

# REFLECTIONS ON LEGAL EDUCATION IN THE AFTERMATH OF A PANDEMIC

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*This essay considers two significant changes to legal education in the aftermath of the COVID-19 pandemic. First, on-line programs will expand, based on the largely successful experiment in delivering legal education on-line during the pandemic. But this expansion must be thoughtful and deliberate. The legal education curriculum could include more on-line courses, but only if the learning outcomes and the pedagogy are aligned with on-line education. Experiential courses may not be the best fit for on-line given the specific learning outcomes and the benefits of in-person instruction in those courses. Second, student well-being will receive more attention in legal education. Our experience with the pandemic reinforced the critical importance of well-being, not only for our students, but also for our profession. Student well-being should be integrated into the legal education curriculum.*

## INTRODUCTION

In March of 2020, the world faced a challenge unseen in over one hundred years. A global pandemic caused by the COVID-19 virus led to quarantines and shelter-in-place orders across the globe. In the United States, the effects of the pandemic were felt in all aspects of life.<sup>1</sup>

The experience of COVID-19 taught us much about our resilience and our adaptability. Our collective perseverance led us through the myriad challenges of the pandemic. These challenges, both personal and professional, ranged from physical health to financial strain to technological competence to mental health and well-being.

This essay explores two central challenges in legal education as a result of the pandemic. The first challenge involves changing the delivery of legal education from in-person to on-line. The second challenge involves the more difficult problem of caring for students' well-being. Both of these challenges existed before the pandemic, but the pan-

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<sup>1</sup> By March 20, 2020, almost every state had in effect a shelter-in-place order, which closed all non-essential businesses. Paris Martineau, *What's a Shelter in Place Order and Who's Affected?*, WIRED, March 20, 2020. Four states had no restrictions: Arkansas, North Dakota, South Dakota and Nebraska. Six additional states had restrictions in some areas: Iowa, Kansas, Oklahoma, Nevada, Wyoming and Alaska. *Id.*

demically dramatically accelerated the importance of these issues—especially student well-being. The pandemic required immediate responses, and for the most part, universities and law schools responded well. The key questions before us are: what have we learned from our brief experiment? Will we retain some of the advantages? What assumptions and myths should be explored further?

Some of the events of 2020 and 2021 bear repeating. In addition to the new challenges of the pandemic, a series of killings by police opened long-standing wounds, exposing the pervasive effects of structural racism in our society.<sup>2</sup> The murder of George Floyd, the killing of Breonna Taylor, and numerous other instances of police brutality demonstrated a wanton indifference to Black lives.<sup>3</sup> Grass roots organizations, such as Black Lives Matter, responded with renewed strength and resolve.<sup>4</sup> And yet, Asian and Jewish Americans also suffered senseless attacks based in racism and anti-Semitism.<sup>5</sup>

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<sup>2</sup> “Our country is currently experiencing a reckoning with systemic racism.” Francesco Arreaga, *Law Schools Have a Moral and Social Responsibility to End Systemic Racism*, CALIF. L. REV. ONLINE (July 2020), <https://www.californialawreview.org/law-schools-systemic-racism>. The *Washington Post* compiled a database of police shootings since 2015. The results indicate that police shoot and kill young Black men at a rate more than twice the rate for young White men. The searchable database provides insights into police violence. Julie Tate, Jennifer Jenkins & Steven Rich, *Fatal Force*, WASH. POST, updated Sept. 2, 2021, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/>; see also Lynne Peeples, *What the data say about police brutality and racial bias – and which reforms might work*, NATURE, June 19, 2020, updated May 26, 2021, <https://www.nature.com/articles/d41586-020-01846-z>. For a discussion of structural racism, see John A. Powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 U.N.C. L. REV. 791 (2008).

<sup>3</sup> See, e.g., Sentencing Order at 12, *State v. Chauvin*, No. 27-CR-12646, (Minn. Dist. Ct. June 25, 2021) (“Chauvin manifested his indifference to Mr. Floyd’s pleas for his life and his medical distress. . . .”); Jenee Osterheldt, *Breonna Taylor and America’s Wanton Disregard for Black Lives*, BOS. GLOBE, Sept. 24, 2020, <https://www.bostonglobe.com/2020/09/24/metro/breonna-taylor-americas-wanton-disregard-black-lives/>; Richard A. Oppel, Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor’s Death*, N.Y. TIMES, April 26, 2021, <https://www.nytimes.com/article/breonna-taylor-police.html>.

<sup>4</sup> Arreaga, *supra* note 2, CALIF. L. REV. ONLINE at 1; Larry Buchanan, Quoc Trung Bui, & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES, July 3, 2020, <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>; Keeanga-Yamahtta Taylor, *Did Last Summer’s Black Lives Matter Protests Change Anything?*, NEW YORKER, August 6, 2021, <https://www.newyorker.com/news/our-columnists/did-last-summer-protests-change-anything>.

<sup>5</sup> Thomas Fuller, *Fear, and Discord, Among Asian Americans Over Attacks in San Francisco*, N.Y. TIMES, July 21, 2021, <https://www.nytimes.com/2021/07/18/us/asian-attacks-san-francisco.html>; *More Than 9,000 Anti-Asian Incidents Have Been Reported Since the Pandemic Began*, N.P.R., August 12, 2021, <https://www.npr.org/2021/08/12/1027236499/anti-asian-hate-crimes-assaults-pandemic-incidents-aapi>; Max Malta, *Who’s Behind Recent Rise in US anti-Semitic Attacks?*, B.B.C. NEWS, May 28, 2021, <https://www.bbc.com/news/world-us-canada-57286341>; Ruth Graham & Liam Stack, *U.S. Faces Outbreak of Anti-Semitic Threats and Violence*, N.Y. TIMES, May 26, 2021, <https://www.nytimes.com/2021/05/26/us/>

Our judicial system changed in a manner that has yet to take shape. The death of Justice Ruth Bader Ginsburg, a heroic defender of liberty, and the controversial appointment of a new associate justice in her place threatened the future of rights for women and the promise of security for large segments of our society.<sup>6</sup>

Our political system seemed to crumble. We experienced a tense election, marked by tsunamis of false information that challenged fundamental principles of science and a partisan rhetoric that valued winning above all else.<sup>7</sup> These trends threatened the very core of our democratic institutions.<sup>8</sup> We watched—with horror and disbelief—a desperate attempt to stage a violent coup d'état at our nation's Capitol.<sup>9</sup>

We became aware of our dependency on technology. On one

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anti-semitism-attacks-violence.html.

<sup>6</sup> See Opinion, *Ruth Bader Ginsburg's Legacy*, N.Y. TIMES, Sept. 19, 2020, <https://www.nytimes.com/2020/09/19/opinion/ruth-bader-ginsburg-legacy.html>; *Columbia Law Review In Memoriam: Justice Ruth Bader Ginsburg*, COLUM. L. REV. ONLINE, <https://columbialawreview.org/issue/rbg/>; Maureen Mulligan, *A Tribute to the Legacy of Justice Ruth Bader Ginsburg and the Power of Sponsorship*, ABA JOURNAL, February 17, 2021, <https://www.americanbar.org/groups/diversity/women/publications/perspectives/2021/february/a-tribute-the-legacy-justice-ruth-bader-ginsburg-and-power-sponsorship/>; Joe Pinsker, *RBG's Fingerprints Are All Over Your Everyday Life*, THE ATLANTIC, September 23, 2020, <https://www.theatlantic.com/family/archive/2020/09/ruth-bader-ginsburg-legacy/616447/>; Erwin Chemerinsky, *The Philosophy that Makes Amy Coney Barrett so Dangerous*, N.Y. TIMES, Oct. 21, 2020; Eric Lutz, *Amy Coney Barrett has a Chance to Decimate Abortion Access*, VANITY FAIR, May 18, 2021, <https://www.vanityfair.com/news/2021/05/amy-coney-barrett-has-a-chance-to-decimate-abortion-access-mississippi-supreme-court>;

<sup>7</sup> NATIONAL ARCHIVES, 2020 ELECTORAL COLLEGE RESULTS, Jan. 7, 2021 (“Due to violent unrest in and around the Capitol, the electoral results were not certified until 3:44 a.m., the morning of January 7, 2021”), <https://www.archives.gov/electoral-college/2020/>; Davey Albe, *Tracking Viral Misinformation*, N.Y. TIMES, Sept. 3, 2021, <https://www.nytimes.com/live/2020/2020-election-misinformation-distortions>; Sadie Gurman, *Trump Pressed Justice Department to Discredit 2020 Election, Official's Notes Show*, WALL ST. J., July 31, 2021, <https://www.wsj.com/articles/trump-pressed-justice-department-to-discredit-2020-election-officials-notes-show-11627665949>.

<sup>8</sup> Sue Halpern, *Threats Against Election Officials Are a Threat to Democracy*, THE NEW YORKER, June 29, 2021, <https://www.newyorker.com/news/news-desk/threats-against-election-officials-are-a-threat-to-democracy>; Michael Nietzel, *More than 200 Scholars Issue Warning that American Democracy is in Danger, Call for Reforms*, FORBES, June 1, 2021, <https://www.forbes.com/sites/michaelnietzel/2021/06/01/more-than-100-scholars-issue-warning-that-american-democracy-is-in-danger-call-for-federal-reforms/?sh=16d430e826f7>; John Aldrich, et al., *Statement of Concern: The Threats to American Democracy and the Need for National Voting and Election Administration Standards*, NEW AMERICA (statement of 200 scholars), <https://www.newamerica.org/political-reform/statements/statement-of-concern/>.

<sup>9</sup> *Inside the Capitol Riot: An Exclusive Video Investigation*, N.Y. TIMES, June 30, 2021, <https://www.nytimes.com/2021/06/30/us/jan-6-capitol-attack-takeaways.html>; FEDERAL BUREAU OF INVESTIGATION, U.S. CAPITOL VIOLENCE, <https://www.fbi.gov/wanted/capitol-violence>; Vera Bergengruen & W.J. Hennigan, *The Capitol Attack was the Most Documented Crime in History. Will that Ensure Justice?*, TIME, April 9, 2021, <https://time.com/5953486/january-capitol-attack-investigation/>.

hand, our professional lives moved on-line and tech tools allowed many of us to carry on and to continue our work.<sup>10</sup> Filters and background screens allowed us to create a virtual environment and improve our appearance. On the other hand, we exposed a deep digital divide, where those with means held an even greater advantage and those without fell even further behind.<sup>11</sup> We discovered that the algorithms we thought were objective had their own deeply imbedded biases.<sup>12</sup>

Internally, we became aware of our dependent relationship with technology and the way our screens control us. We developed a new fear of an attack for ransom, but in this type of attack the object is not a friend or family member, but access to our own data.<sup>13</sup> We launched new security protocols to protect our identities.<sup>14</sup> Yet, we also found it difficult to walk away from that last email or tweet and separate our work from our personal lives.

Our daily lives and interactions with others changed dramatically. The restrictions on travel meant we were not able to see family and loved ones. We couldn't convene or attend celebrations of life, such as

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<sup>10</sup> Jose Maria Barrero, Nicholas Bloom, & Steven J. Davis, *Don't Force People to Come Back to the Office Full Time*, HARV. BUS. REV., August 24, 2021, <https://hbr.org/2021/08/dont-force-people-to-come-back-to-the-office-full-time>; *The Rise of Working from Home*, THE ECONOMIST, April 8, 2021, <https://www.economist.com/special-report/2021/04/08/the-rise-of-working-from-home>.

<sup>11</sup> Nicholas Thompson & Wired Staff, *The Pandemic is Forcing Everyone to Face the Digital Divide*, WIRED, August 8, 2020, <https://www.wired.com/story/the-pandemic-is-forcing-everyone-to-face-the-digital-divide/>; Adaobi Anakwe, *Sink or Swim: Virtual Life Challenges Among African-American Families during COVID-19 Lockdown*, 18 INT'L J. ENVTL. RES. & PUB. HEALTH 4290 (2021), <https://www.mdpi.com/1660-4601/18/8/4290/htm>;

<sup>12</sup> The pandemic saw new focus on the issue of algorithmic bias, where computerized formulas that were intended to remove human bias from decision-making are far from objective. The hidden nature of bias—behind an algorithm—makes it more difficult to detect and rectify. Examples include bias in facial recognition software, bias in algorithms designed to make employment or promotion decisions, and bias in formulas used by hospitals to allocate resources. Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROC. OF MACHINE LEARNING RES. 1 (2018); Miranda Bogen, *All the Ways Hiring Algorithms Can Introduce Bias*, HARV. BUS. REV., May 6, 2019, <https://hbr.org/2019/05/all-the-ways-hiring-algorithms-can-introduce-bias>; see also, Dina Ross, *What Are Algorithms and Are They Biased Against Me?*, BLOOMBERG, December 11, 2020, <https://www.bloomberg.com/news/articles/2020-12-11/what-are-algorithms-and-are-they-biased-against-me-quicktake>; Natasha Singer & Cade Metz, *Many Facial Recognition Systems are Biased, Says U.S. Study*, N.Y. TIMES, December 19, 2019, <https://www.nytimes.com/2019/12/19/technology/facial-recognition-bias.html>.

<sup>13</sup> FEDERAL BUREAU OF INVESTIGATION, INTERNET CRIME COMPLAINT CENTER IC3, *Ransomware: What It Is & What to Do About It*, February 4, 2021, [https://www.ic3.gov/Content/PDF/Ransomware\\_Fact\\_Sheet.pdf](https://www.ic3.gov/Content/PDF/Ransomware_Fact_Sheet.pdf); *Why Is There a Surge in Ransomware Attacks?*, THE HACKER NEWS, August 13, 2021, <https://thehackernews.com/2021/08/why-is-there-surge-in-ransomware-attacks.html>.

<sup>14</sup> FEDERAL BUREAU OF INVESTIGATION, FBI URGES VIGILANCE DURING COVID-19 PANDEMIC, <https://www.fbi.gov/coronavirus>.

graduations and weddings. We couldn't gather at funerals to share our grief and bury our lost ones. For some, the quarantine meant crushing isolation and for others, a complete absence of personal space. Amid these myriad challenges our collective well-being suffered. Law students, lawyers, professors and administrators were not immune.

For the most part, law schools rose to the occasion and met these challenges. Our experience demonstrated that law schools could change quickly—a largely untested proposition. The mandate to convert immediately to an on-line format demonstrated that legal education could be delivered effectively in a virtual setting. Many law schools placed a heightened value on hearing student voices and on student well-being. Many law schools developed programs to provide assistance to students in this time of need and provided opportunities to openly discuss distressing social, political, economic, and moral issues.

The first section of this essay reviews the shift to on-line learning and highlights recent changes to the ABA Accreditation Standards. While the process of amending the Standards began before the pandemic, the process accelerated and assumed more significance during the pandemic.<sup>15</sup> The first section concludes that some classes may be more amenable to an on-line delivery, while others, especially clinics, are best in-person.<sup>16</sup> The second section focuses on student well-being, including recent attention from the ABA on issues of student well-being. The second section also refers to information about student well-being gathered through informal surveys in May of 2020 and in March of 2021. Unsurprisingly, the surveys found law students faced a variety of challenges and self-reported deleterious effects on their own mental health. The surveys also found that, even where students faced moderate or severe challenges, they were unlikely to ask for help.

The essay concludes by drawing a connection between student well-being and the types of courses, such as clinics, that are best taught in person. Two artifacts of the pandemic are likely to remain with legal education: first, on-line education will likely expand and may play a larger role in curricular design and development; and second, law schools will increasingly focus on student well-being as a part

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<sup>15</sup> See *infra* notes 23 to 34 and accompanying text.

<sup>16</sup> It is important to note the distinction between various forms of experiential legal education, including clinics, externships and simulation-based courses. In many jurisdictions, all forms of experiential learning moved on-line, such that students in externship placements were working from home. In other jurisdictions, students in externship placements attended the externship seminar on-line but worked at the law office where they were placed. The point emphasized below is the on-line experience misses an important target, especially regarding the integration of self-care and well-being into the development of professional identity. See *infra* Part III.

of the legal education experience. These two artifacts should be examined together. As on-line legal education expands, law schools should consider not only whether the course is a good fit for on-line delivery, but also how on-line delivery will affect student well-being.

### I. DISTANCE EDUCATION

Within the sphere of legal education, the pandemic demanded immediate and widespread change. Anyone familiar with the world of legal education would agree that change does not come easily or frequently. The pandemic required a transition to a completely on-line provision of education and—for many clinicians—the provision of legal services in a virtual format.

The shift to an on-line legal education model created a severe disruption to our industry. Our brief experiment is likely to show the viability of on-line legal education, such that we should expect many law schools to significantly expand on-line courses. Teaching on-line had some practical and financial advantages. Students and teachers met on-line from their own homes. Commuting was eliminated completely, saving time, fuel and maintenance costs, and, perhaps most importantly, mental frustration. Some types of teaching and learning might be more effective on-line than in-person, especially where the learning outcomes focus on memorization of substantive law and where the course is recorded and students can rewind and replay segments of each lecture.

Courses and programs that focus on skills and values may be less adaptable to an on-line format. Seminars that rely on a high level of interaction between professors and students can be difficult to replicate on-line. Clinics and other experiential courses, where students require training in communication skills, work best in a live setting, especially where establishing rapport with a new client is of paramount importance and where ethical considerations about confidentiality might test the capabilities of new technologies.

In sum, if we were to integrate some of the lessons we have learned from our mandatory dive into a completely on-line world, legal education might look very different from the way it was before the pandemic. We might find less need for the largest lecture format classes where the primary goal is a transfer of information and where students have little opportunity for interaction with each other or with the professor. Some part of legal education could be delivered on-line and even asynchronously, through a series of recorded lectures.<sup>17</sup>

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<sup>17</sup> To some extent, this would be analogous to bar review programs, such as BarBri, which have moved from in-person lectures to on-line recorded videos. The recorded subject matter need not be standardized, and schools could offer students more choice. For

The focus of in-person classes could shift from the transfer and acquisition of information to the development of critical analysis and lawyering skills. The Socratic Method, a long-standing stalwart of legal education, might be refined by focusing on outcomes related to analysis, rather than the fear-inducing event it has become in many first-year classrooms. The flipped classroom might evolve further, where the preparation involves coverage of cases and materials through video programming, and the live presentations involve more discussion and problem-solving. The size of the typical law school classroom could be reduced dramatically, allowing more personal interaction between students and professors.

Before the pandemic, the determination of which courses, if any, were taught on-line was almost exclusively a decision made by the individual teacher. Only professors comfortable with technology and amenable to spending the time developing an on-line course would teach on-line. “Well, Professor X will teach on-line (or wants to teach on-line), so that course will be taught on-line.” The pandemic proved that everyone can teach on-line because everyone had to do it.

Post-pandemic, we have an opportunity to evaluate which courses or types of courses are best suited to on-line delivery. Of course, the determination of which courses or topics are best suited to on-line delivery would not be an easy task. It would likely entail a wholesale review of the law school curriculum and would require a deep dive into the knowledge, skills, and values that a program of legal education should deliver to law students.

A thorough review of the law school curriculum would yield long term benefits. Recently, in response to new ABA regulations, law schools have adopted learning outcomes.<sup>18</sup> The next step is to examine specific learning outcomes with an eye to whether the outcome could be achieved on-line or in person. The lesson we’ve learned from the pandemic is the barrier to on-line education is not as high and unreachable as we thought it was—and all of us have made the transition. The curriculum could be revised in a manner that would be both aligned with specific learning outcomes and intentionally designed in a serial manner.<sup>19</sup>

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example, schools could offer students the option to study torts from a law and economics perspective, a relational theory of contracts, or property through a critical legal studies lens.

<sup>18</sup> See ABA Section on Legal Education and Admissions to the Bar, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2021-22, STANDARD 302. Academics from other disciplines must have been wondering how legal education functioned without learning outcomes. But that’s a story for another day.

<sup>19</sup> The use of a sequential curriculum is described as a “best practice” for legal education. ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION: A VISION

Imagine a sequential curriculum where each semester builds on the foundation of the previous term: a first year dedicated to acquiring a base of knowledge; a second year focused on the development of analytical skills and the application of knowledge into practice; and a third year spent in clinics, externships, or subject-specific seminars. A few schools have tried this approach, though on a limited scale. For example, California Western School of Law utilizes a sequential approach in the experiential curriculum.<sup>20</sup> In the first year, students develop skills in research, writing, and analysis. In the second year, students are placed in the role of lawyer in a series of simulated cases. And in third year, students continue to develop skills and values by working with real cases and clients in clinics or externships.<sup>21</sup> California Western is not alone, but very few schools have undertaken a sequential curriculum.

The pandemic lowered the barriers to on-line education. In an environment where every professor has taught on-line, schools could examine which courses could or should be taught on-line, rather than the old system of relying on an individual professor's proclivity or interest in teaching on-line.

This argument should not be interpreted as advocacy for a transition to a completely on-line law school. As noted below, some courses should not be taught on-line.<sup>22</sup> Rather, the pandemic has provided an opportunity to align the course learning outcomes with the mode of delivery of the course. The pandemic removed some of the barriers to that approach. But other barriers remain; chief among them are the ABA's regulations on Distance Education.<sup>23</sup>

#### A. *The ABA's Regulation of Distance Education*

With the March 2020 shelter-in-place orders, law schools had no choice but to move immediately to a distance education format.<sup>24</sup> Before the pandemic, the ABA started the process of amending sev-

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AND A ROAD MAP (Clinical Legal Education Association 2007) (hereafter cited as "Best Practices Report") at 68-76; *see also*, DEBORAH MARANVILLE, LISA RADTKE BLISS, CAROLYN WILKES KAAS, ANTOINETTE SEDILLO LOPEZ, BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD (Clinical Legal Education Association 2015).

<sup>20</sup> <https://www.cwsl.edu/academics/academic-initiatives/stepps-program/sequential-curriculum>

<sup>21</sup> *Id.*

<sup>22</sup> *See, infra*, notes 45 to 48 and accompanying text.

<sup>23</sup> The pandemic brought to the forefront the ABA's limitation on "distance education courses" where the teacher and students are separated and convene through technological means, either synchronously or asynchronously.

<sup>24</sup> Martineau, *supra* note 1.



eral provisions of the Standards governing legal education.<sup>25</sup> In August of 2020, the ABA House of Delegates adopted two resolutions related to distance education, Resolution 109A and 109B. Resolution 109A involved three amendments to the ABA Standards. The first change revised the definitions section to include “Distance education course” and “Distance Education J.D. Program.”<sup>26</sup> The second change under Resolution 109A shifted the approval process for distance education programs to a “substantive change process” under Standard 105 (and Rule 24) from a “variance process under Standard 107.”<sup>27</sup> The third change deleted Standard 306, which related to distance education programs; two sections of Former Standard 306 were moved to Standard 311 and 511 respectively.<sup>28</sup> Resolution 109B amended the authority of the ABA’s Council on Legal Education to adopt temporary policies in response to an emergency.<sup>29</sup>

Before the August 2020 changes, ABA Standard 306 regulated distance and on-line education at accredited law schools. Former Standard 306 permitted courses where “students are separated from the faculty member for more than one-third of the instruction” and where technology supported “regular and substantive interaction . . . either synchronously or asynchronously.”<sup>30</sup> Former Standard 306 allowed

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<sup>25</sup> ABA, MEMORANDUM FROM THE STANDARDS REVIEW SUBCOMMITTEE TO THE COUNCIL ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, May 8, 2020, [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/may2020/20-may-council-standards-memorule-2.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/may2020/20-may-council-standards-memorule-2.pdf) (last accessed May 30, 2021).

<sup>26</sup> ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT TO THE HOUSE OF DELEGATES, Resolution 109A, August 2020, <https://www.americanbar.org/content/dam/aba/administrative/news/2020/08/2020-am-resolutions/109a.pdf> (last accessed May 30, 2021)[hereafter Resolution 109A].

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Resolution 109B amended the authority of the ABA’s Council of the Section of Legal Education and Admission to the Bar [hereafter, “Council”] to include the power to adopt for a limited duration “emergency policies and procedures in response to extraordinary circumstances.” AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REVISED STANDARDS FOR APPROVAL OF LAW SCHOOLS, Resolution 109B, August 2020, <https://www.americanbar.org/content/dam/aba/administrative/news/2020/08/2020-am-resolutions/109b.pdf> (last accessed May 30, 2021)[hereafter Resolution 109B]. This amendment made it possible for the Council to quickly approve changes to law school curricula in response to the pandemic and to allow a similar response to future extraordinary events such as a pandemic or a weather disaster. ABA, MEMORANDUM FROM THE STANDARDS REVIEW SUBCOMMITTEE TO THE COUNCIL ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, *supra* note 25. The Council’s authority would apply to circumstances that affected a number of law schools simultaneously, rather than an event affecting only a single law school. “[T]he proposed emergency actions are not intended to displace the normal processes outlined in the Standards where an individual law school seeks to respond to extraordinary events.” *Id.*

<sup>30</sup> Former Standard 306 (a) (deleted by Resolution 109A), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_)

law schools to grant students up to one-third of the total number of credit hours required for the J.D. degree via distance education courses. Former Standard 306 also limited the number of credit hours via distance learning to one-third of the total hours required for the J.D. degree and set a limit of ten credit hours for distance education in the first third of the program of legal education (typically the first year).<sup>31</sup>

The August 2020 Resolutions created a new category of “Distance Education J.D. Program,” defined as “a program where a law school grants a student more than one third of the credit hours required for the J.D. degree for distance education courses.”<sup>32</sup> Clauses from Former Standard 306 were moved to different sections of the ABA Standards. The clause in Former Standard 306 related to a limit of ten hours of distance education in the first year was moved to Standard 311, which covers the academic calendar and the number of credit hours required for the degree of J.D.<sup>33</sup> A clause related to verifying the identity of students engaged in distance learning programs was moved to Standard 511.<sup>34</sup> The amendments in Resolutions 109A and 109B also altered the process for a law school to request permission to offer more than a third of the credit hours for the J.D. degree through distance learning.<sup>35</sup>

Currently, no ABA-accredited law school provides a J.D. degree through distance education.<sup>36</sup> The largely untested question is whether some law schools will continue to operate on-line or offer a Distance Education J.D. Program.

### *B. Early Adopters of Distance Education*

Two law schools, Mitchell Hamline School of Law and Syracuse University College of Law, have established on-line J.D. programs, where students earn a law degree with more than one-third of the credits earned in an on-line format. Both programs received approval

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to\_the\_bar/standards/2019-2020/2019-2020-aba-standards-and-rules-of-procedure.pdf.

<sup>31</sup> *Id.*

<sup>32</sup> Resolution 109A, *supra* note 25.

<sup>33</sup> ABA Standard 311, [https://www.americanbar.org/dam/administrative/\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter3.pdf](https://www.americanbar.org/dam/administrative/_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter3.pdf) (last accessed May 30, 2021).

<sup>34</sup> Resolution 109A, *supra* note 25.

<sup>35</sup> Under the former structure, a law school had to apply for a variance (under Standard 107) because the shift to a distance education program would involve a change beyond what was permitted under the current Standards. Under the new structure, a law school must apply for a “substantive change” under Standard 105 and Rule 24. Resolution 109A, *supra* note 25.

<sup>36</sup> AMERICAN BAR ASSOCIATION, GUIDE TO ABA APPROVED DISTANCE EDUCATION, Dec. 14, 2020, [https://www.americanbar.org/\\_education/\\_/](https://www.americanbar.org/_education/_/) (last accessed May 31, 2021).

from the ABA.<sup>37</sup> While the programs differ, both programs offer insights into the future of on-line legal education. Significantly, both programs retain a requirement for in-person education. A critical aspect of both programs, then, involves a careful consideration of the legal education curriculum, and a division of courses and topics into areas that are amenable to on-line education and areas that are taught in person.

In the Mitchell-Hamline curriculum, students complete the “Hybrid J.D.” degree program in four years.<sup>38</sup> During the first two years, students adhere to the one-third rule, acquiring one-third of their credit hours on-line and two-thirds in person (via intensive in-person sessions).<sup>39</sup> In the last two years, however, students have the option of participation completely in-person or completely on-line.<sup>40</sup> The on-line courses at Mitchell-Hamline are presented asynchronously, allowing students to take classes on their own time. Mitchell-Hamline formally applied to the ABA for a variance for the on-line program in 2013.<sup>41</sup>

The Syracuse Program, “JDinteractive,” claims to be the “first real-time, fully interactive, ABA-approved online degree program.”<sup>42</sup> The Syracuse program allows students the opportunity to complete the J.D degree in three years and three months. The program has several “Residencies,” which are taught in person, but the total number of credits for the on-campus residency courses falls below the two-thirds requirement under the ABA Standards.<sup>43</sup> While the Mitchell-Hamline program offers asynchronous on-line courses, the Syracuse program touts the “interactive” nature of its curriculum, with synchronous courses where students have the opportunity to interact with professors in real time.

Significantly, both the Mitchell-Hamline Hybrid JD program and the Syracuse JDinteractive program reserve experiential courses for the in-person part of the curriculum. The in-person requirements for the Mitchell-Hamline curriculum include: a “Capstone Week” each semester, comprised of skills training and real-world simulations that develop capacities in counseling, negotiation, writing and trial practice; and “Case-study workshops,” which focus on creative problem

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<sup>37</sup> <https://jdinteractive.syr.edu/>; <https://mitchellhamline.edu/about/blended-learning-at-mitchell-hamline/>

<sup>38</sup> See <https://mitchellhamline.edu/academics/j-d-enrollment-options/blended-learning-at-mitchell-hamline/>.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> <https://mitchellhamline.edu/about/blended-learning-at-mitchell-hamline/>.

<sup>42</sup> <https://law.syr.edu/admissions/online-jd-program/>.

<sup>43</sup> See <https://jdinteractive.syr.edu/curriculum/residential-courses/>.

solving and strategic thinking.<sup>44</sup> The Syracuse program requires in-person residencies twice each year. These residencies focus on professional skills, such as negotiation, counseling, trial practice, and the role of a lawyer.<sup>45</sup>

### C. *Learning from Experience*

Two programs that have already adopted on-line legal education reserved part of the curriculum for in-person instruction. And both require in-person instruction for courses that cover similar material, such as counseling, negotiation, simulated problem solving, and professional identity. This division makes sense. Courses such as counseling and negotiation depend on interpersonal relationships, which may be more difficult to see, understand, interpret, and manage in an on-line environment. For example, in both negotiation and counseling, lawyers must be attentive to body language and other non-verbal cues. This can be especially difficult in an on-line environment where one sees only the face of the other party. Further, other courses, such as simulation-based problem-solving courses, require deep critical thinking and strategic planning. These courses may (if executed properly) integrate scaffolding, where students engage with problems just above the student's capacity to solve alone and where students rely on guidance from an experienced professor or practitioner to solve the problems.<sup>46</sup> Moreover, courses that focus on legal ethics, the norms of the legal profession, and the development of professional identity often rely on a mentor relationship, include observations of lawyers in practice, and benefit from reflecting on professional experiences.<sup>47</sup> Rather than transferring to the student knowledge of specific rules, these courses develop context for the student and assist the student in understanding why a specific course of action might be appropriate in one scenario and inappropriate in another. Thus, in-person instruction is most important in courses where the learning outcome or the mode of teaching includes personal interaction, core values, or reflective conversations.<sup>48</sup>

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<sup>44</sup> <https://mitchellhamline.edu/about/blended-learning-at-mitchell-hamline/>

<sup>45</sup> <https://jdinteractive.syr.edu/curriculum/residential-courses/>

<sup>46</sup> Scaffolding describes a pedagogy where teachers provide structured support for students to enable them achieve the next level of learning. Scaffolding typically involves a context of a task or problem that is just beyond the capacity of the student to complete alone. See Diane May, *Using Scaffolding to Improve Learning in Legal Environment Courses*, 31 J. L. STUDIES EDUC. 233 (2014).

<sup>47</sup> For an overview of issues of professionalism and professional identity see Eli Wald, *Formation Without Identity: Avoiding a Wrong Turn in the Professionalism Movement*, 89 U.M.K.C. L. REV. 685 (2021). For a discussion of reflection see Timothy Casey, *Reflective Practice in Legal Education: The Stages of Reflection*, 20 CLIN. L. REV. 317 (2014).

<sup>48</sup> I thank Professor Alexander Scherr for this important insight.

The pandemic taught us similar lessons. While everyone made a transition to on-line education during the pandemic, some courses and topics were better suited to a virtual format. Courses such as clinics and clinic seminars, problem-based simulations, and courses based on professional development and ethical dilemmas were more difficult to present on-line. Client interactions were moved on-line, depriving both students and professors of many aspects of the interpersonal relationship. While clinic students still had the benefit of their professors as mentors, the opportunities for observation were more limited. Some of the learning in a clinical setting comes from the activity that occurs around the student's case. For example, in a litigation clinic, students might have an opportunity to observe other lawyers arguing cases in court on the same day. These opportunities for observation frequently add to the overall learning experience, even (or perhaps especially) when the observation includes less than ideal lawyering.

The experience of moving clinical teaching on-line highlighted other aspects of the clinic experience. Clinicians engage with students more frequently and for longer periods of time than professors in other courses. The student-teacher ratio in a clinic is often eight to one or lower. Any clinician can recall the student tentatively knocking at an office door, asking "Do you have just a minute. . .?", and the ensuing hour of deep conversation. These individual interactions provide much of the special character of the clinical experience.<sup>49</sup> Moving on-line meant the barrier between student and teacher had to be bridged with a request to meet or an email that detailed the student's question. The absence of the quick, brief, and contemporaneous interactions between student and teacher transformed the clinical experience in ways that are difficult to quantify, but are nonetheless very real.

#### *D. Looking Forward*

The pandemic dispelled the myth that legal education could not be delivered on-line. We did it. That said, some aspects of the legal education curriculum are better suited to on-line delivery and some aspects are best delivered in person. Figuring out which parts of the curriculum could be delivered on-line will require a deep examination of learning outcomes and pedagogy, and will entail alignment of the subject matter, the desired outcomes, and the selected pedagogy with the mode of delivery.

The ABA's revision of the Standards governing distance learning open the door to further expansion of on-line legal education. While

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<sup>49</sup> See *infra* Part III.

the amendments create the possibility of a completely on-line legal education, no ABA-accredited law school has adopted a *completely* on-line curriculum.<sup>50</sup>

## II. STUDENT WELL-BEING

Apart from the substantial changes to the delivery of legal education, the pandemic shined a light on another long-overlooked aspect of legal education: student well-being. The tremendous upheaval meant students, teachers, and administrators faced unprecedented challenges

As noted above, much of the law school experience is regulated, either formally, through the ABA Standards, or informally, through efforts to comply with best practices noted in the Carnegie Report of 2007, the MacCrate Report of 1992, and other resources.<sup>51</sup> But one critical area has been missed: student well-being.

### A. Wellness Reckoning

Recent scholarship has called attention to this glaring absence. Professor Janet Thompson Jackson has called for a “wellness reckoning.”<sup>52</sup> In her article, *Wellness and Law: Reforming Legal Education to Support Student Wellness*, Professor Jackson not only presents a call to action but also offers a blueprint of concrete steps that law professors and administrators can take immediately.<sup>53</sup> She explains that some lauded aspects of the legal profession, such as our adversarial system and the competitive environment of law school, contribute to “wellness dysfunction.”<sup>54</sup> Further, the factors that have a negative impact

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<sup>50</sup> Mitchell Hamline School of Law and Syracuse University Law School have developed hybrid programs that include more than one-third distance education. Concord Law School in Los Angeles offers a fully online J.D. program, but is not accredited by the ABA. <https://www.concordlawschool.edu/academic-programs/juris-doctor/>

<sup>51</sup> Task Force on L. Sch. & the Profession: Narrowing the Gap, *Legal Education and Professional Development – An Educational Continuum*, A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO BAR (1992), <https://www.corteidh.or.cr/tablas/28961.pdf> [hereinafter “MacCrate Report”]; WILLIAM M. SULLIVAN, ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007) [hereinafter “Carnegie Report”]; BEST PRACTICES REPORT, *supra* note 18.

<sup>52</sup> Janet Thompson Jackson, *Legal Education Needs a Wellness Reckoning*, U.S. LAW WEEK, April 7, 2021, <https://news.bloomberglaw.com/us-law-week/legal-education-needs-a-wellness-reckoning> (last accessed May 31, 2021); *see also*, Janet Thompson Jackson, *Wellness and Law: Reforming Legal Education to Support Student Wellness*, 65 HOWARD L. J. 1 (2021) [hereafter *Wellness and Law*].

<sup>53</sup> Jackson, *Wellness and Law*, *supra* note 52.

<sup>54</sup> *Id.*; *see also*, Susan Sturm, *From Gladiators to Problem Solvers: Connecting Conversations About Women, The Academy, and the Legal Profession*, 4 DUKE J. GENDER L. & POL. 119, [hereafter, Sturm, *Gladiators*] “This ‘gladiator’ model of legal education and lawyering celebrates analytical rigor, toughness, and quick thinking. It defines successful performance as fighting to win: an argument, a conflict, or a case.” Sturm, *Gladiators*, at 121.

on student well-being tend to continue within the ranks of lawyers.<sup>55</sup> Lawyer well-being is not just a law school issue, but the issues seems to start in law school.

The ABA has apparently recognized the omission of student well-being and called for public comments on a proposal to amend the ABA Standards.<sup>56</sup> The proposed action would amend Standard 303(b) to require law schools to provide “substantial opportunities to students for . . . the development of professional identity.”<sup>57</sup> In addition, Standard 508, which covers Student Support Services, would be amended to require law schools to provide all students with “information on law student well-being resources.” Law student well-being resources “include information or services related to substance abuse and mental health.”<sup>58</sup>

Attention to the issue of student and lawyer well-being coincided with interest in the development of professional identity and the promotion of professionalism. As with well-being, calls for attention to professionalism arose in both the legal profession and the legal academy.<sup>59</sup> Many law schools had begun efforts to develop “professional identity” as a learning outcome for legal education. Efforts to integrate professional identity formation are not new to legal education and certainly did not arise from the pandemic. Recent scholarship, however, notes the renewed importance of professional identity. For example, Professor Eli Wald discussed the momentum for programs in professional identity, while expressing hope that the opportunity would be well spent.<sup>60</sup>

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<sup>55</sup> Jackson, *Wellness and Law*, *supra*, note 52.

<sup>56</sup> AMERICAN BAR ASSOCIATION, MEMORANDUM FROM THE SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, ABA STANDARDS 303 AND 508 AND RULES 2 AND 13, March 1, 2021, [https://www.americanbar.org/content/dam/aba//\\_education\\_and\\_admissions\\_to\\_the\\_bar/20210301-notice-and-comment-standards-303-and-508-rules-2-and-13.pdf](https://www.americanbar.org/content/dam/aba//_education_and_admissions_to_the_bar/20210301-notice-and-comment-standards-303-and-508-rules-2-and-13.pdf) (last accessed May 31, 2021).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Within the legal profession, several state and local bar associations have focused attention on lawyer civility (a part of professionalism). For example, the California Supreme Court amended the oath of an attorney to include statements about professionalism and civility. See CAL. RULES OF COURT r. 9.4 (2014); see also, ST. BAR OF CAL., STATEMENT ON ATTORNEY CIVILITY AND PROFESSIONALISM, <https://www.calbar.ca.gov/attorneys/conduct-discipline/ethics/attorney-civility-and-professionalism>.

<sup>60</sup> Wald, *supra* note 47; see also, Neil Hamilton, *The Next Steps of a Formation-of-Student-Professional-Identity Movement: Building Bridges Among the Three Key Stakeholders – Faculty and Staff, Students, and Legal Employers and Clients*, 14 ST. THOMAS L. J. 285 (2018); Neil Hamilton, *Fostering Professional Formation: Lessons from the Carnegie Foundation’s Five Studies of Educating Professionals*, 45 CREIGHTON L. REV. 763 (2012); MACCRATE REPORT, *supra* note 51; BEST PRACTICES, *supra* note 51.)

### B. *Student Well-Being in the Pandemic*

The pandemic created new challenges and heightened existing ones. The impacts of the pandemic were not distributed equally. Some had to make minor adjustments to work and study at home, while others faced major disruptions to physical health, financial security, and emotional well-being. Law students, faculty, and staff were not immune. As in society, the impacts of COVID-19 were disproportionately distributed across our communities.

A preliminary question might be, how widespread are issues of student well-being? Or what types of issues should be included under the heading of “student well-being.” One law school conducted a series of informal check-ins with students in the form of on-line surveys. While these informal surveys lack the rigor of standard empirical research, they offer insights for future research in the area of student well-being.<sup>61</sup>

Several points emerge from both anecdotal evidence of student well-being and from the check-in survey results. First, student well-being should cast a wide net. Some students will experience one type of issue, for example, a physical health issue, while other students will experience a different challenge, for example the additional responsibilities of caring for a child or other family member.<sup>62</sup> In addition to physical health challenges, the pandemic exacerbated financial challenges, with many students losing employment opportunities. Finally, with respect to mental health challenges, students experienced mental health challenges in different ways, with some reporting feelings of isolation and others reporting they had no personal space or no place

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<sup>61</sup> Survey results on file with the author. The survey was designed as a way to “check-in” with students in the absence of the usual cues to student well-being derived from in-person interactions. Several flaws with the survey were discovered after the fact. That said, the survey results are striking in the overall number of students reporting moderate or severe issues and in the difference between the results of the spring 2020 survey and the spring 2021 survey. The second survey included 15 types of challenges ranging from mental and physical health to food security and family care obligations. The most salient results are reported here. These surveys were not prepared with scientific precision or with prescient attention to the value of a longitudinal study. Thus, the questions and scales are different for the 2020 and 2021 surveys. The informal results reported here serve as anecdotal evidence of the need for more attention and rigorous study of these issues. The author intends to undertake additional empirical research on student well-being.

<sup>62</sup> The pandemic highlighted these issues because many students had physical health issues, many more were affected by physical health issues of family members, and any student with children at home faced the challenge of additional responsibilities. Many of these challenges fell disproportionately to women and those serving as primary care givers. See generally, T. Murat Yildirim & Hande Eslen-Ziya, *The Differential Impact of Covid-19 on the Work Conditions of Women and Men Academics during the Lockdown*, 28 GENDER, WORK, & ORG. 243 (2020).



to study. Our anecdotal evidence confirms these insights.<sup>63</sup>

The informal “check-in” surveys also reveal that many students are aware of the importance of well-being, especially with respect to mental health issues, but they are not seeking assistance.<sup>64</sup> This result suggests both positive and negative implications. First, one of the ongoing challenges regarding mental wellness has been the reluctance to identify the issues; the good news is students seem ready to admit that issues exist. However, there are still barriers to receiving assistance. Like all aspects of the “check-in” surveys, the conclusion should be that student well-being is ripe for more rigorous study. The severe challenges of the pandemic focused attention on an issue that requires more research and, like the issue of expanding on-line education, merits deep consideration and a thoughtful response.

### *C. Integrating Student Well-Being into the Curriculum*

The pandemic forced law schools to move to an on-line mode of delivery. The section above discusses the potential for expanding on-line education with a conscious and thoughtful design, while retaining in-person courses where appropriate.<sup>65</sup> Courses that focus on interpersonal relationships, professionalism or professional identity, socialization, analysis of the importance of context, or reflective practice are best delivered in person due to the individual nature of the responses and the importance of contemporaneous interaction.<sup>66</sup> This type of course, which includes many experiential courses and clinics, might also serve as the best place to integrate student well-being into the curriculum.

The recent amendments to Standard 303 require law schools to include instruction in professional identity. This is a step in the right direction. But the amendments regarding student well-being only require that law schools offer resources on wellness.<sup>67</sup> A better option

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<sup>63</sup> For example, one clinic student attended the seminar while sitting on the bathtub because it was the only quiet space in an apartment crowded with extended family.

<sup>64</sup> A large majority of respondents reported experiencing mental health issues and also reported they did not seek assistance through school resources. In response to the issue of mental health—feeling more depressed or anxious or experiencing symptoms of another mental health issue—students responded as follows: 34% reported severe issues; 36% reported moderate issues; 22% reported mild issues; and only 7% reported no issues. A separate question asked students if they had responded either moderate or severe to any of the issues, whether they had contacted one of the Student Life offices. 75% responded they had not sought assistance.

<sup>65</sup> See *supra*, notes 43 to 50 and accompanying text.

<sup>66</sup> *Id.*

<sup>67</sup> See ABA STANDARD 508, [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2020-2021/2020-21-aba-standards-and-rules-for-approval-of-law-schools.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-for-approval-of-law-schools.pdf).

would be to integrate well-being as a part of professional identity. This would ensure that well-being holds a place in the required curriculum, rather than as a part of necessary support. Of course, the requirement to offer support should also remain. If the issue of well-being were integrated into professional identity, it would likely fall into the category of courses better delivered in person.

### III. LEARNING FROM THE PANDEMIC

What lessons can we learn? First, we need to take seriously issues of student well-being. The scholarship of Professor Jackson leads us in the right direction. Although many law schools have taken steps and formalized programs to address student well-being, the issue has yet to be institutionalized in the required curriculum of legal education. The ABA is on the right track with the recent proposal to add resources on well-being to the mandatory slate of services that must be offered to all law students, but a better option would be to include well-being as a part of the required curriculum. This could be accomplished by recognizing—formally through an amendment to the ABA Standards—that well-being is a part of professionalism and professional identity.

Second, our experiment with moving to an on-line format demonstrates the capacity to change quickly. Our experience may show the benefits of an on-line program for some students and for some types of learning outcomes. On-line teaching and learning has succeeded in other platforms, so there is no reason to believe legal education would be immune to the benefits of a virtual classroom.<sup>68</sup> One commentator has suggested that legal education must change if it is to survive.<sup>69</sup>

Some parts of legal education may remain remarkably stable. Some have suggested that the new era of teaching law will move away from providing foundational knowledge and toward problem solving and “soft” skills, such as “collaboration, empathy, cultural awareness, client management, and customer service.”<sup>70</sup> If that is the case, then the new vision of legal education may be more like a clinic or a seminar and less like the stereotypical lecture halls portrayed in the media

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<sup>68</sup> For example, a recent study found that Khan Academy—an on-line teaching method—found success in preparing students for the LSAT. Kimberly Dustman, Gregory Camilli & Ann Gallagher, *LSAT Takers and Khan Academy Preparation* (April 19, 2021), <https://ssrn.com/abstract=3845015> (last accessed May 31, 2021).

<sup>69</sup> “The education industry—an enormous business—is next up on the disruption list, and law schools are at the top of the list.” Mark Cohen, *Post Pandemic Legal Education*, FORBES, August 13, 2020, <https://www.forbes.com/sites/markcohen1/2020/08/13/post-pandemic-legal-education/?sh=72170f9d75d2> (last accessed May 31, 2021).

<sup>70</sup> *Id.*

(and found on most campuses).<sup>71</sup>

The pandemic presented significant challenges for clinical teaching and experiential learning. Clinics faced issues with regard to students, clients, work outside the clinic (e.g. court hearings), and administration. Because clinical teaching relies so heavily on individual instruction, the “returns to scale” and improvements through repetition that could be realized in other educational settings did not apply to clinics. Moreover, teachers and students interact in a variety of modes in a clinical setting. The amount of information exchanged in an email or even on a video conference is far less than in a face to face encounter. When the only interactions are electronic, either by email or video conference, students tended not to ask the follow up question that might lead to a deeper understanding of a complex issue. The frequent “do you have a minute” conversations, the ones that occur in the clinic hallway or just outside the office of the professor, ceased to exist—and the learning derived from those contemporaneous interactions was lost.

Clinical education occurs in real time and, for the most part, with real clients. Students learn to make decisions with incomplete, inconsistent or inaccurate information, and they learn to exercise professional judgment by working alongside clinical professors.<sup>72</sup> The close working relationship is a hallmark of the clinical experience. The student receives information from the professor in the form of subtle cues, a nod of affirmation or an eye roll of disapproval. These communications occur instantaneously and provide silent guidance for the student attempting to complete a challenging task.

The communication flows in two directions, not only from professor to student, but also from student to professor. The close working relationships mean professors get to know students well and understand the strengths and weaknesses of each individual. The professor’s advice for one student may be different than the advice to another student because that advice is based on the professor’s knowledge of the individual student’s characteristics, experiences, preferences, and biases—information the professor gains through personal interaction with the student. Professor Sandy Ogilvy described gaining “a window into the thinking and lives . . . of students” through their reflective

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<sup>71</sup> See, e.g., the depiction of Professor Kingsfield in *THE PAPER CHASE* (20th Cent. Fox 1973), <https://www.youtube.com/watch?v=QX22TyCge7w> (last accessed May 31, 2021), or Professor Stromwell in *LEGALLY BLONDE* (M.G.M. 2001, [https://www.youtube.com/watch?v=GWY85\\_MC\\_AY](https://www.youtube.com/watch?v=GWY85_MC_AY) (last accessed May 31, 2021).

<sup>72</sup> For an analysis of the modes of thinking developed in a clinical environment, see Anthony Amsterdam, *Clinical Legal Education – A 21st Century Perspective*, 34 J. LEGAL EDUC. 612 (1984).

journals.<sup>73</sup> While journals remained available to professors as a source of information about their students, the restrictions of the pandemic meant that professors had fewer opportunities to observe and interact with students. The decrease in information available to professors made it more difficult to evaluate the student's performance, to assess the student's reflection about the performance, and to provide individualized guidance to the student. The quality of clinical work and the low student-teacher ratios mean that clinical professors often know their students better than colleagues teaching doctrinal courses.

The depth and frequency of student-teacher communication translates to students frequently looking to clinical professors for advice on a whole range of topics. Because clinicians know students better, they are in a better position to observe student well-being and may notice when students are experiencing issues related to well-being. As clinicians, our close proximity to students means they are more likely to share with us their personal challenges and the ways their personal lives affect their professional obligations. Most clinicians would include student counseling as a significant part of their daily professional lives. The clinical experience exposes the student to the pressures and the stress that accompanies the representation of real clients. Clinicians frequently discuss stress-management strategies, often tailored to the specific experience of an individual student. These important exchanges tend to arise in the moment, organically, and without advanced planning. Yet these conversations play a critical role in the student's professional development because the clinician can integrate concepts of self-care and well-being into a student's professional identity.

We lost some of that connection when we went on-line. The lack of proximity and the lack of hours spent working together changed the clinical experience for both teachers and students. There were fewer opportunities for the unplanned but critical conversations about well-being. During the pandemic, we experienced a simultaneous increase in the factors causing stress and a decrease in the availability of means to manage stress. The experience of the pandemic put in stark relief the importance of the clinical environment—and the close mentor relationships between clinicians and students.

Moving clinical education on-line may have some advantages, such as gaining more access to some types of clients. But any gains must pale in comparison to the change in the mentor-apprentice relationship and the loss of countless conversations that address student

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<sup>73</sup> J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLIN. L. REV. 55, 59 (1996). Professor Ogilvy was referring specifically to obtaining information through journals, which remained an important pedagogic tool during the pandemic.

well-being. Clinical courses are designed to foster the critical interactions between student and professor. Because these interactions arise more frequently and naturally in person, the clinical courses where these interactions occur should be delivered in person.

Our experience with clinical legal education in the pandemic should provide us with new and better arguments for the value of clinical teaching. Client communications became both easier and more difficult. In some types of clinics, the elimination of in-person appointments meant that many more people had access to the limited resources of the clinic. Many more people were able to access clinic resources if it meant waiting for a Zoom session rather than a trip to the clinic office.<sup>74</sup> Clients who might not have been able to meet with a lawyer were able to do so because of the ease of electronic communication. But for some clients, especially those clients with limited access to computers or tablets, the pandemic expanded the digital divide.<sup>75</sup> Those clients found it more difficult to access lawyers because they did not have the resources, and the usual places where they could access resources, such as public libraries, were closed.

The pandemic affected other areas of experiential learning as well. Externship programs switched to an on-line format, depriving students of many of the networking opportunities and access to mentors that they would have had in an in-person setting. Simulation courses and even legal writing courses had to change to an on-line format. The challenge was greatest in areas where non-written communication was paramount, such as counseling or negotiation. While video-recording simulated performances gave the professor another means to evaluate the student's performance, some aspects of communication must be seen live in order to be completely assessed. And while it's true that legal practice will likely involve more video interaction and the ability to communicate through video will become a core competency, there will always be an acute need for in-person communication. Experiential learning provided critical training in that arena, and students in the pandemic who did not receive that training may need to acquire those skills in the early stages of their careers.

## CONCLUSION

In reflecting on the events of the past year, we should recognize our resilience and perseverance—our success, if you will. The experi-

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<sup>74</sup> The ease of electronic communication may have shifted the demographics of the client population. For example, in one “walk-in” civil clinic, there were more examples of neighbor disputes and fewer domestic violence issues, perhaps because of the ease of communication.

<sup>75</sup> See *supra*, note 11 and accompanying text.

ence of moving to an on-line delivery of legal education proved that it was possible. Moving forward we should anticipate the expansion of on-line or distance education, but we should embrace that expansion through thoughtful analysis of learning outcomes and pedagogic methods. This analysis will allow us to determine a proper alignment between the purpose and process of a course and the limitations of distance education.

Our management of the challenges of the pandemic gave us reason to believe in future innovations and continued success. But we should also acknowledge that the pandemic extorted a high price, one that was not distributed equally. As lawyers in practice, we often see that the very characteristics that lead to professional success, such as a dedication to clients, an extreme work ethic, and a willingness to put work before other concerns, can result in disaster in other aspects of our lives. As a profession, we must acknowledge our failure to dedicate adequate attention to lawyer well-being. As an academic community, we have the opportunity to improve both our students' lives and the future of our profession. We must take seriously the issue of well-being, and we must signal that commitment by integrating well-being into the curriculum. That integration should be pursued thoughtfully and carefully, and a starting point would be a close look at courses that focus on professional identity. Our culture needs to change. But change, as we know, is difficult for the legal culture.

The pandemic and other events of the past year brought new challenges and resurrected ancient ones. Our continued success, both in law school and in the legal profession, will depend on our ability to care for ourselves and to provide care for our colleagues in a meaningful way. The real challenge lies ahead.