather Long & Danielle Douglas-Gabriel, "The latest Crisis: Low-Income Students are Dropping Out of College this Fall in Alarming Numbers" (16 September 2020) *Washington Post* (describing students without WiFi at home struggling to attend online classes and that "[s]tudents from families with incomes under $75,000 are nearly twice as likely to say they 'canceled all plans' to take classes this fall as students from families with incomes over $100,000, according to a U.S. Census Bureau survey in late August"); and Emma Dorn, Bryan Hancock, Jimmy Sarakatsannis & Ellen Viruleg, "COVID-19 and Learning Loss – Disparities Grow and Students Need Help" (8 December 2020), McKinsey & Company (blog), online: <www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-learning-loss-disparities-grow-and-students-need-help> (describing particular impact of COVID-19 on students of color at pre-college levels due to the lack of resources needed to make online learning work).

52 Indeed, international students often are courted because of their ability to pay full tuition. See Silver, "Agents of Globalization in Law", *supra* note 6; and Branwen Jeffreys, "UK Universities See Boom in Chinese Students", *BBC News* ("[t]he 120,000 Chinese students are an important source of income for universities because international students pay fees two to three times higher than UK students"). On the impact of international enrollment generally in higher education, see Mueller, *supra* note 37.

53 The blame for the pandemic addressed to China by Trump and his administration was widely felt, including by students who were seen as Chinese, even if in fact they were not from China, Helier Cheung, Zhaoyin Feng &

the list of who was in mind as universities quickly adapted to the pandemic.[54] Moreover, with a full third of international students hailing from China,[55] their exclusion was seen as warranted by legitimate logics of immigrant threat, national security and fear, all of which were roiling the country. The shift to holding classes online occurred shortly before the Trump administration attempted to use visa regulations to put international students in the untenable situation of choosing between their health and maintaining their visa in good

Boer Deng, "Coronavirus: What Attacks on Asians Reveal About American Identity" (27 May 2020) *BBC News*. Separately, one of our Korean students reported that he had been asked by his family to limit his time outside of his apartment as much as possible in order to avoid any acts of violence.

54 There was a rush to send students home when the pandemic struck, but for certain international students it was not possible to get home. Alex Schroeder, "Campus Chaos: International Students Navigate COVID-19 Closures" (18 March 2020) *Marketplace*:

> [f]ive days. That's all the time Woojin Lim, a sophomore at Harvard University, and his thousands of international classmates had to pack up, store their belongings and get on planes home after the school announced Tuesday, March 10 that it would be requiring students to leave campus over fears of the COVID-19 outbreak. Since then, hundreds of schools have followed suit [. . .].

See also Jonah Fox, "How Coronavirus Threw America's International Students Into Chaos" (25 August 2020) *The College Post* (describing the financial costs of the pandemic for international students, including the price to fly home, travel disruptions, inability to work in the US to defray expenses, ineligibility for aid from the CARES Act to get home).

55 Institute for International Education, "2020 Fast Facts" (2020), online (pdf): OpenDoors <opendoorsdata.org/wp-content/uploads/2020/05/Open-Doors-2020-Fast-Facts.pdf>. The "Top Places of Origin of International Students" shows China as accounting for 34.6% of all international students.

standing,[56] and this assumed that in-person classes were even available.[57] As the immigration policy changes were announced, law schools — like other higher education institutions — attempted to calm and reassure international students that the schools had their backs. Messages like those from Harvard's dean were common, telling students: "we will do all we can to help enable all of our students, from across the globe, to safely continue their law school education, earn their degrees and become great lawyers . . . ". Mary Lu Bilek, then dean of the City University of New York's law school, explained that the school was: "committed to working with each [international student] to determine how to best accommodate their health and safety and educational needs consistent with the ICE rules".[58] But how much of this signaling was actually on par with policy left more to be desired.[59]

On the one hand, law schools were simply responding to the larger regulatory regimes in which they were embedded. For example, in 2020, the ABA Council of the Section of Legal Education made a new exception for legal education to be virtual and still eligible for law school credit.[60] This was a

---

56 Max Cohen, "Trump Administration Bars International College Students If Their School's Classes are All Online" (6 July 2020) *Politico* ("[i]nternational students who attend college in the United States on visas will be barred from staying in the country if their school's classes are entirely online during the fall semester, the Trump administration said Monday"); Miriam Jordan & Anemona Hartocollis, "U.S. Rescinds Plan to Strip Visas From International Students in Online Classes" (16 July 2020) *New York Times*.

57 Karen Sloan, "Law School's Scramble to Retain Foreign Students Amid ICE Online Education Ban" (7 June 2020) *Law.com*.

58 *Ibid*, quoting both deans (among others).

59 Based on a review of the websites of the top-50 ranked law schools in May and June of 2020, fewer than 10 schools specifically mentioned LLM students in early announcements relating to the fall of 2020. Even by the summer of 2020, many law schools omitted any mention of LLM students in their public communications about the 2020-2021 academic year.

60 The Council of the ABA Section of Legal Education obtained authority to grant variances from the distance education credit limitation of one-third of all credits when the pandemic caused law schools to close their physical doors, "Council Moves to Expand Flexibility for Fall Academic Year" (2020), online:

required response to a raging public health crisis that would have otherwise derailed the course of these professional education trajectories, but it had mixed implications for international students. On the other hand, international students suddenly had more accessible options to US educational opportunities, but the shift to online classes also did not take their interests as central.[61] For example, it changed one of the main draws for many of these students, particularly those who had not spent significant time in the US prior to law school — the chance to be in the US and socialize within the law school environment before trying to make their way into an increasingly insular profession.[62] At the same time, bar regulators did not necessarily adapt in sync

---

American Bar Association <www.americanbar.org/news/abanews/aba-news-archives/2020/06/council-moves-to-expand-flexibility/>; using this authority, they granted 199 variances during 2020, "Memorandum from the Office of the Managing Director of Accreditation and Legal Education" (2020), online (pdf): American Bar Association <www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/20-21-distance-education-variances.pdf>. It is considering how to address distance education going forward, "Council of the ABA Section of Legal Education and Admissions to the Bar, Brief Overview of the Roundtable Questions and Discussions" (2021), online (pdf): American Bar Association <www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/21-jan-roundtable-report.pdf>.

61 Because the change affected law schools, rather than particular degree programs, the issue of international students appears not to have been raised at the Council.

62 The desire to live in the US as well as to experience a US college campus were among the most common reasons cited for enrolling in a US LLM program according to Silver's study of international LLM graduates, Silver, "Coping with the Consequences", *supra* note 6; and Silver, "Getting Real", *supra* note 5. Apart from law, the same phenomenon is also widely understood as important, see *e.g.* Nadine Burquel & Anja Busch, "Lessons for International Higher Education Post COVID-19" (25 April 2020) *University World News*:

> [o]nline education has many benefits. However, learners also search for networking on campus, exchanges, shaping of new ideas, project work (including with private sector companies and in the community) and working in groups. This can be done online but nothing will replace the

with these changes, so the eligibility of international LLMs to sit for a bar exam was at risk.[63]

> social and physical interactions that we all need as social beings. In business schools, MBA students pay significant tuition fees for the professional networks they develop and connections with professionals.

63 The District of Columbia's Rule 46, which governs bar eligibility generally, was modified by an Order of the Court adopted on an emergency basis to provide that applicants who did not graduate from an ABA-approved law school (generally including international LLM students) could qualify for bar eligibility if they completed "at least 12 of the 26 credit hours . . . through in-person classroom courses in the ABA-approved law school", meaning that students would have to attend classes in-person during the height of the pandemic:

> [P]ersons who seek admission to the DC Bar under D.C. App. Rule 46(c)(4) [which applies to graduates of non-ABA-approved law schools, including non-U.S. law schools] . . . could complete up to 14 of the required 26 credit hours of study through distance learning classes that satisfy the ABA definition of 'distance education courses'.

See Order of the District of Columbia Court of Appeals (2.10.2021), <www.dccourts.gov/sites/default/files/2021-02/Order%20Adopting%20Emergency%20Amendments%20to%20D.C.%20App.%20R.%2046--FINAL_0.pdf>. However, this meant that these students would be required to complete the rest of their credits in-person during a period when most law schools were not offering in-person classes and travel was restricted. The DC Court subsequently modified the Rule to remove this language, District of Columbia Court of Appeals (No. M-273-21)(5.13.2021), announcing changes to the rules, including:

> [s]econd, Rule 46 will now explicitly address whether remote instruction is permissible for applicants who did not graduate from an ABA-approved law school and who seek admission to the D.C. Bar based in part on having taken 26 hours of qualifying classes from an ABA-approved law school. As amended, the Rule will permit such remote instruction as long as the instruction meets the definition of "distance education course" set out in the American Bar Association Standards and Rules of Procedure for Approval of Law Schools

Notice to adopt proposed amendments to D.C. App. R. 46, No. M-273-21 (D.C. Ct. App. February 10, 2021), <www.dccourts.gov/sites/default/files/2021-05/M-273-21%20Promulgation%20Order%20for%20Rule%2046%205-2021%20Amendments%205.13.21_0.pdf>.

It is not possible to gauge with certainty the enrollment consequences for international law students during the height of the pandemic because, as we noted earlier, the largest group of international students pursue the LLM degree, and the regulatory demurral to LLM programs creates a dearth of information.[64] But we can look to enrollment patterns in higher education generally for insight. According to the Institute for International Education, there was an overall 43% decline in new enrollment of international students nationwide, largely related to the disruption to travel caused by regulatory restrictions and embassy closures.[65] That figure rises to 72% if only in-person enrollment of new international students is the focus.[66] There is no comparable data for international law student enrollment, but enrollment of new international JD students suffered more than overall enrollment by more than 2-to-1: enrollment of new international JDs fell by approximately 14% while overall international JD enrollment fell by approximately 6%.[67] These figures may reflect the

64 We recently estimated that the number of schools hosting one or more post-JD programs for international law graduates doubled in the decade between 2006 and 2016, resulting in 80 law schools with such programs. Since then, law schools have invested in master's programs for non-law graduates, in which international graduates also often enroll. The lack of enrollment data in light of these trends is particularly frustrating because of the importance of tuition generated by these students for subsidizing other, JD-centric activities. But the vacuum of reported data does not mask growth, both in the number of schools offering LLM programs and in the size of the programs offered.

65 Julie Baer & Mirka Martel, "IIE Fall 2020 International Student Enrollment Snapshot" (2020), online: IIE <www.iie.org/Research-and-Insights/Open-Doors/Fall-International-Enrollments-Snapshot-Reports#:~:text=November%202020%3A%20Fall%202020%20International%20Student%20Enrollment%20Snapshot%20(Joint%20Survey>. See also Karin Fischer, "Covid-19 Caused International Enrollments to Plummet This Fall. They Were Already Dropping" (16 November 2020) *Chronicle of Higher Education*.

66 Baer & Martel, *ibid*.

67 These figures are compiled from ABA Standard 509 disclosures reported by the law schools, "Standard 509 Information Reports" (2022), online: American Bar Association <www.abarequireddisclosures.org/Disclosure509.aspx>.

variations in paths into legal education that international students pursue, where the decision to pursue a JD may follow years of being in the US for college, high school and even primary school.[68] While the JD numbers tell only a relatively small part of the story of international law student enrollment, aggregate losses may have been deflected by flexibility offered to LLMs, including with regard to the timing of beginning and completing their degrees.[69] Moreover, the structure of many LLM programs that capitalize on empty seats in classes that include JD students, too, enabled schools to avoid significant disruption in terms of curricular planning and use of faculty resources. But for students, this experience marked a new level of alienation, even if some were advantaged by the structures of online learning.

The pressures of this environment on students were clear from how ready they were to be done with the 'new normal'. An account from five University of Connecticut students is revealing:

> After a semester of online learning across a six-hour time difference, [one student]'s resolve to come to Hartford only intensified. The online format was difficult, and the time difference made it challenging to engage with lectures,

---

68 Silver & Ballakrishnen, "Sticky Floors", *supra* note 4.

69 A number of law schools, including Berkeley and Northwestern, offered international LLMs the option of starting their program in the spring rather than the fall, for example. See *e.g.* Dean's Announcements Regarding 2020-2021 LLM Programs, UC Berkeley:

> > In response to the COVID-19 pandemic, Berkeley Law is providing our entering academic year students with 4 program options to better meet their educational needs. Students may choose to start this fall and finish their degree in spring 2021, as is the typical academic year schedule. Additionally, for this year, we are giving students the options to start their program in spring 2021 and finish in summer 2021 by enrolling in our LLM professional track courses; or start in spring 2021 and finish in fall 2021. Students may also choose to defer to fall 2021.
>
> (announcement on file with authors). See also Karin Fischer, "After Deep Drops, International Applications Rebound, Survey Finds" (10 June 2021) *The Chronical of Higher Education* (describing colleges as "hedging their bets" by allowing international students to defer enrollment from fall 2021 to spring 2022 and also by offering online courses; "[o]nly 25 percent said they would offer only in-person instruction").

> she said. Once settled into their Hartford lifestyle, the students said they found a much easier school routine. Living within the time zone that aligned with the class hours allowed them to keep regular schedules and better engage with the material.[70]

The article characterized the students' decision to come to Hartford as "bold", but it still does not tell us about the attrition, or the very many who chose not to do this, or for whom this choice was an impossibility.

A. Nothing New Here: Pre-existing Scripts of Student Inclusion and Isolation

Faculty responses to the presence of international students in classrooms have always isolated expectations and inclusions of international students, but COVID-19 offered new ways in which to do this exclusion. Some of this was explicit, such as the tweet by one law professor questioning whether he was exposed to COVID-19 from one of his Chinese students[71] and the blog post by

---

70 These students described their US-based experiences in much the same terms as LLMs have in the past:

> [i]n addition to attending virtual and on-campus classes, the students made the most of their time in the United States by taking road trips and exploring the area. [Three of the five students in the U.S. for the spring semester of their LLM] traveled extensively together, including trips to Boston, New York City and Maine. They said these trips, and their friendship, have been the highlight of their time in Connecticut.

See Camille Chill, "Taking the Distance Out of Distance Learning" (26 May 2021) *UConn Today*.

71 Saumya Gupta, "Professor's Tweets Regarding COVID-19 Elicit Student Concerns of Xenophobic Tone" (27 April 2020) *Daily Bruin*; see also Joe Patrice, "Law School Professor Muses That His Chinese Students Spread Coronavirus" (13 April 2020) *Above The Law*; and Cmaadmin (Edu), "UCLA Law Professor Wonders on Twitter if One of His Chinese Students Brought Back Coronavirus" (16 April 2020) *Diverse Issues in Higher Education.* See UCLA Chapter, Asian/Pacific Islander Law Students Association, "Letter From The Asian/Pacific Islander Law Students Association Regarding Stephen Bainbridge", online: (2020) 68:1 UCLA Law Review Discourse (response to Bainbridge tweets and responses, sent to administration of UCLA Law School;

a professor at a different law school asserting that it was ridiculous to think that COVID-19 was not leaked from a Wuhan lab.[72] While these examples are on the extreme, they reflect the longtime attitude that international students as a group are not seen as comprising of diversity in the same ways as other students in the context of higher education, including law schools.

While the pandemic certainly created new problematic strains for inclusion, it also shed light on a range of old microaggressions that were always rife in classroom interactions. Professors have always found distinguishing between international and domestic students to be justified — an othering that was necessary to maintain the institutional sanctity of their spaces. One example goes directly to the issue of how the COVID-19 experience might shift policies and practices because it addresses the question of recording a class. Prior to the pandemic, recording class was not the norm in the law schools we have studied, and this was a burden for at least one international JD we interviewed. When he asked his professor if he could record the class, he was refused; the professor answered: "if you're a JD student, and if you're here, I don't think you will have any problem".[73] But more individual teaching approaches also were implicated apart from policies that could be school-wide, like recording. For example, students in our earlier work relayed how another professor who was using American pop culture references stopped to identify a student as the only person in the room who would not understand the particular reference — in this instance to the TV show, The Simpsons.[74] Another example involved a professor

---

note that earlier in the semester, the same faculty member tweeted about asking "China to ban eating bats . . . and other wild animals that serve as viral hosts").

72 University of San Diego Law school professor wrote on his personal blog "The Right Coast": "[i]f you believe that the coronavirus did not escape from the lab in Wuhan, you have to at least consider that you are an idiot who is swallowing whole a lot of Chinese **** swaddle". See Kristina Davis, "USD Law Professor Under Investigation Over Chinese Reference in Coronavirus Blog Post" (19 March 2021) *The San Diego Union Tribune*.

73 Ballakrishnen & Silver, "Culture of Language", *supra* note 7 at 207, quoting Minsoo Lee, Interviews*, supra* note 24, I1518.

74 *Ibid* at 208.

who was reluctant to pronounce a student's name, so referred to her by her last name despite using first names for all of the other students in the class. Many students reported that their professors did not call on any international students at all, despite the norm in law school classrooms.[75] Faculty could be brutal in complaining about international students being passive in class; one faculty member removed their humanity entirely by referring to international students as "rocks and stones". While these examples differ in the way that the faculty distinguish between international and American students, each instance worked as a separation of international students from the ideal or model of the American student. This distancing occurred even where the professor gave the same response to the international student about recording as would be given to an American — it is the difference in the starting point, however, that makes this seemingly equal treatment unequal. As one international JD put it: "there's some people, and dare I say some professors, . . . who are just uncomfortable with different cultures, bad English".[76]

Students, in turn, have internalized many of these differences. Although some international students across programs expected to be treated differently because of their status, international students in the JD program felt the need to reinforce their identity as 'mainstream', *i.e.* JD students rather than international

---

75 For example, Susan Yang, an international JD, explained that one of her professors did not call on Asian students: "[b]ut the professor has a reputation of not calling on Asian students [*laugh*]. Which is what my academic advisor student mentor told me. She was like, "[o]h, yeah, him. He doesn't really cold-call on Asian students", Interviews, *supra* note 24, I1947A. But even when students are called on, the experience does not always achieve parity, as Violet Min, another international JD student, explained: although one of her professors did call on international students, he spent less time with them, giving them short shrift in terms of an opportunity to "think about the questions or to find . . . the question", compared to the time spent with native English speakers, I1511.

76 Ballakrishnen & Silver, "New Minority", *supra* note 8 at 663–64, quoting John Oh, Interviews, *supra* note 24, I1526.

students, to help buffer some of this treatment.[77] This sort of distancing, however, while strategic, did not always protect the international JD from being seen as non-ideal. In part, the challenge for certain international JDs reflects the particular emphasis on language that is part of the US law school experience and education, or what one international JD, Timothy Cho, described as:

> the American JD students [being] really very, very bright students who are very well spoken even among, like, the Americans, right? They talk very fast, they're very eloquent, they're very quick and smart, so, it could be pretty difficult for someone who don't speak English very well to socialize with them, I think.[78]

This difficulty in socializing was reflected in friendship groups of international JDs tending to be focused on other international JD students from their home country or region; for certain students, social relationships also

---

77 International students in the JD program expect to have a different experience than their LLM classmates, and in fact, this motivates their choice of the JD program. They recognize the marginality of the LLM, and in choosing the JD they believe they are opting into a mainstream experience. See Ballakrishnen & Silver, "New Minority", *supra* note 8. They see the JD as providing significant advantages for career purposes, particularly for those wanting to stay in the US, for providing a more thorough and grounded education and opportunity to soak up US culture and even language. For example, as we show in other work (Ballakrishnen & Silver, "Culture of Language", *supra* note 7 at 201), certain international JDs took pains to distance themselves from LLMs, such as Adam Marquez, from Mexico:

> for some reason I've seen a lot of negative comments, I hear them all the time from JDs about LLMs. And I think a lot of it has to do with the language barrier and sometimes LLMs don't know how to express themselves very good in class and so it slows down the class or . . . And some people criticize the LLM, like [they] think that many LLMs don't take studying as seriously, like they're more here or some of them are just here for a year and they go back to the law firm and they're more like having a good time and they're not going to be as prepared for class. And some people get upset about that, things like that

Interviews, *supra* note 24, 11525 at 17.

78 Ballakrishnen & Silver, "Culture of Language", *supra* note 7 at 204, quoting Timothy Cho, Interviews, *supra* note 24, I1521.

crossed the degree-divide to include LLMs from the same countries, too.[79] While online environments made these groups and networks harder to forge, they did make the uncertainties in everyday interaction less stark and the difference between students — especially when they were only boxes on a virtual screen — less palpable.[80] Students, for example, expressed the opportunities that online learning offered in aberration to the traditional classroom dynamic as an effective entry point for participation. This was not just because of structural accommodations like making recordings available. As one student offered, the 'blue hand' was simply easier to raise than the real hand.[81] Moreover, as faculty translated from in-person to online teaching, some conversations that might have occurred during class were moved to written forums, whether discussion boards or chats, which may have made contributing more comfortable for different students, including international students. Still, these new ways of

---

79 Anthony Paik, Swethaa Ballakrishnen, Carole Silver, Steven Boutcher & Tanya Rouleau Whitworth, "Diverse Disconnectedness: Homophily, Social Capital Inequality and Student Experiences in Law School" (under review 2021).

80 Data from the Law School Survey on Student Engagement ("LSSSE") on students' self-reports of their participation in class shows marked differences between groups reflecting race and gender: overall, Asian students were least likely to participate frequently in class, and Black students were most likely to do so. Women consistently report less frequent participation than men across race, Jakki Petzold, "LSSSE Annual Results 2019: The Cost of Women's Success (Part 3)" (4 March 2020), *LSSSE* (blog), online: < www.lssse.indiana.edu/blog/lssse-annual-results-2019-the-cost-of-womens-success-part-3/>. Further, additional LSSSE data from 2016 highlighted the intersection of Asian and international identities: "[i]n LSSSE's 2016 survey, 50% of students of Chinese descent were international students, while only 1% of Filipino students were, and proportions of other AAPI subgroups identifying as international students varied widely: 24% Korean; 14% Asian Indian; 8% Vietnamese; and 7% Japanese", Vinay Harpalani, "Guest Post: Understanding the Nuances: Diversity Among Asian American Pacific Islanders" (21 May 2021), *LSSSE* (blog), online: <www.lssse.indiana.edu/blog/guest-post-understanding-the-nuances/>.

81 Interviews, *supra* note 24, I21101.

counting participation did not make up for the ways in which these students continued to be structurally isolated by the administration.

The challenges that international students face in the classroom often go beyond technical reasons like language to more substantive structural issues like the cultural context, norms and expectations of law school. The "learned pattern of how to be present in an American [law school] classroom"[82] is foreign to many international JD students, whose experiences prior to law school — whether or not in the US — accept a variety of classroom behavior. In contrast, law school is less accepting and rewards a particular assertiveness that functions to exclude certain students, including many who identify as international. The hesitancy that international students experience in volunteering to participate in class can reflect their confidence in working in English, as well. As one student explained:

> frankly speaking, I'm ... I'm always afraid to make mistakes in front of American students who are in class. Then I'll get really embarrassed. So I try not to speak when I know that it's ... when I'm not too confident with grammar. I only speak in class when I'm confident enough that I won't make any grammar mistakes. So even though my English ... even though I can communicate and I'm capable of conveying my thoughts in ... in English, I'm always self-conscious about the fact that my English ... isn't perfect.[83]

Getting a word in when one is already second-guessing one's position in class might seem hard enough, but it is unclear if these hesitations were aided by the virtual law school environment. Schools and classrooms make clear what is expected out of a model or ideal student in these spaces but being transparent about expectations might not be enough if the actual expectation is based on a biased version of participation. For instance, a professor at an elite law school recently commented that he assumed students who did not participate in his class had nothing to add to the conversation happening in it. This inference likely is inapposite for American students, but it is doubly so for international students. Good teachers often suggest that they 'know' when a student is paying

---

82 Ballakrishnen & Silver, "Culture of Language", *supra* note 7 at 205.

83 *Ibid* at 206 quoting Minsoo Lee, Interviews, *supra* note 24, I1518.

attention in class; but it is also possible that what is seen as 'good participation' is based on imaginations of effect rather than actual knowledge about what it 'looks like' to be paying attention in class. Further, in an online learning environment, where everyone is a pixelated window, assumptions about where one is directing attention or whether they are 'good participants' gets even more complicated. This new environment has allowed for reconsideration of our pedagogic assumptions of affect. As a result, however well-intentioned, professors' perspectives on participation might hurt more than help inclusion.

But it is not simply the mindset, confidence and approach of the international students that frames their experiences and encounters. The responses of American students and faculty also play an important role. American classmates may respond with surprise to encountering a student whose first language is not English in a US law classroom, which can translate into reactions that feel very hard to international students. One international JD student, for example, described an interaction when a classmate gave her a "dirty look" for not being able to answer her question, when the student: "felt so awkward to ask questions, because I feel everybody else around me knows what is going on, except myself".[84] Another student described an in-class interaction when she was paired with a classmate, but the classmate did not "have eye contact with me. I wonder why. And then I tend to not like those classes with class discussions". [85] These and similar reports highlight that classroom interactions can be hostile for international JDs. In contrast, the pandemic might have offered new ways of being part of these conversations, such as the ease of entering a conversation online, mentioned earlier.[86] Alongside these insights into new possibilities are also age-old precarities that they highlight for our attention.

The pandemic, for example, made making social networks that were co-curricular or affinity-based much more difficult to navigate. But even when they

---

84 Ballakrishnen & Silver, "Culture of Language", *supra* note 7 at 210.

85 *Ibid.*

86 See text, *supra* note 81.

were available logistically, pre-pandemic, these have been fraught spaces of interaction and inclusion. Outside of class, for example, interactions between international and American students continued to reflect expectations of the ideal American student. One example relates to student clubs, and particularly the Asian American student organization, one of several affinity groups common in US law schools. For international students from the Asia Pacific region, the Asian American student organization was perceived as especially *American*. One student described the students in his law school's Asian affinity group as: "a little too American, so I just don't click with them in a way".[87] Qiang Bai, an international LLM, made a similar comment about the group at his law school:

> [T]hey are Asian students, but they are Asian US students, and what we're looking for is Chinese international students. I think the US international thing makes the difference. There is not much identification, so to speak . . . with Asian Americans".[88]

Interactions outside of these more structured opportunities were likely to follow the pattern of relationships revolving around students from the same home country or region rather than crossing national status lines, as we have described in other work.[89] Once seen through the framework of the ideal student and law schools as spaces valorizing a very neuro-nondiverse identity of that student, these patterns become easier to identify and their valence much more categorically obvious.

A third way in which the pandemic influenced students was its impact on their careers. International JDs have the benefit of access to all of the career advising structures that law schools offer to any JD, but here, too, equal treatment belies inequality. The advising needs of international JDs differ because their futures may be overlaid with uncertainty related to visa restrictions

---

87 Ballakrishnen & Silver, "New Minority", *supra* note 8 at 664 quoting John Oh, Interviews, *supra* note 22, I1526.

88 *Ibid*, I1552.

89 Ballakrishnen & Silver, "New Minority", *supra* note 8 at 663–64.

and family obligations. Nevertheless, students describe their career advisors as relatively indifferent to their backgrounds, despite these being crucial for helping students explain their reasons for wanting to develop careers in the US.[90] Moreover, because they cannot hold federal clerkships or most other federal governmental positions,[91] this can affect the development of mentoring relationships within the law school, too, particularly with faculty who pride themselves on being able to facilitate clerkship placements, in addition to the obvious limitation of career options. Being without US citizenship works as a limitation on the kinds of professional capital that international students can

---

90 These students pursue law school with one eye on career opportunities in a way that is distinctive. It affects their curricular decisions, the markets they target for job searches, and the kinds of organizations they pursue. One student described her disappointment with her career advisor: "[l]ike career service, I got an advisor. She – I don't think she, like, she showed much interest in my background . . . when we talked about my Chinese background", Ballakrishnen & Silver, "Culture of Language", *supra* note 7 at 202 quoting Yu Wei, Interviews, *supra* note 24, I1517.

91 Most federal agencies and clerkships are available only to US citizens. See "Citizenship Requirements for Employment in the Judiciary" (2022), online: Online System for Clerkship Application and Review <www.oscar.uscourts.gov/citizenship_requirements>, describing conditions that include citizenship, refugee seeking permanent residency, permanent residency seeking citizenship and owing allegiance to the US, in certain circumstances, for federal clerkships; "Entry-Level (Honors Program) and Experienced Attorneys – Conditions of Employment", online: Department of Justice <www.justice.gov/legal-careers/entry-level-and-experienced-attorneys-conditions-employment>:

> Congress generally prohibits agencies from employing non-citizens within the United States, except for a few narrow exceptions as set forth in the annual Appropriations Act . Pursuant to DOJ component policies, only U.S. citizens are eligible for employment with the Executive Office for Immigration Review, U.S. Trustee's Offices, and the Federal Bureau of Investigation. Unless otherwise indicated in a particular job advertisement, qualifying non-U.S. citizens meeting immigration and appropriations law criteria may apply for excepted service employment with other DOJ organizations. However, please be advised that the appointment of non-U.S. citizens is extremely rare; such appointments would be possible only if necessary to accomplish the Department's mission and would be subject to strict security requirements. Applicants who hold dual citizenship in the U.S. and another country will be considered on a case-by-case basis.

pursue. And in the midst of the pandemic, when international travel was more complicated by health regulations and concerns, consular offices were only intermittently operational, and disparities in vaccine availability and effectiveness raise the risk that the practicalities of hiring an international student might overwhelm even those organizations that typically are willing. Overall, then, the perception of international students was not one of equal treatment and the pandemic allowed for new legitimate reasons to exclude these students.

IV. Where Can We Go from Here? Revisiting Inequalities with New Perspectives

The experiences since the pandemic began have given us a new window into persistent and age-old institutional issues that plague legal education. It has also reinforced all the ways in which law schools work on a model that is set up to respond to a particular 'ideal student' and how changes at the institutional level only ever happen when that model student requires it. This model of predicating and responding institutionally to an ideal type is problematic for many reasons. For one, the category of an ideal type both alienates those that do not feel like they fit the category and creates an impossible pressure for those in that category to perform appropriately. Further, responding to this idea of an ideal student during times of crisis allows institutions to feel like they have 'solved' a problem when in fact, what they have accomplished is a performative posturing aimed at an assumed audience. We say an assumed audience because ideal types, by definition, are not actual actors but, rather, idealized versions of who actors ought to be. Thus, trying to solve a problem for a 'typical' student often will miss the mark because students are not typical and because the ways in which they deviate are relatively unpredictable.

For international students, the pandemic brought about many obstacles that were insurmountable, and the 'fixes' that were targeted at the typical American student did not give them the same relief. For instance, when schools started to shut down and close in March 2020, foreign nationals in the country had to make the impossible decision to either stay put and be separated from their families or to leave — if they could — and manage to continue doing

coursework from afar on schedules that were entirely incompatible. Naturally, this is not to say there are perfect solutions to these crisis scenarios, and when in flux, it is rational for organizations to make decisions based on what might serve the interests of the majority population.[92] Still, thinking about the tendency to prioritize certain kinds of students within these contexts when there are hard decisions to be made reveals something about the inherent inequality built into the architecture of these schools. Together, these inequalities — from time differences for class schedules to visa paperwork and lack of proximity — made students feel even more isolated than they might have been under other circumstances, resulting in a reckoning about the value and meaning of this virtual credential they were receiving.[93] Altogether, the pandemic may have brought about new spaces of exchange within law schools around curriculum, pedagogy and student services that allowed for a visibly more inclusive system of participation, but it also produced systems that simultaneously reinforced feelings of exclusion for those students least capable of handling its precarity.

---

92 See *supra* note 56. Apart from the complexity, expense and safety considerations of international travel when students were told to go home, additional considerations related to their resources affected all students: was home safe? Did it have reliable internet for attending online classes? Did it allow them adequate opportunities to study? Were they caring for others in their home?

93 We also recognize that law schools may see this as an opportunity to capitalize differently — and more concretely — on the experience of the pandemic by creating new programs that cater specifically to students for whom the advantages of online learning are obvious. This could lead to efforts to develop new models of degree programs that would cater to international students — like international study abroad programs, on-site semesters, etc. — while simultaneously excluding them more and more. Although we do not mean to speak to the veracity of the range of these programs across contexts, and their varied uses by students and affiliates, it is the case that these credentials are not at par with any of these more traditional credentials that these schools might offer their more mainstream students, including the LLM. Rather, they offer a way to buffer one's local credentials to different degrees in their home country conditions, especially among those with knowledge asymmetries.

Still, it requires emphasizing that this is hardly a phenomenon *just* about international students. This article focuses specifically on a particular population of law students — those who identify as international — but it could just as easily aim at other students who are similarly on the periphery of the ideal student orb within these spaces. Rather, we hope this focus on international students allows for an opportunity to revisit approaches and structures in education to provide greater and more equal opportunities for all kinds of marginalized populations.

At the same time, the pandemic was not just about highlighting problems; the crisis also offered new ways to think about solutions. Specifically, the kinds of flexibility that the last year has brought about in legal pedagogy offers some insight into the capacities of institutions to change what they think of as 'non-negotiables' when it comes to responding to what they think of as their typical student. As a disabled student in one of our classes lamented, they had spent years petitioning for the kinds of accessible course content that were made available to students during the pandemic, but it took this kind of threat to 'typical' law students for schools to take note of it as a serious problem.

Our larger argument is that in dealing with times of crisis, solutions cannot be targeted at only one sliver of a given population. Any solution that attempts to respond too specifically to the problem could miss a larger opportunity to consider structural faults. In the case of post-pandemic law schools, beyond a 'fix' or sets of recommendations to make the experience of a particular set of students better, any true response must consider a larger commitment to institutional change. We suggest that there are two main ways to think about this call for an overhaul. The *first* is to consider how even 'good strategies' that are meant to help institutions could limit possibilities for certain students. The *second* is to acknowledge the ways in which any given organization privileges its ideal type of student and to work towards changing the norm of response towards the perspective of the most vulnerable student in any situation. We suggest that in approaching equity and change from this 'universal design' perspective we would be reworking what commitments to equity can look like across a wider range of parameters. Finally, we end by reinforcing that solutions

for diversity, no matter the minority population in question, cannot be a one-stop solution. Drawing from other work on these kinds of variations between experiences of minority students, we conclude by offering that intra-group variations in the category of students that are seen as diverse are all together so vast that any real fix is going to need more intimate policy calibrations.

A. Good Strategies: But for Whom?

One of the many trends in higher education (and business) has been the emphasis on design, and we see these comments from architectural designers Alex O'Briant and Tomas Rossant, who work with universities, as providing helpful framing for thinking about how the pandemic affected legal education:

> [b]eing apart has helped focus us all on the value of being together. And I think that's the incredible moment for campuses, which are so steeped in the concept of place, and in-person learning and interaction. There is an opportunity to really evaluate where we can get the most benefit culturally and educationally from being in person, because the thing we've learned in the last year is how to not be together . . .
>
> I think the real value of being in a learning culture physically in place is all the ad hoc critical dialogue, all the spontaneous interactions, what we call learning outside the classroom. And, ideally, we should still have that. Higher education should be focused on being in a place, but I think what we have ask, do I have to be in that place 24-7? Do I have to be in that place for the whole semester? Can I say, hey, this semester it's just freshmen, right, who are on campus? And this next semester, it's seniors. And what does that do to the efficacy of learning and teaching?[94]

By focusing on gains from interaction — whether spontaneous or by design — and "learning outside the classroom", O'Briant and Rossant highlight a central reason why students from around the world have seen it as worthwhile to travel for higher education to locations far from their homes, and why law

---

94 Rossant and O'Briant are with Ennead Architects, which works with universities and colleges on design needs, Doug Lederman, "The Future of the Physical Campus" (16 July 2021) *Inside Higher Ed.*

schools and other parts of society attempt to encourage diversity in their populations. Many of the gains that international students have described as worth that investment of time, money and energy relate to the everyday interactions, observations, soaking up culture, language and experience that is the norm for US students attending a US law school. The very core of the US law school experience reflects these elements of observation, participation and interaction, as students are put through what some have described as a form of educational hazing that is common to first-year law students around the country.[95] Moreover, some of the most important regulatory authorities representing major legal markets reinforce the centrality of physical presence by privileging it in bar eligibility requirements, as well.[96] Similarly, the ideal of a diverse workforce is that everyone gains from bringing together different perspectives; the interaction presumed in O'Briant and Rossant's statements holds the promise of better decisions and outcomes if emanating from a diverse and interactive group.[97]

---

95 See *e.g.* Elizabeth Mertz, *The Language of Law School: Leaning to "Think Like a Lawyer"* (Oxford: Oxford University Press, 2007).

96 For example, the New York State Board of Law Examiners states, in its explanation of section 520.6, that:

> [a]ll coursework to be completed in the United States. All coursework must be physically completed at the campus of the ABA-approved law school in the United States. ANY course taken at a law school's campus in a foreign country does NOT qualify toward the 24-credit requirement for the LL.M. degree. No credit is allowed for distance, correspondence or external study or for an on-line program or course" [emphasis in original],

"Foreign Legal Education" online: The New York State Board of Law Examiners <www.nybarexam.org/foreign/foreignlegaleducation.htm>.

97 See *e.g.* "Nasdaq to Advance Diversity through New Proposed Listing Requirements" (2020), online: Nasdaq <www.nasdaq.com/press-release/nasdaq-to-advance-diversity-through-new-proposed-listing-requirements-2020-12-01> (in announcing the proposal, the President of Nasdaq said "[c]orporate diversity, at all levels, opens up a clear path to innovation and growth. We are inspired by the support from our issuers and the financial community with this effort and look forward to working together with companies of all sizes to create stronger and more inclusive boards"); David Rock & Heidi Grant, "Why Diverse Teams Are Smarter" (4 November

But our studies of international law students and international legal education tells us that the benefits of in-person education that O'Briant and Rossant describe also are particularly challenging for certain students to attain and that in contrast, online pedagogy has offered certain advantages,[98] while in-person education, at least over the last many fraught months, held particular challenges for at least certain international students.[99] Still, as we experience increasingly more open and in-person classrooms and schools, the strategies of many schools are to return to the past and ditch the online experiment, with few exceptions, which, it likely will be argued, is a rational response to exogenous forces.[100] These decisions have important implications for ensuring there are enough in-person students regularly attending to have a 'normal' classroom and law school experience, and making exceptions may feel threatening to the way law school traditionally has been done. But they also implicate considerations of how to think about pedagogy and participation from the perspective of these precarious students.

While the expectation of interaction and participation is an important element of the social capital emanating from US legal education for

---

2016) Harvard Business Review; and Sundiatu Dixon-Fyle, Kevin Dolan, Vivian Hunt & Sara Prince, "Diversity Wins: How Inclusion Matters" (2020), online: McKinsey & Company <www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters>.

98 Some of these include the shift to using writing for participation instead of limiting participation to in-class speaking only, which may benefit at least some international students, among others. But at the same time, we acknowledge that in-person learning also can serve as at least a superficial equalizer in terms of providing students with the physical space quiet enough to study and take exams, and for relying on a stable internet.

99 This was particularly difficult for Asian students — including of course students who do not identify as international — because of the hate they encountered on US streets and in encounters with everyday Americans, or even within their law schools. See *supra* notes 53, 67-72.

100 See *supra* note 60 (discussion of bar regulations and ABA accreditation rules regarding limitations on online education. There is some indication that the ABA Council may amend its position on this topic).

international students, the fact is that for certain students — including many international students — participation and interaction with US law students, faculty and lawyers can be challenging, if not downright disappointing. For one, many international students feel isolated within law school settings, and there is some corroboration that they are not just imagining this parallel law school experience that many of them suggested having. Even when they are aware of the diversity within their classrooms and hallways, however, the interaction between American students and international LLMs along the lines that O'Briant and Rossant consider foundational to the in-person experience can be difficult. This is not unique to US law schools; rather, it is a characteristic of international higher education generally, and particularly acute where differences in degree programs result in differences in incentives and opportunities.[101] Our earlier work found that international LLMs tend to interact most frequently and meaningfully with other international students.[102] For some, this is further focused on international students from the same home country or region, as Ben Zhang described: "I did not have a lot of communication with JD students, and when I had, it's also between me and a Chinese JD. I did not have a lot of communication with foreign JDs".[103] Qiang Bai, another international LLM, described a similar experience:

> [s]o basically the international students will talk to international students and mostly will talk to the students that come from the same country as we were. So, for me, I talk to Chinese students, Japanese students, Korean students. I have some pretty good memories with South American students, as well. I'm still trying to think whether this is an intentional choice or it's just how things go, because, at first, it's justifiable, because we will not stay here in the United States. That's a pretty big basic mindset for many of the international students, that we're not here to stay. So, we will concentrate, or at least pragmatically speaking, more of our efforts on the people who we might encounter again when we go back to practice. I had that thought, but I don't know the

101 Silver, "Getting Real", *supra* note 5.

102 Silver, "Agents of Globalization in Law", *supra* note 6.

103 Interviews, *supra* note 24, G1767.

> consequence of the situation now, whether it's intentional or it's just how things go.[104]

These are typical comments based on our ongoing research, and they suggest that the kind of interaction in in-person law school contexts results in quite distinct patterns for international LLMs.[105] At the same time, the social capital derived from the LLM is strengthened, in the views of many students, prospective employers and even LLM program directors, not only by such interaction with American students but also by a period of practice in the US following graduation. But getting this sort of employment is extraordinarily competitive, depending on myriad factors including connections from a student's home country to global US-based law firms (so-called political hires by the firms); the need for a student's expertise in their home country law, which reflects the volume and nature of US business with the student's home country; and the ease of hiring American JD graduates who can satisfy employers' needs.[106] In other words, the ideal of easy interpersonal relationships and exchanges embedded in O'Briant and Rossant's descriptions are far from the reality for students who do not 'naturally' feel equipped with the social capital that is embedded in the hierarchy of law school, especially when such capital is expected to be inherited from sources that are external to the school rather than achieved through the process of the school. And virtual realities held other kinds

---

104 Interviews, *supra* note 24; I1552, *supra* note 88.

105 From the perspective of JD students, the perception of this LLM graduate rings true. Earlier work by Silver based on a survey of JD students revealed that a full 30% of the 6893 respondents at 21 law schools indicated their uncertainty about whether any international LLMs were even enrolled in their law school, Silver, "Getting Real", *supra* note 5 at 479. See also above text following note 73.

106 See Silver, "Case of the Foreign Lawyer", *supra* note 27 at 1076–77 (describing law firm recruiting in Canada and Australia during times of extreme competition for top American JDs). See also Silver, "States Side Story", *supra* note 23 at 2404–405 (describing Silver's finding that the most likely LLMs to secure positions in the US — apart from political hires — are those who most easily can blend into the mainstream of US lawyers, which means they are White men from English-speaking common law countries).

of advantages that are not necessarily recognized as capital yet: easier participation through blue hands, reviewing recorded classes,[107] some designed interaction through break-out rooms and using writings on discussion boards and even in a Zoom chat as an alternative way of participating. Still, neither students nor schools can afford to ignore this ideal of interaction because it involves a kind of capital that is in demand in the market that continues to privilege normative markers of achievement.

Finally, one example of schools attempting to consider the interests of their students while also keeping one eye on the job market for them (which in turn links to reputation) was the adjustment to grading that occurred during the spring of 2020 when the pandemic first caused schools to move online. Nearly all US law schools adopted a pass/fail system in recognition of both the pressures and very challenging circumstances under which students were operating and the uncertainties surrounding the administration of exams online, from internet problems to exam security.[108] One study conducted to assess students' responses

---

107 As Susan Yang, one of our international JD interviewees, explained:

> [v]irtual learning. It's actually better for me, because a lot of my professors speak pretty fast, and if I'm in class trying to take notes, I am bound to miss something. But with the virtual stuff I can rewind. Because it's all recorded, anyway. That's actually really good for me. I know some people don't like it, because they can't focus as much. But I think I actually focus better on virtual stuff, because I listen to a lot of podcasts. Maybe my professors would be offended to hear this, but I focus really well for podcasts--because then I can wash dishes, and listen. If I have something to do with my hands, I think I focus better

Interviews, *supra* note 24, I2047B. See generally Leonard Baynes, "Predictions On Pandemic'for Lasting Impact On Legal Education" (2 June 2021) *LAW360* (commenting on recordings of classes as helpful for all students).

108 Karen Sloan, "Pass/Fail Grading in Law School Gets Mixed Marks From Students" (17 June 2020) *Law.com* (law school administrators reasoned that the simplified grading scheme would reduce some of the pressure and anxiety law students were feeling at a time of uncertainty, and would level the playing field for students who were attending class and studying under challenging conditions). On the variations in these systems, see John Bliss, David Sandomierski & Tayzia Collesso, "Levelling the Field? An Equity Analysis of the COVID Disruption in Law School Grading", (paper delivered at the Law & Society Association Annual Meeting, 2021) [unpublished] at 5 ("[n]early

to the shift to pass/fail found important differences in students' sense of whether the change helped them. Women generally reported feeling more burdened by the shift than men, and minorities were more likely to see it as an advantage.[109] According to the study, minority women reported more negative feelings about the impact of the shift than women generally.[110] In interviews we conducted with international LLM students following the spring 2020 semester, the grading shift generally was perceived as negative. Students emphasized the importance of grades for home-country employers to which they would return,[111] and for purposes of trying to find a position in the US, where US employers are accustomed to relying on them.[112] All of this is to say that the paternalistic response of schools was based on their assumption that students fell into neat categories, perhaps based on the year in law school or socioeconomic backgrounds, but this approach ignores the reality of the subgroups that schools fail to recognize, much less of individual students with different agendas and capital to draw on. A better approach would have enabled more adaptability, even if it complicated the comparison that is at the heart of so much of the organizational structures of the schools.

B. The Institutional Case for Universal Design

While in an absolutely perfect solution, each students' needs would be met individually, organizations cannot practically afford to curate their cultures

---

three quarters of all US law schools adopted a mandatory Pass/Failforr Credit/No Credit system; nearly one fifth of US schools instituted an optional Pass/Fafor or Credit/ No Credit System").

109 Bliss, Sandomierski & Collesso, *ibid* at 11.

110 *Ibid*.

111 Interviews, *supra* note 24, I2019B.

112 *Ibid*, I2053B:

> I obviously think it's important to point out that it matters a lot more to traditional legal candidates--you know, any person who is doing an LLM program, you know? Because they are looking to utilize their LLM grades as an entry gateway to impress a US law firm, in saying: "Listen, we came here. We studied well and we can perform here".

based on specific individual needs. But swapping the idea of the ideal or typical student with the construct of the most precarious student could offer an important change in perspective to inform how we think of doing better equity in law schools. When we start by making law schools more accessible to the most vulnerable students in any situation, the futures that such a space can create change alongside it.

Scholars of education and disability studies have long proposed the idea of *universal design for learning/instruction* ("UDL/UDI") — a model that drives product and environmental design that is usable by all people without the need for adaptation.[113] Although initially seen as a model of norms that would be adaptable from equitable architecture to education,[114] over the years, universal design has become central to accessible education and pedagogy theory.[115]

---

113 "What is Universal Design?" (2022), online: The Center for Universal Design <www.universaldesign.org/definition>, the Center for Universal Design, About UD:

> [u]niversal design is the design of products and environments to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. –Ron Mace; The intent of universal design is to simplify life for everyone by making products, communications, and the built environment more usable by as many people as possible at little or no extra cost. Universal design benefits people of all ages and abilities.

See also "The Principles of Universal Design Version 2.0" (1997), online: The Center for Universal Design <www.//projects.ncsu.edu/ncsu/design/cud/about_ud/udprinciplestext.htm>.

114 Margaret King-Sears, "Universal Design for Learning: Technology and Pedagogy" (2009) 32:4 Learning Disability Quarterly 199 ("these principles are played out in both technological and pedagogical ways[:} . . . . equitable use, flexibility in use, simple and intuitive use, perceptible information, tolerance for error, low physical effort, and size and space for approach and use", citing "The Principles of Universal Design Version 2.0" (1997), online: The Center for Universal Design <www.//projects.ncsu.edu/ncsu/design/cud/about_ud/udprinciplestext.htm>.

115 See Jeanne L Higbee & Emily Goff, eds, *Pedagogy and Student Services for Institutional Transformation: Implementing Universal Design in Higher Education* (Minnesota: Center for Research on Developmental Education and Urban Literacy, 2008) (describing a case study demonstrating "how developing

Unlike 'deficit' approaches that assume that the classroom is set up for those who are 'able' and needs special accommodation for those who are diverse, a more inclusive model *starts* with the assumption that everyone is diverse and then makes accommodations that allow for such diversity to be responded to in the most equitable way.[116] Central, of course, to this is the research-ratified assumption that belonging and feelings of connectedness make for better classes not just for those who newly feel connected but for others who can learn from such connected peers.[117] As Dr. Catherine Sanger, a teaching and learning expert

---

accommodations for a student with multiple disabilities benefit the entire class" in higher education contexts).

116 Catherine Shea Sanger, "Inclusive Pedagogy and Universal Design Approaches for Diverse Learning Environments" in Catherine Shea Sanger & Nancy W Gleason, eds, *Diversity and Inclusion in Global Higher Education* (Singapore: Palgrave Macmillan, 2020) at 31.

117 This relationship, between belonging, learning and academic success, is supported by research, including Terrell L Strayhorn, *College Students' Sense of Belonging: A Key to Educational Success for All Students* (New York: Routledge, 2018); Joan M Ostrove & Susan M Long, "Social Class and Belonging: Implications for College Adjustment" (2007) 30:4 The Review of Higher Education 363; L R M Hausmann, J W Schofield & R L Woods, "Sense of Belonging as a Predictor of Intentions to Persist Among African American and White First-Year College Students" (2007) 48:7 Research in Higher Education 803; P Yi, "Institutional Climate and Student Departure: A Multinomial Multilevel Modeling Approach" (2008) 31:2 The Review of Higher Education 161; Isabel Moallem, *A Meta-Analysis of School Belonging and Academic Success and Persistence* (PhD Dissertation, Loyola University Chicago, 2013) [Loyola eCommons, 2013]; S J Spencer, C M Steele & D M Quinn, "Stereotype Threat and Women's Math Performance" (1999) 35:1 Journal of Experimental Social Psychology 4; J Aronson & M Inzlicht, "The Ups and Downs of Attributional Ambiguity: Stereotype Vulnerability and the Academic Self-Knowledge of African-American Students" (2004) 15:12 Psychological Science 829; and J Aronson, C Fried & C Good, "Reducing the Effects of Stereotype Threat on African American College Students by Shaping Theories of Intelligence" (2002) 38:2 Journal of Experimental Social Psychology 113. In the law school context, see Carole Silver, Louis Rocconi, Heather Haeger & Lindsay Watkins, "Gaining from the System: Lessons from the Law School Survey of Student Engagement about Student Development in Law School" (2012) 10:1 University of St Thomas Law Journal 286 (using LSSSE data in

at what was one of the world's most internationally diverse and innovative programs, Yale-NUS College,[118] suggests:

> UDL [Universal Design for Learning] was initially focused on supporting students with varied learning abilities, but lends itself naturally to culturally diverse and international learning contexts. Most tactics that benefit one group or type of learners benefit others as well. For example, complementing verbal lectures with visual aids helps not only students who may have hearing impairment but also those who are unfamiliar with the professor's accent or vocabulary. UDL is sometimes misunderstood as advocating hyper-individualized support. This is not the case. The idea behind UDL is not to apply resource-intensive 'spot treatments' for individual student needs. Instead, UDL integrates broader structural changes that make our classes more engaging and accessible for all, regardless of specific student needs or required accommodations.[119]

This flipping of our starting points from the 'ideal student' to the more peripheral student is helpful because needs that could include students at the periphery are likely to subsume interests for those at the core. International students with language cleavages might be more likely not to follow sarcasm or

---

analyzing the relationship between students feeling comfortable and supported in law school and academic gains:

> [t]he positive impact of a supportive law school environment suggests that students who feel comfortable and supported by their schools are better able to thrive academically. While this finding makes intuitive sense, it stands in contrast to the traditional image of law schools—also typical in media portrayals—as fostering competitive and intimidating experiences.

118 On National University of Singapore's decision to close Yale-NUS College, see David Bloom, "The Yale-NUS Closure's Unanswered Questions" (2021) online: Surface <www.globalist.yale.edu/2021-2022-issues/the-yale-nus-closures-unanswered-questions/?utm_source=rss&utm_medium=rss&utm_campaign=the-yale-nus-closures-unanswered-questions>.

119 Sanger, *supra* note 116 at 35. UDL also relates to social justice initiatives, see *e.g.* Mirko Chardin & Katie Novak, *Equity by Design* (California: Corwin, 2020); Soung Bae, Nicole S. Ofiesh & Jose Blackorby, A Commitment to Equity: The Design of the UDL Innovation Studio at the Schwab Learning Center, White Paper (2018), https://slc.stanford.edu.

humor in a classroom, they might benefit most from recordings, and following a range of cultural logics, they might feel most conscious about raising their hand and aggressively participating in a law school classroom as Socratic pedagogy demands. But from a universal design standpoint, rethinking pedagogy to assess whether such diversions are actually serving the intended audience might have important implications for more than just the international students in question. What is more, doing so following a model of universal design rather than as an accessibility response allows for the very students who are likely to be siloed as 'other' to not stand out quite as much.

Although our extension of these principles to international students expands the idea of who needs accommodation (and how accommodation should even be thought of),[120] we are certainly not the first scholars to suggest the relevance of UDI for law schools and the profession.[121] Research has pushed back against the 'accommodations model' for legal education and urged law schools to consider the importance of UDI principles as foundational for pedagogy in classrooms and student assessments well beyond the functional model of providing access to students with disabilities,[122] as well as for students with neuro-divergent learning styles and ESL backgrounds.[123] Research also has made the case for considering UDI as a way to promote self-efficacy, a value venerated in law school, especially as it pertains to millennial (and GenZ!) learners who now predominantly populate these schools.[124] More recently,

---

120 But see Bae, Ofiesh & Blackorby, *ibid* at 10 (recognizing non-native speakers of English as one sector of students included generally within UDL).

121 See *e.g.* Meredith George & Wendy Newby, "Inclusive Instruction: Blurring Diversity and Disability in Law School Classrooms Through Universal Design" (2008) 69:3 University of Pittsburgh Law Review 475; Jennifer Jolly-Ryan, "Bridging the Law School Learning Gap through Universal Design" (2012) 28:4 Touro Law Review 1393; and Matthew L Timko, "Universal Design in Law Schools" (2018), online: *SSRN* <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=3183987>.

122 George & Newby, *ibid.*

123 Jolly-Ryan, *supra* note 121.

124 Higbee & Goff, *supra* note 115.

research has made the connection to neurodiversity and the legal profession, noting that:

> attorneys with disabilities are viewed by . . . the profession as a mental health and wellness issue, rather than what it really is: a diversity, equity and inclusion issue . . . the pivot to remote work has been hugely beneficial to many attorneys with disabilities . . .[125]

During the pandemic, these notions of the relevance of UDL were brought home more directly as faculty were guided in revising courses to teach online, with UDL principles serving as a framework for considering issues of access that were seen as generally relevant to the student population. Although the focus in these arguments remains on domestic law students, the imminent rise in the demographics of the international student population in US law schools demands a response that both takes more seriously this line of research and extends it more broadly to students who are in the periphery of their environments, regardless of attribute.

The experiences of the pandemic might have accidentally laid the groundwork for reconceiving legal education. Remote learning and the Zoom-sphere not only changed the power dynamics between a range of actors, but it also forced people to think about how they engaged with their pedagogic model and who they sought to serve. At our own law schools, for example, the summer of 2020 was filled with an unprecedented collective effort to adapt to teaching online, including tens of workshops along with shared materials, new technologies and consulting with experts in course design. Principles of UDL were very much a part of these conversations, although some law faculty did not recognize its relevance, much less its importance. But for many, this was the first time they considered processes of teaching over substance. This shock has been helpful to what could have otherwise stayed an inert academic community that

---

125 Zack Needles, "Haley Moss on Disability as a Diversity Issue and Why Remote Work Makes Her 'Incredibly Hopeful for the Future'" (23 June 2021), online (podcast): *Law.com* <www.law.com/2021/07/23/haley-moss-on-disability-as-a-diversity-issue-and-why-remote-work-makes-her-incredibly-hopeful-for-the-future/>.

consistently has rewarded research over pedagogy and teaching within its hierarchies.[126] Instead of reverting to a pre-pandemic norm, we have a chance to offer more opportunities for different kinds of students who otherwise have not, and likely cannot, gain from the pre-pandemic version of law school. Naturally, this cannot be a wholesale fix of the entire market. It needs to be an individual and institutional introspection about what it would look like if each school prioritized its most precarious first and made that the model of their pedagogic policies.

The inequalities that the pandemic has made stark have always existed, and the diversities in these inequalities are important to keep in mind. All diversity cannot be clubbed together for ease in order to facilitate the same one-stroke fix. Rather, these variations in diversity can allow for more comprehensive models for the ways in which inequality seeps into the institutions we inhabit and inherit. By questioning the ways in which our environments privilege majority actors — however construed within the logics of our environments — we are offered a unique insight into the ways in which our ideal solutions respond to ideal types of actors. Instead, we could use this shock that has made us do the 'extraordinary' this past year to reconsider, rethink and restart our commitments. Responding to this call with agentic action could be of imminent value as we consider creating the futures of legal education that we desire and deserve.

---

126 See Rachel López, "Unentitled: The Power of Designation in the Legal Academy" (2021) 73:1 Rutgers University Law Review 101 (describing the two-tiered hierarchy of the legal academy). On the question of faculty status and teaching quality, see David N Figlio, Morton O Schapiro & Kevin B Soter, "Are Tenure Track Professors Better Teachers" (2013) National Bureau of Economic Research Working Paper No 19406 at 15, (study of Northwestern undergraduate first-year students "suggest[s] that non-tenure track faculty at Northwestern not only induce students to take more classes in a given subject than do tenure line professors, but also lead the students to do better in subsequent coursework than do their tenure track/tenured colleagues"). See also Elie Mystal, "Does Tenure Hurt Students?" (2013), *Above the Law* (reporting on a blog post by Harvard Law Professor I Glenn Cohen advising that focusing "too much on teaching or service" is one step towards not getting tenure).

V. Conclusion: The Problem with One-Stop Diversity

The pandemic upended the world for so many people in many different and similar ways. Our concentration here on international students and their navigation of law school is but one example of how focusing on actors that are most on the periphery can give us insight into the problems most central to the systems in which they are embedded. Globalization might well have required the "potential for geographic mobility".[127] But, like most, this mobility comes at the cost of inclusion that does not really center the very actors that seek it the most or have to travel the farthest to gain it.[128]

This, of course, is not to say that schools do not already work in ways that are committed to what they think of as 'best' for their students. Schools, in fact, do what they *see* as best for their own students, usually predicated on what they think of as the intended model of the typical or ideal student, allowing for exceptions as they think of 'outliers' who are more diverse. Often, internal decisions of schools made in the context of what's best for students are juxtaposed against the very real fact that students then emerge and interact within a single legal market, facing unequal consequences and environments based on what their other competitor cohorts' schools did. As a result, no matter the internal decisions, there also are severe external factors of the market arising from each law school's reputation and ranking, for example, that administrators and advisors have to consider while pivoting during times of crisis.

At the same time, a single measure for 'all students' or even all 'diverse students' is unlikely to be able to do the work of changing the culture in these spaces, much less serving in ways that the universal design principle suggests. In other work, we show how inter-group variations in minorities are crucial for understanding differences in student experiences and suggest that resultant

---

127 Silver, "Agents of Globalization in Law", *supra* note 6.

128 Caitlin Dickerson, "My World is Shattering: Foreign Students Stranded by Coronavirus" (25 March 2020) *The New York Times*. See discussion and notes, *supra* notes 54-59.

policy should think about diverse groups at a more micro-level for 'good inclusion' to serve the groups it purports to serve.[129] But just like ideal students, ideal solutions are dangerous because they presuppose a certain kind of institution, yet another category that is not generalizable. Instead, what is being called for here is a reckoning on one's own institutional terms to think about cultures of schools, needs of diverse students, and importantly, *differences* rather than similarities in those needs. We suggest that when motivated in this way, the solutions that are institutionally evolved to target the needs of the interactionally-most-precarious student are most likely to be effective for everyone else who is likely to be included in it.[130] This way of thinking about institutional diversity from the ground up is how law schools can build not just for themselves but contribute effectively towards a better and more equitable legal profession.

Of course, when dealing with schools, there are market considerations and competition perspectives that complicate these decisions,[131] but global market considerations might also be an incentive for schools to start and do things differently.[132] Instead, the suggestion is that a more granular student-centric

---

129 Our other work shows how similar patterns of isolation and varying social capital are inherent in networks of other kinds of minority groups, too. See Paik et al, *supra* note 79. On the theory of "rethinking inclusion", see Swethaa Ballakrishnen, *Rethinking Inclusion* (LSI 2021 under review).

130 For example, reconsidering bar regulations, solving the challenges posed to international LLMs because of the pandemic would also have solved the challenges posed to American JDs, but the reverse — which was the focus — did not extend a fix to the LLMs. See *supra* note 63. Similarly, reconsidering discussions of inequality in law school and higher education generally must begin with the question of who is within the frame of reference, and whether all students — including international students — are visible to those leading these discussions.

131 For law schools, rankings — and particularly US News — is the overwhelming consideration. See Espeland & Sauder, *supra* note 21.

132 That is, the global competition for internationally mobile students exerts an influence on schools' approaches. In some instances, this takes the form of collective outreach that includes funding for travel, for example, which not only defrayed costs incurred because of the pandemic but also signaled the

approach is more likely to build strong institutions if we truly are committed to their equity. Reshaping our structures with this directive could offer new energy to the modifications we strive to make following the intuitions gained from this traumatic pandemic experience. If we are lucky, with enough institutional buy-in and momentum, they could change the cultures of the institutional fields and frameworks that house them. This may call for reallocating resources to maintain course design specialists who can work with faculty and are attuned to issues of diversity and inclusion generally to support the continual rethinking of teaching. It might involve initiatives to press for a reconsideration of the regulatory approach to LLM programs or other spheres that house important populations of students in precarious positions, in recognition that excluding them from the focus of regulation has not supported them. It almost certainly should include an institutional commitment to taking a different approach to diversity and inclusion, including rethinking who is included and excluded at a particular school and the implications for teaching, student organizations and

---

importance of this group to the university and its community. Amy Walker, "Over 7,000 Chinese students flown into Manchester on 31 specially chartered flights" (11 November 2020) *Manchester Evening News* (describing an initial transport of 7,000 students organized "by a working group set up initially in Manchester including representatives from Greater Manchester's universities, Greater Manchester Combined Authority, Manchester Airport Group, the Manchester China Forum and student accommodation providers"). This sort of collaborative effort generally has not been pursued by US law schools. See also "Queen's University Belfast Charters Plan to Bring 369 Chinese students Back to UK Campus" (20 September 2020) *CGTN.* But see Julie Hare, "Return of International Students Under Threat, Again" (5 July 2021) *The Australian Financial Review* (describing "another aborted plan" to bring international students back to Australia); Karin Fischer, "American Attitudes Toward International Students Are Warm but Wary" (14 May 2021) *Chronicle of Higher Education* (describing survey results that show a substantial portion of respondents being concerned about the motives of international students, particularly from China); and Danny Vesurai & Alex Wong, "New Technology Fee for International Students Triggers Intense Backlash" (16 November 2018) *The Daily Northwestern* (describing imposition of a fee for software to facilitate visa reporting being imposed only on international students).

other matters.[133] Lastly, they might develop organizational structures that reach beyond the university — much less law school — walls to provide support to students that cannot be provided by a single school, no matter how well-intentioned.[134] Overall, though, we see this as an opportunity for a collective shift, where the market, regulators and schools come together for coordinated solutions to the challenges we have outlined here.

As we write, the world of higher education — like many of its contemporary institutions — is poised to enter another phase of 'reopening' in response to the ongoing pandemic. What this reopening means in the everyday might differ based on each school, its priorities, capacities and context. But one thing remains true for them all: in reopening, if law schools revert to their pre-pandemic approaches entirely, or even if they stick to pandemic measures just as a way to react rather than evolve, they will re-cement the past, including the inequality embedded in law school structures and interactions.

---

133 For example, faculties might consider implementing annual workshops on the backgrounds of their students as a sort of know-your-audience initiative that attends particularly to diverse students, broadly conceived, where they could routinely consider the particular interests and challenges of the students in their law school. On feelings of being 'othered' generally, see Ballakrishnen & Silver, "New Minority", *supra* note 8; and Vesurai & Wong, *ibid* (in reacting to a fee imposed only on international students, one student commented: "'I'm already aware of my otherness, of being an alien, of being suspected and scrutinized,' said Niki Charlafti, a third-year doctoral music composition student on an F-1 visa from Greece. 'This fee makes me feel very unsafe on top of all of the other challenges'").

134 See Walker, *supra* note 132.

Acknowledgments

This research was supported by the Northwestern University Pritzker School of Law Faculty Research Program and the UCI Hellman Fellowship. We thank Northwestern Law students Barang Phuk, Kaitlin Ryan, June Choi, Tori Hu and Karen Eskander and UCI Law student Sydney Martin for valuable research assistance; and Bryant Garth, Janet Garesché, Sarah Lawsky, Darrell Mottley and Jim Speta for helpful discussions that framed this research, including ideas of universal design, international student assimilation and COVID-19-related bar eligibility requirements for LLM graduates.

Canadian Journal of Comparative and Contemporary Law

VOLUME 8 | NUMBER 1 | 2022

CHARTING THE FUTURE OF LEGAL EDUCATION