Crisis-Induced Innovation in U.S. Legal Education

Morenike Saula

The COVID-19 pandemic of 2020-2021 has brought about significant changes in the form and method of learning in traditional U.S. law schools. In March 2020, many schools switched from teaching in-person classes to a distance learning format, in order to follow the Centers for Disease Control and Prevention (CDC) social distancing guidelines;[1] mitigate the spread of infectious disease in the community;[2] or, in some places, to comply with state-mandated closures of university campuses.[3] The guidelines recommended institutions of higher education to suspend all in-person classes and event activities and to implement e-learning and distance learning plans.[4] This method of learning was previously, not supported by the American Bar Association (ABA). Specifically, the former Standard 306(e) of the ABA Standards limited the number of distance learning credit hours to one-third of the required credits for a J.D. degree.[5] It also stated that only ten of those credit hours may be earned in the first year.[6] Any ABA-accredited law school that decided to offer online J.D. programs beyond those specified limits had to apply to the ABA for variance from Standard 306. In July 2020, the ABA

Morenike Saula is Visiting Associate Professor of Law and Business, Finance and Entrepreneurship Law Fellow, The George Washington University Law School.

1. Ctr. for Disease Control and Prevention, U.S. Dep't of Health & Hum. Services, Interim Guidance for Administrators of U.S. Institutions of Higher Education 1 (2020), https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-administrators-college-higher-education.pdf.

2. Emma Dill et al., *As Coronavirus Spreads, the Decision to Move Classes Online is the First Step. What Comes Next?* Chron. Higher Educ. (Mar. 6, 2020), https://www.chronicle.com/article/As-Coronavirus-Spreads-the/248200.

3. *The Coronavirus Spring: The Historic Closing of U.S. Schools (A Timeline)*, Educ. Week (July 1, 2020), https://www.edweek.org/leadership/the-coronavirus-spring-the-historic-closing-of-u-s-schools-a-timeline/2020/07 (displaying a map of the school closures and noting that the "magnitude and speed of closures was unprecedented").

4. Interim Guidance, *supra* note 1, at 4–5.

5. ABA Standards And Rules Of Procedure For Approval Of Law Schools, Standard 306 (2020-21), https://www.americanbar.org/groups/legal_education/resources/standards/ (reserved and deleted Aug. 2020).

6. *Id.*

granted over 199 variances to law schools seeking to teach fully remotely,[7] or offer hybrid learning programs.[8] In November 2020, those variances were extended for the spring 2021 semester.[9] The significant increase of Standard 306 variances could only have been precipitated due to the COVID-19 virus.

In August 4, 2020, the ABA Council of the Section of Legal Education and Admissions to the Bar amended their bylaws to permit the Council to address emergency situations affecting multiple law schools.[10] Specifically, the amendment authorizes the Section Council to adopt "emergency policies and procedures" to address "extraordinary circumstances" impacting multiple law schools' ability to comply with the ABA Standards until those circumstances subside.[11] The "emergency policies," which includes the variances from the former Standard 306, are in effect only for the duration of the specific "extraordinary circumstance."[12] Thus, in the absence of the current pandemic or other widespread emergency, law schools may revert to in-class teaching modes.

For the first time in the history of American legal education, the ABA now permits law schools to fully institute a Distance Education J.D. program. The ABA guidance on Distance Education provides that law schools may grant up to one-third of the required credits for a J.D. degree, for distance learning courses.[13] It further states that law schools that seek to go beyond these limits,

7. ABA Memorandum, *Distance Education Variance Modifications and Extensions to Spring 2021* (Dec. 2, 2020), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/20-21-distance-education-variances.pdf (indicating 81 schools planned to do online/remote instruction and 48 planned to do hybrid instruction in spring 2021). *See also,* ABA Standard 306 Variance Approval List (July 2020), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/306-variance-approval-list.pdf (showing the full list of the schools).

8. Hybrid learning programs are a combination of in-classroom and online classes.

9. ABA Memorandum, *Distance Education Variance Modifications and Extensions to Spring 2021* (Dec. 2, 2020), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/20-21-distance-education-variances.pdf (indicating 81 schools planned to do online/remote instruction and 48 planned to do hybrid instruction in spring 2021).

10. ABA Standards and Rules of Procedures for Approval of Law Schools 2020-2021, Rule 2(c), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-rules.pdf.

11. *Id.*

12. *Id. See also* ABA Memorandum, *Recommendations on Proposed Changes to the Standards and Rules*, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/aug20/20-aug-council-rule-2-memo.pdf (indicating that the shift from in-class learning to distance learning was an emergency response to the COVID-19 pandemic of 2020).

13. ABA, *A Guide to ABA Approved Distance Education* (Dec. 14, 2020), https://www.americanbar.org/groups/legal_education/resources/distance_education/ (Dec. 14, 2020).

must apply for a "substantive change" under Standard 105[14] and Rule 24.[15] Standard 105 (a) (12) of the ABA Standards, permits law schools to institute a Distance Education J.D. Program if it has obtained the acquiescence of the Council of Legal Education.[16] Despite this significant improvement, there are no ABA-approved law schools that offers its J.D. program completely online or through distance learning.

A primary restriction that may prevent many law schools from offering a completely online J.D. program is that many states require a certain number of in classroom credits to be eligible to sit for their state bar examination.[17] For example, New York State (NY) requires students to earn at least 64 credit hours of the required 83 credit hours for a law degree, in classroom study, to be eligible to sit for its bar. [18] Like most states, NY issued a temporary waiver to permit students who's in-classroom courses were converted to a distance education course due to the pandemic, to sit for its bar examination.[19] Since this is a temporary waiver, it is unclear if the restrictions on distance learning credit hours will continue once the pandemic is over.

In addition to the distance learning methods adopted, other deviations from the traditional law school practice brought about by the pandemic include the adoption of different modes of course evaluation and grading. Previously, the ABA did not require law schools to use any particular method of evaluation,[20] so many law schools used in-class proctored exams to test students' academic performance. However, because of the social distance guidelines and, in some cases mandates, the ABA reversed and removed Standard 306 thus giving law

14. ABA Standards and Rules of Procedures for Approval of Law Schools 2020-2021, Standard 105(a)(12), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter1.pdf.

15. ABA Standards and Rules of Procedures for Approval of Law Schools 2020-2021, Rule 24(12), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-rules.pdf.

16. ABA Standards Approval, *supra* note 14.

17. One exception is the California State Bar, which already allows students from non-ABA-accredited law schools (including schools with completely online J.D. programs) to sit for the California bar exam, provided they meet other requirements. Rules of the State Bar, Title 4, Div. 3. Unaccredited Law School Rules (2007), https://www.calbar.ca.gov/Portals/0/documents/rules/Rules_Title4_Div3-UnAcc-Law-Sch.pdf.

18. *See, e.g.,* New York State Board of Law Examiners, *Rules of the Court Section 520.3* (stating that at least 64 of the 83 credit hours must be earned in classroom study), https://www.nybarexam.org/Rules/Rules.htm.

19. *Order, Temporary Waiver of Strict Compliance*, State of New York Court of Appeals (April 21, 2020), http://www.nycourts.gov/ctapps/news/TempWaiver-4-21-2020.pdf.

20. ABA Standards & Rules of Procedure for Approval of Law Schools, *Standard 306*, at 23 (2019-2020).

schools even more freedom. Many law schools conducted its exams remotely.[21] Some law schools also adopted a mandatory credit or no-credit grading system for the spring 2020 semester[22] to accommodate students' various needs. Similarly, schools with formerly rigid class recording policies decided to suspend such rules and record all classes to accommodate all students.[23] This sudden ability to administer distance learning and remote activities has shown that there is room for growth and innovation for distance learning in legal education. But the lack of guidance from state bars may inhibit law schools from permanently transitioning to these more-flexible methods of online and hybrid instruction.

Unlike in the United Kingdom, legal education in the United States is a graduate program, which means many students in a U.S. law school are above the age of thirty or are "non-traditional" students.[24] This includes students from all walks of life: working-class adults, married students, students with dependents, etc. These students have heavier coursework responsibilities than students in undergraduate programs. In addition, millennials born between 1981 – 1997[25] are likely to have additional responsibilities such as student loan debt from undergraduate work, raising young children, or caring for aging parents.[26] Such circumstances may, one way or the other, impact the ability of millennials to attend law school. The possibility of a permanent and

21. *See, e.g.,* Rutgers L. Sch., *Spring 2020 Camden Exam Packet*, https://law.rutgers.edu/spring-2020-camden-exam-packet (last visited July 28, 2020).

22. *See* Jared Gans, *Law School Adopts Mandatory Credit/No Credit Policy for Spring Classes,* The GW Hatchet, https://www.gwhatchet.com/2020/03/29/law-school-adopts-mandatory-credit-no-credit-policy-for-spring-classes/ (updated Mar. 30, 2020); W. New Eng. Univ. Sch. of L., *School of Law Grading Policy Change* Apr. 13, 2020, https://www1.wne.edu/coronavirus/update-april-07-2020.cfm.

23. *See, e.g.*, Geo. Wash. Univ. Law Sch., *Class Recording Policy,* https://www.law.gwu.edu/class-recording-policy (last visited July 28, 2020).

24. In the United States, eighty percent of law school applicants are between the ages of twenty-two and twenty-four, while the remaining twenty percent are age thirty or older. Gabriel Kuris, *Advice for Older Law School Applicants to Consider*, U.S. & World News Rep. (Jan. 27, 2020, 9:34 A.M.), https://www.usnews.com/education/blogs/law-admissions-lowdown/articles/advice-for-older-law-school-applicants-to-consider.

25. Michael Dimock, *Defining Generations: Where Millennials End and Generation Z Begins*, Pew Rsch. Ctr. (Jan. 17, 2019), https://www.pewresearch.org/fact-tank/2019/01/17/where-millennials-end-and-generation-z-begins/.

26. *See, e.g.,* Michael Zang et al., *The Next Wave of Practicing Lawyers,* AmericanBar.org (Jan. 22, 2020), https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/26/2/the-next-wave-practicing-lawyers/#ref6 ("The ever-rising cost of education is not balanced by increasing salary: the median starting salary for private-sector law firms in 2016 was slightly more than $68,000, while the public sector reported a median salary of $53,500. It is no surprise, then, that millennials, saddled with student loan debt, are marrying and starting families at a later age than prior generations. The percentage of married adults over the age of 18 dropped from 72% in 1960 to 50% in 2016, while the median age for first marriage has increased roughly seven years during that time. Of those who have never married, about four in ten cite financial stability as a major reason why they are not currently married." (citations omitted)).

completely online J.D. degree would go a long way to accommodate persons with such needs.

This essay provides recommendations for making law school in-person attendance, course evaluation, and assessment methods more accommodating after the circumstances of the pandemic subside because the circumstances of millennials will not.

Recommendations

Distance Learning

Distance learning is not relevant only in the time of a crisis or pandemic, but it is an innovative way to pursue legal education. It has the potential to provide better learning results than traditional face-to-face learning;[27] and it often proves to be "more effective, than the traditional classroom."[28] It can provide greater access to legal education to individuals in remote areas or to those who cannot afford to live away from home because of time and financial constraints. It is also advantageous for schools with particular specialty programs to expand their reach to students outside of their geographical location.[29] Students in online learning conditions are likely to perform better and retain more than those learning through traditional face-to-face methods.[30] Distance learning would significantly accommodate the needs of mature students and students with disabilities.[31]

Offering more online programs would particularly benefit students in ad hoc or emergency situations.[32] Online learning options should not be provided only during a pandemic because students may face other unique challenges that may necessitate distance learning during the course of their program. Such

27. The Working Group for Distance Learning in Legal Education, Distance Learning in Legal Education—A Summary of Delivery Models, Regulatory Issues, and Recommended Practices 9 (2015).

28. Barbara Means, et al., *Evaluation of Evidence-Based Practices in Online Learning: A Meta-Analysis & Review of Online Learning Studies*, U.S. Dep't of Educ. 44–45 (2010); *See also* Jeffrey A. Van Detta, *The Law School of the Future: How the Synergies of Convergence will Transform the Very Notion of "Law Schools" During the 21st Century from "Places" to "Platforms,"* 37 Univ. La Verne L. Rev. 103, 109 (2015) (stating that "online legal education can be consistently as effective, and often even more effective, than the traditional classroom...").

29. The Working Group, *supra* note 27, at 10 (explaining how Vermont Law School's widely recognized Environmental Law program is able to reach more students through its distance learning program).

30. *Id.* at 9.

31. Jason S. Palmer, "*The Millennials are Coming!": Improving Self-Efficacy in Law Students Through Universal Design in Learning*, 63 Clev. St. L. Rev. 675, 678 (2015) (discussing the importance of employing universal design features to be "usable by all individuals, whether or not a disability exists...").

32. Distance learning has been implemented by many law schools for their Master of Laws (LL.M.) programs and other non-J.D. programs.

people should not be left without an option. As a law student in England, I had a friend who was raped and bullied by her fellow classmates at a house party. After the incident, she was unable to continue in-class learning and was forced to continue her degree through distance learning while her case was in court. Such circumstances require special accommodation. If she had been in the United States, it would be a shame if she is forced to complete her degree in the same classroom as her perpetrators, or to have to transfer to another law school, because her school lacked distance learning options.

As a millennial, I also believe it is important to approach legal education in a way that is more relatable to people in the millennial generation, now the largest percentage of the workforce.[33] A common perception about millennials is that we are the "Entitlement Generation"[34] because we want things quick and easy. The reality is that millennials are curious, inventive and goal-getters. We constantly seek the use of technological innovations to advance our way of life. Millennials are "the most technologically-integrated generation in the history of humanity";[35] therefore, advanced technology skills need to be integrated into legal education. The transformation from traditional law school classrooms to digital platforms[36] started that process but it must continue. The pandemic has shown that remote lectures and remote methods of evaluation are feasible, using the right technology. During the pandemic, many schools facilitated synchronous teaching using live technological platforms like Zoom, WebEx, Google Meet, and Skype, which all permit real-time engagement between faculty and students. Possible challenges with this, however, include lack of reliable internet service, lack of a convenient learning environment and lack of technological resources. In addition, some students and faculty might be less comfortable with full technology integration into the curriculum. However, these are not insurmountable challenges.

Similarly, schools can combine synchronous teaching with asynchronous methods to provide students with 24-hour access to learning materials and videos, using platforms like West's TWEN, Blackboard online classroom, Moodle, and other asynchronous learning technology. Although there is still a lot to be learned about how to undertake certain activities online, the Harvard Report on Distance Learning shows that synchronous method is effective in conducting activities like moot courts, client interviewing, and counseling

33. *See The Next Wave*, *supra* note 26 ("In 2015, the number of millennials in the workforce passed boomers for the first time, making up 34% of the global workforce (and nearly a quarter of all lawyers in the U.S.).").

34. Katerina Lewinbuk et al., *The Voice of the Gods is Crippling: Law School for the Helicoptered Millennials,* 10 St. Mary's J. Legal Mal. & Ethics 30, 37 (2019).

35. Ashley Krenelka Chase, *Upending the Double Life of Law Schools: Millennials in the Legal Academy*, 44 Univ. Dayton L. Rev. 1, 9 (2018).

36. Jeffrey A. Van Detta, *supra* note 28, at 108 (discussing the application of technology to legal education that will make the law school "no longer a place, but rather, a platform, unfettered by the bonds of time and physical space.").

exercises.[37] Applying these technologies in legal education would adapt to the skills and needs of millennials. The COVID-19 pandemic particularly shows that this change toward technological advancement is not only necessary, but inevitable.

Most states should be willing to permit students with a completely Distance Education J.D. degree to sit for their bar examinations. This will allow ABA accredited law schools to provide distance learning options for J.D. students in order to suit their personal circumstances or preferences. Many non-accredited schools in California currently offer J.D. programs completely online, and their students are eligible to sit for the California bar exam.[38] Although California is an exception presently, it can serve as a model for other state bars. Since we are in the age of information technology, it is important for states to adapt and evolve accordingly to effectively meet the needs of today's society and integrate the skills of the incoming generations. Also, support for distance learning may also be increasing given the number of schools that applied for variances and continuances from the ABA. [39] It is very likely that distance learning has come to stay.

Less Rigid Class Recording Policy

The pandemic also brought to light another very important need for law students: access to class recordings (not in lieu of class participation). Some professors do not allow them. Class recordings would give students an opportunity to relearn what they have been taught at a more study-friendly time or place. As a law student in England, I had a friend who studied at Oxford Brookes University Law School. One night I saw her use her lecture recordings to make her study aids and outline. I thought to myself, what a special advantage she has, to be given the opportunity to relearn all she had been taught in a quest for perfection and mastery. This kind of advantage should be given to all law students at all times, and not only during a pandemic.

If our goal is to train great lawyers, we should be willing to give them unlimited access to the tools they need to achieve such excellence. Access to class recordings will allow students to master the subject area. The quality of a legal education is based not only on the knowledge we give to students but also on the ability of students to retain that knowledge. This would also significantly accommodate students with unique learning needs.

Grading System

The use of a curve-based grading system is unfair to many students because it does not assess students accurately according to the course learning outcome.

37. The Working Group, *supra* note 27, at 15.

38. This includes Concord Law School of Kaplan University, California School of Law and Northwestern California University School of Law.

39. ABA Memo., *Distance*, *supra*, note 7.

Rather, it assigns grades to students based on their performance relative to their colleagues. In a curve-based system, after students' exam scores have been calculated, the graders assign grades based on a predetermined limit on the number of students permitted to get a particular grade.[40] For example, in a class of forty, a quota curving system can require the grader to assign a grade of A-plus to no more than four students, even if ten students deserve to get an A-plus. Imagine if bar exams were graded this way! Many students would not be given the grades they deserve. Using the curve-based system means that students are graded based on an unseen or unreliable expectation.

The curving system also leaves room for injustice. For instance, using the above example, if ten students scored ninety-two percent on an exam, what criteria should the faculty use to determine which four out of the ten students to assign an A-plus? I understand that curving can be used "to adjust grades on a poorly designed test,"[41] but this does not mean it should be the norm. If at all curving must be used, it should be limited for such purpose, but not as the norm. As a law student in the United States, I have heard students say, "you stand a better chance of getting an A if you take more classes with the LL.M. students," most of whom come from countries with English as a second language. Is this the kind of practice we want to continue, students choosing classes based on their competition? Students should not be pitted against their peers. The aim of a legal education is not to get better grades but to be a better lawyer.

Criterion-referenced grading (or goal-based grading), on the other hand, is preferable because it does not limit the number of students who can be assigned an A grade. It simply assigns grades based on the students' examination scores and not according to their relative performance to the rest of the class. This is more reflective of students' actual performance and not their comparable performance. For example, as a law student in England, I was graded primarily based on my examination score (goal-based grading). My school's academic regulation states that "the purpose of assessment must be to enable students to demonstrate that they have fulfilled the intended learning outcomes of their course and that they have achieved the standards required for the particular awards they seek."[42] Not only are students required to meet the intended learning outcomes; faculty must also be able to "relate that achievement to

40. This is a type of curving is called "quota systems." *See* Michael J. Reese, *To Curve or Not to Curve*, Ctr. for Educ. Res., The Innovative Instructor (April 2013), https://cer.jhu.edu/files/InnovInstruct-BP_toCurveOrNotToCurve.pdf. For more on the law school quota system, *see* Nancy H. Kaufman, *A Survey of Law School Grading Practices*, 44 J. Legal Educ. 415, 417-418 (1994) ("of the 119 schooles responding ...79...indicated that some form of curve is in place for at least some classes.").

41. *See* Reese, *supra* note 40, at 2.

42. Coventry Univ., *Section 5: Regulations for the Assessment of Students,* Section 5.1.1(a) (2020–2021), https://livecoventryac.sharepoint.com/:w:/s/externalstudentdocuments/EeIZoL1pR8xJuWu5kNiPLtsB_XUhBoMuKJShipWgi4axNQ?e=ahZAPs.

a consistent national standard of award."[43] This measure of learning is more representative of what is required of students in law practice, where lawyers do not receive grades from senior partners or courts as a measure of their performance. Treating students this way will ensure they are fully cognizant of their strengths and weaknesses. It will also encourage them to make the necessary changes as they approach the practice of law.

Curving does not accurately assess students based on the course learning outcomes. As Todd Hufnagel notes, a curve-based system makes it "entirely possible for a student to get an A and yet not understand the material at all."[44] This is an inaccurate method of grading students, and it should be discouraged.

Take-Home Examination Administration

Schools should transition from administering timed in-class examinations, which cause anxiety among students,[45] to take-home examinations. Take-home examinations are widely accepted by students because of their stress-free nature. They allow students to focus on understanding the course materials rather than memorizing the course materials. They also foster long-term retention of knowledge because they test students' ability to apply the law critically, applying the necessary resources for problem-solving.

Strictly timed examinations do not prepare students for real practice where students will be judged on their lawyering skills such as the ability to carefully research, analyze, and apply the law.[46] Students who prepare for in-class examinations are usually more focused on passing the examination rather than understanding the subject matter. Such students are more likely to memorize course materials than students who prepare for take-home examinations. Take-home examinations promote creativity and encourage students to prioritize the practical application of the law, which has more long-term value than memorization.[47]

43. *See id*. at Section 5.1.2.

44. *See* Reese, *supra* note 40, at 2 (quoting Todd Hufnagel, professor of Materials Science and Engineering that "[u]sing the criterion-based grading with specific learning objectives allows me to assess whether or not the students grasped what I am trying to teach. If everyone in the class has thoroughly mastered the material, why shouldn't they all get A's?").

45. Laurence Li, *Students, Faculty Consider Take-Home Exams*, Yale News (Dec. 07, 2016, 1:34 A.M), https://yaledailynews.com/blog/2016/12/07/students-faculty-consider-take-home-exams/. For an analysis of exams in the law school context, *see* Ben Gibson, *How Law Students Can Cope: A Student's View*, 60 J. Legal Educ. 140, 143, (2010) (discussing how law students experience high amounts of stress and anxiety and how exams have become measures of the students own self-worth).

46. Jennifer Jolly-Ryan, *Bridging the Law School Learning Gap Through Universal Design,* 28 Touro L. Rev. 1393, 1422 (2012).

47. *Id*. at 1422-1423 (stating that "[t]ake-home assignments more closely simulate the practice of law" and that clients and judges are not going to "appreciate a lawyer who does not carefully research, write, and reflect on a legal question.").

Conclusion

COVID-19 has shaken the norms of every law school. It has forced legal educators to abandon rigid rules and embrace innovation, in a way that aligns with the skills and needs of millennials. It has awakened us to the important reality that our rules should not curtail the reach of legal education but should rather extend it. It has also taught us to abandon a "one size fits all" approach, to accommodate various students' needs. Further, it has reminded us that students, and not rigid compliance with stagnant rules, are our priority. Technology has brought many changes to the practice of law, and legal education is no different in its ability to benefit from such changes.

The changes brought about by the COVID-19 pandemic are essential, not only in a crisis, but for everyday living. Distance learning opportunities would put more students in school; less rigid class recording policies would encourage students' mastery of the course; goal-based grading would accurately reward students for their academic performance, based on the course outcomes; and finally, take-home examinations would more adequately prepare students for the practice of law than in-class tests. We should not think of those needs as giving in to so-called entitlement, but instead as preparing our students to join law practice in the 21st century.