

# The University of New Hampshire Law Review

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Volume 22  
Number 2 *Volume 22, Number 2 (2024)*

Article 6

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6-1-2024

## **New and Useful Improvements: The Role of Institutional Culture, Leadership, Incentives, and Regulation in 30 Years of Legal Education Since the MacCrate Report**

Greg Brandes

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### **Repository Citation**

22 U.N.H. L. Rev. 209 (2024).

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Greg Brandes

## New and Useful Improvements: The Role of Institutional Culture, Leadership, Incentives, and Regulation in 30 Years of Legal Education Since the MacCrate Report

22 U.N.H. L. Rev. 209 (2024)

**ABSTRACT.** New and useful improvements – in the words of the patent statute – have emerged from legal education’s pursuit of seamlessly developing contributing members of the legal profession, as the 1992 MacCrate Report advocated. These include the widespread adoption of distance learning techniques for better teaching and assessment, course pedagogy that is more inclusive for students with diverse learning needs, and a new subset of the academy schooled and interested in the science of teaching and learning. But it has not been easy.

Efforts to improve legal education have sometimes foundered and other times flourished because of varying faculty and institutional cultures, economic and career incentives and disincentives, and the slowly evolving scheme of regulation within which innovation must proceed. Innovations such as the case method, the Socratic classroom, and final exams in law school courses were once controversial, and their adoption travails illuminate the challenges confronting modern legal education innovators. Then as now, cultures that insist upon pedagogical conformity confine creativity and inhibit innovation. Incentives rewarding hierarchies and the status quo are also mis-aligned with innovation. Faculties and programs that align tenure and promotion, pay, status, and institutional governance authority with age-old traditions are unlikely to innovate, even when change is clearly required to keep pace with evident best practices, student needs, and the expectations of the profession and regulators. Cautious regulation historically constrained innovation and progress in some ways, but is no longer a significant barrier to innovation.

Cultures and incentives that put students and learning first are more apt to test innovations, respond to opportunities, and adopt emerging best practices, and regulators are now aligned with these goals. This focus on students mirrors the call to action by the MacCrate Report authors all those years ago.

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## I. THE CONTEXT OF RISK TAKING AND INNOVATION IN LEGAL EDUCATION

The patent statute, 35 U.S.C. § 101 confers protection of the right to own and monetize inventions that are “new and useful” to their inventors and discoverers:

§ 101 - Inventions patentable. Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.<sup>1</sup>

If law schools were organized like tech companies, value would be placed on innovation and creativity.<sup>2</sup> When law schools *have been* organized to create and value new ideas, test them, reward them, and incorporate them in improving education and outcomes, significant innovations and improvements have occurred.<sup>3</sup>

This article examines the risk-taking environment, culture, leadership, incentives, and regulatory conditions in which law schools may create significant “new and useful” innovations. Each environmental force or factor is examined and its role in connection with risk taking and innovation is explained and illustrated. Regulation is given particular attention both because it was, in legal education, mistakenly or deliberately, held responsible as a constraint on innovation too widely for too long, and because, at times at the state level in California and federally, it

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<sup>1</sup> 35 U.S.C. § 101.

<sup>2</sup> Rocket Lawyer, for example, owns seven patents, ranging from a “Cryptographic Contract Payment and Dispute Resolution System” to “Systems and methods for facilitating attorney-client relationships, document assembly and nonjudicial dispute resolution.” See *Patent Public Search Basic (PPUBS Basic)*, U.S. PAT. & TRADEMARK OFF., <https://ppubs.uspto.gov/pubwebapp/static/pages/ppubsbasic.html> (choose “Assignee name” in both “Search” dropdowns; then type “Rocket” in first “For” search bar; then choose “AND” in “Operator” dropdown; then type “Lawyer” in second “For” search bar and click “Search” button underneath) [<https://perma.cc/9ZJJ-GCKS>] (last visited Jan. 4, 2024).

<sup>3</sup> Formation of innovative organizations comes about through leadership and teamwork. The ideas presented here have grown from research and experiences over nearly forty years of learning from many great partners and leaders pushing the envelope of legal education. Dean Barry Currier of Concord Law School and the ABA, retired, remains an inspiring leader and example. Colleagues David I.C. Thomson of the University of Denver Sturm College of Law and Sara Berman of the University of Southern California Gould School of Law are visionaries furthering modern pedagogy in legal education. The founders of Concord Law School truly launched online legal education: Founding Dean Jack R. Goetz, Robert Hull, Associate Dean of Academics, Craig Gold, Associate Dean of Technology, Donna Skibbe, Vice President, Steve Bracci, Associate Dean of First Year Programs, Cassandra Colchagoff, Associate Dean of Administration, and Dr. Martha Siegel, Dean of Students, who all solved so many of the innovator’s puzzles, and Estream, Inc., the amazing technology partner on all platforms for early online legal education, and its founders Grant Moncur and Craig Gold. Earlier still, Walter McLaughlin, one founder of SMH Bar Review, created the “Computer Diagnostic Assessment,” as very early software to inventory student strengths and weaknesses in the law tested in multiple-choice settings, to aid in preparation for the Multistate Bar Exam (MBE). Along with many others, these people led the author into innovation as a way of professional life.

was an impetus for innovation.

Examples illustrate the process by which some of the most important innovations in the history of legal education came to be. The Langdell innovations of the case method, casebooks, exams, and dialogic classes illustrate the process by which a significant innovation in legal education began, gained ground, gained acceptance, and then became accepted by the standard rigidly enforced by institutional cultures. Some of the most important innovations of the last thirty years, including distance education as a modality of legal education delivery, the application of learning science to legal education, and the evolution of intentionality in curriculum and assessment—first undertaken significantly by the distance education schools and faculties—are extensively traced and compared. Other innovations, such as the massive growth of clinical and experiential legal education, the addition of substantial academic advising and support resources and expertise in law schools, and the creation of bar studies departments, are extensively discussed in the literature and not given the time they deserve as innovations here, but ought to be remembered.

Innovations examined here mostly occurred in the period following the 1992 publication of the MacCrate Report,<sup>4</sup> and were influenced by it. The history of innovation in legal education before 1930 also provides useful context. The MacCrate Report challenged law schools to better prepare their students for the career of law and entry into the profession of law.<sup>5</sup> The challenge was taken up in a variety of ways, but one of the hardest shifts to accomplish—still incomplete in many ways—is to focus on the students’ experiences and outcomes rather than the schools’ educational activities and “inputs.” This requires an evolution that is resource intensive and not natural to law faculty, and thus an “innovation” many schools have been slow to adopt.

Understanding these dynamic forces can equip an institution to remake itself into an innovation engine rapidly if the will exists to do so. There are, however, many ways innovations can go wrong, and some of these are addressed, too.

## II. EARLY, CONTROVERSIAL, SUCCESSFUL INNOVATION: THE CASE METHOD

To understand the process of innovation in legal education, look to the most enduring innovation of all: the case method pedagogy pioneered at Harvard Law School, while Christopher Columbus Langdell was Dean, from 1870 to 1895.

Didactic methods of teaching law predated widespread adoption of the case

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<sup>4</sup> See generally EUGENE E. CLARK, A.B.A., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992).

<sup>5</sup> *Id.* at 14.

method in American law schools.<sup>6</sup> They were, themselves, an innovation replacing the earlier dominant form of preparation for the profession: apprenticeship.<sup>7</sup> Dr. Josef Redlich, Professor of Law in the University of Vienna, commissioned by the Carnegie Foundation for the Advancement of Teaching to examine American legal education, traced this history and found, in 1914, many law schools using the case method, but others continuing an earlier, rigid, “text-book” method of delivering doctrinal legal knowledge:

All the older American law schools started by being so-called lecture schools. *Blackstone’s Commentaries*, which, as we know, were used for purposes of instruction earlier and with far more lasting effect in America than in England, formed the almost exclusive basis of the work. Within a generation there developed very naturally out of these same lectures a literature of text-books; and straightway the second method of American legal education in order of time — the text-book method — came into being. The essential feature of this was, and still is, that, from recitation period to recitation period, the students are assigned a specified portion of a regulation text-book to study, and for the most part to memorize; this is then explained by the teacher and recited on at the next period. In this method of instruction one part of the hour is occupied with the more or less purely mechanical testing of the knowledge learned by the students, the so-called “quizzing.” Frequently also, in such schools, particularly where the number of students is large, the instruction was, and still is, supplemented by the appointment of special assistants — quiz masters — who conduct this part of the instruction in special hours.<sup>8</sup>

Professor Redlich described, remarkably insightfully for an Austrian legal scholar not reared in the American legal—or legal education—system, the new “case method” of law teaching:

In this Langdell has recognized an extremely important pedagogical principle; a principle peculiar to the case method, and one to which all later pupils and followers of Langdell have adhered. The intellectual labor, namely, of disentangling the facts and the leading train of thought from the report of each decided case is to be performed by

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<sup>6</sup> See Harlan F. Stone, *Dr. Redlich on the Case Method in American University Law Schools*, 1 ST. LOUIS L. REV. 111, 111 (1916) (a contemporary critique of the Redlich Report describing the “storm of criticism” that met Langdell’s introduction of case method pedagogy at Harvard in 1870).

<sup>7</sup> A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1965–66 (2012) (tracing the earlier developments of teaching law “From Apprenticeship to Langdell”).

<sup>8</sup> JOSEF REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING* 7–8 (1914). In an accompanying footnote, Professor Redlich reported a highly developed ecosystem of American law schools, which had grown rapidly in the 60 years before his writing, in 1914:

Ames points out here that the first chair of jurisprudence was established under the influence of Thomas Jefferson at the famous old College of William and Mary, in Virginia, 1779, and that John Marshall heard the lectures of Chancellor Wythe, the first professor, there. How little these early law professorships or schools amounted to, however, is shown by the fact that in the year 1833, when the school at Litchfield was closed, there were scarcely 160 students in the 7 university schools then existing. In 1850 there were 14 schools; in 1860, 23, with 1000 students altogether; these schools, with a single exception, all forming a department of a university. In the year 1901 Ames counted 105 law schools, with 13,000 students, and at present there are more than 150 schools, with over 20,000 students.

*Id.* at 7 n.1.

the students, quite independently, even although carried on to a certain extent under the guidance of the teacher. The central idea of the new method was thus indicated from the start. According to Langdell and his pupils, the law—meaning of course the English common law as it has been developed in America—should be acquired methodically from the original material of all principles and doctrines of the common law,—that is to say, from the decided cases, —by individual, purely personal, intellectual labor on the part of the student. To this end a further device was employed. Langdell began his actual teaching by having each of the cases, which the students had to study carefully in preparation for the class, briefly analyzed by one of them with respect to the facts and the law contained in it. He then added a series of questions, which were so arranged as gradually to lay bare the entire law contained in that particular case. This stimulated questions, doubts, and objections on the part of individual students, against whom the teacher had to hold his ground in reply. Teacher and pupils then, according to Langdell’s design, work together unremittingly to extract from the single cases and from the combination or contrasting of cases their entire legal content, so that in the end those principles of that particular branch of the law which control the entire mass of related cases are made clear. The two ideas taken together suggest and are sufficiently well described by the term “Socratic method,” — an expression which was indeed early employed by Langdell and his pupils.<sup>9</sup>

Perhaps more pointedly, the new pedagogy introduced questioning the law and challenging the lawgiver—in this case the professor—as a primary and vital role of the *student* of law. Of necessity, didactic teaching methods order and solidify the law, presenting it within easily identified categories as a concrete system.<sup>10</sup> The case method was chaotic by comparison. It represented a freedom of intellect unheard of to most learners of the time:

To Langdell and his followers the most important means of instruction is the analysis of the separate cases by the student. The analytical decomposition of the separate cases, and the distillation of the legal principles contained in each such case; the construction, on the basis of the analysis of the separate cases given in the case-book, of a system, historically and logically accurate, of the entire legal institution or field of law, — all these are in the first instance tasks for the students, who must perform them, even though under the guidance and direction of the teacher, as independently as possible. It is easy to recognize wherein then the fundamental difference lies. Under the old method law is taught to the hearer dogmatically as a compendium of logically connected principles and norms, imparted ready made as a unified body of established rules. Under Langdell’s method these rules are derived, step by step, by the students themselves by a purely analytical process out of the original material of the common law, out of the cases; a process which forbids the *a priori* acceptance of any doctrine or system either by the teacher or by the hearer. In the former method all law seems firmly established and is only to be grasped, understood, and memorized by the pupils as it is

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<sup>9</sup> *Id.* at 12.

<sup>10</sup> See generally Ravi Desai & Kevin D. Ashley, *Teaching with Dialectic Arguments vs. Didactic Explanations*, 24 PROC. ANN. MEETING COGNITIVE SCI. SOC’Y (2002) (comparing didactic and dialectic methods of teaching legal analysis skills of distinguishing cases); Noel Entwistle, *Contrasting Perspectives on Learning*, in THE EXPERIENCE OF LEARNING 3 (Ferenc Marton et al. eds., 3rd ed. 2005) (overviewing approaches to teaching and learning); Richard Johnstone, *Rethinking the Teaching of Law*, 3 LEGAL EDUC. REV. 17 (1992) (describing didactic teaching in action in Australian law schools).

systematically laid before them. In the latter, on the other hand, everything is regarded as in a state of flux; on principle, so to speak, everything is again to be brought into question. Or, in other words, in the method of legal instruction developed by Langdell law is conceived as the expression of social order in judicial form, which begins its separate existence all over again in every single case. Teacher and pupil approach it in the same way, the learner discovering it, under the guidance of the teacher, as a new and original joint creation.<sup>11</sup>

The case method suggested the law was alive and evolving, not dead and simply awaiting retrieval from its stone chamber. The influence of Langdell is felt across the ages, no less for reforming legal education to a model it employed almost exclusively for more than a century, than for his influence on the way lawyers and others think and act as officers of the court and civil beings.

### III. SYLLABUS, CASEBOOK, CLASSES, TEST—LEGAL EDUCATION’S DOMINANT MODEL FOR 150 YEARS

Next, to see how innovations become successful and part of the way things are done, it is useful to examine the wider adoption of Langdell’s model of legal education. It included not only the case method but also classroom dialogic as the preferred teaching method, the development of “casebooks,” establishment of a three-year curriculum in law, the implementation of mandatory exams and admission tests, and other extraordinary innovations for the time.<sup>12</sup> The Redlich Report is often cited as endorsing the case method and supporting its widespread adoption in American law teaching, but it was in fact, just one, rather late, contributor.<sup>13</sup> Other factors influenced legal educators at other institutions to adopt the method—which soon became standard, not controversial.

The key factors this article posits as contributing to the ability of an organization or industry to innovate and actionably turn new ideas into improvements are described while reviewing the adoption of Landell’s innovation. These are: Culture, Leadership, Incentives, and the Regulatory Environment.

### IV. CULTURE

It is axiomatic that every collection of people has a culture.<sup>14</sup> At this micro level,

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<sup>11</sup> REDLICH, *supra* note 8, at 13.

<sup>12</sup> Spencer, *supra* note 7, at 1978; Rachel Gurvich, et al., *Reimagining Langdell’s Legacy: Puncturing the Equilibrium in Law School Pedagogy*, 101 N.C. L. REV. F. 118, 127 (2023); Susan Katcher, *Legal Training in the United States: A Brief History*, 24 WIS. INT’L L.J. 335, 359 (2006).

<sup>13</sup> Katcher, *supra* note 12, at 361.

<sup>14</sup> “A cultural group is defined simply as a collection of individuals who share a core set of beliefs, patterns of behavior, and values. The groups may be large or small, but they are identified by their ways of thinking and behaving.” Nat’l Ctr. for Cultural Competence, *Cultural Awareness Definitions*, GEO. UNIV. CTR. FOR CHILD AND HUM. DEV.,



culture is the collection of behaviors this group of people supports or rejects, which together can be considered their “norms.”<sup>15</sup> Normatively compliant behavior is rewarded by the group and its members, while non-compliant behavior is sanctioned.<sup>16</sup> Individually and collectively, the group enforces—and reinforces—its norms.<sup>17</sup>

Among these norms are the all-important one for innovation: the tolerance for risk takers, and how their activities are received by the influential actors in the culture. The degree to which risk taking is celebrated or discouraged will largely determine the culture’s ability to innovate.

Described more broadly, “culture” encompasses the entire environment into which innovations are introduced and tested. This includes forces such as dissatisfaction with existing products, ideas, or methods, pent-up demand for something new, effective branding, failure of competitors, and other market features and actions.<sup>18</sup>

In organizations and industries, culture can be formed intentionally or by omission.<sup>19</sup> It is the product of choice and chance, norms, and incentives, and in the author’s experience, unless carefully nurtured, tends toward an entropy of change resistance and aversion to risk that is deadly to innovation.

Contrast the culture of Silicon Valley tech startups with that of AT&T for more than 150 years. In 2005, a little startup called “Google,” just seven years from first

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<https://nccc.georgetown.edu/curricula/awareness/D17.html> [<https://perma.cc/BA2E-B79C>] (last visited Jan. 6, 2024).

<sup>15</sup> See Richard A. Posner & Eric B. Rasmusen, *Creating and Enforcing Norms, with Special Reference to Sanctions*, 19 INT’L REV. L. & ECON. 369, 369–70 (1999).

<sup>16</sup> *Id.* at 370–80.

<sup>17</sup> Nat’l Ctr. for Cultural Competence, *How Do Human Beings Acquire Culture?*, GEO. UNIV. CTR. FOR CHILD AND HUM. DEV., <https://nccc.georgetown.edu/curricula/awareness/C10.html> [<https://perma.cc/HQA2-QVL4>] (last visited Jan. 7, 2024).

It is important to remember that culture is learned through language and modeling others; it is not genetically transmitted. Culture is encoded in the structure, vocabulary, and semantics of language. Persons acquainted with more than one language are aware that there are concepts, norms, and emotions that are available in one language/culture that are not available in the other, and this is a reminder of the inextricable link between language and culture. Much of culture is acquired out of consciousness, through exposure to the speech, judgments, and actions of others. Because we learn all of our lives, we are constantly learning our cultures. We may even pick up and incorporate parts and pieces of a culture different from our own through that process known as acculturation if we have the opportunity to live in a different cultural environment or associate frequently with persons from another culture. The unconscious operation of cultural learnings in our minds is both beneficial and problematic. It is beneficial in the sense that much of the time we automatically know how to behave appropriately in many situations, and we have values by which to rapidly evaluate the actions and ideas of others. On the other hand, the internalization of our cultural values ill prepares us for interaction with, and evaluation of, people from other cultures.

<sup>18</sup> See Fawzi Halila, *The Adoption and Diffusion of Environmental Innovations* 15–30 (Sept. 2007) (Ph.D. thesis, Luleå University of Technology).

<sup>19</sup> See *What Is Organizational Culture? And Why Does It Matter?* GALLUP, <https://www.gallup.com/workplace/327371/how-to-build-better-company-culture.aspx> [<https://perma.cc/9B6E-8528>] (last visited Jan. 8, 2024).

incorporation in California, had a market cap of nearly fifty-two billion dollars, the largest share of the worldwide internet advertising market, and the “Googleplex,” its home in Mountain View, California, complete with company chefs, “children’s day care, doctors, dry cleaning, laundry, a gym, and basketball and volleyball courts.”<sup>20</sup> Also in 2005, AT&T was 128 years from its founding in 1877 and still selling mainly long-distance services as a standalone product. It was being acquired by SBC, the successor to Southwestern Bell, a regional operating company that emerged from the breakup of the former AT&T monopoly in settlement of the government’s antitrust litigation started in 1974.<sup>21</sup> AT&T was valued at \$15.7 billion, being acquired by a part of its former self that was valued at about seventy-eight billion dollars.<sup>22</sup> Earlier, AT&T had spun off Bell Labs, the innovation center in Murray Hill, New Jersey, which it had nurtured and supported since 1925, into Lucent Technologies.<sup>23</sup> Wired Magazine covered the decline of Murray Hill, calling it a “bell jar”:

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<sup>20</sup> See *Alphabet Market Cap*, STOCK ANALYSIS, <https://stockanalysis.com/stocks/googl/market-cap/> [https://perma.cc/7CUJ-3X4Z] (last visited Jan. 3, 2024) (showing Google’s successor company’s, Alphabet, market capitalization from Aug. 18, 2004 through Aug. 18, 2005); Steve Lohr, *At Google, Cube Culture Has New Rules*, N.Y. TIMES (Dec. 5, 2005), <https://www.nytimes.com/2005/12/05/technology/at-google-cube-culture-has-new-rules.html>, [https://perma.cc/H2DV-GHEK] (describing the “Googleplex”); *Google exec: 2005 the turning point for online ads*, CNET (Dec. 30, 2005, 8:00 AM), <https://www.cnet.com/tech/tech-industry/google-exec-2005-the-turning-point-for-online-ads/> [https://perma.cc/48UD-WWT7] (outlining Google’s share of the internet advertising market).

<sup>21</sup> *Baby Bell buying Ma Bell: SBC to buy former parent AT&T despite drop in long-distance business; analysts question \$16B deal*, CNN MONEY (Jan. 31, 2005, 11:13 AM EST), [https://money.cnn.com/2005/01/31/technology/sbc\\_att\\_deal/?iid=EL](https://money.cnn.com/2005/01/31/technology/sbc_att_deal/?iid=EL) [https://perma.cc/6H85-QJ8A].

<sup>22</sup> Market value of SBC in 2005 was developed from several sources of information. SBC’s 10-K filed with the SEC in February 2005, showed total shares outstanding of 3,303,437,610. SBC Commc’ns, Annual Report (Form 10-K) (Feb. 28, 2005). At a closing share price of \$24.38 on November 19, 2005 – the day SBC changed its name to AT&T – that number of shares outstanding would indicate a market value of \$80.5 billion. *Historical Stock Information*, AT&T Inc., <https://investors.att.com/stock-information/historical-stock-information/historical-quote/att-inc> [https://perma.cc/G9JX-2VGK] (enter “Nov. 18, 2005” in “From Date” dropdown; then enter “Nov. 19, 2005” in “To Date” dropdown; then click “Show Data”) (last visited Jan. 8, 2024). However, SBC Communications was listed as number 33 in the Fortune 500 for 2005 at a market value of \$77.3 billion. *The 2005 Fortune 500: SBC Communications*, CNN MONEY, [https://money.cnn.com/magazines/fortune/fortune500\\_archive/snapshots/2005/1182.html](https://money.cnn.com/magazines/fortune/fortune500_archive/snapshots/2005/1182.html) [https://perma.cc/5TQG-P7HF] (last visited Jan. 8, 2024). It was listed in the Top 100 Companies by Market Capitalization, on May 29, 2005 after announcing the acquisition but before its closing, as valued at \$78 billion. May 29, 2005’s *Top 100 Companies by Market Capitalization*, FORTBOISE, <https://fortboise.org/top100/top100-20050529.html> [https://perma.cc/FK4L-LC7J] (last updated July 3, 2005). This \$78 billion valuation is used as an approximate valuation for the year.

<sup>23</sup> *AT&T Performs \$21 Billion Spinoff Lucent Creation Is Broadest Stock Distribution Ever*, THE SPOKESMAN REV. (Oct. 1, 1996), <https://www.spokesman.com/stories/1996/oct/01/att-performs-21-billion-spinoff-lucent-creation/> [https://perma.cc/84QA-4XHE].

The telecom crash happened six months after the dot-com crash of 2000 and, though it's less well known, caused the evaporation of two trillion dollars' worth of wealth. Four years later, Lucent Technologies was sold to the French telecommunications conglomerate Alcatel. Since then, the buildings of Murray Hill have been under a massive bell jar in which time has gone static, and there is the distinct sense here of being, if not embalmed, trapped in the past. There's not enough money to buy replacement light bulbs let alone fund massive fundamental research. Bell Labs of today is charged with creating an astonishing new future in a time-stand-still physical environment reminiscent of the hallways through which that small child raced his plastic scooter in *The Shining*.<sup>24</sup>

Intentionality of culture is simple in concept. The group decides to normatively reward and support inquisitive and creative behaviors and actions and hold in high esteem those who accomplish innovation, including practical application and nurturing adoption by those within and outside the group.<sup>25</sup> A core leadership group, well aligned and consistent in its goal setting, hiring and promotion decisions, and resource allocations, can accomplish establishing exploration and invention norms in an organization.<sup>26</sup> This is particularly attainable in a new organization, where norms are being established as people are joining. It is much harder to change a "fossilized" norm of staid adherence to "the way we've always done it."<sup>27</sup>

Significant leaps that cause adopters to be swept up broadly in a kind of movement can bring rapid adoption of innovations. The Apple iPhone and similar products can be seen as an example of this kind of adoption. From 2006 to 2012—just six years—Apple catalyzed massive growth in the relatively mundane market for

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<sup>24</sup> DOUGLAS COUPLAND, *KITTEN CLONE: INSIDE ALCATEL-LUCENT* (Visual Editions 2014), as reprinted in *The Ghost of Invention: A Visit to Bell Labs*, WIRED, <https://www.wired.com/2014/09/coupland-bell-labs/> [<https://perma.cc/NGP3-WSXP>] (last visited Jan. 8, 2024). The author witnessed the decline of AT&T via Lucent Technologies firsthand. For several years before 2001, he led a series of training and development exercises at the Merrimack Valley Works (MVW), the former Western Electric manufacturing and Bell Labs research facility near North Andover, Massachusetts. MVW employed 12,000 people in the 1970s, but by 2001 the massive facility was nearly empty; an entire floor of cubicles three football fields long was occupied by fewer than a dozen people, and employment was only about 700 on three shifts.

<sup>25</sup> Adoption and nurturing of innovation have been studied extensively. For a meta-analysis of theoretical frameworks of innovation adoption, including insights on social/cultural/normative effects identified across multiple frameworks see Jennifer P. Wisdom et al., *Innovation Adoption: A Review of Theories and Constructs*, 41 ADMIN. & POL'Y MENTAL HEALTH SERV. RSCH. 480, 495 tbl.3, 497 tbl.4 (2014). For a simplified discussion of the culture and values supporting innovation adoption, see Don Mroz, *7 Core Values to Bolster Innovation*, WIRED, <https://www.wired.com/insights/2013/06/7-core-values-to-bolster-innovation/> [<https://perma.cc/6FXC-TPTZ>] (last visited Nov. 15, 2023).

<sup>26</sup> See Pino G. Audia & Jack A. Goncalo, *Past Success and Creativity Over Time: A Study of Inventors in the Hard Disk Drive Industry*, 53 MGMT. SCI. (forthcoming Jan. 2007) (manuscript at 24–28) (on file with Cornell University ILR School).

<sup>27</sup> Don Mroz, *How to Invigorate Innovation in a Stagnant Organization*, WIRED, <https://www.wired.com/insights/2013/10/how-to-invigorate-innovation-in-a-stagnant-organization/> [<https://perma.cc/XD9Q-RRXD>] (last visited Jan. 9, 2024).

smartphones in the United States, from just six percent of mobile phone sales to more than sixty-seven percent.<sup>28</sup> It was new and cool, and instantly became the thing to have and show off, especially among the elite and stylish tech cognoscenti.

Langdell's innovations corresponded remarkably well with their historical and cultural moment. Acutely, the period between the end of the Civil War and 1895 illuminated the challenges of wielding the power of the law to reflect, redirect, and enforce norms of behavior in American society.<sup>29</sup> Slavery was officially gone, and the Confederate states were forcibly reunited with the Union states.<sup>30</sup> The Constitution was amended to add civil rights for previously enslaved peoples via the Thirteenth, Fourteenth, and Fifteenth Amendments.<sup>31</sup> Religious, cultural, economic, political, and racial groups jockeyed for power and influence in the massive reconstruction efforts.<sup>32</sup>

Law students attending Harvard in the last quarter of the nineteenth century would have been born between about 1840 and 1870. These young men—and it was all men in those days—were elites. Predominantly from wealthy and powerful families, they had benefited from classical educations, knew civic, government, financial, and religious leaders of the day, and were in many cases destined to continue family legacies, much like elites of today often do.<sup>33</sup> They were also likely great-grandsons of Revolutionary War veterans or survivors, not very far removed from the great events that led to America itself.<sup>34</sup> 1876 was the centennial of

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<sup>28</sup> See Michael DeGusta, *Are Smart Phones Spreading Faster than Any Technology in Human History?*, MIT TECH. REV. (May 9, 2012), <https://www.technologyreview.com/2012/05/09/186160/are-smart-phones-spreading-faster-than-any-technology-in-human-history/> [<https://perma.cc/LT87-QLZF>]:

[T]he era of the smart phone in America really began in 2002, when existing PDAs took on the ability to make phone calls. . . . Four and a half years later, in late 2006, the quarter before Apple announced its now-iconic iPhone, only 715,000 smart phones were sold, representing just 6 percent of U.S. mobile-phone sales by volume. Up to that point, the smart phone was spreading not much faster than personal computers had in the preceding decades, and more slowly than radio decades before. That changed when Apple's iPhone sold 1.12 million units in its first full quarter of availability, despite prices starting at \$399. Year over year, the market share of smart phones almost doubled, to 11 percent of U.S. mobile-phone sales. Now Nielsen reports that smart phones represent more than two-thirds of all U.S. mobile-phone sales. Nielsen also reports that 50 percent of all U.S. mobile-phone users—which equates to about 40 percent of the U.S. population—now use smart phones.

<sup>29</sup> P. SCOTT CORBETT ET AL., *The Era of Reconstruction, 1865-1877*, in U.S. HISTORY 407, 418 (OpenStax 2021); P. SCOTT CORBETT ET AL., *Politics in the Gilded Age, 1870-1900*, in U.S. HISTORY 521, 522–23 (OpenStax 2021).

<sup>30</sup> CORBETT ET AL., *The Era of Reconstruction, 1865-1877*, in U.S. HISTORY, *supra* note 29, at 416, 424.

<sup>31</sup> *Id.* at 410, 415, 418.

<sup>32</sup> See *generally id.* at 3–4, 195, 775–780.

<sup>33</sup> See 2 CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 417 (The Lawbook Exch., Ltd. 1999) (1908).

<sup>34</sup> See 1850-1877: *Lifestyles, Social Trends, and Fashion: Overview*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/history/news-wires-white-papers-and-books/1850-1877->

independence, and the years from 1870 to 1895 would certainly have included marking the centennial of the Constitutional Convention, and the Constitution.<sup>35</sup> This generation, especially among young, male elites, cannot have been better primed for interest in law as a calling, and public interest in the law would have been at a peak. Just as one sees today, interest in the law as a profession and career when the rule of law by the Constitution is even mildly in the limelight; it is easy to imagine the hunger with which the people of that era would have consumed news of these legal developments and incorporated them in their worldview—and plans.

The decades following the American Civil War also saw Americans with a passionate sense of renewal. Rejection, or discarding, of old ways was coupled with hunger for the new benefits of freedom.<sup>36</sup> Science was just emerging as both a university discipline and a populist entertainment.<sup>37</sup> Langdell's, and Harvard's, new means of educating lawyers represented a reframing of law as a scientific endeavor, in which scientific methods of analysis and testing could be applied to achieve determinative and desirable outcomes.<sup>38</sup> Langdell, as educated as any man of the time, cannot have been blind to the need to make the study of law as scientific as possible, so that the university system would accept it and grant it status equal to other disciplines. He distinctly identified his method with science:

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to

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lifestyles-social-trends-and-fashion-overview [https://perma.cc/W5PT-P68D] (last visited Dec. 27, 2023):

Americans were still more alike than different. The majority of them still lived on farms (53 percent in 1870). Most of them spoke English as their first (and only) language, worshiped in Protestant churches, and revered the precepts passed down to them by their forebears of the Revolutionary War generation.

<sup>35</sup> See, e.g., *President Grant and the 1876 Centennial Exposition in Philadelphia*, NAT'L PARK SERV., <https://www.nps.gov/articles/000/president-grant-and-the-1876-centennial-exposition-in-philadelphia.htm> [https://perma.cc/9LRY-J8SZ] (last visited Dec. 27, 2023).

<sup>36</sup> James M. McPherson, *Out of War, A New Nation*, 42 PROLOGUE MAG., no.1, Spring 2010:

The institutions and ideology of a plantation society and a slave system that had dominated half of the country before 1861 went down with a great crash in 1865 and were replaced by the institutions and ideology of free-labor entrepreneurial capitalism. For better or worse, the flames of the Civil War forged the framework of modern America.

<sup>37</sup> See generally NAT'L EDUC. ASS'N, AM. BOOK CO., REPORT OF THE COMMITTEE OF TEN ON SECONDARY SCHOOL STUDIES (1894) (describing history of science education in the United States); Hyman Kuritz, *The Popularization of Science in Nineteenth-Century America*, 21 HIST. EDUC. Q. 259 (1981) (discussing the burgeoning interest in science in the late nineteenth century); Brian Hepburn & Hanne Andersen, "Scientific Method", in THE STANFORD ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., 2021), <https://plato.stanford.edu/archives/sum2021/entries/scientific-method/> [https://perma.cc/U664-MA9K] (last visited Feb. 5, 2024) (outlining history of science).

<sup>38</sup> Nancy Cook, *Law as Science: Revisiting Langdell's Paradigm in the 21st Century*, 88 N.D. L. REV. 21, 23 (2012).

acquire that mastery should be the business of every earnest student of law.<sup>39</sup>

Professor Redlich records that Langdell's innovations were remarkably successful at Harvard.<sup>40</sup> When Langdell became a professor in 1871, three faculty members had responsibility for teaching 165 students.<sup>41</sup> By 1895, the numbers were ten faculty members and 400 students, and by 1905 more than 760 students were enrolled.<sup>42</sup> It soon spread to many other law schools, through the powerful role Harvard alumni who became law faculty at other institutions played as its "apostles."<sup>43</sup> This illustrates another means by which innovations succeed: through the power of leadership by early adopters.

## V. LEADERSHIP

Leadership is a complex subject, where mountains of literature and millions of hours of training yearly teach leadership skills to managers and entrepreneurs. Very different styles can still be effective in different situations, depending on the people and circumstances. A reader interested in studying leadership can find resources nearly everywhere, and detailed treatment of leadership as a skill or discipline is beyond the scope of this article.

Leadership's influence on innovation and risk taking is, however, somewhat easier to describe and quantify. Leaders create an environment that spurs creativity, risk-taking, and innovation, or they indifferently expect it to just happen. Note that it is comparatively rare for a leader to purposely squelch innovation. Many pay too little attention to nurturing it, or are distracted by other priorities. Many others let safety, convenience, consistency, or change resistance become the enemy of risk taking in their organizations, effectively preventing innovation by erecting a wall around, "the way we've always done it" or, "what we know people want."

Google founders Larry Page and Sergey Brin, PhD students at Stanford when the first code for the search engine was written, were classic innovators, still writing code while leading the growing company.<sup>44</sup> The CEO of AT&T in 2005 was David Dorman, an early 1980s employee of Sprint Communications and a serial CEO by the

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<sup>39</sup> C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS*, at viii, (2d ed. 1879).

<sup>40</sup> REDLICH, *supra* note 8, at 14.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* Professor Redlich does not record the Harvard enrollment in 1914. However, Charles Warren's "History of the Harvard Law School and of early legal conditions in America" lists the graduating class of 1908 as having 160 members. WARREN, *supra* note 33, at 349–51.

<sup>43</sup> REDLICH, *supra* note 8, at 14.

<sup>44</sup> John Batelle, *The Birth of Google*, WIRED (Aug. 1, 2005, 12:00 PM), <https://www.wired.com/2005/08/batelle/> [<https://perma.cc/6RTZ-HL4P>].

time he joined AT&T in 2002.<sup>45</sup> His training was in industrial management, and his focus, before and after heading AT&T, was corporate: governance, funding, acquisitions, spin-offs, and mergers.<sup>46</sup> The culture promoted by the leadership at Google emphasized constant revision of the company's products.<sup>47</sup> The leadership culture at AT&T was focused on balancing the books and repositioning the company in the telecommunications market as an enterprise data and IT services firm.<sup>48</sup>

There are leaders whose rigidity and change resistance prevents them from pushing forward a creative effort that challenges the status quo. These leaders may be effective at producing results within established parameters, but unable to reform, revise, or grow beyond the experiences and conditions in which they operate.

Leadership is about motivating behavior. It is about accomplishing goals through the efforts of others, and bringing about that magical combination of the opportunity, environment, and motivation to accomplish great things. Every leader is faced with the challenge of directing the work toward the goal and its achievement, and in so doing faces the need to motivate the people doing the work to do it, do it well, and do it in time for it to make a difference in attaining the goals.

Motivation that is intrinsic is the most powerful, and among the most effective ways to motivate intrinsically is the power of the social group. The human urge to fit in acts powerfully to moderate behavior in many people and groups. Behaviors the group accepts and supports become easier to adopt and spread among its members.<sup>49</sup> Once the behaviors have reached sufficient acceptance, they become norms enforced by the social environment of the group.

Leaders model and enforce norms, which are then adopted by influencers in the social environment of the community or entity.<sup>50</sup> These influencers, and the norms they support, are productive contributors to the innovation environment in an institution, organization, or industry.<sup>51</sup>

Leaders may also have a role in punishing non-conforming behaviors by members of the group they lead. Members of the group will, in fact, expect this.

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<sup>45</sup> Scott Woolley, "I'm Just Dave", FORBES (May 26, 2003, 12:00 AM), <https://www.forbes.com/forbes/2003/0526/076.html?sh=76dcccdf70c9> [https://perma.cc/533S-7HTD].

<sup>46</sup> See David Dorman: Positions, Relations and Network, MKT. SCREENER, <https://www.marketscreener.com/business-leaders/David-Dorman-2600/biography/> [https://perma.cc/7XVS-TU5L] (last visited Dec. 28, 2023).

<sup>47</sup> Sang Kim Tran, *Google: A Reflection of Culture, Leader, and Management*, 2 INT'L J. CORP. SOC. RESP., Dec. 19, 2017, at 2–3.

<sup>48</sup> Ken Belson, *AT&T Looks Beyond 'Number, Please'*, NY. TIMES (Jan. 22, 2005), <https://www.nytimes.com/2005/01/22/business/att-looks-beyond-39number-please.html> [https://perma.cc/VMX3-EX2P].

<sup>49</sup> See Tran, *supra* note 47, at 2.

<sup>50</sup> *Id.* at 7.

<sup>51</sup> *Id.* at 8.

Take the example of a classroom where one or two students dominate the conversation in class. At first, other students will demonstrate a great deal of patience with this because of their natural affinity with fellow student—and, in law school, their personal interest in not being called upon themselves. Eventually, even the most patient will become frustrated and expect the teacher to rein in the dominating behaviors. In this example, the class has a normative expectation of both student and teacher behavior. Variations from the norm are acceptable to a degree, but will not be effective or tolerated beyond those boundaries.

Leaders support innovation primarily by establishing effective norms around creativity and managing employee expectations regarding reward recognition and incentives concerning innovations. Leaders also establish norms among the managers and supervisors, and all employees, to ensure they reinforce effective innovation norms. Leaders may also demonstrate support for innovation by personal invention, as in the case of Mark Zuckerberg of Meta whose college product, Facebook, is among the most successful social media platforms.<sup>52</sup>

Something is known of the faculty and leadership cultures of late nineteenth-century and early twentieth-century law schools in America. Histories of the major schools exist,<sup>53</sup> and some shed light on the leadership and environmental issues of the day, though rarely in a modern way. We have, for example, this excerpt from a Yale alumni publication dated March 23, 1917:

It was also during the administration of Dean Rodgers that instruction came to be given exclusively by the case method. The decisions of the courts had, as a matter of course, always been used as the subject matter of instruction, and some members of the Faculty had even prepared sets of cases and used them as part of the assigned work . . . The further development of the system of instruction was and still is inevitable not only because it is the historical method, but because it puts into the student's hands the material necessary for analytical, comparative, and critical study of specific legal doctrines. No living legal system can consist merely of a set of mechanical rules. Even after it has been extensively codified, it cannot be taught dogmatically as a mere memory exercise . . . No law school now insists more strongly than does Yale upon the necessity of studying our common law system comparatively and critically . . .

The ever-increasing magnitude of the legal field has also compelled a change in the character of law faculties. For the best results, it has become necessary that law professor's [sic] should give their whole allegiance to teaching and research. While it has always been known that the law is a science and its teaching an art, it has become necessary to develop both the science and the art so much more intensively that faculties must be composed chiefly of men specially trained and able to give their

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<sup>52</sup> Elizabeth Dwoskin et al., *The Case Against Mark Zuckerberg: Insiders Say Facebook's CEO Chose Growth Over Safety*, WASH. POST (Oct. 25, 2021, 3:34 PM), <https://www.washingtonpost.com/technology/2021/10/25/mark-zuckerberg-facebook-whistleblower/> [https://perma.cc/YD62-B4B3].

<sup>53</sup> See, e.g., JULIUS GOEBEL, *A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY* (1955); ROBERT J. KACZOROWSKI, *FORDHAM UNIVERSITY SCHOOL OF LAW: A HISTORY* (2012); *The Yale School of Law: An Account of its Recent Progress and Expansion Reminiscences of its Earlier Days*, in YALE ALUMNI WKLY., Mar. 23, 1917.



undivided efforts. Dean Rogers believed in this principle and put it into operation so far as the finances of the School permitted. During the present year, six professors have thus given their whole time to the school; and as four distinguished professors have just been added to the staff, there will hereafter be not fewer than ten full-time men.

These ten men form a sympathetic and cooperative group, as regards fundamental aims,—nearly all of about the same age, but with the greatest variety of previous training and experience.<sup>54</sup>

It is noteworthy that at least this Yale author found that, by 1917, the case method should be considered the “historical” method, and that it was beyond dispute that, “law is a science.”<sup>55</sup> We also have the writings of faculty at various law schools, which give a hint of the reaction to Langdell's ideas. These also show the classic innovation success pattern: initial controversy, early adoption, gaining acceptance, and wider adoption, settled share of the “market” and, eventually, benchmarked as the standard against which alternatives are measured.<sup>56</sup>

Langdell was clearly successful in the long run. His successor as Dean at Harvard, James Barr Ames, adopted and furthered the case method.<sup>57</sup> Ames served as Dean through the early part of the twentieth century, and Harvard continued to graduate large classes, so it is easy to see how the method became the norm in legal education in America within the relatively short time between 1870 to 1917.<sup>58</sup>

## VI. INCENTIVES

Independent Inventors, driven by the need to create, solve a problem, or meet a market they have discerned, need no further incentives. Innovation in an institutional setting, however, faces a set of headwinds that many large organizations never successfully overcome.

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<sup>54</sup> *The Yale School of Law: An Account of its Recent Progress and Expansion Reminiscences of its Earlier Days*, *supra* note 53, at 2.

<sup>55</sup> *Id.* at 3.

<sup>56</sup> Stone, *supra* note 6.

<sup>57</sup> Harvard Law School (HLS), one author argues, was not, by the end of Dean Ames' tenure, continuing the stature it enjoyed when he took over as Dean in 1895. In *Impoverishing “the greatest law school in the world”: The Financial Collapse of Harvard Law School, 1895-1909*, Professor Bruce A. Kimball charts the rise and fall of HLS finances, and attributes the collapse in the early 20<sup>th</sup> century to multiple causes, among them pride, overspending, and a sense that HLS was, “too successful to fail.” Bruce A. Kimball, *Impoverishing “the Greatest Law School in the World”: The Financial Collapse of Harvard Law School, 1895-1909*, 61 J. LEGAL EDUC. 4, 25–28 (2011). As noted earlier, another cause may well have been a waning of interest in law as the factors that led to HLS's rise receded into history. One cannot also forget that in this time, war clouds were gathering in Europe.

<sup>58</sup> *Id.* at 7, 20. Professor Kimball argues, further, that Ames' tenure was marked by little innovation: “Under Ames, the school “ran smoothly in the groove started by Langdell. There were no marked differences of opinion.” *Id.* at 26. The faculty offered no innovations, for “there was rarely any discussion,” and the dean's “recommendations were habitually accepted.” *Id.* (citing SAMUEL WILLISTON, LIFE AND LAW: AN AUTOBIOGRAPHY 187 (Gaunt 1998) (1940)).

It is commonly believed that large enterprises and institutions fail at innovation because they do not see the change that is ahead, or, if they see it, are too structurally and operationally calcified to adapt themselves to new ideas, customers, products, or ways of doing things.<sup>59</sup> These suppositions are true in some cases, but in many other institutions, the failure is more often the result of “good” management: management decision-making with a focus on quarterly or annual outcomes expected by the owners, donors, board, or public markets, and an approach to fiscal and operational strategy that is reflective of these incentives.<sup>60</sup> The so-called innovator’s dilemma is that new products and markets are costly to address, take a long time to develop, and often generate losses in the early years.<sup>61</sup> How can a large institution justify taking that risk, when it has a solid grasp of its current market position and customers?<sup>62</sup> Shouldn’t just doing more of the same be preferable to investing in risky innovations and ventures?

Kodak was at the forefront of imaging technologies, producing the cameras that returned photos from space for the Apollo program in the mid-1960s (a derivation of television technology).<sup>63</sup> It also made working digital still cameras—the product that was to spell the end of its production of film products for the consumer market it created in 1880—before most other firms.<sup>64</sup> Kodak had the product that would revolutionize imaging in 1975, but it had leadership and a history that was focused

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<sup>59</sup> Scott D. Anthony, *The Persistence of the Innovator’s Dilemma*, HARV. BUS. REV. (Nov. 10, 2011), <https://hbr.org/2011/11/why-does-the-innovators-dilemma> [<https://perma.cc/HK94-DVQA>].

<sup>60</sup> CLAYTON M. CHRISTENSEN, ET AL., *DISRUPTING CLASS: HOW DISRUPTIVE INNOVATION WILL CHANGE THE WAY THE WORLD LEARNS* 50 (2008).

<sup>61</sup> Xenios Thrasylvoulou, *Understanding the Innovator’s Dilemma*, WIRED, <https://www.wired.com/insights/2014/12/understanding-the-innovators-dilemma/> [<https://perma.cc/4ZK9-UTAM>] (last visited Dec. 28, 2023).

<sup>62</sup> See generally CLAYTON M. CHRISTENSEN, *THE INNOVATOR’S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL* (1997) (discussing dynamics of innovation in large enterprises and organization). Dr. Christenson’s solution to the dilemma, for large enterprises with the resources to support them, is the formation of subsidiaries charged with developing the new product and bringing it to market, without the constraints and responsibilities of the parent company. This strategy has been implemented in several large higher education institutions, such as Purdue University, which purchased Kaplan University, one of the first accredited online universities, and operates it separately as Purdue University Global, University of Massachusetts, which purchased assets of the former Brandman University and operates it as UMass Global, and Arizona State University, which purchased the assets of Ashford University and operates it as the University of Arizona Global Campus.

<sup>63</sup> See *Space Imaging*, KODAK, <https://www.kodak.com/en/company/page/space-imaging-history> [<https://perma.cc/YK3G-DEQ3>] (last visited Dec. 28, 2023).

<sup>64</sup> A photo of a Kodak digital camera from 1975, with the engineer credited with inventing it, is in Edward Clay, *A Brief History of Kodak*, INDEP. PHOTOGRAPHER (Nov. 10, 2020), <https://independent-photo.com/news/historic-brands-kodak/> [<https://perma.cc/956P-L93U>].

on film, still a very profitable business in the 1980s.<sup>65</sup> When Kodak eventually launched a digital product—meant to connect the digital image to its core film business—it spent \$500 million on the launch and abandoned it only three years later.<sup>66</sup>

Xerox, also an imaging company, was first to dominate the xerographic copier market, so much so that to “xerox” something became a verb.<sup>67</sup> Xerox also invented or refined many of the technologies and tools consumers and businesses now use every day: computer graphical user interfaces (GUIs), object-oriented program languages, Ethernet, desktop computer image editing, the laser printer, and many others.<sup>68</sup> But Xerox failed to commercialize many of its inventions.<sup>69</sup> Why? The answer is likely that its R & D subsidiary, called XEROX PARC, founded in Palo Alto, California in 1970, was too isolated from the leaders who decided how to allocate resources.<sup>70</sup> The copier market was booming, and profits were strong.<sup>71</sup> Why take a risk on computers? This risk aversion and failure to commercialize the products of its R & D investments was to have long-term, disastrous consequences.<sup>72</sup>

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<sup>65</sup> Kodak’s decade long effort to pivot to digital is chronicled in Chunka Mui, *How Kodak Failed*, FORBES (Jan. 18, 2012, 9:58 AM), <https://www.forbes.com/sites/chunkamui/2012/01/18/how-kodak-failed/?sh=34dcb5c16f27> [<https://perma.cc/A9UG-EYGK>].

<sup>66</sup> Kodak’s Advantix system, which sought to partner digital and film technologies failed after an investment of more than \$500 M. *Id.*

<sup>67</sup> *Xerox*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/xerox> [<https://perma.cc/6P9X-MC4W>] (last visited Dec. 28, 2023).

<sup>68</sup> *Xerox History Timeline*, XEROX, <https://www.xerox.com/en-us/about/history-timeline> [<https://perma.cc/D5RG-F3WA>] (last visited Dec. 28, 2023).

<sup>69</sup> Tendayi Viki, *As Xerox PARC Turns 47, The Lesson Learned Is That Business Models Matter*, FORBES (July 1, 2017, 12:30 AM) <https://www.forbes.com/sites/tendayiviki/2017/07/01/as-xerox-parc-turns-forty-seven-the-lesson-learned-is-that-business-models-matter/?sh=569a395f7548> [<https://perma.cc/T2DF-QSGW>].

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

<sup>71</sup> Xerox, Annual Report (Form 10-K) (Feb. 28, 1997):

We estimate that the global document market that we serve, excluding Japan and the Pacific Rim countries served by Fuji Xerox, was over \$100 billion in 1996 and is estimated to grow to about \$175 billion in 2000... We estimate that the high-end black-and-white laser printing market was over \$6 billion in 1996 and is expected to grow to about \$10 billion in 2000. Our revenues from high-end black-and-white laser printers grew 7 percent in 1996 to \$2.1 billion... We estimate that the color laser copying and printing market was \$5 billion in 1996 and is expected to grow to \$14 billion in 2000. Our revenues from color laser copiers and printers grew 59 percent in 1996 to almost \$1 billion.

<sup>72</sup> In 1980, Xerox was number forty on Fortune magazine’s annual list of the top 500 largest American Corporations. *Fortune 500: 1980 Archive Full List 1-100*, CNNMONEY, [https://money.cnn.com/magazines/fortune/fortune500\\_archive/full/1980/](https://money.cnn.com/magazines/fortune/fortune500_archive/full/1980/) [<https://perma.cc/29FN-NSHC>] (last visited Dec. 28, 2023). By 1990 it was number twenty-one. *Fortune 500: 1990 Archive Full List 1-100*, CNNMONEY, [https://money.cnn.com/magazines/fortune/fortune500\\_archive/full/1990/](https://money.cnn.com/magazines/fortune/fortune500_archive/full/1990/) [<https://perma.cc/GP29-6AYR>] (last visited Dec. 28, 2023). But by 2000 it dropped to number eighty-seven, and by 2010, number 152. *Fortune 500: 2000 Archive Full List 1-100*, CNNMONEY,

In both cases, the incentives of management led to decisions to sideline innovations that the entity owned, which it had obtained via significant investment of resources and time. This is different from the law school situation. These entities had substantial labs devoted to exactly this type of invention. They just failed to connect the invention to its market and benefit from it.<sup>73</sup>

Innovation in Langell's era was, by comparison, easy. Schools and faculties were small, the students and prospective students of law were open to a new approach, the teaching of law was in flux, moving from independent schools to those associated with universities, and the university system itself had not yet fully emerged.<sup>74</sup> Langdell was able to grow the faculty—from four in 1870 to ten in 1895—with people who used his preferred method.<sup>75</sup> These same conditions existed at many law schools, since the period from 1879 to 1920 saw tremendous enrollment growth, which would have been accompanied by growth in faculty at all schools.<sup>76</sup>

Law school innovations typically take place outside the core of the institution, too. Doctrinal legal education delivery today, in many institutions, is virtually indistinguishable from that provided in the major university law schools at the turn of the twentieth century. The case method, with its casebooks, dialogic classrooms, and single, final, summative exam, all pioneered by Langdell before 1895, remained

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[https://money.cnn.com/magazines/fortune/fortune500\\_archive/full/2000/](https://money.cnn.com/magazines/fortune/fortune500_archive/full/2000/) [https://perma.cc/LRN2-8YQF] (last visited Dec. 28, 2023); *Fortune 500 2010: Top 1000 American Companies* - Xerox, CNNMONEY, [https://money.cnn.com/magazines/fortune/fortune500\\_archive/full/2000/](https://money.cnn.com/magazines/fortune/fortune500_archive/full/2000/) [https://perma.cc/L594-5WQA] (last visited Feb. 9, 2024). Its successor, Xerox Holdings, was number 505 on the 2023 list. *Xerox Holdings*, FORTUNE, <https://fortune.com/company/xerox> [https://perma.cc/M43X-D69P] (last updated June 5, 2023).

<sup>73</sup> Craig Wynett et al., *Inspiring Innovation*, HARV. BUS. REV., Aug. 2002, at 39, 40.

A final word of caution. Isolating innovation from mainstream business can produce a dangerous cultural side effect: Creativity and leadership can be perceived as opposite. This artificial disconnect means that innovators often lack the visibility and clout to compete for the resources necessary for success. Only when innovators operate with the credibility of leaders will innovation become a productive part of everyday business.

<sup>74</sup> Claudia Goldin & Lawrence F. Katz, *The Shaping of Higher Education: The Formative Years in the United States, 1890 to 1940*, J. ECON. PERSP., Winter 1999, at 37, 41–42.

<sup>75</sup> Erwin N. Griswold, *The Harvard Law Review – Glimpses of Its History as Seen by an Aficionado*, in Harv. L. Rev.: Centennial Album I (1987), <http://harvardlawreview.org/1987/01/glimpses-of-its-history-as-seen-by-anaficionado> [https://perma.cc/PR3Z-KQND].

One of the important innovations was the appointment to the faculty of several recent graduates of the Law School who lacked substantial experience in practice. The first of these young scholars was James Barr Ames of the Class of 1872. Ames was appointed Assistant Professor in 1873, and became a Professor of Law in 1877 at the age of thirty one. He later served as Dean of the Law School from 1895 to 1910. He was widely regarded as the scholar who perfected the case method of instruction, and he was greatly beloved by his students and admired by law teachers throughout the United States. Ames gave encouragement to the students in late 1886, and in early 1887 he contributed the first article in the first issue of the *Review*.

<sup>76</sup> See ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 452 (1921).

the gold standard for many individual faculty members for more than 100 years.<sup>77</sup>

Today's students are different, learn differently, and have different needs than students in 1895, but the incentives at play in modern law schools brutally inhibit innovation in the core of the institution. The structural incentives for faculty at most institutions include:

- Promotion — from Assistant to Associate and Professor, along with the benefits of each; a product of faculty committee action in most institutions;
- Tenure — a product of faculty politics, passage of a minimum time at the institution, and attaining academic stature through publishing, service, and other activities;
- Money — promotion and tenure related, but also possibly associated with chairs, institutes, administrative positions, overloads, program leadership, and other opportunities for service;
- Teaching load — including overloads, releases, and stipends for particular activities (e.g. teaching in the summer);
- Teaching assignments — topical appeal and qualification, and scheduling convenience.
- Sabbatical — a benefit of tenure, usually tied to time and status;
- Chairs and institutes — rewards for significant achievements in service, or recognition of significant achievements in academic stature;
- Mobility — not only the ability to move to a school with a higher ranking or better faculty environment but also the ability to visit or become emeritus after a significant tenure and service to the institution;
- Status — in the faculty of a single institution, there is certainly a faculty culture and there can be a rigid social structure.

Contrast these to the incentives that drive inventors and innovators, and one can see why innovations in law schools are hard to achieve:

- Problem or Puzzle Solving;<sup>78</sup>

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<sup>77</sup> See Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 27 (1996).

<sup>78</sup> Raymond Kurzweil is the inventor of optical character recognition (OCR), the first musical synthesizer, and the first machine to read text aloud for the blind, and a prolific inventor, with 117 patents as of 2019. Interviewed at MIT in 2001, Kurzweil reportedly said:

The scientist values knowledge; the inventor takes pleasure in seeing the leap from a dry formula to an impact on people's lives, to making a difference in the real world. Invention in technology is a form of magic: revealing the methods does not ruin its effect. There is magic to any creation.

Kurzweil also debunked "the 'myth of the inventor who disappears into his basement and emerges with a breakthrough. Actually, it's a group. Part of inventing is having leadership qualities, a vision, a passion and the ability to get a group to work effectively together.'" Sarah H Wright, *Inventors Discuss Their Sources of Inspiration*, MIT NEWS (Dec. 5, 2001), <https://news.mit.edu/2001/invention-1205> [<https://perma.cc/ZN57-FB4E>].

- Creation Urge;
- Wealth;
- Recognition and/or Prestige;
- Freedom to Fail, Yet Persist.<sup>79</sup>

Law schools are not constructed to be innovation engines. In fact, they often do not view it as in their interest to be seen as innovators. First, law school rankings, for decades, emphasized reputation highly.<sup>80</sup> Reputation scores are the combination of peer assessment and assessment by academic peers, lawyers, and judges.<sup>81</sup> These scores are theoretically earned for academic quality, but are not much more than legacy promotion exercises—elites rating their alma mater rather highly and others not so much.<sup>82</sup> New rankings methods introduced in 2023 put a greater emphasis on employment of graduates and bar passage rates, which are public and less subjective metrics.<sup>83</sup> They may also eventually reflect the advantages held by the more innovative schools, whereas reputation scores of alumni, from perhaps decades ago, will likely not.

Second, prospective law students do not include the quality of the legal education among the top factors in choosing a law school.<sup>84</sup> Apart from rankings, law schools are chosen for location, cost, bar passage rate, employment outcomes of graduates, salaries of employed graduates, prominent alumni and faculty, and many other factors.<sup>85</sup> Quality of the education offered is not specifically cited as a significant factor in school choice, but neither is it listed as among the least important considerations.<sup>86</sup> It is likely that legal education quality is simply too

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<sup>79</sup> “I have not failed. I’ve just found 10,000 ways that won’t work.” This, and other quotations by Thomas Edison, such as the widely known, “genius is one percent inspiration, ninety-nine percent perspiration” reveal the mind and motivations of this famous – and folksy – inventor. *Edison Quotes*, EDISON INNOVATION FOUND., <https://www.thomasedison.org/edison-quotes> [<https://perma.cc/CC8D-XYUM>] (last visited Feb. 2, 2024).

<sup>80</sup> Karen Sloan, *Big Shifts in U.S. News & World Report Law School Rankings. Here’s Why.*, REUTERS (May 11, 2023, 2:27 PM), <https://www.reuters.com/legal/legalindustry/big-shifts-us-news-world-report-law-school-rankings-heres-why-2023-05-11/> [<https://perma.cc/WN2U-ZECL>].

<sup>81</sup> Robert Morse et al., *Methodology: 2023-2024 Best Law Schools Rankings*, U.S. NEWS AND WORLD REP. (May 10, 2023, 9:00 PM), <https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology> [<https://perma.cc/7PYD-W9KS>].

<sup>82</sup> See generally Phyllis V. Larsen, *Academic Reputation: How U.S. News & World Report Survey Respondents Form Perceptions*, 4 CASE INT’L J. EDUC. ADVANCEMENT 155 (2003) (analyzing survey respondents’ responses to reputation questions in U.S. News surveys).

<sup>83</sup> Morse et al., *supra* note 81.

<sup>84</sup> See Christopher J. Ryan, Jr., *Analyzing Law School Choice*, 2020 U. ILL. L. REV. 583, 600 tbl.4 (2020).

<sup>85</sup> *Id.* at 600.

<sup>86</sup> See *id.* at 600 tbl.4, 603 tbl.5. Dr. Ryan charts factors rated most highly in law school choice,

difficult for a novice consumer to assess from the information available to prospective students and so they rely on rankings and other indicia as surrogates. It is also likely that, like consumers in many situations, students choosing a law school would form *perceptions of value* that include many factors, including perceived quality.<sup>87</sup> These students likely reject schools they perceive to be lesser value choices, unless other factors—such as location or limited opportunities for admission—dominate their school choice.<sup>88</sup> These prospective law students should value innovation as an aspect of perceived quality and value, especially where the innovations benefit students or make the education more affordable, accessible, or attainable with the time and resources available to those students. But very few schools, apart from those with distance education programs, emphasize their innovative nature.<sup>89</sup>

Experiential and skills faculty, law librarians, technology support staff, instructional designers, and non-J.D. program administrators and faculty have been the drivers of innovation in many law schools.<sup>90</sup> Often, individuals in these groups live, to one degree or another, outside the highly regimented hierarchy of the doctrinal, research-focused faculty.<sup>91</sup> This, too, has had the unfortunate effect of limiting emphasis on innovation. But it has proven to be an advantage for some law schools, if not for the faculty and staff members themselves. By being “siloeed” they were freer to explore the best ways to accomplish their roles, which often led to the incorporation of new technologies, pedagogical innovations informed by learning science, assessments that were developmental and formative instead of merely

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and education quality, per se, is not among the highest factors considered by students attending any of the four school types surveyed. The list of factors of *least* consideration in law school choices has surprising entries regarding rankings and diversity. *Id.* at 602–03.

<sup>87</sup> See *id.* at 612–13.

<sup>88</sup> See *id.* at 615.

<sup>89</sup> See generally Michael Ariens, *Law School Branding and the Future of Legal Education*, 34 ST. MARY'S L.J. 301 (2003) (summarizing law school branding). The Legal Services Innovation Index looked at ABA law schools' own assertions about innovation to rate the most innovative law schools. 40 schools were identified according to the Index's criteria. Daniel W. Linna Jr., & Jordan Galvin, *Law School Innovation Index*, LEGAL SERV. INNOVATION INDEX, <https://www.legaltechinnovation.com/law-school-index/> [https://perma.cc/UP27-Q5FF] (last visited Feb. 2, 2024). Innovation in the narrow context of schools that teach intellectual property and related topics mention innovation. Schools may analyze innovation in action or policy, such as at Duke Law's Center for Innovation Policy. *The Center for Innovation Policy at Duke Law*, DUKE UNIV. SCH. OF L., <https://law.duke.edu/innovationpolicy> [https://perma.cc/HVL9-AZQA] (last visited Feb. 2, 2024). But references to the law school itself innovating are rare. Employment and salaries are a frequent marketing message instead. See generally Ben Trachtenberg, *Law School Marketing and Legal Ethics*, 91 NEB. L. REV. 866 (2013).

<sup>90</sup> CLEA, the Clinical Legal Education Association, supported the work of Professor Roy Stuckey and others in collecting Best Practices for Legal Education, which went well beyond clinical education. See generally ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007).

<sup>91</sup> DAVID I.C. THOMSON, THE WAY FORWARD FOR LEGAL EDUCATION 20–21 (2023).

evaluative, and other vital revisions of legal education.<sup>92</sup>

California has a long history of openness to diverse forms of legal education. It is the only state with an established framework, standards, and an agency with authority to state-accredit and register law schools, and remains one of the only states to permit “reading for the law” in the form of correspondence education and study in a law office or judge’s chambers.<sup>93</sup> These schools have always served students intending law practice careers and trained them with practicing members of the judiciary or legal profession, so the “apprenticeships” that experts suggest schools should offer—into the values and mores as well as the methods and practices the legal profession—were always integral to their legal education.<sup>94</sup>

Some of the most innovative work has come from these law schools, which are outside the framework of American Bar Association (ABA) approved legal education. In California, Concord Law School, now part of Purdue Global but founded as part of the Kaplan organization in 1998, was the first law school in America and one of the first in the world, to deliver a full, robust legal education entirely online.<sup>95</sup> The Concord story was possible because of the vision of its founder, Jack R. Goetz, the genius and sweat of its founding team, the support of its corporate owners, and the fortunate regulatory environment, which allowed graduates of unaccredited schools to sit for the California Bar Exam if certain, very specific and rigid qualifications were met.<sup>96</sup>

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<sup>92</sup> Many of the innovations being explored and tested arise from advances in learning science being applied to legal education, new ABA assessment requirements, and online and hybrid learning techniques, platforms, and methodologies. The biennial Online and Hybrid Learning Conference, of which the author is a co-founder, explores evidence-based pedagogical approaches toward defining best practices. Prior conference materials and recordings are useful resources for reviewing the work being done by many legal education innovators. See 2019 Conference Materials, UNIV. OF DENVER STURM COLL. OF L., <https://www.law.du.edu/sites/default/files/2023-06/2019%20Online%20Learning%20Conference%20Materials.pdf> [https://perma.cc/JW4A-NKXX] (last visited Feb. 3, 2024); 2022 Conference Agenda, UNIV. OF DENVER STURM COLL. OF L., [https://www.law.du.edu/sites/default/files/2022-09/Sturm%20College%20of%20Law\\_Online%20%26%20Hybrid%20Learning%20Pedagogy\\_2022%20Agenda\\_web.pdf](https://www.law.du.edu/sites/default/files/2022-09/Sturm%20College%20of%20Law_Online%20%26%20Hybrid%20Learning%20Pedagogy_2022%20Agenda_web.pdf) [https://perma.cc/7W2M-ZTGP] (last visited Feb. 3, 2024).

<sup>93</sup> See *Accredited Law School Rules*, THE STATE BAR OF CAL. (Jan. 1, 2022), [https://www.calbar.ca.gov/Portals/0/documents/rules/Rules\\_Title4\\_Div2-Acc-Law-Sch.pdf](https://www.calbar.ca.gov/Portals/0/documents/rules/Rules_Title4_Div2-Acc-Law-Sch.pdf) [https://perma.cc/RK8G-7HAY] [hereinafter *Accredited Law School Rules 2022*]; *Guidelines for Accredited Law School Rules*, THE STATE BAR OF CAL. (Jan. 1, 2022), <https://www.calbar.ca.gov/Portals/0/documents/admissions/Guidelines-for-Accredited-Law-School-Rules.pdf> [https://perma.cc/JZ2V-ADYB] [hereinafter *Guidelines for Accredited Law School Rules 2022*].

<sup>94</sup> *About CALS*, CAL. ACCREDITED L. SCH., <https://calawschools.org/about-cals/> [https://perma.cc/6SVC-N9KU] (last visited Feb. 2, 2024).

<sup>95</sup> See Robert E. Oliphant, *Will Internet Driven Concord University Law School Revolutionize Traditional Law School Teaching?* 27 WM. MITCHELL L. REV. 841, 846–47 (2000).

<sup>96</sup> See generally Andrew S. Rosen, *Concord University School of Law's On-Line Law Degree*



Concord Law School students took online courses divided into weekly topical modules, in which students read traditional casebook assignments, but also read hornbook assignments and watched video content from prominent law professors that was carefully keyed to the module content.<sup>97</sup> A companion skills and training course was required, in which students completed similar modules in legal reasoning and analysis, IRAC, and introductory legal research and writing skills.<sup>98</sup> Both courses integrated formative assessments in addition to final exams, supported by an extensive feedback mechanism.<sup>99</sup>

Concord Law School's curriculum was delivered via a learning management system (LMS) developed in MS Access by the school's technology partners that featured online syllabi, online formative and summative assessments, grading, attendance tracking, student relationship management features, transcripts, bulletin boards, email, and other features that put it years ahead of other LMS products that existed at the time.<sup>100</sup> All this innovation permitted students to immediately see the results of multiple-choice assessments, submit assignments

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*Program*, 15 ST. JOHN'S J. LEGAL COMMENT. 311 (2001) (discussing Concord University School of Law's founding).

<sup>97</sup> Oliphant, *supra* note 95, at 852–53.

<sup>98</sup> See Rosen, *supra* note 96, at pp. 315–17. IRAC is an acronym for Issue, Rule, Analysis and Conclusion, a commonly taught legal issue analysis template for bar exams, essays, and other writing and discussions of legal issues. Students identify the legal issue raised by the facts of the hypothetical, state the applicable legal rules, discuss the facts of the hypothetical that either establish the elements of the legal rules or do not, and all of that discussion support the students' ultimate conclusion regarding the matters raised by the hypothetical.

<sup>99</sup> Legal Writing and Test Taking combined training on legal analysis, multiple choice and essay testing, legal research, and legal writing for first year part time students. Formative assessment essays on each first year doctrinal subject (Contracts, Criminal Law and Torts in this part time program) were assigned, written, and graded in this course. For the structure of the course, which changed little from its first incarnation in 1999 and shows very similar structure within an updated user interface. See Legal Writing and Test Taking Syllabus (March 8, 2014) (unpublished syllabus) (on file with the author).

<sup>100</sup> The best known of these was Blackboard. Blackboard Inc, was formed in 1998 as the merger of CourseInfo, founded by Stephen Gilfus while at Cornell University, and Blackboard LLC, a 1997 startup led by two former KPMG consultants, Michael Chasen and Matthew Pittinsky. See *History of Blackboard and the Blackboard Learning System*, GILFUS EDUC. GRP., <https://gilfuseducationgroup.com/history-of-blackboard-and-the-blackboard-learning-system/> [https://perma.cc/4PG4-E5RS] (last visited Feb. 8, 2024); Jason Tomassini, *Blackboard Inc. CEO to Step Down*, EDWEEK MKT. BRIEF (Oct 15. 2012), [https://marketbrief.edweek.org/marketplace-k-12/blackboard\\_inc\\_ceo\\_to\\_step\\_down/](https://marketbrief.edweek.org/marketplace-k-12/blackboard_inc_ceo_to_step_down/) [https://perma.cc/UE2X-69PQ]. Blackboard, Inc. with venture funding, grew rapidly and soon engulfed another early LMS, WebCT. See *History of Blackboard and the Blackboard Learning System*, GILFUS EDUC. GRP., <https://gilfuseducationgroup.com/history-of-blackboard-and-the-blackboard-learning-system/> [https://perma.cc/4PG4-E5RS] (last visited Feb. 8, 2024). Blackboard's commercial success began immediately, when it produced \$620,000 in annual revenue in 1998. See *Reinventing the Blackboard in 1997*, ENCYCLOPEDIA.COM <https://www.encyclopedia.com/books/politics-and-business-magazines/blackboard-inc> [https://perma.cc/D5VS-G6CE] (last visited Feb. 8, 2024).

and receive feedback, check and track their progress, and interact with their professor in near real-time<sup>101</sup>—all in 1998, when a “fast” internet connection was 56 kilobytes per second (KBPS) via dial-up modem.<sup>102</sup>

Live online classes across the nascent Internet started in January 1999, using technologies developed from text chat and early audio streaming products.<sup>103</sup> Students could hear their professors and see handouts and other document, but interacted with the professor and each other in text—which was all the bandwidth and technology could support at the time.<sup>104</sup> Surprisingly, this text interaction was remarkably effective in creating broad-based engagement in the live sessions, if skillfully moderated by the professor, because students experienced—perhaps for the first time in their educational career—a socially “safe” environment for participating in class.<sup>105</sup> The professor could literally encourage every student to answer every question or comment on every case, and select the ones to share with the class. With care and intentionality, students who would never participate in

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<sup>101</sup> The Concord Learning Management System was created in 1997 and 1998 by Concord Law School and its technology partner, Estream, Inc., and continually upgraded through 2017. It provided many features not found on other LMS systems at the time of its creation, such as integrated messaging and live classes, quizzing, essay testing, progress dashboards for faculty and students, and numerous reports on student success and faculty responsiveness. For example, essay grading and feedback allowed two-level faculty and instructional staff collaboration, a feature still not available in modern LMS systems as of this writing. These and other features greatly advanced academic integrity and improved the student experience. The Concord LMS remained in use with other partner law schools until 2019. Samples of the messaging handled through the system, quizzes taken by the system, reports from the system, screenshots of the software’s dashboard, and recordings of live classes are on file with the author.

<sup>102</sup> *Who Invented the Internet?*, PLUSNET <https://www.plus.net/broadband/discover/history-of-the-internet/> [<https://perma.cc/52Y4-N9R2>] (last visited Feb. 28, 2024).

<sup>103</sup> Gregory J. Brandes, Dean, Concord L. Sch., Presentations to Invited Audiences at the Association of American Law Schools (AALS) Annual Meeting (Jan. 2–7, 2000). These presentations described and illustrated the Concord Law School learning management system to over 100 law professors and deans in a meeting suite at the conference. They included demonstrations of the live classroom technology then in use, which featured one-way audio from the professor and two way, moderated live “chat” interactions with and among students. The professor conducted the class very much like any law school class, using the text chat to see student responses to questions and share them with the class through the moderation feature. Crude by today’s standards, it had one remarkable advantage: It permitted just about every student to answer every question. The professor, moderating the comments, was able to encourage live class engagement, and nearly all students participated. This presentation showed both the student view and professor view of this classroom technology in action. For a contemporary description of what it looked like to a reporter at the professor’s side, see Dan Carnevale, *Hold a Socratic Chat: A Law Professor Teaches Students at a Distance*, CHRON. HIGHER EDUC. (June 24, 2005), <https://go-gale-com.unh.idm.oclc.org/ps/i.do?p=BIC&u=durh54357&id=GALE|A147069911&v=2.1&it=r&sid=summon> [<https://perma.cc/DSL2-WUJV>].

<sup>104</sup> Oliphant, *supra* note 95, pp. 854–57.

<sup>105</sup> *See id.* at 856

person could be stars of the online classroom—where their competence, and not their social anxiety, was on display.

In 2013, Concord Law School developed one of the first video-streaming classroom systems, in which students could hear and see the professor, see slides or videos, and see other students' textual comments.<sup>106</sup> Within just a few years, video and audio were both two-way, and the text interaction became less important—and some of the social constraints of the classroom returned.

Concord's success was immediate and immense. It attained full accreditation from the Distance Education Training Council (DETC), the precursor of today's Distance Education Accrediting Commission (DEAC), in 2001<sup>107</sup> and by 2004 was a school of 1,700 students<sup>108</sup> and almost 100 faculty and staff.<sup>109</sup> Concord accomplished this without ABA approval or federal student aid, and at a total degree cost for the Juris Doctor (J.D.) of less than \$50,000.<sup>110</sup>

Concord's success inspired competitors. Many existing correspondence law schools converted to distance education formats. Individual faculty members at otherwise traditional law schools began experimenting with tools for polling students in the live classroom, submitting assignments online, recording classes, and delivering feedback. Other schools experimented with elective offerings online in the J.D. program. Even some ABA-approved law schools initiated online or hybrid non-J.D. programs for Master of Legal Studies (M.L.S.) and Master of Laws (LL.M.)

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<sup>106</sup> Gregory J. Brandes, Dean, Concord L. Sch., Presentation to the State Bar of California Board of Trustees and Member Oversight Committee: Beyond the 10th Row: Distance Education Overview and Efficacy (May 8, 2013). This presentation described and illustrated the Concord Law School "Indigo" and "Seminar 2" live online class systems, which included live streaming video and audio at a very early stage of that technology. The professor conducted the class via video and audio and could add a student's video/audio stream, too, for Socratic dialogue or student presentations. Developed by Concord Law School and Estream, Inc., to the author's knowledge, this was the first classroom teaching platform in use in legal education that permitted this type of two way video and audio interactivity.

<sup>107</sup> *History of Purdue Global Law School*, PURDUE GLOBAL LAW SCHOOL, <https://www.purduegloballawschool.edu/about/history> [https://perma.cc/D9VA-MDFC] (last visited Feb. 6, 2024).

<sup>108</sup> See Tony Mauro, *Fewer Pencils, Fewer Books: Rethinking the Limits of an Online Law Degree*, LEGAL TIMES, Sept. 6, 2004, at 31.

<sup>109</sup> Concord Law School Faculty and Staff Contact Information (Oct. 28, 2004) (unpublished contact list) (on file with the author); Concord Law School Faculty and Staff Contact Information (Apr. 4, 2009) (unpublished contact list) (on file with the author). Contact information on file with the author list the professors, instructional staff, lecturers, deans, staff, and administrators associated with Concord Law School at various times. The contact list from October 28, 2004 shows 112 such individuals, while the contact list from April 4, 2009 contains 116 such contacts.

<sup>110</sup> *Report of the Purdue University Global Concord Law School Working Group*, IND. SUP. CT., 9 (Feb. 23, 2023), <https://www.in.gov/courts/files/rules-proposed-2023-march-working-group-report.pdf> [https://perma.cc/H89H-LDAS].

degrees.<sup>111</sup>

Meanwhile, Concord continued to innovate and gain acceptance.<sup>112</sup> Under the leadership of Barry Currier, former consultant on accreditation to the ABA Section of Legal Education and Admission to the Bar, and later its Managing Director of Accreditation,<sup>113</sup> Concord evolved new courses in skills and other areas, new systems for student support and live classes, a unique governance model for a school with a distributed, practitioner faculty, and a peer review system for faculty development and evaluation that was automated through the LMS. Concord's Peer Evaluation System (PES) leveraged the power of the LMS to deliver faculty activities like classes and assignments to faculty peers for evaluation according to rubrics and established guidelines.<sup>114</sup> A directly elected faculty governance committee assigned the events and reviewed the evaluations, trained the faculty members in peer review and developmental feedback techniques, and compiled the peer feedback into the evaluation report.<sup>115</sup> Every faculty member learned to be a peer evaluator, and gained from both giving and receiving regular, detailed, developmental.<sup>116</sup>

These examples from legal education prove sound the advice of Dr. Christenson in "The Innovators Dilemma," delivered to businesses wishing to enhance their ability to accomplish innovation and make it work in the real world: to accomplish innovation in an established organization, form a subsidiary and empower it and resource it to achieve the goal.<sup>117</sup> Only in this way can the pitfalls of established culture, leadership, and incentives be avoided, and innovations be nurtured and prosper. Concord Law School was an innovation engine within Kaplan Inc. because it had a highly entrepreneurial, innovation-centric culture, and operated with limited interference from "corporate" for most of its successful years. While it continues to prosper in a different form, the innovations and example—this independence fostered continue to underly its success—and that of its many, and

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<sup>111</sup> See WORKING GROUP ON DISTANCE LEARNING IN LEGAL EDUCATION, *DISTANCE LEARNING IN LEGAL EDUCATION: DESIGN, DELIVERY AND RECOMMENDED PRACTICES 6* (Rebecca Purdom et al, eds., 2015).

<sup>112</sup> See Mauro, *supra* note 108, at 31, 33.

<sup>113</sup> Mark Hansen, *ABA Taps One-Time Law School Dean to Head new Legal Ed Section Post*, ABAJOURNAL (Mar. 28, 2013, 8:34 PM), [https://www.abajournal.com/news/article/aba\\_taps\\_currier\\_to\\_head\\_legal\\_ed\\_section](https://www.abajournal.com/news/article/aba_taps_currier_to_head_legal_ed_section) [https://perma.cc/5DR3-B9Y4].

<sup>114</sup> Gregory J. Brandes, Dean of Faculty, Concord L. School, Presentation to the 2010 Concord Law School Faculty Collegium, Online Faculty Peer Evaluation System (Feb. 26, 2010) (on file with author). This presentation described and illustrated the Concord Law School "Peer Evaluation System" (PES), which automated the routing and collection of faculty peer evaluations contributions of faculty members and generated summaries that were used by the faculty-elected Development Opportunities, Mentoring and Evaluation (DOME) Committee to provide developmental feedback to faculty member. Ten or twelve times a year, each faculty member participated in some form of peer evaluation, either giving or receiving feedback to or from a peer.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> CHRISTENSEN, *supra* note 62, at 342 (kindle edition).

growing, imitators.

## VII. REGULATORY ENVIRONMENT

Higher education, until the 1940s, was largely free of regulation. The period from 1887 to 1917 saw the establishment of all the future “regional” accreditors in early form, but this was voluntary private self-regulation, not government oversight.<sup>118</sup> The administrative and cost burden of regulation was not a significant factor in the operation of law schools then, as it is today.<sup>119</sup>

Regulation was coming, but first, market forces would transform professional education in the United States. Many of the early twentieth-century law schools were founded to serve working adults, coming from other occupations, and the teaching was practical in nature and delivered by members of the local legal profession.<sup>120</sup> San Francisco Law School, which claims to be the oldest evening law school in the Western United States, was one of these, tracing its founding to YMCA legal education in 1909.<sup>121</sup> Today’s Loyola University Chicago School of Law, founded in 1908, began as Lincoln College of Law, a part of Saint Ignatius College, the predecessor to Loyola University Chicago.<sup>122</sup> Its first secretary and registrar, Arnold D. McMahon, writing contemporaneously, described the school’s founding purposes and design:

It will be the aim of the Lincoln College of Law to afford to those who must support themselves while preparing for the profession an opportunity to obtain a thorough training in all branches of the law. To this end it has been determined to hold the class sessions in the evening from 6:30 to 9:00 p.m. The classes will be conducted by men actively engaged in the profession, who have been chosen with great care from the leading practitioners of the Chicago bar.<sup>123</sup>

Its mission and vision were, over time, echoed at many other schools seeking to

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<sup>118</sup> See 1919-2019: *The 100-Year History of the Middle States Commission on Higher Education*, MIDDLE STATES COMM’M ON HIGHER EDUC., <https://www.msche.org/about-us/history/> [https://perma.cc/E3UW-XX4E] (last visited Feb. 6, 2024).

<sup>119</sup> See Gary S. Lawson, *Symposium: Changing Images of the State: The Rise and Rise of the Administrative State*, in 107 HARV. L. REV. 1231, 1233–36 (1994).

<sup>120</sup> In the 1921 report by Alred Zantziger Reed to the Committee on Legal Education and Admission to the Bar, 71 of the 142 law schools identified were part time schools or so called “short course” schools, and another seven full time schools offered evening classes or programs. ZANTZINGER REED, *supra* note 76, at 441.

<sup>121</sup> *San Francisco Law School*, Alliant Int’l Univ., <https://catalog.alliant.edu/content.php?catoid=36&navoid=1389> [https://perma.cc/5C8G-XNGN] (last visited Mar. 1, 2024); *San Francisco Law School, A 100 Year History We Can be Proud of*, S.F. L. SCH., <https://sfls.edu/our-history/> [https://perma.cc/JLC4-XC8B] (last visited Feb. 7, 2024).

<sup>122</sup> Thomas M. Haney, *The First 100 Years: The Centennial history of Loyola University Chicago School of Law*, 41 LOY. U. CHI. L.J. 651, 652, 657–58 (2010).

<sup>123</sup> *Id.* at 658.

serve a similar purpose and population.<sup>124</sup> But independent law schools were soon under attack.

It began in the wake of the 1910 “Flexner Report” on medical education, which, like the later Redlich Report, was commissioned by the Carnegie Foundation for the Advancement of Teaching.<sup>125</sup> The report criticized the medical education of the day as overproducing poorly trained practitioners, which, in its view, was in disregard of the public welfare and interest.<sup>126</sup> It attributed this, in large part, to the proliferation of commercial schools, “sustained in many cases by advertising methods through which a mass of unprepared youth is drawn out of industrial occupations into the study of medicine.”<sup>127</sup> Independent schools of law had already begun to affiliate with universities, but now increasingly sought—in the arms of emerging universities—protection from the kind of criticism being leveled at independent medical schools.<sup>128</sup> The debates from this era about the merits of practice-focused schools of law are indistinguishable from the debates on that same topic today.<sup>129</sup>

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<sup>124</sup> See Goldin & Katz, *supra* note 74, at 46–47.

<sup>125</sup> ABRAHAM FLEXNER, MEDICAL EDUCATION IN THE UNITED STATES AND CANADA, A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, at vii (D.B. Updike, The Merrymount Press 1910).

<sup>126</sup> *Id.* at x–xi.

<sup>127</sup> *Id.* at x.

<sup>128</sup> Goldin & Katz, *supra* note 74, at 46.

At the turn of the 20th century, 48 percent of students training to be lawyers, dentists, pharmacists, and doctors (of both humans and animals) attended professional schools that were independent of any other institution of higher education. At this time, professional schools often did not require the students to have had a college degree, and many had not previously attended college at all (Abbott, 1988). But by 1934, only 19 percent of professional students were attending independent schools. In 1897, the U.S. Office of Education surveyed 185 independent professional schools: 103 medical schools, 22 law schools, 32 schools of dentistry, and 28 that taught pharmacy. By 1934 the number of independent professional schools had dropped to 58, of which 27 were law schools. Over this time, the share of all students in higher education attending independent professional schools fell from 15.5 percent of all students to just 1.9 percent of all students.

<sup>129</sup> See ZANTZINGER REED, *supra* note 76, at 416–17.

Disregarding, therefore, the few surviving short course institutions, three different types of law schools seem likely to survive. One type is rooted in our colleges in universities, and, teaching national law by the case method, is destined to produce a minority of our actual legal practitioners, but textbooks for all. The other two types, while differing somewhat from one another in their organization and student constituency, are alike in the more fundamental respects that they are not rooted in the colleges, and that they utilize the labors of the first group for the purpose of training, less thoroughly, but with greater emphasis on the actual local law, the great majority of our future lawyers and politicians. ... The development of differing types of legal education has established in legal practice groups of lawyers of different kind types, each of which has been properly interested in perpetuating its kind. Under the influences of an inherited prepossession, however, each has thought it necessary, not only to do this, but also to impose upon the totality of practitioners its own special conception of legal education. Each has thus come into to conflict with the other when their views did not happen to coincide. Each has seen clearly that if all American lawyers were educated in accordance with the other’s plans, we should be in a bad way. Each, therefore, has tried, when most intolerant, to defeat the others’ plans out right. Each has tried, when most conciliatory, to concoct some device whereby the training of the unitary bar should include the best features of all suggested systems. If one-tenth of the thought that has been given to this vain effort had been expended upon the problems of dividing the bar along lines that can be justified on both political and educational grounds, by this time we might or might not have attained a solution entirely satisfactory from both points of view.

But this controversy, and the attention it drew to quality, would eventually transform professional education from a system of independent professional schools to one of predominantly university-affiliated professional schools.

The Association of American Law Schools (AALS) was a self-regulatory effort. Formed in 1900, by 1940 it boasted nearly 100 member schools.<sup>130</sup> Between the influence of the American Bar Association (ABA) and the AALS, and the pressures of oversight generated by the Flexner and Redlich reports, university-connected law schools became the standard entry path to the legal profession by the end of the 1930s.<sup>131</sup>

#### A. *The Necessary Evolution of Accreditation Standards*

Standards for accreditation of law schools by the ABA came along in the 1920s.<sup>132</sup> Senator Elihu Root's Committee on Legal Education, part of a new Council on Legal Education formed to address concerns about law school quality, reported on the state of legal education in America at the 1921 ABA Annual Meeting.<sup>133</sup> Its conclusions and recommendations eventually led to the first Standards for Legal Education, formally adopted by the Section of Legal Education and Admission to the Bar in 1929.<sup>134</sup> The historical record of the eight years between these events is somewhat lacking, but the 1928 Reed Report<sup>135</sup> is the first time standards in force by both the ABA and AALS were noted by the Carnegie Foundation in its annual Review of Legal Education in the United States and Canada.<sup>136</sup>

The initial Standards, adopted largely in response to the disruptive innovations of day—evening and part-time law schools—were not without their own delay and controversy. In her 1993 history of the ABA Section of Legal Education and Admission to the Bar, Susan K. Boyd describes the 1929 section meeting:

Some of those attending the 1929 Section meeting, during which the Root report became the Standards, still complained that the 1921 Section meeting, at which the Root report was adopted, had not been run fairly. There were references to a "packed body" representing the interests of another organization at the 1921 meeting. The

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<sup>130</sup> *History*, ASS'N AM. L. SCH. <https://www.aals.org/about/history/> [<https://perma.cc/43AM-M3HM>] (last visited Feb. 8, 2024).

<sup>131</sup> Susan Katcher of the University of Wisconsin Law School effectively traced this evolution. See generally Katcher, *supra* note 12.

<sup>132</sup> *Standards Archives*, A.B.A., [https://www.americanbar.org/groups/legal\\_education/resources/standards/standards\\_archives/](https://www.americanbar.org/groups/legal_education/resources/standards/standards_archives/) [<https://perma.cc/QLM8-NCJN>] (last visited Feb. 8, 2024).

<sup>133</sup> SUSAN K. BOYD, *THE ABA'S FIRST SECTION: ASSURING A QUALIFIED BAR* 24 (1993).

<sup>134</sup> *Id.*

<sup>135</sup> Alfred Zantzinger Reed, *Review of Legal Education in the United States and Canada for the Year 1928*, A.B.A. (1929), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/standardsarchive/1928\\_review.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/1928_review.pdf) [<https://perma.cc/N5Q7-E8A2>].

<sup>136</sup> *Id.* at 47.

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organization referred to was the AALS, whose members had been instrumental in the creation of the Root committee, which produced the Root report. Section minutes record that Charles Boston of New York, a former Section chairman who had attended the 1921 meeting, denied the charges.<sup>137</sup>

The initial standards were complied with quickly, but did not settle the debate about the “innovation” of evening and part time law schools. It is startling to read how closely the conversation and debates today mirror those of nearly a century before:

Chairman James Grafton Rogers of Boulder reported rapid progress in observance of the Standards in 1936. Three-quarters of all law schools were enforcing ABA Standards through state bar groups, and 32 schools had two-year prelaw requirements. The Council undertook editing of the *Annual Review of Legal Education* formerly done by the Carnegie Foundation. Character training was the theme of papers presented at Section meetings. Rogers himself said, “We realize that the requirement of a college background for the lawyer is adding something to the breadth of his outlook, to the balance that he keeps at any rate to his general approach to life, and perhaps to the moral and character requirements of the profession.”<sup>138</sup>

Rogers expressed concern the following year over the variety of legal education available in the United States, finding night schools particularly troubling.<sup>139</sup> He doubted that even a fine night school could produce the same results as a full-time day school because of the lack of contact with its students and it would have, therefore, little influence on their professional pride and ethical standards.<sup>140</sup> Part-time students also had the distractions of families, jobs and finances.<sup>141</sup>

The Standards required pre-legal education amounting to one-half that required for a Bachelor’s degree unless the student was classified as a “special student” to whom additional limitations applied.<sup>142</sup> Three years of at least thirty weeks each were required for the curriculum and schedule for full-time students, and four years of forty weeks each was required of part-time students.<sup>143</sup>

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<sup>137</sup> BOYD, *supra* note 133, at 35–36.

<sup>138</sup> *Id.* at 40.

<sup>139</sup> *Annual Review of Legal Education Section of Legal Education and Admission to the Bar of the American Bar Association for 1936*, A.B.A. (1936), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/standardsarchive/1936\\_review.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/1936_review.pdf) [<https://perma.cc/LF6Q-AK5U>] (last visited Jan. 24, 2024).

<sup>140</sup> BOYD, *supra* note 133, at 15.

<sup>141</sup> Today, more than twenty five years after the debut of the first online law school, it is clear that the innovation of distance education, like night schools in 1936, has a permanent place in American legal education. It is only a matter of regulations catching up. Like the standards adopted by the ABA almost 100 years ago, modern standards that support quality and accountability in the delivery of legal education by *this* century’s innovative means are certainly possible, but have taken time to create and implement. For the debut of the first online law school in the United States, see Rosen, *supra* note 96, at 313 and Oliphant, *supra* note 95, at 844.

<sup>142</sup> Zantinger Reed, *supra* note 135, at 47.

<sup>143</sup> *Id.*



Examinations were required, and only adequate grades on those examinations would qualify one for graduation.<sup>144</sup> Instruction in law designed to coach students for bar examinations was banned from the regular course of instruction.<sup>145</sup> Library and full-time faculty requirements have their origins in these initial standards, too.<sup>146</sup> Overall, the standards of 1929 would be very familiar to anyone schooled in today's ABA standards and especially those in California which regulates its state-accredited and registered law schools.

### **B. The Modern ABA Standards**

The advent of the modern standards can be traced back to 1973, when the ABA's House of Delegates approved and adopted formal Standards and Rules of Procedure.<sup>147</sup> The modern structure of definitions followed by sections for organization, educational program, faculty, admissions, library, facilities, etc. exists here, and the standards are specific and detailed for the first time.<sup>148</sup> Procedures for approval, changes in structure, removal from the approved list, appeal, etc. are also present.<sup>149</sup> The ABA also staked out its territory as the sole approver of law schools with the policy position that "every candidate for admission to the bar should have graduated from a law school approved by the American Bar Association . . . ."<sup>150</sup>

The ABA standards and Rules of Procedure evolve almost every year, and it is beyond the scope of this article to address the full history of those changes.<sup>151</sup> It is in the nature of standards that there are few provisions encouraging risk—regulations are meant to protect the public and promote consistency. But there were a few aspects of the standards of 1973 and following years that allowed freedom for creativity and invention—if desired by the law schools:

- Standard 105 encouraged approved schools to "exceed the

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<sup>144</sup> *Id.* at 48.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Approval of Law Schools*, A.B.A., at vi (1973), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/standardsarchive/1973\\_standards.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/1973_standards.pdf) [<https://perma.cc/7MYK-M88P>].

<sup>148</sup> Zantzing Reed, *supra* note 135, at 47–50.

<sup>149</sup> *Approval of Law Schools*, *supra* note 147, at iii.

<sup>150</sup> *Id.* at 1.

<sup>151</sup> The ABA maintains a standards archive, with the standards in effect for each year, where one can trace the history of any standard through the years. The year-by-year archive begins with 1969, but the modern format and numbering of the standards begins with the 1973 document. American Bar Association Section of Legal Education and Admissions to the Bar, Standards Archive, Standards and Rules by Year. *Standards*, A.B.A., [http://www.americanbar.org/groups/legal\\_education/committees/standards\\_review.html](http://www.americanbar.org/groups/legal_education/committees/standards_review.html) [<https://perma.cc/4867-WTE9>] (last visited Feb. 2, 2024).

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minimum requirements of the Standards.”<sup>152</sup> Presumably, this would allow the school to, for example, offer more than the required volumes in the library, better facilities and services, and more diverse and inventive programs and faculty, so long as the minimums were met in all areas.

- Standard 301(b) allowed law schools to “offer an educational program designed to emphasize some aspects of the law or the legal profession and give less attention to others.”<sup>153</sup> Law schools doing so were required, however, to disclose this in their publications.
- Standard 307 permitted schools to operate non-J.D. programs, but:

Programs in addition to the first professional law degree may not detract from the law school's ability to maintain a sound educational program leading to that degree. A law school shall not undertake a program in addition to the first professional law degree unless the quality of its program leading to the first professional law degree exceeds the requirements of the Standards.<sup>154</sup>
- Standard 802 permitted law schools to request a variance from the standards so long as “the proposal is consistent with the general purposes of the Standards.”<sup>155</sup>

### C. *The 2014 Revisions of the ABA Standards*

2014 marked a watershed year for the evolution of the ABA standards. After a prolonged (2008-2014) Comprehensive Review of the Standards,<sup>156</sup> significant changes emerged regarding outcomes and distance learning, which were “concluded in” by the ABA House of Delegates and became effective on August 12, 2014, at the conclusion of that year’s ABA Annual Meeting.<sup>157</sup> The changes, particularly those in Chapter 3 of the Standards for Approval that impact core components of the program of legal education, were set to phase in over the next three years.<sup>158</sup> Among other new requirements, schools were now required to

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<sup>152</sup> *Approval of Law Schools*, *supra* note 147, at 2.

<sup>153</sup> *Id.* at 7.

<sup>154</sup> *Id.* at 10.

<sup>155</sup> *Id.* at 20.

<sup>156</sup> *Standards*, *supra* note 151 (details the history of the standards review process).

<sup>157</sup> James Podgers, *Law School Accreditation Standards Breeze Through House of Delegates with Minimal Fuss*, A.B.A. J. (Aug. 12, 2014), [http://www.abajournal.com/news/article/law\\_school\\_accreditation\\_standards\\_breeze\\_through\\_house\\_of\\_delegates/](http://www.abajournal.com/news/article/law_school_accreditation_standards_breeze_through_house_of_delegates/) [<https://perma.cc/G85J-AYXE>] (the ABA Journal described the final approval of the revised standards by the House of Delegates as relatively trouble-free).

<sup>158</sup> The ABA’s Managing Director of Accreditation, Barry Currier, expected ABA Standards adopted in 2014 to be implemented over the course of the next several years. This rolling

prepare and publish learning outcomes, document their process for granting credit differently, collect and use assessment data in continuous improvement and institutional assessment, use both formative and summative assessment in evaluating students, and include experiential learning in the curriculum.<sup>159</sup> Some of these changes represented radical learning science requirements for law schools accustomed to very individualistic, faculty-centric models of educational design.<sup>160</sup> Changes in standards and interpretations included:

- Standard 204 was edited to add that self-studies, required in connection with periodic reaccreditations, must include evaluation of the school's effectiveness in achieving its learning outcomes.<sup>161</sup>
- Standard 301 added the requirement that learning outcomes for the program of legal education be developed and published.<sup>162</sup>
- Standard 302 described minimum learning outcomes considered necessary for a sound program of legal education.<sup>163</sup>
- Standard 303 required law school curricula to include a minimum amount of experiential learning, and overall to prepare graduates for initial entry into the legal profession.<sup>164</sup>
- Standard 306 was edited to permit distance learning to comprise fifteen semester units of the J.D. program, and allow all fifteen units to be taken in the same semester.<sup>165</sup> Distance learning courses and programs were also

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implementation plan gave schools “time to do the work that some of the changed Standards will require” but also allowed the ABA time to adapt its systems and processes. *Transition to and Implementation of the New Standards and Rules of Procedure for Approval of Law Schools*, A.B.A. (Aug. 13, 2014), [https://www.americanbar.org/groups/legal\\_education/resources/standards/standards\\_archives/](https://www.americanbar.org/groups/legal_education/resources/standards/standards_archives/) [<https://perma.cc/646X-2ATV>].

<sup>159</sup> *Explanation of Changes*, A.B.A., [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/201408\\_explanation\\_changes.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/201408_explanation_changes.pdf). [<https://perma.cc/D6DY-TR5X>] (last visited Feb. 5, 2024); see also *ABA Standards and Rules of Procedure for Approval of Law Schools 2014–2015*, A.B.A. (2014) [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2014\\_2015\\_aba\\_standards\\_and\\_rules\\_of\\_procedure\\_for\\_approval\\_of\\_law\\_schools\\_bookmarked.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_bookmarked.pdf) [<https://perma.cc/LTV7-3NSD>] [hereinafter *Standards and Rules 2014 – 2015*].

<sup>160</sup> *Transition to and Implementation of the New Standards and Rules of Procedure for Approval of Law Schools*, *supra* note 158.

<sup>161</sup> *Explanation of Changes*, *supra* note 159, at 5.

<sup>162</sup> *Id.* at 6–7.

<sup>163</sup> *Id.* at 7.

<sup>164</sup> *Id.* at 7–8.

<sup>165</sup> The changes in Standard 306 in 2014 comprised more than just an increase in the number of units allowable, though that was the “headline.” Other components of the revisions included an

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permitted to use a range of methods for validating student identity. (Interpretation 306-2)<sup>166</sup>

- Standard 310 specified that credit for law school coursework should be determined using the Department of Education’s minimum measure of the student work required for each credit hour (which is similar to the traditional “Carnegie Unit”). Interpretation 310-2 also permitted student coursework toward credit hours to take place over any period, so long as it met the requirements for instruction and student work per credit hour.<sup>167</sup>
- Standard 311 made credit hours, not minutes of instruction, the standard measure of the program of instruction. This, combined with the credit hour definition, made the new regulations much friendlier to alternative means of delivering instruction.<sup>168</sup>
- Standard 314 required formative and summative assessments of student learning to be utilized in the curriculum to both measure and improve student learning and feedback.<sup>169</sup>
- Standard 315 made continuous improvements to the program of legal education, driven by data on student learning and achievement of outcomes, the responsibility of the dean and faculty, and required them to document the process by which this ongoing evaluation is conducted. Interpretation 315-1 added detail on the types of assessment and other data schools may collect and use in improving the program of legal education and student outcomes.<sup>170</sup>

Law schools working to comply with the new and revised standards needed to engage in thoughtful conversations about their learning outcomes, build systems for data collection and analysis, and change faculty and administrative—and particularly curriculum—processes to incorporate demonstrably data-driven decision-making. Almost a decade on from these standards, it remains to be seen when the ABA will look for this data-leading-to-improvement evidence at the program or course level, but Standard 315 required schools to collect and use data with respect to any program with significant enrollment within the law school.<sup>171</sup> To maintain institutional compliance, data on the J.D. program at any school was, at a

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enhanced definition of distance education, expectations for how it would contribute to “direct faculty instruction” in required units, the deletion of a requirement for specific distance learning plans, and other changes. *Standards and Rules 2014 – 2015*, *supra* note 159, at 19–20.

<sup>166</sup> *Explanation of Changes*, *supra* note 159, at 9.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 10.

<sup>169</sup> *Id.* at 10–11.

<sup>170</sup> *Id.* at 11.

<sup>171</sup> *Standards and Rules 2014 – 2015*, *supra* note 159, at 24.

minimum, required.<sup>172</sup>

Distance learning programs were particularly well adapted to compliance with continuous improvement standards. Distance education, done well, emerges from a process of thoughtful, deliberate design. Learning objectives leading to assessable outcomes guide multiple and varied learning activities delivering and shaping the knowledge and skills of students. Regular formative and summative assessments enhance and measure the learning being attained. Collecting meaningful data on student progress and achievement of intended outcomes came easily, and thus distance learning programs were able to provide copious, rich data on student performance and outcomes achievement.

Compliance with the outcomes and assessment standards is required in all areas of the school, even those taught in the traditional classroom method.<sup>173</sup> Yet, schools were slow to consider applying distance learning curriculum design disciplines and technology to more courses and programs. They continued to teach and test traditionally, looking at distance education as at best a poor substitute for a “real” legal education, or at worst a cheap, harmful sham.<sup>174</sup> Meanwhile, programs conducted by distance education methods were collecting torrents of data, because of the technical ability of learning management systems to collect it and the innate design of distance education courses to include formative assessment.<sup>175</sup> These data and analyses were tremendous assets in the regulator’s efforts to understand education quality and outcomes, and overall to evaluate compliance with the standards. Schools operating hybrid programs via variances were required to report on them.

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<sup>172</sup> *Id.* Standard 315 provided:

Standard 315. EVALUATION OF PROGRAM OF LEGAL EDUCATION, LEARNING OUTCOMES, AND ASSESSMENT METHODS.

The dean and the faculty of a law school shall conduct ongoing evaluation of the law school's program of legal education, learning outcomes, and assessment methods; and shall use the results of this evaluation to determine the degree of student attainment of competency in the learning outcomes and to make appropriate changes to improve the curriculum.

<sup>173</sup> For many years, faculty, librarians, deans, and staff from accredited and online schools have worked together and shared best practices in a group informally known as the Working Group for Distance Learning in Legal Education. The Working Group has published a “blue paper” in several editions, collecting administrative, technological, pedagogical, and other insights from hundreds of participants in its meetings, from nearly 100 schools. Now under revision, the current edition, published by the Center for Computer Assisted Legal Instruction (CALI), of which the author is a board member, is *Distance Learning in Legal Education: Design, Delivery and Recommended Practices*. WORKING GROUP ON DISTANCE LEARNING IN LEGAL EDUCATION, *supra* note 111, at 38.

<sup>174</sup> Lael Weinberger, *Keep Distance Education for Law Schools: Online Education, the Pandemic, and Access to Justice*, 53 LOY. U. CHI. L. J. 211, 213 (2021), <https://lawcommons.luc.edu/luclj/vol53/iss1/7> [<https://perma.cc/T2G3-8VQ2>].

<sup>175</sup> Take a look at the amount and type of data collected by one industry-standard learning management system (LMS) distance learning course platform, Canvas. VERSION 4.2.9, <https://portal.inshosteddata.com/docs> [<https://perma.cc/W9QG-7JMB>] (last visited Nov. 17, 2023).

The 2014 standards demanded many changes by approved schools, and institutionally, the ABA was considered likely to rest on its standards-making laurels for a while, having exhausted itself with a seven-year review and rulemaking process. But the revised standards of 2014 did not go far enough to satisfy either the progressive schools or the United State Department of Education, nor did they allow the law school of the future to take shape in the ABA system.

#### **D. The Provocative Role of Variances**

Forward-looking schools, still constrained by the Standards evolving only incrementally, began taking advantage of the existing opportunities for variances from the Standards. The William Mitchell College of Law hybrid J.D. program is an early example of a program operated under a variance.<sup>176</sup> It was the first program to be approved for a variance to allow a blended J.D. program, with strict enrollment caps and reporting requirements, and was highly successful.<sup>177</sup>

In the years following the 2014 revisions, in its meetings with law deans and faculties, the ABA repeatedly encouraged law schools to innovate via the variance process, if desired.<sup>178</sup> The 2014 revisions to the Standards also included clearer direction on variances related to innovation. Standard 107(a)(2) provides direction on how a law school's application for a variance to offer experimental or innovative education should be framed.<sup>179</sup> Per Standard 107(a)(2), variances not meant to

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<sup>176</sup> Eric S. Janus et al., *William Mitchell College of Law's Hybrid Program for J.D. Study: Answering the Call for Innovation*, Sept. 83.3 THE BAR EXAM'R 28, 28–36 (Sept. 2014), <https://thebarexaminer.ncbex.org/article/legal-education/william-mitchell-college-of-laws-hybrid-program-for-j-d-study-answering-the-call-for-innovation/> [<https://perma.cc/Q92F-235S>].

<sup>177</sup> *Id.*

<sup>178</sup> Association of American Law Schools (AALS) annual meetings frequently featured sessions on the evolution of law schools. One such session in which the approach of using variances to foster innovation was prominently discussed occurred Friday, January 3, 2014, during the 2014 AALS annual meeting. The *Workshop on Innovation in Legal Education - Likely New Approach to Variances and Room for Innovation within the Standards* featured Scott Norberg, then Deputy Managing Director of the ABA Section on Legal Education and Admissions to the Bar, Catherine L. Carpenter, Vice Dean of Southwestern Law School, Frank H. Wu, Dean of University of California, Hastings College of the Law, and David N. Yellen, Dean of Loyola University Chicago School of Law discussing the expected standards and use of variances to innovate within them. *American Bar Association Section of Legal Education and Admissions to the Bar Program*, THE ASS'N OF AM. L. SCH. (Jan. 3 2014) [https://memberaccess.aals.org/eweb/DynamicPage.aspx?webcode=SesDetails&ses\\_key=8064f83c-5563-4f05-81f7-145b4ae9f2d5](https://memberaccess.aals.org/eweb/DynamicPage.aspx?webcode=SesDetails&ses_key=8064f83c-5563-4f05-81f7-145b4ae9f2d5) [<https://perma.cc/SX6F-SRJH>].

<sup>179</sup> *Standards and Rules 2014 – 2015*, *supra* note 159, at 7.

2014 Standard 107. VARIANCES

(a) A law school proposing to make any change that is or may be inconsistent with one or more of the Standards may apply to the Council for a variance only on one of the following bases: . . .

(2) In all variance applications that do not fall within subsection (a)(1), the law school must demonstrate that: i) the proposed variance is consistent with the general purposes and

respond to the “extraordinary circumstances” of Standard 107(a)(1) must be “consistent with the general purposes and objectives of the overall Standards,” be “experimental or innovative and have the potential to improve or advance the state of legal education,” and demonstrate benefits outweighing “any anticipated harms to the law school’s program or its students.”<sup>180</sup>

It is now clear that the ABA’s staff and the Council of the Section of Legal Education and Admissions to the Bar (the “Council”) were, in applying the new Standard 107(a)(2), very inclined to grant variances for entire programs of distance learning.<sup>181</sup> Experiments and offerings both within the expanded rules and operating under variances accelerated all through the years following the 2014 standards,<sup>182</sup> and literally exploded in the wake of the pandemic of 2020–2022.<sup>183</sup> Responding to the pandemic and government-mandated closures, every school had converted to some form of “emergency remote teaching,” and many students

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objectives of the overall Standards, ii) the proposed changes or actions that are the basis for the requested variance are experimental or innovative and have the potential to improve or advance the state of legal education, and iii) the anticipated benefits of granting the variance outweigh any anticipated harms to the law school’s program or its students. The variance, if granted, shall be for a term certain and can be extended once, with the extension being for either a further term certain or indefinite, but subject to revocation on the basis of either a change in the showing made by the law school when the variance was granted or a change in circumstances. The decision granting a variance on this basis may require the law school to report to the Managing Director, the Accreditation Committee or the Council regularly as specified in the decision.

<sup>180</sup> *ABA Standards and Rules of Procedure for Approval of Law Schools 2023–2024*, A.B.A. (2023), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2023-2024/2023-2024-aba-standards-rules-for-approval.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2023-2024/2023-2024-aba-standards-rules-for-approval.pdf) [<http://perma.cc/WR9A-GDNB>] [hereinafter *ABA Standards and Rules of Procedure 2023-2024*].

<sup>181</sup> *Extension of Existing Variances to Spring 2022*, A.B.A. (Dec. 2021), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/2021/2021-nov-pandemic-variance-extensions.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/2021/2021-nov-pandemic-variance-extensions.pdf) [<https://perma.cc/PZ4G-TSYS>].

<sup>182</sup> See e.g. *Weekend JD*, LOY. U. CHI. SCH. OF L., <https://www.luc.edu/law/academics/degreeprograms/jurisdoctor/weekendjd/> [<https://perma.cc/HN98-GJ62>] (last visited Jan. 6, 2024) (Loyola University Chicago School of Law’s Weekend J.D. is an example of ABA-approved hybrid legal education, operating within the 2014 standards, supplanting the historic evening part time J., before the pandemic); *Online Hybrid J.D. Program*, U. DAYTON SCH. OF L., [https://udayton.edu/law/jd\\_programs/online\\_hybrid/index.php](https://udayton.edu/law/jd_programs/online_hybrid/index.php) [<https://perma.cc/HPR7-XAUL>] (last visited Jan. 6, 2024) (University of Dayton School of Law is an example of hybrid legal education operating within a variance from the ABA).

<sup>183</sup> *Law Schools Plan Virtual Learning Expansion Post-Pandemic*, A.B.A., <https://www.americanbar.org/news/abanews/aba-news-archives/2022/02/law-schools-plan-virtual-expansion/> [<https://perma.cc/MNK9-WZFS>] (last visited Jan. 6, 2024). As of this writing in fall 2023, eighteen law schools have variance-supported, ABA-approved distance education programs. Five schools have approved fully online programs, and the rest are hybrid. *ABA-Approved Law Schools With Approved Distance Education J.D. Programs*, A.B.A., [https://www.americanbar.org/groups/legal\\_education/resources/distance\\_education/approved-distance-ed-jd-programs/](https://www.americanbar.org/groups/legal_education/resources/distance_education/approved-distance-ed-jd-programs/) [<https://perma.cc/53P7-SLWV>] (last visited Jan 6, 2024).

learned that this form of education worked for them.<sup>184</sup> Some schools took the opportunity to build actual, effective distance education programs in response, or in the years that followed the pandemic.<sup>185</sup>

From the perspective of innovation, the law schools that constructed distance learning or hybrid programs under the new rules and variance opportunities have not been truly “innovative” if innovation means bringing new ideas and inventions into play. None of these programs have, to date, used techniques or technologies that are radically new or different from those deployed at Concord Law School in the years between 1998 and 2008 or other parts of higher education in the same period or even before. It is more appropriate to recognize these schools as “adopters”—some “early adopters” and some “followers”—than “innovators,” since the programs they developed were conducted in much the same way as those conducted by other higher education and law school programs before them. But the advent of standards explicitly describing law school innovation via the variance process intended to “improve or advance the state of legal education,” and the ABA’s frequent admonition to bring variance proposals forward, significantly encouraged some forward-thinking law schools to begin reinventing themselves for the much different world ahead.<sup>186</sup> Many other schools, trapped in some version of traditionalism, elitism, or change resistance, did not move forward.

#### ***E. Evolution of the ABA Standards—2015 Through 2022***

After the exhaustive 2014 revisions, the Council retrenched. The Council merged one of its most important, formal, standing subcommittees, the Accreditation Committee, into the Council.<sup>187</sup> Reasons given for the change

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<sup>184</sup> Stephanie Francis Ward, *Legal Ed. Will Resubmit Proposed Elimination of Admissions-Test Standard and Consider Increasing Distance Ed Credits*, A.B.A. J. (Feb. 17, 2023), <https://www.abajournal.com/web/article/legal-ed-plans-to-resubmit-admissions-test-standard-to-house-of-delegates-and-considers-increase-in-distance-ed-credits> [https://perma.cc/B3VR-EVAC].

<sup>185</sup> As of this writing in fall 2023, eighteen law schools have variance-supported, ABA-approved distance education programs. Five schools have approved fully online programs, and the rest are hybrid. *ABA-Approved Law Schools With Approved Distance Education J.D. Programs*, *supra* note 183.

<sup>186</sup> Law students entering first year in fall 2023 were, for the most part, born in 2000. That means their coming of age—let’s call that middle school through college—took place from 2012 to 2022, an age of ubiquitous Internet and connectivity, not to mention fast-paced, History Channel-style edutainment. It’s only a few short years ahead—let’s say 2030—when the entering class will know only baby pictures taken by smartphone.

<sup>187</sup> Reorganization of the Structure of the Accreditation Project, Memorandum of Jeff Lewis to the Council, undated, a part of the Council meeting materials for the November 2–4 meeting in Boston, MA. Jeff Lewis, *Reorganization of the Structure of the Accreditation Project*, A.B.A., [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/November2017CouncilOpenSession/17\\_nov\\_restructuring\\_project\\_cover\\_memo.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/November2017CouncilOpenSession/17_nov_restructuring_project_cover_memo.pdf) [https://perma.cc/6K3T-J7BV] (last visited Jan. 16, 2024).



included efficiency and quality in decision-making, transparency, and greater effectiveness.<sup>188</sup> The change was adopted after a notice and comment period, review of comments received, recommendation to the House of Delegates,<sup>189</sup> and other processes.<sup>190</sup>

A great deal of the Council's attention was focused, during this period, on the bar examination pass-rate standard and admissions processes and standards.<sup>191</sup> The Council proposed abbreviating the compliance period and simplifying the standard for the minimum compliant bar exam pass rate on several occasions, finally enacting it over the objection of the House of Delegates in May, 2019.<sup>192</sup> The controversial change has resulted in some law schools losing ABA approval since 2017, and others under review or notice of noncompliance procedures.<sup>193</sup>

The Standards Review Subcommittee (SRS) continued its regular work.<sup>194</sup> Each year, certain standards were selected for review, and, in many cases, changes were made.<sup>195</sup> Most of these changes continued the ABA Council's slow evolution toward curriculum, assessment, outcomes, and other objectives. The standards relating to distance education were regularly on the agenda of the SRS, and continually

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<sup>188</sup> *Id.* at 1.

<sup>189</sup> *Section of Legal Education and Admissions to the Bar American Bar Association Council Meeting, Open Session*, A.B.A. (May 11, 2018), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/August2018OpenSessionMaterials/18\\_may\\_council\\_open\\_session\\_minutes.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/August2018OpenSessionMaterials/18_may_council_open_session_minutes.pdf) [<https://perma.cc/MSV4-N3UG>].

<sup>190</sup> Barry A. Currier, *Adoption and implementation of Revised ABA Standards and Rules of Procedure for Approval of Law Schools*, A.B.A. (Nov. 1, 2018), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2018-2019ABASStandardsforApprovalofLawSchools/18-nov-notice-of-revisions-to-aba-standards-and-rules.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABASStandardsforApprovalofLawSchools/18-nov-notice-of-revisions-to-aba-standards-and-rules.pdf) [<https://perma.cc/3NC6-KTMX>].

<sup>191</sup> Gregory G. Murphy, *Revised Bar Passage Standard 316: Evolution and Key Points*, THE BAR EXAMINER (Summer 2019), <https://thebarexaminer.ncbex.org/article/legal-education/revised-bar-passage-standard-316-evolution-and-key-points/> [<https://perma.cc/NG8X-72BY>]. Regarding changes to admissions processes and standards (Standard 501), see Currier, *supra* note 190, at 4–5. One may review the activity in this period at *Standards Archives*, *supra* note 132.

<sup>192</sup> Stephanie Francis Ward, *ABA Legal Ed Section's Council Adopts Tighter Bar Pass Standard; Clock for Compliance Starts Now*, A.B.A. J. (May 17, 2019), <https://www.abajournal.com/news/article/council-of-legal-ed-adopts-tighter-bar-pass-standard-and-clock-for-compliance-starts-now> [<https://perma.cc/W6N6-4TCB>].

<sup>193</sup> *Sanctions, Remedial Action, and Significant Noncompliance Under Rule 11(a)(4)*, A.B.A., [https://www.americanbar.org/groups/legal\\_education/public-notice/sanctions-remedial-action-noncompliance/](https://www.americanbar.org/groups/legal_education/public-notice/sanctions-remedial-action-noncompliance/) [<https://perma.cc/35UZ-DXC9>] (last visited Jan. 16, 2024).

<sup>194</sup> For an overview of the work of the SRC, see Donald J. Polden, *Comprehensive Review of American Bar Association Law School Accreditation Policies and Procedures: A Summary*, THE BAR EXAM'R, 42–49 (Feb. 2010), [https://thebarexaminer.ncbex.org/wp-content/uploads/PDFs/790110\\_Polden.pdf](https://thebarexaminer.ncbex.org/wp-content/uploads/PDFs/790110_Polden.pdf) [<https://perma.cc/RV7R-PHR8>].

<sup>195</sup> For changes made to standards each year, see *Standards Archives*, *supra* note 132.

evolved.<sup>196</sup> It substantially revised Standard 306, the distance education standard, to guide schools on what a compliant course should contain and do.<sup>197</sup> In 2018, the Council increased the maximum allowable distance education from fifteen units to one-third of the credit hours required for the J.D. degree, about thirty units at most schools.<sup>198</sup> A major revision in 2020 actually removed Standard 306 entirely—ironically in August 2020, during the worldwide pandemic—moving several aspects of the standard to other standards.<sup>199</sup> The credit limitations previously contained in Standard 306 were relocated to Standard 311 (e)<sup>200</sup> and definitions for a “distance education course” and a “distance education program” were added to Standard 105.<sup>201</sup> But Standard 306 soon returned with much greater clarity.<sup>202</sup>

A key driver of change was the United States Department of Education. The Council’s authority as an accreditor of law schools is derived from the Department, and the ABA was under review during this period. The ABA was challenged to meet the feedback it received from the Department and its reviewing sub-entity, the National Advisory Committee on Institutional Quality and Integrity (NACIQI), which illuminated federal expectations for accreditors.<sup>203</sup> One example was the Department’s interpretation of “regular interaction” and “substantive interaction”

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<sup>196</sup> Weinberger, *supra* note 174, at 213–216.

<sup>197</sup> The Standards Committee, *Recommendations for Approval for Notice and Comment: Rules and Standards Requiring Clarifications and Definitions and Standards related to the Definition of “Distance Education Course,”* A.B.A. (Nov. 11, 2021), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/nov21/21-nov-council-notice-and-comment-stds-rules.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/nov21/21-nov-council-notice-and-comment-stds-rules.pdf) [<https://perma.cc/6SED-TRJF>].

<sup>198</sup> *ABA Standards and Rules of Procedure for Approval of Law Schools 2018–2019*, A.B.A. 19 (2018), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2018-2019ABASStandardsforApprovalofLawSchools/2018-2019-aba-standards-rules-approval-law-schools-final.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABASStandardsforApprovalofLawSchools/2018-2019-aba-standards-rules-approval-law-schools-final.pdf) [<http://perma.cc/5HNQ-Y2UM>].

<sup>199</sup> Diane Bosse & Barry A. Currier, *ABA Standards and Rules of Procedure – Matters for Notice and Comment- Cancellation of Public Hearing*, A.B.A. (Mar. 17, 2020), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/3-17-20-notice-and-comment-memo-distance-ed-hearing-cancellation.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/3-17-20-notice-and-comment-memo-distance-ed-hearing-cancellation.pdf) [<https://perma.cc/SHG2-DQN7>].

<sup>200</sup> *ABA Standards and Rules of Procedure for Approval of Law Schools 2020–2021*, A.B.A. 22–23 (2020), [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) [<http://perma.cc/AEY2-3UEB>].

<sup>201</sup> *Id.* at ix.

<sup>202</sup> The Standards Committee, *supra* note 197, at 5–6.

<sup>203</sup> Barry Currier, *Report on the Status of the Accreditation Process*, A.B.A. (July 1, 2016), [https://www.americanbar.org/groups/legal\\_education/publications/syllabus\\_home/volume-47-2015-2016/syllabus-summer-2016—47-4-/from-the-managing-director/](https://www.americanbar.org/groups/legal_education/publications/syllabus_home/volume-47-2015-2016/syllabus-summer-2016—47-4-/from-the-managing-director/) [<https://perma.cc/X7A7-NCPL>] (describing the ABA’s NACIQI process).

in the distance education regulations. Definitions were developed for each of these and proposed for adoption.<sup>204</sup> When Standard 306 returned in 2022, these proposed definitions of “regular interaction” and “substantive interaction” were added.<sup>205</sup>

Throughout this period, the Council maintained the position that distance education credits allowed in the J.D. program should be limited.<sup>206</sup> A course was considered a distance education course if more than one-third of instruction was conducted in a setting where the teacher and students were physically separated from each other and technology intermediated their interactions.<sup>207</sup> The per se limits evolved to one-third of the units required for the J.D. degree, with the additional limitation that no more than ten credit hours of distance education was allowable during the first one-third of a student’s J.D. program (essentially the first year).<sup>208</sup> Remote participation in non-distance education courses was also addressed, allowing it as an accommodation under the Americans with Disabilities Act (ADA) or in extraordinary circumstances with appropriate documentation.<sup>209</sup> Programs exceeding these limits and varying these definitions could operate with variances,<sup>210</sup> which became increasingly frequent during this period.<sup>211</sup>

#### ***F. The 2023 Revisions of the ABA Standards***

If 2014 was watershed in the evolution of standards supporting innovation, then 2023 was the year the ABA joined the mainstream of accrediting agencies in its approach to distance education and other aspects of curriculum and program

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<sup>204</sup> The Standards Committee, *supra* note 197, at 6.

<sup>205</sup> *ABA Standards and Rules of Procedure for Approval of Law Schools 2022–2023*, A.B.A. 22 (2022), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2022-2023/2022-2023-standards-and-rules-of-procedure.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2022-2023/2022-2023-standards-and-rules-of-procedure.pdf) [<http://perma.cc/P23C-9CRW>] [hereinafter *Standards and Rules of Procedure 2022-2023*].

<sup>206</sup> Stephanie Francis Ward, *Expanded Online Law School Classes Could Continue Under Plan Endorsed by ABA Legal Ed Council*, A.B.A. J. (May 15, 2020), <https://www.abajournal.com/news/article/ABA-Legal-Ed-approves-motion-for-rule-change-regarding-short-term-emergencies-nixes-request-to-suspend-bar-pass-standard> [<https://perma.cc/7Q47-2SVG>].

<sup>207</sup> *Standards and Rules of Procedure 2022-2023*, *supra* note 205, at 33.

<sup>208</sup> *Id.* at ix.

<sup>209</sup> *Id.* at 22.

<sup>210</sup> Revisions approved in 2014–2015 moved the variance standard from Chapter 8 to Chapter 1, as Standard 107. *See Standards and Rules 2014 – 2015*, *supra* note 159, at 7.

<sup>211</sup> Review variances requests at: *Applications for Variances*, A.B.A., [https://www.americanbar.org/groups/legal\\_education/public-notice/applications-for-variances/](https://www.americanbar.org/groups/legal_education/public-notice/applications-for-variances/) [<https://perma.cc/LUJ8-SETD>] (last visited Feb. 10, 2024). Note, at that page, the many requests for variances from Standard 306 (Distance Education) in the period from August 2017 through February 2019.

design where innovation is regulated. It was aided in this by the compilation of data from existing programs operating under variances and within the allowable distance education limitations, which indicated no reason to question the efficacy of legal education delivered by properly designed and administered distance education methods.<sup>212</sup> But it was ultimately pushed to adopt higher limits by the influence of federal oversight.

The first steps toward the 2023 standards were taken in 2021, after the U.S. Department of Education issued guidance regarding the use of distance education in programs eligible for participation in federal student-aid programs.<sup>213</sup> Actions required of institutional accrediting agencies (including the American Bar Association Council of the Section of Legal Education and Admissions to the Bar) and required by institutions seeking to use distance education beyond the expiration of pandemic-era emergency measures were described.<sup>214</sup> Accreditors were required to have or add accreditation of distance education to their scope of authority, which could be accomplished by notice to the Department, and to conduct reviews of all institutions and programs offering more than fifty percent of the learning by distance education.<sup>215</sup> Institutions were also guided:

Institutions that wish to offer distance education programs should confirm that their institutional accrediting agency has distance education within its scope of recognition. Institutions should work with their accrediting agency to determine the agency's requirements for evaluating whether the institution is capable of effective delivery of distance education programs. After an institution has been approved to offer distance education by its accrediting agency, an institution may offer distance education programs without further accreditor approval – unless and until a program goes above 50 percent of distance education or the institution itself goes over 50 percent for distance education delivery. Exceeding the 50 percent threshold for distance education would then trigger the requirement for approval by the institution's accrediting agency of a substantive change pursuant to 602.22(a)(1)(ii)(C).<sup>216</sup>

Revisions to ABA standards prohibiting more than one-third of the J.D. program

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<sup>212</sup> See the comments of Professor Emeritus Leo Martinez regarding the Council's decision processes quoted in Lilah Burke, *ABA Cleans up Accreditation Rules Surrounding Distance Education for Law Schools*, HIGHER ED DIVE (Aug. 31, 2022), <https://www.highereddive.com/news/aba-cleans-up-accreditation-rules-surrounding-distance-education-for-law-sc/630870/> [<https://perma.cc/6GZC-32SK>] (comments of the ABA's Managing Director of Accreditation and Legal Education, January 4, 2023, at AALS Annual Meeting, San Diego, attended by the author, confirmed that the ABA considered evidence from the first schools granted variances when formulating these regulatory changes).

<sup>213</sup> *Department of Education Guidance on Accreditation and Eligibility Requirements for Distance Education*, (Jan. 19, 2021), <https://fsapartners.ed.gov/sites/default/files/attachments/2021-01/DistanceEducationAccreditationAttachment.pdf> [<https://perma.cc/EB4T-JKHS>].

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 1.

to be delivered by distance education<sup>217</sup> became necessary because of the language of the Department's interpretations of the regulations. In setting the bar at fifty percent, and specifically allowing schools approved to offer distance education to offer programs up to fifty percent "without further accreditor approval," the ABA's one-third limit and other restrictions<sup>218</sup> were out of step. Institutional accreditors were still permitted to set more stringent standards for requiring a *review*—that is, a lower threshold than fifty percent for requiring review of a substantive change involving a shift to distance education, as the ABA had, via its definition of a "distance education program," in 2021.<sup>219</sup> But per se *prohibition* of programs with fifty percent distance education became untenable under the Department's 2021 interpretation and guidance.<sup>220</sup>

The ABA needed to change approaches. In the 2023 revisions, it moved from prohibiting programs exceeding one-third of the learning by distance education—a prohibition to which it was increasingly offering variances—to allowing up to fifty percent distance education without acquiescence in a substantive change,<sup>221</sup> and requiring compliance with its substantive change process if a school or program

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<sup>217</sup> 2021–2022 was a year when Standard 306 was empty and "reserved" and some of its provisions transferred to other sections. Definition 7 described a distance education course as one in which more than one third of instruction was conducted remotely through the use of technology, and definition 8 defined any program in which more than one third of the credit hours were from distance education courses. Standard 311(e) limited distance education in the first year to ten units. *ABA Standards and Rules of Procedure for Approval of Law Schools 2021–2022*, A.B.A., at ix, 23 (2021), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2021-2022/2021-2022-aba-standards-and-rules-of-procedure.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2021-2022/2021-2022-aba-standards-and-rules-of-procedure.pdf) [<http://perma.cc/88NZ-ZS62>].

<sup>218</sup> *Id.* at ix, 23, 110.

<sup>219</sup> *Id.* at ix.

<sup>220</sup> Programs exceeding fifty percent of instruction via distance education or more than fifty percent of students enrolled in distance education programs were banned from participating in federal education lending programs before enactment of the Higher Education Reconciliation Act (HERA), effective July 1, 2006. *GEN0605Attach*, 2, <https://fsapartners.ed.gov/sites/default/files/attachments/dpclatters/GEN0605Attach.doc> [<https://perma.cc/7S2L-K34L>] (Last visited Jan. 16, 2024). HERA modified the law to allow such institutions and programs to participate in HEA funding programs so long as the institution was accredited by an accrediting agency recognized by the U.S. Department of Education for accreditation of distance education. *See id.* Since few accreditors had this authority within their scope at the time, and adding it required a Department review, distance education was very effectively hindered. This all changed during the national emergency resulting from the pandemic of 2019–2022. Agencies could now add distance education to their scope by notice, and many had. Schools across the country were requesting authority to continue online and hybrid programs. The Department issued this guidance to clarify what would happen when the national emergency – and its temporary suspension of limitations and approval requirements – expired. *See id.* at 1–2; *Department of Education Guidance on Accreditation and Eligibility Requirements for Distance*, *supra* note 213.

<sup>221</sup> *ABA Standards and Rules of Procedure 2023–2024*, *supra* note 180, at 22.

sought to exceed the fifty percent threshold.<sup>222</sup> The definition of “distance education program” was removed to enhance clarity,<sup>223</sup> the definition of “distance education course” was edited to refer to Standard 306,<sup>224</sup> and the substantive change procedure in Standard 105<sup>225</sup> was edited to include, as a substantive change requiring Council approval, “changing academic policies to allow a student to earn more than fifty percent of the credit hours required for the J.D. degree through Distance Education Courses.”<sup>226</sup> In all, these changes brought the ABA Standards up to date with the Department’s regulation of other institutional accreditors and recognized the great demand among law students for more distance education.<sup>227</sup>

### **G. Changes From the States, Especially California**

The ABA has taken important steps,<sup>228</sup> by incorporating federal requirements that are part of assuring quality and permitting additional freedom to innovate toward the law school of the future,<sup>229</sup> but it is not alone in reconsidering what is

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<sup>222</sup> See The Strategic Review Committee, *Recommendations for Final Council Approval: Revisions related to Increasing Distance Education Limits (Definitions 7 and 8; Standards 105, 306, 311, and 511; and Rule 240, and Other Matters (Standards 307, 313, and 509)*, A.B.A. 8–9 (Apr. 26, 2023), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/may23/23-may-dist-ed-final-approval-notice-comment-appendix.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/may23/23-may-dist-ed-final-approval-notice-comment-appendix.pdf) [<https://perma.cc/QGQ3-V2KM>].

<sup>223</sup> *Id.* at 2.

<sup>224</sup> See *ABA Standards and Rules of Procedure 2023–2024*, *supra* note 180, at ix.

<sup>225</sup> *Id.* at 7–8.

<sup>226</sup> *Id.* at 7.

<sup>227</sup> *Distance Education Survey: 3L Student Quantitative Responses*, A.B.A., [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/2022/22-distance-ed-survey-responses.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/2022/22-distance-ed-survey-responses.pdf) [<https://perma.cc/7EV6-NUAE>] (last visited Jan. 16, 2024) (a February 2022 survey conducted by the ABA, 68.65% of law students answered “yes” to the question, “Do you want the ability to earn more distance education course credits than your law school currently allows?”).

<sup>228</sup> *ABA Approval of Law Schools: Standards, Procedures, and the Future of Legal Education*, 72 MICH. L. REV. 1134, 1143 (1974) (“The closed system of law school approval coupled with the lack of available information, presents the danger of stagnation in legal education. The danger is aggravated by the absence of standards that would themselves foster innovation within the law schools.”).

<sup>229</sup> On the impacts on innovation and experimentation resulting from the ABA Standards, see *id.* at 1143–47. On the ABA’s move to allowing fifty percent distance education credits without a variance or major change approval, see Joseph K. West, *Matters for Notice and Comment on Increasing Distance Education Limits (Definitions 7 and 8; Standards 105, 306, 311, and 511; and Rule 24 ) and Other Matters (Standards 307, 313, and 509)*, A.B.A. (Feb. 23, 2023), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/feb23/23-feb-council-notice-and-comment-memo.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/feb23/23-feb-council-notice-and-comment-memo.pdf) [<https://perma.cc/SHE9-T6V9>]. On standards regarding assessment, see Victoria VanZandt, *The Assessment Mandates in the ABA Accreditation Standards and Their Impact on*

required to train competent lawyers. Special commissions in at least nine states, including California, New York, Florida, and Illinois—four of the largest—reconsidered aspects of the admissions rules related to lawyer training.<sup>230</sup> Because California is one of the few states with a separate process for accrediting law schools—and has historically been the incubator of significant innovations in legal education—it deserves particular attention.<sup>231</sup>

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*Individual Academic Freedom Rights*, 95 U. DET. MERCY L. REV. 253 (Winter 2018), [https://ecommons.udayton.edu/cgi/viewcontent.cgi?article=1085&context=law\\_fac\\_pub](https://ecommons.udayton.edu/cgi/viewcontent.cgi?article=1085&context=law_fac_pub), [<https://perma.cc/P35G-42AK>].

<sup>230</sup> Several states have undertaken admissions rule reviews and reform of legal education via commissions and task forces. Among them:

New York: At the instance of retiring Chief Judge Jonathan Lippman, New York settled on some changes to skills and service requirements, requiring 50 hours of pro bono service for admission. Rules of the Ct. of Appeals for the Admission of Att'ys and Couns. at L. § 520.16, <http://www.nycourts.gov/ctapps/520rules10.htm#3> [<https://perma.cc/Q83M-8D4N>] (last visited Jan. 16, 2024). New York also mirrored the ABA's rules on distance education, removing some very limiting former rules prohibiting asynchronous components of distance education courses. *Id.* § 520.3(c)(6).

Massachusetts: Adopted the ABA Task Force Report. *ABA Task Force on the Future of Legal Education Releases Final Report*, MASSBAR ASS'N (Feb. 13, 2014), <https://www.massbar.org/publications/ejournal/ejournal-article/ejournal-2014-february-02-13/aba-task-force-on-the-future-of-legal-education-releases-final-report> [<https://perma.cc/79F7-ZBS3>].

Illinois: *Final Report, Findings & Recommendations on the Impact of Law School Debt on the Delivery of Legal Services*, IL. STATE BAR ASS'N 3 (June 22, 2013), <http://www.isba.org/sites/default/files/committees/Law%20School%20Debt%20Report%20-%203-8-13.pdf> [<https://perma.cc/CT7M-GY9Q>].

Wisconsin: Commission on Legal Education, *Final Report and Recommendations*, STATE BAR OF WIS. 20, <https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1511&context=mulr> [<https://perma.cc/38HA-J3KB>] (last visited Jan. 16, 2024); William D. Underwood, *The Report of the Wisconsin Commission on Legal Education: a Road Map to Needed Reform, or Just Another Report?*, 80 MARQ. L. REV. 774–776 (1997).

Connecticut: *Task Force on the Future of Legal Education and Standards of Admission*, CONN. BAR ASS'N 4, 10 (June 2014), [https://www.ctbar.org/docs/default-source/publications/task-force-reports/cba\\_task\\_force\\_report.pdf?sfvrsn=8d281d29\\_0](https://www.ctbar.org/docs/default-source/publications/task-force-reports/cba_task_force_report.pdf?sfvrsn=8d281d29_0) [<https://perma.cc/Y4SV-9FPD>].

Iowa: *Report of the Blue Ribbon Committee on Legal Education and Licensure*, IOWA STATE BAR (Dec. 2013), [iowabar.org](http://iowabar.org) [<https://perma.cc/U26F-W2K2>].

Minnesota: Task Force on the Future of Legal Education, *Report and Recommendations*, MINN. STATE BAR ASS'N, [https://www.mnbar.org/docs/default-source/general-policy/recommendations-and-report-from-the-future-of-legal-education-task-force.pdf?sfvrsn=b37e05cc\\_0](https://www.mnbar.org/docs/default-source/general-policy/recommendations-and-report-from-the-future-of-legal-education-task-force.pdf?sfvrsn=b37e05cc_0) [<https://perma.cc/3QA2-YVQ6>] (last visited Jan. 16, 2024).

National Center for State Courts (began in 2023, report expected in 2025): Molly Justice, *National Judicial Leaders Launch Task Force on Legal Education and Admissions*, NAT'L CENTER FOR STATE CTS. (Nov. 27, 2023), <https://www.ncsc.org/newsroom/news-releases/2023/national-judicial-leaders-launch-task-force-on-legal-education-and-admissions> [<https://perma.cc/VYR8-DB4Q>].

Georgia: Georgia Supreme Court Committee on Legal Education, *Executive Summary*, SUP. CT. OF GA., <https://www.gabaradmissions.org/executive-summary> [<https://perma.cc/3K7Y-LDBG>] (last visited Jan. 16, 2024).

Ohio: *Report of the Task Force on Legal Education Reform*, OHIO STATE BAR ASS'N 18–20 (Dec. 2009), [https://www.ohiobar.org/globalassets/special-reports/osba\\_legal\\_education\\_task\\_force\\_report.pdf](https://www.ohiobar.org/globalassets/special-reports/osba_legal_education_task_force_report.pdf) [<https://perma.cc/M4R8-5BVR>].

<sup>231</sup> See *State Bar Board of Trustees Approve Revamped Law School Accreditation Rules*, THE STATE BAR OF CAL. (May 18, 2021), <https://www.calbar.ca.gov/About-Us/News/state-bar-board-of-trustees-approve-revamped-law-school-accreditation-rules> [<https://perma.cc/E5A6-JQDZ>].

California has long had the need for a comprehensive system of law schools and other paths leading to the profession of law.<sup>232</sup> A state of almost thirty-nine million people,<sup>233</sup> it has more economic activity than all but the largest *countries*.<sup>234</sup> California has great need for lawyers of all types, in all parts of the state, to better serve its massive population.<sup>235</sup>

Access to the legal profession in California is limited to bar applicants with a J.D. degree from an ABA-approved or state-accredited law school, or those who completed other law studies, in other countries, in unaccredited law schools, by correspondence, or in law offices or judges' chambers, undertaken within certain statutorily-specified conditions.<sup>236</sup> It has more than fifty law schools, far more than any other state.<sup>237</sup> As of this writing in early 2024, eighteen law schools in California are ABA-approved, twenty-one are state-accredited, and twelve are registered, unaccredited law schools.<sup>238</sup> Of course, many of these schools continue to teach traditional in-person, residential programs, but distance learning is allowed—and employed—extensively in both accredited and registered unaccredited law schools.<sup>239</sup> Correspondence learning is still permitted, but only in law schools

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<sup>232</sup> See *Law Schools*, THE STATE BAR OF CAL., <https://www.calbar.ca.gov/Admissions/Law-School-Regulation/Law-Schools> [<https://perma.cc/NF3K-EM3K>] (last visited Jan. 17, 2024). California has rules for accreditation of law schools by its Committee of Bar Examiners, and permits unaccredited law schools in the fixed facility, correspondence and distance learning categories.

<sup>233</sup> *State's Population Decline Slows While Housing Grows Per New State Demographic Report*, CAL. DEP'T OF FINANCE (May 1, 2023), [https://dof.ca.gov/wp-content/uploads/sites/352/Forecasting/Demographics/Documents/E-1\\_2023PressRelease.pdf](https://dof.ca.gov/wp-content/uploads/sites/352/Forecasting/Demographics/Documents/E-1_2023PressRelease.pdf) [<https://perma.cc/TSB9-8GY5>].

<sup>234</sup> Matthew A. Winkler, *California Poised to Overtake German as the World's No. 4 Economy*, BLOOMBERG (Oct. 25, 2022), <https://www.bloomberg.com/opinion/articles/2022-10-24/california-poised-to-overtake-germany-as-world-s-no-4-economy> [<https://perma.cc/8ZFX-ANT5>].

<sup>235</sup> The State Bar of California's 2019 Justice Gap Study found a significant unfilled legal need existing in the state. Among many other findings: "Overall, 85% of Californians received no or inadequate legal help to resolve the civil legal issues they experienced." *The California Justice Gap: Measuring the Unmet Civil Legal Needs of Californians*, THE STATE BAR OF CAL. 8 (Nov. 2019), <https://www.calbar.ca.gov/Portals/0/documents/accessJustice/California-Justice-Gap-Report.pdf> [<https://perma.cc/ENF9-4U8A>].

<sup>236</sup> CAL. BUS. & PROF. CODE § 6060 (West 2024) (spells out the ways one can acquire a legal education that qualifies one to sit for the bar exam in California. Distance learning is recognized in two places, under graduation from an accredited law school under section 6060(e)(1), and under the correspondence definition stated in subsection (e)(2)(d)).

<sup>237</sup> See *Law Schools*, *supra* note 232.

<sup>238</sup> See *id.*

<sup>239</sup> See Natalie Leonard, *Report on Law School Performance Pursuant to State Bar Strategic Plan Goal 2: Protect the Public by Enhancing Access to and Inclusion in the Legal System*, THE STATE BAR OF CAL. 3–4 (Aug. 18, 2023), <https://board.calbar.ca.gov/Agenda.aspx?id=17019&tid=0&show=100036069> [<https://perma.cc/39LG-G9CJ>].



regulated as registered unaccredited law schools.<sup>240</sup>

At the urging of the law schools and pursuing its duty of public protection,<sup>241</sup> the State Bar of California engaged in an extensive regulatory review process.<sup>242</sup> This review resulted in the new *Guidelines for Accredited Law School Rules* that allowed extensive distance education in state-accredited law schools.<sup>243</sup> This included allowing fully online law schools to be accredited—a major step forward for innovation.<sup>244</sup> State regulation previously blocked distance education schools from accreditation via several explicit regulatory barriers.<sup>245</sup>

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<sup>240</sup> Schools not accredited by the state (unaccredited law schools) may register with the state to obtain required authority to confer professional degrees, and in doing so must categorize themselves as either correspondence, distance learning, or fixed facility, with different standards applicable based on the category. CAL. R. 9.30 (2023), [https://www.courts.ca.gov/cms/rules/index.cfm?title=nine&linkid=rule9\\_30](https://www.courts.ca.gov/cms/rules/index.cfm?title=nine&linkid=rule9_30) [<https://perma.cc/XR7R-DYVX>]; *Unaccredited Law School Rules*, THE STATE BAR OF CAL. 4.204(J) (2007), [https://www.calbar.ca.gov/Portals/0/documents/rules/Rules\\_Title4\\_Div3-UnAcc-Law-Sch.pdf](https://www.calbar.ca.gov/Portals/0/documents/rules/Rules_Title4_Div3-UnAcc-Law-Sch.pdf) [<https://perma.cc/D3R9-NFTC>]; *Guidelines for Unaccredited Law School Rules*, THE STATE BAR OF CAL. 14–15 (Jan. 1, 2008), [https://www.calbar.ca.gov/Portals/0/documents/admissions/2008-01-01\\_Final\\_Guidelines\\_for\\_the\\_Unaccredited\\_Law\\_School\\_Rules-Re.pdf](https://www.calbar.ca.gov/Portals/0/documents/admissions/2008-01-01_Final_Guidelines_for_the_Unaccredited_Law_School_Rules-Re.pdf) [<https://perma.cc/6YZP-PK3B>]. ABA-approved law schools in California are "deemed" accredited.

<sup>241</sup> By legislative direction, the primary mission of the State Bar of California is public protection. To see how the Bar implements it, the Bar's 5 years Strategic Plan is a good resource. *Strategic Plan 2022-2027*, THE STATE BAR OF CAL. 10, <https://www.calbar.ca.gov/Portals/0/documents/State-Bar-of-CA-Strategic-Plan-2022-2027.pdf> [<https://perma.cc/CG97-H82D>] (last visited Jan. 17, 2024).

<sup>242</sup> The Committee of Bar Examiners (CBE), a sub-entity of the State Bar of California, is charged with maintaining regulations for accreditation and registration of law schools not approved by the ABA. It empaneled two advisory groups, the Rules Working Group I and the Rules Working Group II, to review the regulations (the Accredited Law School Rules and Guidelines for Accredited Law School Rules), and make recommendations for changes. These groups worked from 2013 through 2017 on revisions that, after additional CBE and State Bar Board of Trustee processes, were finally approved and effective in May 2019. See Natalie Leonard, *Draft Implementation Plan for Accrediting Online J.D. Programs*, THE STATE BAR OF CAL. (Mar. 22, 2019) <https://board.calbar.ca.gov/Agenda.aspx?id=15160&tid=0&show=100021198> [<https://perma.cc/RK66-3X98>].

<sup>243</sup> *Id.* at 2–3; Donna S. Hershkowitz, *Appendix I Review: (1) Implementation of Recommendations Regarding Lawyer Assistance Program; (2) Proposed Changes to State Bar Rules Affecting the Committee of Bar Examiners, the California Board of Legal Specialization, the Committee on Mandatory Fee Arbitration and the Client Security Fund Commission – Return from Public Comment and Request for Approval; and (3) Re-Approval of Rules Permitting Accreditation of Online Law Schools*, THE STATE BAR OF CAL. (May 17, 2019), <https://board.calbar.ca.gov/Agenda.aspx?id=15221&tid=0&show=100021819&s=true> [<https://perma.cc/9NTN-QMZT>].

<sup>244</sup> Leonard, *supra* note 242, at 2–3.

<sup>245</sup> See *id.* Previously, only "fixed facility" (traditional residential) law schools could be accredited by the examining committee, the Committee of Bar Examiners (CBE), if they met the

The rule and regulatory changes approved by the State Bar’s Committee of Bar Examiners (CBE) resulted from years of discussion and evolution of the culture of the CBE. Education was necessary, as CBE members are appointed by the Governor, Assembly, Senate, and Supreme Court, and typically come to the role with little or no law school regulation experience.<sup>246</sup> They represent a mix of attorney and non-attorney public members, but rarely, if ever, include any former legal educators.<sup>247</sup>

After years of advocacy and education, a sub-group, the Rules Working Group,<sup>248</sup> appointed by the CBE, worked on revised standards for several years. (A second Rules Working Group would later convene to make the standards even more forward-looking.) The revised standards were eventually approved by the State Bar’s Board of Trustees<sup>249</sup> and acquiesced in by the California Supreme Court.<sup>250</sup> They included five major changes that directly related to better recognition of innovative legal education:

- 1) renaming the previous category of “unaccredited” to “registered”<sup>251</sup> for

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standards in the California *Accredited Law School Rules* and *Guidelines for Accredited Law School Rules*, pay fees, be inspected, etc. Regulatory Changes effective in 2019 removed this “fixed facility” restriction. *Accredited Law School Rules 2022*, *supra* note 93, Rule 4.120–Rule 4.121.

<sup>246</sup> See *Committee of Bar Examiners*, THE STATE BAR OF CAL., <https://www.calbar.ca.gov/About-Us/Who-We-Are/Committees/Committee-of-Bar-Examiners> [<https://perma.cc/BM7B-F6HN>] (last visited Dec. 19, 2023).

<sup>247</sup> See *Committee of Bar Examiners*, THE STATE BAR OF CAL., <https://www.calbar.ca.gov/Admissions/Law-School-Regulation/Committee-of-Bar-Examiners-Meetings/Roster> [<https://perma.cc/GC5X-NQ92>] (last visited Dec. 18, 2023).

<sup>248</sup> The author served on both Rules Working Group I and Rules Working Group II. For the content of the proposals, as they were published for public comment at the time, see *2014 Public Comment*, THE STATE BAR OF CAL., <https://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2014-Public-Comment> [<https://perma.cc/23AF-HFQ4>] (last visited Jan. 6, 2024).

<sup>249</sup> See *May 17, 2019, Open Session Meeting Notes*, THE STATE BAR OF CAL., 8–9 <https://board.calbar.ca.gov/docs/agendaitem/public/agendaitem1000024429.pdf> [<https://perma.cc/TU3J-FXCA>] (last visited Dec. 28, 2023) (the Board of Trustees Public Minutes of the meeting on May 17, 2019 indicating approval of the proposal note the following resolution passed: “FURTHER RESOLVED, that the Board of Trustees hereby confirms its previous approval and adoption of proposed amendments to the Rules of the State Bar and Guidelines for Accredited Law Schools creating a path to accreditation of online J.D. programs, shown in mark-up text in Attachments J and K.”).

<sup>250</sup> The California Supreme Court is not required to approve changes to the *Guidelines for Accredited Law School Rules*. The Court is notified by the State Bar and may object, but if it does not, the Court’s acquiescence is assumed. *Guidelines for Accredited Law School Rules 2022*, *supra* note 93, at Rule 4.177 (“The Committee, in its discretion, may do any or all of the following with respect to its decisions . . . notify the Supreme Court of California”).

<sup>251</sup> For an overview of the changes, including renaming the previous category from “unaccredited” to registered, see Patricia White & Gayle Murphy, *Proposed Amendments to Admissions Rules, Statutes and Court Rules re Regulation of Law Schools – Return from Public Comment*, THE STATE BAR OF CAL., 1 (Feb. 20, 2015),

all types of schools not accredited by the CBE, which is more accurate because some schools in that category are, in fact, fully accredited by other accreditors, and all are registered with the State Bar;<sup>252</sup>

2) permitting state accreditation of distance learning law schools;<sup>253</sup>

3) implementing modern standards by which education quality is assured and measured in all law programs equally, not just in distance learning programs;<sup>254</sup>

4) allowing schools to apply for a “fast-track” to full state accreditation, bypassing the usual two year period of provisional accreditation;<sup>255</sup> and

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[https://board.calbar.ca.gov/Agenda.aspx?id=10960&tid=0&show=100009251#10015098;%20\[https://perma.cc/6FDH-MSFS\]](https://board.calbar.ca.gov/Agenda.aspx?id=10960&tid=0&show=100009251#10015098;%20[https://perma.cc/6FDH-MSFS]). For the proposed rule language changes in redline form, see *Proposed Amendments – 08/18/14 DRAFT*, THE STATE BAR OF CAL., <https://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000012912.pdf> [https://perma.cc/KVQ3-QABK] (last visited Feb. 15, 2024). For Board of Trustees approval, see *May 10 - Board of Trustees – March 13, 2015 Open Minutes*, THE STATE BAR OF CAL., 7–8, <https://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000013232.pdf> [https://perma.cc/7UWU-GUYH] (last visited Feb. 15, 2024) for the following resolution:

RESOLVED, that following a period of public comment and consideration of the public comment received, and upon recommendation of the Board Committee on Admissions and Education, the Board approves the proposed amendments to the: 1) California Rules of Court – Chapter 3. Legal Education, Rule 9.30. Law School Study in Schools Accredited or Registered by the Committee of Bar Examiners, 2) Business and Professions Code Sections 6046.7 and 6060.7, 3) Article 4 Admission to the Practice of Law, Business and Professions Code Section 6060, Qualifications, Examination and Fees, 4) State Bar Rules, Title 4. Admissions and Educational Standards, Division 2. Accredited Law School Rules and, 5) State Bar Rules, Title 4. Admissions and Educational Standards, Division 3. Registered Law School Rules as attached hereto; and it is FURTHER RESOLVED, that staff be directed to pursue adoption of the proposed amendments to the Rule of Court and Business and Professions Code.

<sup>252</sup> Under the proposed changes, the *Unaccredited Law School Rules*, Supreme Court Rule 9.30, and other sources of law would refer to the former unaccredited schools as “Registered” law schools, since some of the schools in the category are, in fact, accredited by other agencies with authority to accredit the first professional degree in law (just like the ABA). At the time, five law schools/programs in California were accredited by the Distance Education Accrediting Commission (DEAC): Abraham Lincoln University, California Southern University, Concord Law School of Kaplan University, Taft Law School, and Southwestern Law School Global Education Division (which had offered an Entertainment Law LLM in partnership with Concord Law School.) Two of these remain, after Concord Law School became accredited and the other two programs closed. For a listing of law schools and programs accredited by the DEAC, see *Directory of Accredited Institutions*, DISTANCE EDUCATION ACCREDITING COMMISSION <https://www.deac.org/Student-Center/Directory-Of-Accredited-Institutions.aspx> [https://perma.cc/Y5QP-NHA2] (last visited Dec. 18, 2023).

<sup>253</sup> See Hershkowitz, *supra* note 243, at 6–7, Attachment J–K, regarding a lengthy Appendix which included changes to the *Accredited Law School Rules* and *Guidelines for Accredited Law School Rules* allowing this.

<sup>254</sup> *Id.* at 113–34.

<sup>255</sup> The revised *Accredited Law School Rules* and made clear the CBE may determine the period of provisional accreditation on a case-by-case basis. See *Guidelines for Accredited Law School Rules*, THE STATE BAR OF CAL. 9–10 (Apr. 23, 2021),

5) adding a Cumulative Minimum Bar Passage Rate requirement, which has the effect of ensuring public protection irrespective of concerns about methods of delivery of the legal education.<sup>256</sup>

The resultant *Accredited Law School Rules and Guidelines for Accredited Law School Rules* permit accredited schools to conduct some or all instruction by distance education as well as describe the qualitative and quantitative requirements for J.D. programs in accredited law schools in a way that can be used regardless of the method of delivery of the education,<sup>257</sup> and eliminate the physical plant and physical library requirements that are presently burdens on programs wishing to innovate significantly in the delivery of legal education.<sup>258</sup> If they want to teach online, state accredited schools must establish, in their self-study and program approval applications, their competence in delivering education in that way, meet federal credit hour guidelines in program and curricular design, and demonstrate the efficacy of each choice of delivery methodology in the education they plan and

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<https://www.calbar.ca.gov/Portals/0/documents/admissions/AccreditedLawSchoolGuidelines.pdf> [<https://perma.cc/K676-L39F>]. See generally *Accredited Law School Rules*, THE STATE BAR OF CAL. (Jan. 1, 2009), <https://www.calbar.ca.gov/Portals/0/documents/rules/Prior-Rules-Title4-Div2.pdf> [<https://perma.cc/RRB6-2HCP>]. This revision was inserted specifically to permit Registered schools meeting the *Accredited Law School Rules and Guidelines* to apply immediately for full accreditation (skipping the typical 2 year provisional period upon approval by the CBE). See Hershkowitz, *supra* note 243, at 115.

<sup>256</sup> Cumulative Minimum Bar Passage Rate standards already apply to the state-accredited schools which must maintain admissions and academic standards that lead substantial percentages of students to success on the California Bar Exam (CBX). The present standard for state accredited law schools requires that forty percent of those graduating and taking the CBX pass it within five years after the first taking of the exam. See *Accredited Law School Rules 2022*, *supra* note 93.

<sup>257</sup> For the *Accredited Law School Rules* in effect in 2019, see *Title 4 Admissions and Educational Standards*, THE STATE BAR OF CAL., <https://www.calbar.ca.gov/Portals/0/documents/rules/Prior-Rules-Title4-Div2.pdf> [<https://perma.cc/9HQ5-8A5V>] (last visited Dec. 18, 2023). The 2019 revised *Guidelines for Accredited Law School Rules* are no longer available online. For a version with additional changes made through April 23, 2021, but not amending Guideline 7.11 since 2019, see *Guidelines for Accredited Law School Rules*, *supra* note 255. Both have since been revised again, substantially, while retaining most aspects of the 2019 changes. See *Guidelines for Title 4. Admissions and Educational Standards Division 2. Accredited Law School Rules*, THE STATE BAR OF CAL. (Jan. 1, 2022), <https://www.calbar.ca.gov/Portals/0/documents/admissions/Guidelines-for-Accredited-Law-School-Rules.pdf> [<https://perma.cc/UHR7-VMFT>]; *Title 4 Admissions and Educational Standards*, THE STATE BAR OF CAL., [https://www.calbar.ca.gov/Portals/0/documents/rules/Rules\\_Title4\\_Div2-Acc-Law-Sch.pdf](https://www.calbar.ca.gov/Portals/0/documents/rules/Rules_Title4_Div2-Acc-Law-Sch.pdf) [<https://perma.cc/U7UY-NUU7>] (last visited Dec. 18, 2023) (hereinafter *Title 4 Admissions and Educational Standards Adopted January 1, 2022*).

<sup>258</sup> For the 2021 revised *Guidelines for Accredited Law School Rules*, Division 8 Library requirements and Division 9 Physical Resources, see *Guidelines for Accredited Law School Rules*, *supra* note 255, at 43–49.

conduct.<sup>259</sup>

Each of these changes has, at its root, a desire to offer affordable and accessible legal education to Californians while maintaining quality assurance and public protection.<sup>260</sup> The Board of Trustees for the State Bar voted unanimously to recommend that the California Supreme Court adopt the rule changes and to recommend the statutory changes to the legislature.<sup>261</sup> Yet, it took more than six years to win the approvals and rule changes needed for these proposals to be finally adopted and made effective.<sup>262</sup>

The California regulatory changes provide an example of how successful innovations become influential. The CBE, Board of Trustees, California Supreme Court, and California legislature eventually recognized that the performance of fully online law schools, like Concord Law School, compared very favorably to the performance of state accredited schools and some of the ABA approved schools in California.<sup>263</sup> Because it permitted different types of education models to be

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<sup>259</sup> See *2015 Public Comment*, THE STATE BAR OF CAL., <https://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2015-Public-Comment> [<https://perma.cc/TJ7S-2H5K>] (last visited Feb. 19, 2024). No adverse comments were noted.

<sup>260</sup> An original goal of California's Task Force on Admissions Regulation Reform was to decide whether to do away with the unaccredited law school category, and the correspondence and distance learning categories with it. That mission evolved to focus instead on practical training of new lawyers, and the approach ultimately adopted resulted from a close partnership between law schools and the bar. *The State Bar of California: About Us*, THE STATE BAR OF CAL., <https://www.calbar.ca.gov/About-Us/BoardofTrustees/TaskForceAdmissionsRegulationReform> [<https://perma.cc/8V48-KT5C>] (last visited Feb. 19, 2024). The work of addressing concerns about unaccredited law schools moved to the Committee of Bar Examiners and the Rules Working Group it formed. The Working Group achieved a consensus on retaining the category, renaming it something less pejorative, removing all barriers to accreditation of distance learning schools, and allowing fast-track full approval if a school can demonstrate full compliance with the standards.

<sup>261</sup> For the minutes of the Board of Trustees meeting in which the proposals were approved, see *May 10 - Board of Trustees - March 13, 2015 Open Minutes*, *supra* note 251. The proposal adopted is described in the staff memo. See White & Murphy, *supra* note 251. For the attachments containing actual proposed amendments to rules of court, statues and rules of the CBE, see *March, 13, 2015 Board of Trustees Meeting Agenda*, STATE BAR OF CAL. 133 <https://board.calbar.ca.gov/Agenda.aspx?id=10948&tid=0&show=100009239&s=true#10014966> [<https://perma.cc/U2QH-2ST9>] (last visited Jan. 9, 2024).

<sup>262</sup> *Compare Proposed Amendments to Guideline 7.11 (Distance-Education Credit) of the Guidelines for Accredited Law School Rules*, THE STATE BAR OF CAL., <https://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2015-Public-Comment/2015-13> [<https://perma.cc/2DPR-DHFN>] (last visited Feb. 19, 2024) with *Rules for Accredited Law Schools Effective January 1, 2022* and *Guidelines for Accredited Law School Rules Effective January 1, 2022*. See both at *Law Schools*, *supra* note 232.

<sup>263</sup> This is not a rare occurrence; graduates of online schools in California regularly perform

created and tested, California was able to directly compare results, such as bar exam outcomes of graduates, at different types of law schools.<sup>264</sup> California directly observed the quality distance learning programs at Concord Law School, St. Francis School of Law, and Northwestern California University School of Law outperforming traditional residential law schools, including some that were California and ABA approved.<sup>265</sup> This led to acceptance of the innovations in curriculum design and delivery and recognition that the delivery modality does not necessarily correlate with the quality of the legal education being delivered.<sup>266</sup> Excellence can occur in any modality, as can mediocrity or worse.

Once this was recognized, standards focusing on the quality of outcomes as well as regulation of “inputs” to the education (e.g., number of hours of academic engagement) became possible. California made changes to its standards for accredited schools (*Accredited Law School Rules* and *Guidelines for Accredited Law School Rules*) to permit greater opportunities for state-accredited schools to engage in distance education, with “guardrails” developed from the unquestionably successful examples already operating within the state.<sup>267</sup>

Innovation requires a “lab” or “sandbox” in which to create, play, and test. It could be done safely in California because the available regulatory framework allowed and even encouraged innovation to solve the problems of legal education

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better than graduates of some ABA-approved schools on the California Bar Exam (one of the toughest in the nation). For just one example, Concord Law School’s sixty-two percent first time taker passage rate on the February 2023 California Bar Exam bested that of California Western School of Law (33%), Golden Gate University School of Law (48%), Loyola Law School – Los Angeles (59%), University of the Pacific McGeorge School of Law (59%), and University of San Francisco School of Law (50%), among those school where statistics were reported. *General Statistics Report February 2023 California Bar Examination*, STATE BAR OF CAL., 3–4 <https://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/February-2023-CBX-Statistics.pdf> [<https://perma.cc/D538-MVCP>] (last visited Nov. 18, 2023).

<sup>264</sup> *Id.* Exam Statistics reports, since July 2015, include results in a statistical entry only if the *n* is eleven or more, to protect the identity of individual exam takers in small categories (such as race/ethnicity categories from particular schools or types of schools). Comparisons must take this into account when using public data. However, the State Bar itself has the full data and has used it in evaluating the performance of schools of different types.

<sup>265</sup> *Id.*

<sup>266</sup> See the memoranda accompanying Agenda Items O-4-1, O-4-2, and O-4-3 concerning these three institutions – the first fully online law schools ever to be accredited by the State Bar of California – on the Agenda of the August 21, 2020 meeting of the CBE. *Friday, August 21, 2020 - Saturday, August 22, 2020, Committee of Bar Examiners Meeting Notice and Agenda*, STATE BAR OF CAL., <https://board.calbar.ca.gov/Agenda.aspx?id=15790&t=0&s=false> [<https://perma.cc/XDA3-PLA>] (last visited Dec. 18, 2023); NATALIE LEONARD, ACTION ON INSPECTION REPORT AND ACCREDITATION OF CONCORD LAW SCHOOL (State Bar of Cali., Agenda Item O-401, 2020); NATALIE LEONARD, ACTION ON INSPECTION REPORT AND ACCREDITATION OF NORTHWESTERN CALIFORNIA UNIVERSITY SCHOOL OF LAW (State Bar of Cali., Agenda Item O-402, 2020); NATALIE LEONARD, ACTION ON INSPECTION REPORT AND ACCREDITATION OF ST. FRANCIS SCHOOL OF LAW (State Bar of Cali., Agenda Item O-403, 2020).

<sup>267</sup> *Guidelines for Title 4. Admissions and Educational Standards Division 2. Accredited Law School Rules*, *supra* note 257; *Guidelines for Accredited Law School Rules*, *supra* note 255.

around accessibility, preparation for practice, and affordability. A key aspect of the California sandbox was the distance education standard. Its history is traced in detail in this article because it reflects the trajectory of California's regulatory support for innovation, which contributed greatly to broader, national reform.

The innovative evolution of California's regulatory scheme really began in June 2015, when the California Committee of Bar Examiners (CBE) voted to publish for public comment revisions to standard 7.11 of the *Guidelines for Accredited Law School Rules* regarding distance education.<sup>268</sup> The rule in effect at the time severely limited distance education in state-accredited schools:

7.11 Distance-Education Credit.

(A) A law school may grant up to twelve distance-education semester credit units or the equivalent in quarter credit units toward its J.D. degree and other professional law degree programs. A law school must not grant a student more than four distance-education semester credit units or the equivalent in quarter credit units in any academic term, and no student in a J.D. degree program may enroll in a distance-education course until the student has completed the first academic year of law study.<sup>269</sup>

The regulation proposed in 2015<sup>270</sup> amended the guideline to permit state accredited schools to offer distance education in the first year of law school and to permit more than four units of distance education in the same semester:

7.11 Distance-Education Credit.

(A) A law school may grant up to twelve distance-education semester credit units or the equivalent in quarter credit units toward its J.D. degree and other professional law degree programs.<sup>271</sup>

While strictly evolutionary, the change moved the California regulation closer to the ABA Standard (Standard 306) at the time, which also restricted the overall number of distance education units that could be taken in one term.<sup>272</sup> It allowed

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<sup>268</sup> *Proposed Amendments to Guideline 7.11 (Distance-Education Credit) of the Guidelines for Accredited Law School Rules*, *supra* note 262.

<sup>269</sup> *Title 4 Admissions and Educational Standards, Division 2. Accredited Law School Rules Guidelines for Accredited Law School Rules*, THE STATE BAR OF CAL., 26–27 (Dec. 3, 2016) [https://www.calbar.ca.gov/Portals/0/documents/admissions/2016-12\\_AccreditedLawSchoolGuidelines\\_R.PDF](https://www.calbar.ca.gov/Portals/0/documents/admissions/2016-12_AccreditedLawSchoolGuidelines_R.PDF) [<https://perma.cc/22RM-HSYD>].

<sup>270</sup> The redlined version of the proposed rule accompanying the Committee of Bar Examiners Open Session Agenda item is called: Amendments to Guideline 7.11 (Distance Education Credit) of the Guidelines for Accredited Law School Rules. *Amendments to Guideline 7.11 Distance-Education Credit*, STATE BAR OF CAL., <https://apps.calbar.ca.gov/cbe/docs/agendaitem/Public/agendaitem1000000991.pdf> [<https://perma.cc/2EDG-7T4H>] (last visited Jan. 8, 2024). This document was Attachment A of Agenda Item O-402 of the CBE meeting of August 28, 2015. *August 28, 2015 Committee of Bar Examiners Meeting, Notice and Agenda*, STATE BAR OF CAL., <https://apps.calbar.ca.gov/cbe/docs/agendaitem/Public/agendaitem1000001033.pdf> [<https://perma.cc/752A-3MSN>] (last visited Nov. 18, 2023).

<sup>271</sup> *Amendments to Guideline 7.11 Distance-Education Credit*, *supra* note 270.

<sup>272</sup> See George Leal, *Amendments to Guideline 7.11 (Distance-Education Credit) of the Guidelines*

distance education in the first year, which ABA Standard 306 still did not.<sup>273</sup> The staff memo<sup>274</sup> respecting the proposed change noted that the deans of the currently accredited schools sitting on the Rules Advisory Committee (an informal, standing committee of the Committee of Bar Examiners, charged with ongoing support of negotiated rulemaking) proposed a significantly changed regulation. It would have allowed the schools to offer up to fifty percent of the J.D. program via distance education; however, this change was not submitted to the Educational Standards Subcommittee for action.<sup>275</sup>

California revisited the distance education standard two more times. In May 2019, revisions to the *Guidelines for Accredited Law School Rules*<sup>276</sup> abandoned limits on distance education in state accredited schools completely, opting instead for an approach that required “academic engagement” in specified amounts for all types of accredited programs, and a compliant design, documented in curriculum documentation:

7.11 Distance-Education Credit<sup>277</sup>

A law school may offer any amount of academic engagement entitled to earn credit under Guideline 6.5(A) and may do so through the use of any form of distance-learning technology approved by this Guideline.

(A) For purposes of this guideline, “distance-education” is approved and defined as any and all instruction that earns credit for academic engagement taught through any of the following technological means: any electronic, technological transmission, whether through the Internet in a synchronous or asynchronous mode, or any electronically-stored or recorded media, whether by audio or video presentation.

(B) For purposes of this guideline, students may earn credit toward the 1,200 hours of verified academic engagement, as defined by Guideline 6.5(A), using distance learning technology through any of the following: (1) participating in a synchronous class session; (2) viewing and listening to recorded classes or lectures; (3) participating in a live or recorded webinar offered by the law school; (4) participating in any synchronous or asynchronous academic assignment in any class monitored by a faculty member; (5) taking an examination, quiz or timed writing assignment; (6) completing an interactive tutorial or computer- assisted instruction; (7) conducting legal research assigned as part of the curriculum in any class; and (8) participating in any portion of an approved clinical or experiential class or activity offered through distance learning technology.

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for *Accredited Law School Rules – Return from Public Comment*, 1–2 (Aug. 24, 2015) <https://apps.calbar.ca.gov/cbe/docs/agendaitem/Public/agendaitem1000001032.pdf> [<https://perma.cc/QKG7-BMDY>].

<sup>273</sup> In 2015, ABA Standard 306 (f) prohibited schools from enrolling a student in distance education courses before the student had completed “instruction equivalent to 28 credit hours toward the J.D. degree.” *Standards and Rules 2014 – 2015*, *supra* note 159, at 19.

<sup>274</sup> George Leal, *Amendments to Guideline 7.11 (Distance-Education Credit) of the Guidelines for Accredited Law School Rules - Request for Public Comment* (June 16, 2015), <http://apps.calbar.ca.gov/cbe/docs/agendaitem/Public/agendaitem1000000990.pdf> [<https://perma.cc/S9AW-8CDK>].

<sup>275</sup> *Id.* at 1.

<sup>276</sup> *Guidelines for Accreditation Law School Rules*, *supra* note 255.

<sup>277</sup> *Id.* at 42–43.



If a law school counts other synchronous or asynchronous activities toward the 1,200-hour academic engagement requirement, such activities should be substantially similar to or exceed the listed examples in terms of the nature and scope of interaction and communication between the students and the curriculum and faculty.<sup>278</sup>

(C) Law schools must verify the minimum required academic engagement for the J.D. degree delivered through distance learning technology. Law schools may comply with this requirement by either:

(1) Establishing and documenting a curriculum requiring the minimum number of hours of academic engagement required by Guideline 6.5(A); or

(2) Documenting completion of the minimum number of hours of actual academic engagement by each student.<sup>279</sup>

The documentation of a compliant curriculum required by subsection (C)(1) must include the intended or expected time for completion of each activity or assignment considered academic engagement, and such time must reasonably approximate the actual time required for completion of the activity or engagement.<sup>280</sup> A school may establish the reliability of the time estimate by logs, time studies, research or by reference to externally documented standards.<sup>281</sup>

The documentation of academic engagement by individual students permitted by subsection (C)(2) must establish the actual time spent by each student on assigned academic engagement activities.<sup>282</sup> Documentation of actual academic engagement may be accomplished by technological or other means, but must include a reliable methodology for recording time actually spent by the student.<sup>283</sup>

This revision—enacted before the pandemic but after years of rulemaking and negotiation—revolutionized legal education. For the first time, wholly online institutions could be fully accredited and treated comparably to traditional, residential schools. Both synchronous and asynchronous distance learning activities could result in credit, and the focus was placed on students engaging with the professor and material in a variety of possible instructional models rather than merely attending a classroom setting.<sup>284</sup> In little over a year, three existing, high-

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<sup>278</sup> *Id.* at 42.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 43.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> Guideline 6.5, Quantitative Academic Requirements was edited, in the 2019 revisions, to set the same standards for all schools: 1,200 hours of verified academic engagement are required for the J.D. and:

The 1,200 hours of academic engagement must be earned through completion of no fewer than eighty semester units or their equivalent, with each semester unit requiring a minimum of 45 hours of student work, including both academic engagement and preparation, of which a minimum of 15 hours must be academic engagement verified as prescribed by these guidelines.

Guideline 6.5(B) defined activities that qualified as “academic engagement” to include:

(a) student attendance in a physical classroom; (b) student participation in a synchronous or asynchronous curriculum offered through distance-learning technology; (c) a combination of academic engagement

## NEW AND USEFUL IMPROVEMENTS

performing, online institutions were accredited, including Concord Law School, St. Francis School of Law, and Northwestern California University School of Law.<sup>285</sup> The growth of hybrid and online programs at other California-accredited law schools accelerated, and within a short time, the Accredited Law School Rules were modified to include a version of the former Guideline 7.11 provisions regarding academic engagement and diverse learning activities as a new philosophy of accreditation.<sup>286</sup>

California accreditation of distance learning schools and programs—and the pandemic of 2020 through 2022—would end up significantly propelling overall opportunity for distance learning in law schools. Pioneering California schools were able to establish that distance education can be done successfully and at the highest quality level because of a regulatory system that permitted different types of learning environments. The models varied significantly, but all were able to produce results that equaled or bettered those of many traditional, residential settings. The ABA and its approved schools—with a few exceptions—were slow to recognize these changes, despite the data coming out of California and the public education efforts of some leaders of the California schools. But by 2023, there is no doubt the idea has caught on, with seventeen approved distance education programs and many more operating within the prior or expanded regulations.<sup>287</sup>

The process by which distance education innovations took hold in the years from 1998 to 2023 has closely mimicked the evolution of the case method, in both events and timelines. State-by-state efforts to allow students access to the bar exam when undertaking innovative legal education demonstrated efficacy to others. The market was highly receptive, and the innovative schools were wildly successful. As more and more graduates of these programs successfully passed state bar

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offered through (a) and (b). Academic engagement may include up to 120 hours of student participation in an experiential or clinical program approved under Guideline 6.6. Final examination time, not exceeding ten percent of the total number of hours of academic engagement, may be included as academic engagement hours, and counted toward the 1,200 hour requirement.

These standards align California accreditation rules with the expectations of the U.S. Department of Education regarding credit for student work and its own definition of academic engagement in 34 C.F.R. ¶ 600.2 (2019). See also *Guidelines for Accredited Law School Rules*, *supra* note 255, at 30–31.

<sup>285</sup> These three schools were accredited on the same day, August 21, 2020. For the studies and staff memos recommending accreditation in the agenda of the Committee of Bar Examiners for August 21, 2020, see *Friday, August 21, 2020 - Saturday, August 22, 2020*, *Committee of Bar Examiners Meeting Notice and Agenda*, *supra* note 266. For the Public Minutes of the CBE meeting of August 21, 2020 for the actual approval vote, see *Open Session Minutes, The Committee of Bar Examiners of the State of California, August 21 and 22, 2020*, STATE BAR OF CAL., <https://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000026598.pdf> [<https://perma.cc/2J4W-CMFQ>] (last visited Feb. 22, 2024).

<sup>286</sup> For Rule 4.160(B)(12), Rules for Accredited Law Schools Effective January 1, 2022, see *Title 4 Admissions and Educational Standards Adopted January 1, 2022*, *supra* note 257, at 16–17.

<sup>287</sup> *ABA-Approved Law Schools With Approved Distance Education J.D. Programs*, *supra* note 183.

exams<sup>288</sup> and engaged in the ethical and competent practice of law,<sup>289</sup> other states and the ABA had greater reason to reconsider remaining, limiting accrediting rules. In both cases, about ten to twenty years of outcomes were observed before these changes were considered safe enough to be adopted more broadly.<sup>290</sup> Standards and attitudes originating in an age before computers and the Internet—in some cases before even television—finally yielded to irrefutable evidence from twenty-five years of efficacy, *but only after legal educators broadly experienced it directly.*

## CONCLUSION

For three decades, legal education has pursued the goal of seamlessly developing contributing members of the legal profession, as the 1992 MacCrate

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<sup>288</sup> Concord Law School's first graduates sat for the California Bar Exam in 2002 – and earned a sixty percent first time pass rate. Its graduates, and those of other good online law schools, continue to perform as well as graduates from some ABA-approved schools. *Compare 2023 Minimum Cumulative Five-Year Bar Examination Pass Rates for California Accredited Law Schools (MPR)*, STATE BAR OF CAL., <https://www.calbar.ca.gov/Portals/0/documents/admissions/Education/MinimumPassRateStandardCumulativePassRates.pdf> [https://perma.cc/W6VA-5MDV] (last visited Dec. 19, 2023), with *California Bar Examination Statistics*, STATE BAR OF CAL., <https://www.calbar.ca.gov/Admissions/Examinations/Exam-Statistics> [https://perma.cc/XK65-UTSC] (last visited Dec. 19, 2023).

<sup>289</sup> It is significant to note that the distance learning law schools in California today claim more than 3000 graduates and almost 800 members of the State Bar of California. *History of Purdue Law School*, *supra* note 107. Owing to disciplinary system privacy, it is not known whether there have been any significant differences in rates of discipline among their graduates. But to date, to the authors' knowledge, there has not been a single disbarment or other public discipline of any graduate of any accredited or registered distance learning law school. Thus, to date, there's no reason to believe that rates of discipline of these graduates would ultimately be any different than those of the general population of licensed lawyers.

<sup>290</sup> The ABA began a comprehensive review of its standards in 2008, not completing it until 2014. See Randy Hertz & Don Polden, *Comprehensive Review of the ABA Standards for the Approval of Law Schools*, A.B.A. (Aug. 15, 2008) [https://www.americanbar.org/groups/legal\\_education/committees/standards\\_review/comp\\_review\\_archive/](https://www.americanbar.org/groups/legal_education/committees/standards_review/comp_review_archive/) [https://perma.cc/EB52-B9PQ] (see document titled "2008 Comprehensive Review Memo"). See also *Transition to and Implementation of the New Standards and Rules of Procedure for Approval of Law Schools*, *supra* note 158. Another nine years would pass before the ABA allowed distance learning up to fifty percent of the core JD program without requiring a major change approval, or a variance. James Leipold, *Access to Legal Education Expanded Through Increased Distance Learning*, L. SCH. ADMISSION COUNCIL (Aug. 17, 2023), <https://www.lsac.org/blog/access-legal-education-expanded-through-increased-distance-learning> [https://perma.cc/77MC-FK45]. The State Bar of California reviewed its distance learning standards multiple times during the period from 2008 to 2019, when it eliminated standards that prevented accreditation of fully online law schools. See *supra* text accompanying footnotes 118-227 (detailing the history of the ABA's distance learning standards); *supra* text accompanying footnotes 228-290 (detailing the history of California's distance learning standards).

Report<sup>291</sup> advocated, via countless variations.<sup>292</sup> Real and effective improvements to the teaching, learning, and student environments established decades ago—when law school expansion, both in enrollment and number of schools, was at its peak—were urgently needed but slow to materialize. New and useful improvements—in the words of the patent statute—have recently emerged, as has a new subset of the academy schooled and interested in the science of teaching and learning. The future is looking bright for law schools to become places for advancing the art and science of educating lawyers. To keep momentum, schools and the academy should attend to culture, leadership, incentives, and regulations.

### **A. Culture of Innovation**

In American law schools, the period from 2020 to 2023 challenged the culture and hierarchy as never before in recent history. The worldwide pandemic exposed every law professor and administrator—and all present and future law students—to the benefits of innovations pioneered and proven decades before by law schools in California and a few ABA-approved schools. Though it was certainly not the destructive disruption of the Civil War—which, by one estimate, would have seen more than six million war dead if it was fought in 2010<sup>293</sup>—every teacher and administrator was forced to respond to both government-mandated closures and health-related crises. Some took up the challenge much better than others. Power, status, and opportunity shifted to those who adapted—and helped the law school survive the crisis—and away from those who did not. Attitudes and expectations changed dramatically, populations shifted, and long-held prejudices against remote work and distance learning broadly evaporated. An opportunity for long-lasting change—allowing legal education to become an innovative industry—was created, and it should not be wasted.

Schools wishing to ensure a culture in which innovations can be developed, tested, and adopted more broadly must attend to their faculty and leadership culture. Elements of an innovative law school culture include:

- “Students first” orientation of the entire community
- Evidence-based practices are the most valued and expected
- Outcomes, not inputs are rewarded and incentivized
- Pedagogical expertise, research, writing, and application, are regarded as essential knowledge and skills, and faculty tenure and promotion are cognizant of it

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<sup>291</sup> See generally CLARK, *supra* note 4.

<sup>292</sup> The extensive critique of the MacCrate Report and its application in law schools is covered in countless sources. As examples among them, see Bryant G. Garth, *From MacCrate to Carnegie: Very Different Movements for Curricular Reform*, 17 J. LEGAL WRITING INST. 261 (2011); Spencer, *supra* note 7.

<sup>293</sup> McPherson, *supra* note 36.

- Team effort, not merely individualism, is rewarded and incentivized

To evaluate where a culture stands, is useful to look at how members of the culture act in innovation situations. For example:

- What happens when innovations are suggested by someone at the school? Does the answer depend on faculty rank or status of the innovator?
- What happens when something that has been tried fails? Are there adverse consequences to the one who tried it? Or rewards?
- Does the institution ever celebrate failure as an opportunity to learn valuable lessons and improve?

### ***B. Effectively Intertwined Leadership and Incentives for Innovation***

Leadership within law schools is distributed among many individuals and governance institutions—surely some of whom are or can be innovation supporters. The Dean has extraordinary influence, both as to leadership and incentives at most schools, owing to the office’s inherent authority—as to values as much as the organizational structure—and its typical control over institutional resources such as budgets and endowments, and benefits such as sabbaticals. Associate and Assistant deans, program and institute directors, library directors, and other subsidiary leadership have direct access and influence on the most important potential innovators in any law school. All these can use interpersonal means, such as encouragement and how they allocate their time and activities, to send a powerful message to bring forward ideas, take the risk to test them, evaluate them through effective scientific means, and use the results to bring about institutional improvement.

Faculty leadership is the most vital link in establishing both an innovative culture and incentives for teaching and pedagogical creativity. Common faculty committees, such as those devoted to tenure, promotion, and curriculum, have a direct role in the institution’s supportiveness and response to ideas that may improve the student experience or student and graduate outcomes.<sup>294</sup> Faculties must find ways to come together around supporting new efforts, and this must be particularly messaged by established, senior faculty members, to whom newer faculty look for examples, who often hold important and powerful positions on these committees.

As with culture, it is useful to look at how leaders of the institution, including leaders of the faculty apart from administrators, set examples and respond in different innovation situations. For example:

- What do leaders say about innovation? Is it an explicit expectation of any

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<sup>294</sup> See Howard Katz, *What Law School Curriculum Committees Can Learn from Architecture Schools*, 18 TENN. J. BUS. L. 622 (2016).

part of the institution?

- Does the leader innovate?
- When talking about accomplishments, are innovations highlighted? For example, when deans meet alumni, are innovations among the important things mentioned?
- Does the institution's tenure and promotion committee fairly value faculty scholarship in the areas of pedagogy, learning science, assessment, and teaching and learning?
- How do faculty leaders, both formal and informal, respond to proposed innovations in faculty meetings?
- Are faculty members who teach innovatively granted the same benefits and status or rank as faculty members who teach more traditionally? Or, are innovators favored or disfavored?

### C. A Regulatory Environment Encouraging Innovation

Regulatory standards are rarely the engine or backbone of innovation. Mostly, they constrain it, make it more expensive, or regulate it out of existence. It is refreshing to see the many changes in the ABA and state standards, and these regulators deserve credit for taking steps toward a future that is already present in many other parts of education.<sup>295</sup> But the evolving scheme of regulation within which innovation proceeds must be made to tolerate and further creativity in teaching and learning. Standard 306 today imposes much more liberal limits on distance education than before, and even those limits will give way to innovations in course and program design as additional evidence of efficacy accumulates.<sup>296</sup> In

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<sup>295</sup> The 2014 revisions to the ABA Standards included many that were already in effect at other national and regional accreditors. Standards relating to the measurement and evaluation of the program of education, the definition of a credit hour, and requiring learning outcomes have been standard fare for these accreditors for several years. See e.g., *Accreditation Handbook Policies, Procedures, Standards and Guides of the Distance Education Accreditation Commission*, DISTANCE EDUCATION ACCREDITING COMM'N (Apr. 5, 2022), [https://www.deac.org/UploadedDocuments/Handbook/DEAC\\_Accreditation\\_Handbook.pdf](https://www.deac.org/UploadedDocuments/Handbook/DEAC_Accreditation_Handbook.pdf) [<https://perma.cc/BVX8-N4ST>].

<sup>296</sup> It is vital to remember that distance learning does not need to be more efficacious than traditional, classroom-based residential learning—it only has to be at least or nearly equally effective for it to be treated the same in regulation. There is a substantial body of evidence to indicate that distance learning methodologies applied in many disciplines lead to similar or better outcomes. For an extensive review of distance learning efficacy research, see *Studies of Distance Learning*, WHAT WORKS CLEARINGHOUSE, <https://ies.ed.gov/ncee/wwc/distancelearningstudy> [<https://perma.cc/7VQK-FZBR>] (last visited Feb. 22, 2024). An example finding:

The average effect size for ELA was 0.20 (SE = 0.03) and was statistically significant ( $p < .05$ ). This effect size translates to an improvement index of +8, meaning the average student participating in one of the eligible distance learning programs is predicted to score eight percentile ranks higher in ELA than the average student receiving traditional, in-person instruction. For mathematics, four studies—which together included 5,393 students—Met WWC Group Design Standards. The average effect size was 0.03

the meantime, there remains the urgent need to move away from some of the costliest—and occasionally ineffective or inefficient—parts of legal education. Among the changes needed:

- The requirement that courses may deliver no more than one-third of the instruction by distance education or be subject to the credits limitation should evolve to a simple rule of predominance: when distance education exceeds fifty percent of instruction in a course, then the course becomes one delivered primarily by distance education. This is merely a sensible, honest definition and has already been acceded to in a variance approved by the ABA.<sup>297</sup>
- The requirement that courses be defined as distance education or something else<sup>298</sup> is archaic and often misleading, particularly in schools that use an LMS to support instruction in all types of classes. Quality student learning experiences, assessment rigor, and other aspects of educational quality are just as achievable in online, hybrid, or residential formats; from an instructional design standpoint, it is merely a matter of choice and resource application to achieve it, and the barriers to it are largely faculty and resource related. Further, labels and distinctions should be transparent and useful for consumer protection, and labeling distance education while not labeling poor residential education achieves neither goal. Either kind may be poor, or terrific, and distance education normally has the advantage of thoughtful, advanced design. Instead of labels, schools should simply prove the efficacy of their modality choices through solid efficacy evidence, from assessment of student outcomes. Label that reliably and the consumer will have really been protected.
- Per se limits on the number of units of distance education allowable in the J.D. program ought to be removed. Obviously, these limits were retained, as modified, out of genuinely held concerns by these regulators, but conservatism—endemic to the bar and even more to the legal education

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(SE = 0.05) and was not statistically significant (p = .56). The effect size translates to an improvement index of +1.

S.D. Sahni et al., *A What Works Clearinghouse Rapid Evidence Review of Distance Education Learning Programs*, INST. EDUC. SCI. 12 (Feb. 2021) [https://ies.ed.gov/ncee/WWC/Docs/ReferenceResources/Distance\\_Learning\\_RER\\_508c.pdf](https://ies.ed.gov/ncee/WWC/Docs/ReferenceResources/Distance_Learning_RER_508c.pdf) [<https://perma.cc/LS9B-7SM9>]

<sup>297</sup> Janus et al., *supra* note 176, at 28.

<sup>298</sup> *ABA Standards and Rules of Procedure 2023–2024*, *supra* note 180.

(7) “Distance Education Course” means one in which students are separated from all faculty members for more than one-third of the instruction and the instruction involves the use of technology to support regular and substantive interaction between the students and all faculty members, either synchronously or asynchronously. See also Standard 306.

academy—also played a part.<sup>299</sup> Schools ought to be empowered to make evidence-based learning design decisions, wherever they may occur in the curriculum, since research suggests thoughtfully employed distance learning delivers better student outcomes compared to traditional, classroom-style, face-to-face instruction.<sup>300</sup> Schools should decide—and justify in their curriculum documentation—the best designs for their courses and programs. Additionally, schools should disclose these design choices wherever they may be significant to consumer choice and information.

To address lingering concerns remaining in the federal and ABA schema of limits and oversight, and improve the quality of education in all courses, schools ought to be required to articulate and document the learning design for each course in curriculum documentation. This would require much more than is sometimes being done in the residential setting, but little more than is usually done in effective distance learning programs. Enhancing this one aspect of required documentation would lead to improved quality and result in better transparency, so long as it is coupled with the requirement that the school employ the best methodologies available to them for delivering the learning experiences in that course needed to achieve the course's desired outcomes, without regard to modality. For example, it may be that classroom dialogic is the best way to train students in legal analysis skills, but not the best way to train them in evidentiary objections at trial. An online simulation might be a much better method for trial preparation, and many have existed for this purpose for years. Schools ought to have incentives to use the best method, and disclose the methods they use. The present standards essentially make the assumption that in-person, face-to-face instruction is the best design, an

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<sup>299</sup> The proceedings of the ABA Task Force on the Future of Legal Education make fascinating reading. The ABA kept a bibliography of articles on the work of the task force on its website. See *generally News and Articles*, A.B.A., [https://www.americanbar.org/groups/professional\\_responsibility/taskforceonthefuturelegaleducation/newsandarticles/](https://www.americanbar.org/groups/professional_responsibility/taskforceonthefuturelegaleducation/newsandarticles/) [<https://perma.cc/38WA-GKJE>] (last visited Dec. 19, 2023). The final report of the task force highlighted the problems facing schools and recommended a number of innovations, including reduced admission requirements, non-lawyers providing some legal services, and establishing a mechanism for ongoing assessment of the quality of legal education. See *Reports and Recommendations American Bar Association Task Force on the Future of Legal Education* (Jan. 2014), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/report\\_and\\_recommendations\\_of\\_aba\\_task\\_force.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf) [<https://perma.cc/3MCZ-SC8N>]. Reading it leaves no doubt that the judgment and decisions of the present generation of reformers arise from well-intended concerns about how best to adapt legal education to the future.

<sup>300</sup> For a meta-analysis of more than 100 studies finding that, on average, distance learning has as good or slightly better learning and retention results than classes delivered in a residential setting, see BARBARA MEANS ET AL., *EVALUATION OF EVIDENCE-BASED PRACTICES IN ONLINE LEARNING A META-ANALYSIS AND REVIEW OF ONLINE LEARNING STUDIES 17–18* (U.S. Dep't of Educ. 2010).



assumption that is not supported in the research.<sup>301</sup> Instead of placing arbitrary limits on design, as Standard 306 does,<sup>302</sup> the emphasis should be on how well a school can design a course to deliver and assess its outcomes, and on allowing the school to deliver the course by whatever design or technology is most appropriate and efficacious.

If, for example, a focus on effective learning design results in seventy percent of instruction in a particular course being delivered synchronously online by an expert who happens to be at another campus or in another state, that should be vastly preferable to an in-person, face-to-face course delivered by a less-qualified individual. Decades of experience with distance learning, and modern interactive technology, prove that mere physical separation will not prevent the students from being successful in achieving the learning objectives of the course, but poor-quality learning design and inexperienced teaching certainly will. Schools ought to be able to decide the learning design, document it, and then proceed to teach it, assess student outcomes, collect data on the efficacy of the design, and apply that evidence to make data-informed improvements. It disserves the student to erect artificial regulatory barriers that might make the student's best education into a violation of standards.

The standards ought to focus on requiring schools to document and execute a thoughtful learning design for the overall curriculum and each course. This is a natural complement to the standards and best practices requiring outcomes and assessment, program review, and other quality assurance measures. It is, in fact, a significant omission in the present regulatory scheme. The place for this is not in the distance education standard, but in the curriculum standards applicable to all courses, Standard 303 or the credit hour standard (Standard 310).<sup>303</sup> A new section for either standard could be added as follows (numbering assumes it is being added to Standard 310):

Standard 310. DETERMINATION OF CREDIT HOURS FOR COURSEWORK

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<sup>301</sup> The meta-analysis concluded: "The meta-analysis found that, on average, students in online learning conditions performed better than those receiving face-to-face instruction." *Id.* at ix. Most studies have found better results – or no significant differences – from use of technology in education. For convenient retrieval of research on the area, see *No Significant Difference*, DETA, <https://detaresearch.org/research-support/no-significant-difference/> [https://perma.cc/K4L9-EGFN] (last visited Feb. 24, 2024).

<sup>302</sup> For the text of Standard 306, see *ABA Standards and Rules of Procedure 2023–2024*, *supra* note 180, at 22.

<sup>303</sup> Standard 303 presently sets requirements for content of the curriculum but not for documentation of the school's curricular decision-making. *Id.* at 18–20. Standard 310 requires "written policies and procedures for determining the credit hours that it awards for coursework," and sets parameters for how this is to be determined that comply with Department of Education requirement, but curiously does not require any other type of documentation of course design. *Id.* at 24.

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(c) A law school shall keep complete documentation of its courses and curriculum, including at least, for each course:

- (1) Course description, including major topics and unit allocation;
- (2) Knowledge and skill outcomes expected to be achieved by anyone successfully completing the course; also known as “course learning outcomes”;
- (3) A teaching plan for each course, showing how the course assignments, such as but not limited to readings, lectures, writing, practical experiences, projects, and classroom discussion, provide students with the knowledge and skills required to achieve the outcomes defined for the course;
- (4) An assessment plan for each course, showing how achievement of the defined outcomes is measured by the assessments included within the course;
- (5) A record of how data on student achievement of course learning objectives has been used in evaluating the course and making improvements; and
- (6) A record of the result of improvements made by the process described in Standard 315.

It is significant to note that while Standards 303 and 310 do not presently explicitly require any specific course documentation—as some accrediting standards do<sup>304</sup>—implementing the present outcomes and assessment standards will, practically speaking, require schools to do just that. So this will not, in fact, greatly increase the burdens on schools beyond those already imposed by the new standards.<sup>305</sup> It will, helpfully, describe the kinds of documentation that will meet

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<sup>304</sup> See e.g., *Part Three Accreditation Standards*, DISTANCE EDUC. ACCREDITING COMM’N, 93 <https://www.deac.org/UploadedDocuments/Handbook/Accreditation-Handbook-Part-Three.pdf> [<https://perma.cc/RRV3-T8LV>] (last visited Feb. 23, 2024) (“Documenting Credit Hours”).

<sup>305</sup> This is not without precedent. Standards of the WASC Senior College and University Commission require that any accredited institution:

periodically engages its multiple constituencies, including the governing board, faculty, staff, and others, in institutional reflection and planning processes that are based on the examination of data and evidence. These processes assess the institution’s strategic position, articulate priorities, examine the alignment of its purposes, core functions, and resources, and define the future direction of the institution.

Standard 4: Creating an Organization Committed to Quality Assurance, Institutional Learning, and Improvement, Criteria for Review (CFR) 4.8. *2023 Handbook of Accreditation, Standards of Accreditation*, WASC SENIOR COLL. UNIV. COMM’N, <https://www.wscuc.org/handbook2023/#standards-of-accreditation> [<https://perma.cc/U4BY-R6M5>] (last visited Feb. 23, 2023). Distance Education Accrediting Commission (DEAC) Accrediting Commission Standard XII requires a written plan that identifies trends, optimizes opportunities, maintains quality, and enables the institution to provide for the financial stability, long term quality, and growth of the institution. *Accreditation Handbook Policies, Procedures, Standards and Guides of the Distance Education Accreditation Commission*, *supra* note 295, at 87.

the outcomes standards and should cause schools to implement thoughtful learning designs in courses and programs that deliver higher-quality legal education. This is a classic example of how policy implemented in regulations drives adoption of practices that will lead to innovation.

The last step is what regulations are needed to *cause* true innovation to happen. Standard 315 requires “ongoing evaluation of the law school’s program of legal education, learning outcomes, and assessment methods,” and the use of this evaluation to “make appropriate changes to improve the curriculum.”<sup>306</sup> This one reference, if interpreted entrepreneurially, could be sufficient, but probably does not go far enough in requiring significant, evidence-based improvement. A standard that compels schools forward could be written negatively—prohibiting practices known to be ineffective, outdated, expensive, and unlikely to survive in a new era—or it could be written positively, either encouraging replacement practices or even just continual review and advancement based on evidence. To be most effective, however, it should be “global,” effecting every decision made about curriculum, staffing, allocation of resources, policies, and other aspects of the operation and administration of the law school, and it should impose its burdens and accountability on all the important decision-makers: dean, faculty, and governing board or body.

Former Standard 203, removed in the 2014 revisions, provides a basis for this proposed new standard. It read:

Standard 203. STRATEGIC PLANNING AND ASSESSMENT

In addition to the self-study described in Standard 202, a law school shall demonstrate that it regularly identifies specific goals for improving the law school’s program, identifies means to achieve the established goals, assesses its success in realizing the established goals and periodically re-examines and appropriately revises its established goals.<sup>307</sup>

Standard 203 now concerns the Dean, so new numbering is needed.<sup>308</sup> But Chapter Two, with its focus on global organization and operation, is still where it belongs. So, call the new Standard number 208 and place it in that same chapter. It ought to read something like:

Standard 208. STRATEGIC PLANNING, INSTITUTIONAL REVIEW, AND CONTINUOUS IMPROVEMENT. The law school shall be organized, operated, and administered to achieve the objectives of a written strategic plan prepared by the Dean and Faculty and approved by the institution’s

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<sup>306</sup> *ABA Standards and Rules of Procedure 2023–2024*, *supra* note 180, at 26–27.

<sup>307</sup> For the former Standard 203, see *ABA Standards and Rules of Procedure for Approval of Law Schools* 2013–2014, A.B.A., 12 [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2013\\_2014\\_final\\_aba\\_standards\\_and\\_rules\\_of\\_procedure\\_for\\_approval\\_of\\_law\\_schools\\_body.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_final_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_body.pdf) [<https://perma.cc/D5YM-3AXP>] (last visited Apr. 5, 2024).

<sup>308</sup> *ABA Standards and Rules of Procedure 2023–2024*, *supra* note 180, at 12–13.

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- governing body in accordance with Standard 201. The strategic plan shall:
- a) set specific and measurable goals for the law school's curriculum and programs that include improving its delivery of a sound legal education in ways that are supported by evidence of student attainment of the learning outcomes defined by the institution;
  - b) identify and apply the means to be used to achieve the established goals, and provide adequate resources to its efforts to achieve them;
  - c) assess the institution's success in realizing the established goals; and
  - d) demonstrate the institution's ongoing continuous progress and improvement with respect to those goals.

The institution's strategic plan should be revised at least bi-annually to update progress toward its identified goals, ensure consistent application of resources, and periodically re-examine and appropriately revise established goals.

Returning to a requirement for strategic planning, and expanding it to include implementing continuous improvement, would foster innovation and protect schools in the long run. The marketplace of law schools will eventually weed out entrants unwilling or unable to adopt best practices and employ learning science to improve student outcomes, but the ensuing chaos and disorder will be bad for all law schools. Mergers, closures, and defaults disrupt any industry, but are particularly troubling in education because the impacts are felt by students for their entire lives and careers. Accreditors and regulators ought to be focused *now* on forcing schools to evolve thoughtfully and responsibly, both to prepare them for the next disruption, and to equip them for success in the long run, not just educationally, but economically and technologically.

### ***D. Time and Tide Wait for No Law School***

Adoption of new standards can take years. Schools need not wait to get started toward the vision of the future they define for themselves. The best evidence-based practices are becoming known, and schools should lean into them now.

In *Distance Learning in Legal Education: Design, Delivery and Recommended Practice*<sup>309</sup>—the publication of the Working Group for Distance Learning in Legal Education sharing collected practices and tools, and issues and their solutions—the Working Group notes that: “Legal education has been slower to adopt distance approaches than many other fields . . . The distance learning tide is coming in for law as well, and when an aquatic experience is inevitable it is best to start the

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<sup>309</sup> See generally WORKING GROUP ON DISTANCE LEARNING IN LEGAL EDUCATION, *supra* note 111, at 10.

swimming lessons earlier rather than later.”<sup>310</sup>

The tide has been coming in for some time now; Concord Law School began teaching its first cohort of fully online law school students in the fall of 1998.<sup>311</sup> In his prescient 2009 book, *Law School 2.0: Legal Education for a Digital Age*,<sup>312</sup> Professor David Thomson of the University of Denver Sturm College of Law argues:

Technology is an unstoppable force. Many developments are coming together at the same time – our changing students, maturing technological tools for education, the various studies that have pushed hard for reforms in legal education. . . . Technology facilitates the changes discussed in this book, because it can help to create relevant, interactive, active learning experiences in and out of the classroom. Technology lubricates the changes discussed in this book because it can loosen some of the economic barriers to change, such as leveraging economies of scale, enabling more online learning, and helping to maximize our most precious resource: our faculties.<sup>313</sup>

Schools that can develop a culture that is open and supportive of innovation, with appropriate incentives for faculty, staff, and other stakeholders to innovate, will have a great head start, but these are some of the hardest things. The law schools of 2050 will have all these and more sorted out.

They’ll have had leadership—including especially faculty-governance leadership—that saw the future and could enliven the community toward a common vision and plan to get from where they were to where they needed to be. This leadership will have devoted the institution’s rewards and resources in the directions that matter for achieving hard things: culture, incentives, and governance necessary to creating a law school that is an innovation engine. We’ve already seen this, in the schools historically and more recently adopting and building significant distance education programs.

They’ll also be the schools that pushed the regulatory boundaries—within reason and common sense—and provided the regulators with evidence-based reasoning for the variances and regulatory changes needed to achieve what they wanted to do. Again, this is already happening.

Perhaps most of all, they’ll have faculty incentivized to research, innovate, and apply learning science to legal education pedagogy, to make law school better for students of all kinds. Their model will focus on providing education to those who need significant creative support as well as those who could probably succeed on their own.

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<sup>310</sup> *Id.* at 9.

<sup>311</sup> David Ching, *Purdue Global’s Concord Law School Celebrates 25 Years of Audacity*, PURDUE UNIV. (Mar. 30, 2023), <https://stories.purdue.edu/purdue-globals-concord-law-school-celebrates-25-years-of-audacity/> [<https://perma.cc/LFR4-H8AN>].

<sup>312</sup> DAVID I. C. THOMPSON, *LAW SCHOOL 2.0: LEGAL EDUCATION FOR A DIGITAL AGE* (LexisNexis Matthew Bender, 2009).

<sup>313</sup> *Id.* at 143–44. Professor Thomson is the first John C. Dwan Professor in Online Learning. To the authors’ knowledge, this is still the first chair in American legal education devoted to technological innovation in legal education.

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The law schools of 2050 will undoubtedly look as different from today's law schools as the law schools of 2023 look from the law schools of 1992. Innovation will undoubtedly be the reason—if culture, leadership, incentives, and regulation align toward that future.

