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Keep Distance Education for Law Schools: Online Education, the Pandemic, and Access to Justice

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Keep Distance Education for Law Schools: Online Education, the Pandemic, and Access to Justice

Lael Weinberger*

While distance education made inroads throughout higher education, law schools kept their distance—until a global pandemic forced them all online for a time. For the first time, the gatekeepers to the profession at the American Bar Association (ABA) and state bars temporarily dropped their limits on distance learning. Now as American law schools prepare to return to normalcy, should distance learning remain an option? This essay argues it should, because it has potential to improve access to justice, in that distance education can reduce the costs of law school, increasing the supply of lawyers who can afford to provide less expensive legal services. Now is the time for legal regulators to make permanent what they allowed temporarily during the pandemic: distance-education-friendly accreditation and bar admission standards.

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INTRODUCTION

Distance education for law schools has been waiting just offstage for thirty years now. In the 1990s, the internet facilitated a new era of distance education across much of higher education. Commentators began to predict that it was only a matter of time before it would make significant inroads in legal education. Years passed and it never happened. Then in one tumultuous month, all legal education went online. That, of course, was March 2020, when the global COVID-19 pandemic prompted worldwide shutdowns of business, travel, cultural activities, and schools.

A year later, the United States is transitioning back to business as usual. But what about law schools? This paper argues that distance learning ought to be here to stay—not as the default, to be sure, but as an option to a much greater extent than it was pre-pandemic. It is worth keeping distance learning because it provides flexibility from which innovative educators and students alike can benefit. That, in turn, has the potential to matter for access to justice. Distance education could lower some of the costs associated with legal education, facilitating the entry of individuals into the profession who might be interested in working in areas that are relatively less remunerative. End result: more people who need lawyers have a chance of finding lawyers they can afford. Distance education is no silver bullet for access to justice. But it could make a difference. Law schools should have the chance to explore this if they want to.

However, that distance education stays a live option is far from certain because regulators need to agree. The gatekeepers of the profession—the bar associations—have disfavored distance education. It’s time now for a fresh look at the possibilities. It’s time the gatekeepers take off the restraints that can no longer be justified as protecting the public.

I. THE DEFERRED PROMISE OF DISTANCE EDUCATION IN LAW

Distance education has been waiting in the wings, on the verge of transforming legal education, for a long time. But it has never made good on its promise—never, that is, until a global pandemic forced the entirety of higher education into crisis mode. This section sketches the recent history of American law schools’ relationship to distance learning.

A. *The Promise of Distance Learning*

In the late 1990s, the internet began to transform distance education. Gone were the days of relying primarily on physical packets of mailed materials. The time lags dropped, and gradually the amount of synchronous distance education grew.

By the end of the 1990s, observers were saying that distance education had gone far toward shedding the bad reputation it had long held as second-rate. Technology in the hands of innovative educators had made it possible for students to get genuine engagement and real-time interaction without ever setting foot on campus.

Law schools, though, were the holdouts. In keeping with the oft-repeated truism that the legal profession clings to tradition and precedent and is resistant to change, law schools displayed no eagerness to join the latest fad in higher education technology. “The reluctance stem[med], at least in part, from concerns about maintaining rigorous standards, interschool cooperation, methods of payment, and so on.”¹ Tinkering around the edges of Socratic methodology was about the limit of educational innovation for law schools.

For the people in law schools paying attention to the distance education revolution, it seemed likely that distance education would sooner or later make inroads.² It was just a matter of time before the slow-moving legal profession would follow the crowd. “Distance education is therefore clearly looming in the immediate future of the legal education establishment and has the potential to revolutionize legal education.”³ A handful of “experimental” courses appeared in law school catalogs. By most accounts, they went well.⁴ It seemed that it would be just a matter of time before the law schools started to adopt some distance education components. But the revolution proved elusive.

A few schools started offering distance education courses, but the regulators did not make it easy. The ABA required in-class hours of study for accreditation. Distance education didn’t count. In 2002, the ABA promulgated Standard 306 to specifically address distance education. Under that standard, no distance education could be taken in the first year

1. Arturo López Torrés & W. Clinton Sterling, *Will Law Schools Go the Distance? An Annotated Bibliography on Distance Education in Law*, 91 L. LIBR. J. 655, 656 (1999).

2. For an early example, see Ronald W. Staudt, *Does the Grandmother Come with It?: Teaching and Practicing Law in the 21st Century*, 44 CASE W. RES. L. REV. 499, 506 (1994) (“New technology and communications will permit the class to continue beyond its time and place constraints.”).

3. Torrés & Sterling, *supra* note 1, at 656.

4. See, e.g., Ronald J. Colombo, *Teaching a Synchronous Online Business Organizations Course to J.D. Students: A Case Study*, 48 HOFSTRA L. REV. 873, 882–83 (2020) (describing the general success of the first distance learning course offered at an American law school in 1996).

of law school. (The standard would later be amended to allow up to ten credits in “the required 1L curriculum.”)⁵ After the first year, no more than four credit hours of distance education could be taken in any semester. Total distance education was capped at twelve total credits.

Some schools offered courses within these limits—an ABA curriculum study found that twenty percent of responding schools offered synchronous distance education, and ten percent offered asynchronous distance education.⁶

Meanwhile, in the 1990s, a handful of schools in California without ABA accreditation had begun offering primarily or exclusively distance education curriculum.⁷ But graduates of schools without ABA accreditation were not able to take the bar exam in most states.⁸ (California was the outlier in its willingness to allow graduates of unaccredited schools to take the exam.) I had my first legal education from an unaccredited California law school, from which I took classes while I was still an undergraduate.⁹ That allowed me to take the California bar exam when I was twenty-two years old. But it was only later, after graduating from a traditional brick-and-mortar, ABA-accredited law school, that I would have the option of practicing law in

5. *ABA Accreditor for Law Schools Recommends Expanding Distance Learning Opportunities*, ABA (Feb. 12, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2018/02/aba_accreditor_for/ [<https://perma.cc/N97Q-K39E>]; Nathan Allen, *Future of the J.D.: More Online?*, TIPPING THE SCALES (Feb. 13, 2018), <https://tippingthescales.com/2018/02/increased-online-learning-way-j-d/> [<https://perma.cc/9C5P-Q7K7>] (citing Memorandum from Pamela Lysaght, Chair Standards Rev. Comm., to Dean Maureen O'Rourke, Chair, Council of the Section of Legal Educ. and Admissions to the Bar (Jan. 22, 2018) https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/February2018CouncilOpenSessionMaterials/CI_src_memo_re_standard_306.pdf).

6. William R. Rakes, *From the Chairperson: Distance Education*, SYLLABUS, Winter 2007, at 2, 2.

7. *E.g.*, Oak Brook College of Law (1994), Concord Law School (1998). For the current list of schools in California offering distance education curricula, see *Unaccredited Law Schools in California*, CAL. STATE BAR, <http://www.calbar.ca.gov/Admissions/Law-School-Regulation/Law-Schools#unaccredited> [<https://perma.cc/4W6Y-ZNDB>] (last visited June 29, 2021) and law schools in California accredited by the State Bar's Committee of Bar Examiners, Cal. State Bar, <https://www.calbar.ca.gov/Admissions/Law-School-Regulation/Law-Schools#cals> [<https://perma.cc/W7ZA-LZZT>] (last visited Oct. 12, 2021).

8. Gabriel Kuris, *Pros, Cons of Attending an Unaccredited Law School*, US NEWS & WORLD REP. (Dec. 7, 2020), <https://www.usnews.com/education/blogs/law-admissions-lowdown/articles/pros-cons-of-attending-an-unaccredited-law-school> [<https://perma.cc/Y83M-B2BA>] (discussing the pitfalls of attending an unaccredited law school where graduates cannot sit for the bar in most states or practice out of state).

9. One of the quirks of how the California bar regulates its unaccredited law schools is that it permits students to take law school classes before having completed an undergraduate degree, as long as the student has met the minimum number of college credit hours. *See* CAL. BUS. & PROF. CODE § 6060(c) (West 2021) (laying out the requirements for beginning the study of law in California).

my home state of Illinois.

For most ABA schools, the appeal of distance learning was quite limited, particularly when kept within the confines of Standard 306. By capping the amount of distance education available in any semester, students had little of the flexibility that drove the rise of distance education in many other fields. Gone was the possibility that someone could work on their degree while (for instance) living in a different physical location from their school.

B. *Delayed*

ABA Standard 306 ensured that the promise of distance education never proceeded further than the one-off course in the law school curriculum. Arguments in its favor would still appear from time to time. In 2007, the chair of the ABA's legal education section suggested the future of distance education was bright: "Is there any reason not to believe that distance education in law will grow and become more and more accepted as technology becomes better and more reasonable in cost?"¹⁰ He even suggested that the ABA would likely change its accreditation standards to "permit more and different types of distance learning."¹¹ "We may see, over time, significant changes that would permit a law school to be accredited by the ABA that offers most of its courses by modes of distance education with only a portion of the offerings through traditional face-to-face instruction."¹² After the implosion of the legal job market in the aftermath of the 2008–09 crash, some law professors argued that more distance education could be helpful.¹³

But the pace of change was still glacial. In 2014, Mitchell Hamline School of Law in St. Paul, Minnesota, applied for and received the first variance from the ABA's Standard 306.¹⁴ This allowed Mitchell Hamline to create a pioneering part-time J.D. program that fully blended in-person and online learning, with the ability to be enrolled exclusively online after

10. Rakes, *supra* note 6, at 3.

11. *Id.*

12. *Id.*

13. See, e.g., Steven C. Bennett, *Distance Learning in Law*, 38 SETON HALL LEGIS. J. 1, 4–6 (2014) (explaining how online legal education could be especially useful in the wake of an economic recession).

14. Christopher P. Chapman, *The Audacity to Innovate: Pioneering an Online J.D. Program*, INSIDE HIGHER ED (June 13, 2018), <https://www.insidehighered.com/digital-learning/views/2018/06/13/importance-online-innovation-legal-education-opinion> [<https://perma.cc/647N-NL8P>]; Doug Lederman, *The Uncertain Landscape for Online Legal Education*, INSIDE HIGHER ED (Jan. 24, 2018), <https://www.insidehighered.com/digital-learning/article/2018/01/24/recent-developments-legal-education-show-both-movement-and> [<https://perma.cc/LR9R-ZDCX>] (describing the impact on legal education after the ABA gave the nonprofit school Mitchell Hamline permission to create a hybrid part-time J.D. program in late 2013).

the first four semesters of the program.¹⁵ (The cost remained the same as the part-time, fully on-campus program.)¹⁶ The program was well received. “AccessLex Institute funded an interim evaluation of that program, and results demonstrated that students in the hybrid program were achieving learning outcomes comparable to residential students.”¹⁷ From 2017 to 2018, the ABA approved variances for three more schools: Southwestern, Syracuse, and Dayton.¹⁸

In 2018, the ABA loosened its rules on online legal education: “Law programs can now deliver 30 credit hours of a 90-credit program online, up from the previous maximum of 15.”¹⁹ One ABA committee member commented that thirty credit hours is “a good number, partly because a lot of people argue that a third of law school education is a waste anyway”²⁰—a rather tepid endorsement of distance education!

It was modest progress, but progress to be sure. With a little creativity, a school had the space to design some fairly flexible forms of hybrid learning²¹—not that anything really took off before the world of legal education was rocked by a pandemic.

C. COVID-19 and the Instant Rise of Distance Education

We all know what happened next: in the spring of 2020, a global pandemic led to shutdowns of just about everything, law schools included. Instantly, law schools everywhere switched to distance education.²² School year 2020 finished online. Over the summer,

15. *J.D. Enrollment Options*, MITCHELL HAMLINE SCH. OF L. <https://mitchellhamline.edu/academics/j-d-enrollment-options/> [https://perma.cc/9VKW-PYDJ] (last visited May 17, 2021).

16. *Id.*

17. Chapman, *supra* note 14.

18. *Applications for Variances*, ABA, https://www.americanbar.org/groups/legal_education/public-notice/applications-for-variances/ [https://perma.cc/G6Z6-TPSD] (last visited June 15, 2021). Southwestern’s variance was granted in November 2017, followed by Syracuse and Dayton in 2018. *Id.* The University of New Hampshire School of Law received a variance in 2019. *Id.*

19. Mark Lieberman, *States Limit Spread of Online Legal Education*, INSIDE HIGHER ED (Jan. 23, 2019), <https://www.insidehighered.com/digital-learning/article/2019/01/23/new-york-maintains-restrictions-around-online-programs-amid> [https://perma.cc/KS84-9DSD].

20. Stephanie Francis Ward, *Distance Learning Standards Under Consideration by ABA Legal Ed Section*, ABA J. (July 17, 2017, 7:00 AM), https://www.abajournal.com/news/article/distance_learning_standards_under_consideration_by_1_egal_ed [https://perma.cc/2VBH-WG6B].

21. *See, e.g.*, Jack Graves, *Standard 306 and Hybrid Legal Education Without Variances*, UNIV. DENV. STURM COLL. LAW, <https://www.law.du.edu/documents/conferences/online/Standard-306-and-Hybrid-Legal-Education-Without-Variances.pdf> [https://perma.cc/VG7T-JN8H] (presenting options for distance education available without an ABA Standard 306 variance).

22. *See, e.g.*, Matthew Krumholtz, *Law Schools Scramble to Educate Students in Fallout from Virus That Sent Students Home*, NYSBA (Mar. 24, 2020), <https://nysba.org/law-schools-scramble-to-educate-students-in-fallout-from-virus-that-sent-students-home/> [https://perma.cc/3YNB-

educators agonized over the fall: should schools stay online? Reopen in person? Switch to some version of hybrid learning?

In July 2020, the ABA granted 199 law school requests for variance from Standard 306.²³ Across the country, law schools sought—needed—the flexibility of staying entirely online, of offering hybrid courses (as did the majority of schools), or of reopening in-person but having to deal with the occasional, temporary switch to online in response to COVID-19 outbreaks on campus.²⁴ In August, the ABA decided that the variance process was pointless and repealed Standard 306.

It's not that the field is entirely unregulated now. Standard 311(e) provides, “A law school may grant up to 10 credit hours required for the J.D. degree for distance education courses during the first one-third of a student's program of legal education.” Interpretation 311-1 in the Standards says that the sixty-four credit hours of “regularly scheduled classroom sessions or direct faculty instruction” can include “[c]redit hours earned through distance education.”

The New York Bar has long had its own regulation on distance education, keeping in effect pre-2018 ABA rules: no distance education in the first year and capping total distance education at fifteen credits (out of ninety).²⁵

But on the whole, law schools are now afloat in a sea of uncertainty. As society reopens and life goes back to normal (or something like it), does distance education have a future? Was the pandemic-induced turn to distance education a digression, or does it represent an enduring option in legal education, maybe even a change of course?

The pandemic made distance education unavoidable. It put its limitations on display for everyone to see. But it also demonstrated its potential. All American law students learned via distance education for several months at the least. Some learned via distance education for more than a full academic year. They did so amidst the stressful conditions of a global pandemic, economic disruption, political crises, and more. The faculty made the transition to distance education without any time to prepare for the change (in the spring of 2020 in any case). No one would claim that the conditions were anywhere near optimal. But neither does

K8K5] (discussing how law schools shifted to remote learning when the COVID-19 pandemic led to shutdowns in March 2020).

23. See, e.g., *Applications for Variances*, *supra* note 18 (listing the past variances granted by the ABA by year).

24. Cf. *Council Moves to Expand Flexibility for Fall Academic Year*, ABA (June 1, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/06/council-moves-to-expand-flexibility/> [https://perma.cc/ZZ5P-BEHB] (discussing a proposed rule change to allow law schools increased flexibility in deciding how to offer legal education during the fall 2020 semester).

25. N.Y. COMP. CODES R. & REGS. tit. 22, § 520.3(c)(6) (2021).

anyone (to my knowledge) suggest that the education these law students received fell below the minimum standards required for their legal education. (If they do, then a lot of law students will be entitled to some hefty refunds.) To the contrary—the law students in school between spring of 2020 and spring of 2021 overcame some very challenging circumstances. They learned what they needed to learn via distance education.

In short, American law schools have proven that distance education can meet (at least) the minimum standards for legal education.

II. DISTANCE EDUCATION AND ACCESS TO JUSTICE: WHY DISTANCE EDUCATION SHOULD REMAIN AN OPTION BEYOND THE PANDEMIC

Now that distance education has made its appearance in legal education, it's worth revisiting the reasons for allowing law schools to offer distance education. I'll assume that in-person instruction is the best form of education, all other things being equal. But the argument here is that, even with that assumption, distance education deserves to be on the table. Because all other things are not equal. In fact, there is a serious access to justice problem in this country. While the details of the problem are endlessly debated, the broad contours are well known to legal scholars and attorneys. My claim here is that distance education—if given the chance—could play a role in alleviating some of the access-to-justice problems. To be clear, I'm not claiming it's a cure. My claim is a modest one: that distance education can help. I separate the arguments as to *how* distance education helps into three points. For each, the logic is simple.

First, demand outstrips supply of legal services in America today. Lots of Americans have legal needs. But a great many of them can't afford legal services. Lowering the cost of legal education could increase the supply of lawyers and help meet the demand.

Second, legal services are expensive not just because the supply of lawyers is low, but because the cost of legal education makes it impossible to make a profit offering legal services unless the cost is relatively high. If the product is legal service, the cost of production includes legal education. Distance education could reduce the cost of providing legal services by lowering the cost of production.

Third, even assuming a constant supply of legal education, cost reduction could help facilitate choices by lawyers to devote their practices to lower-paying, underserved clientele. Empirical data suggests that the cost of legal education has tended to encourage law school graduates to pursue highly paid jobs and to discourage them from pursuing less-well-remunerated jobs serving lower-income clientele. Exactly how significant a role the cost of law school plays in all of this is the subject of considerable debate in the empirical literature. But it is hard to doubt

that the cost of law school affects decision-making at some level.

A. *Demand for Legal Services Outstrips Supply*

The most familiar point here is that the demand for legal services considerably outstrips the supply.²⁶ There's good reason to think that most Americans can't get legal counsel or representation as often as they'd benefit from having it. American society has a lot of law, with ramifications all over society.²⁷

We expect large corporations to seek legal counsel about all sorts of transactions. But regular Americans don't and can't. To some extent it's a matter of scale; it's not cost-justified to seek legal counsel every time I spend \$200 to rent a U-Haul truck for a local move, or even spend \$20,000 to buy a car. The calculation is different for a large corporation that wants a lawyer to negotiate or review the terms when it's going to spend millions of dollars to rent or buy a fleet of vehicles for delivery operations.²⁸ But it's also the case that regular people regularly encounter transactions where the legal implications for their lives, and those of their families, can be significant: buying a house, divorcing, allocating child custody, and estate planning, not to mention criminal law issues where defendants are formally guaranteed counsel but, in practice, often have to rely on woefully overburdened public defenders. It would be ideal to be able to consult a lawyer at multiple stages. But for many people, that's not possible. The lawyer only comes in after things are already in a mess, after long waits and much anxiety. For instance, legal aid services often have lengthy backlogs, so that it can take as long as two years for a client to get to talk with a lawyer about a divorce.²⁹

Meanwhile, the trend is toward greater regulation from government at all levels. America is a legalistic society, and it is only becoming more so. "As law becomes increasingly crucial and complex, access to legal

26. See, e.g., ABA COMM'N ON THE FUTURE OF LEGAL SERVS., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 11 (2016), https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf [<https://perma.cc/BVN2-YZL5>] (discussing efforts to provide greater legal services to individuals who need it most but cannot afford them).

27. See Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 446 (2016) (discussing how the law governs our professional and personal relationships, leading to many civil suits).

28. Doubtless, Amazon had lawyers help negotiate deals or review contracts when it went on its delivery-van-buying binge. See generally, Sebastian Blanco, *Amazon Buying So Many Commercial Vans, It's a Boom for Mercedes, FCA, and Ford*, CAR AND DRIVER (Dec. 20, 2019), <https://www.caranddriver.com/news/a30295937/amazon-commercial-vans-ford-mercedes-fca/> [<https://perma.cc/S2BU-E6GD>] (discussing Amazon's recent decision to purchase 100,000 new electric delivery vehicles).

29. See DEBORAH L. RHODE, ACCESS TO JUSTICE 13 (2004) (discussing the lack of legal aid resources available).

services also becomes increasingly critical.”³⁰

It’s not a problem that can be solved by increasing the budgets of some legal aid organizations. “The problem we face in the American legal system is not a problem of how to increase pro bono or legal aid (although we should do that too), which are ultimately mere drops in the bucket on the order of a few percentage points of total legal effort and resources.”³¹ The problem goes to a more fundamental level; the supply of lawyers who work with individuals generally just isn’t enough.

B. Many Americans Are Priced Out of the Market for Legal Services

Lower-income Americans are most likely to have trouble accessing legal services, for the obvious reason that they can’t afford to pay for it. On the whole, the American legal profession auctions its talent to the highest bidder. That means large corporations have lots of legal counsel (and by many—admittedly controversial—metrics, high quality counsel at that). The challenge of finding affordable counsel gets harder as one goes down the income distribution. Yet there are challenges to finding good legal counsel long before one gets to the poverty line. As one report explained: “[L]ack of basic civil legal assistance is not limited to the poor. Numerous studies show that the majority of moderate-income individuals do not receive the legal help they need.”³² One study suggested that 100 million Americans have civil access-to-justice issues.³³

The details of how to assess and precisely quantify the need is one of the longstanding debates in the literature on the legal profession.³⁴ But it isn’t hard to understand the conundrum. Legal services cost money, and there are plenty of people who are hesitant to pay for advice on confronting contingencies that may never arise.

Part of the reason for the uneven distribution of the supply is simply that law school graduates—like many others—want to maximize their earnings. Perhaps more troubling, though, is that some law school graduates feel they cannot afford to do less remunerative work that they

30. *Id.* at 8.

31. Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 156 (2010).

32. ABA COMM’N ON THE FUTURE OF LEGAL SERVS., *supra* note 26, at 12.

33. See Sandefur, *supra* note 27, at 445–46 (discussing a 2013 study from a mid-sized city in the Midwest in which two-thirds of adults experienced some form of a civil justice situation, many of which the ABA describes as “basic human needs”).

34. On the state of the literature, see, e.g., Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOCIOLOGY 339, 340 (2008), reviewing the sociological study of access to civil justice, empirical studies focused on the experiences individuals have with civil justice events, organizations, and institutions. See also Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101, 102 (calling for a new expansive research agenda building on prior decades of sociolegal research to expand access to justice).

might have found more fulfilling.

Law school debt is the particular problem that I want to focus on here. The cost of law school has been rising dramatically for years.³⁵ Debt has long been a major concern. A number of early studies found it to be a primary concern, a finding that was then critiqued as reductionist (debt is not the sole or necessarily the primary determinant over other issues in shaping career decisions).³⁶ But debt doesn't need to be the sole or even the predominant factor for my point to still hold: high debt burdens make it more likely that law school graduates gravitate toward the highest-paying jobs. Meanwhile, the salary disparity between the best private practice jobs and public interest employment has grown ever wider for years. In a survey of judges, a large fraction of the judges recommended reducing salary differentials across the profession.³⁷

A significant part of the supply component is that someone who has taken on six figures of debt to earn a law degree does not want to take a job that pays (often) less than a six-figure annual salary. A recent study found that a majority (fifty-six percent) of law graduates had more than \$100,000 of debt.³⁸

Empirical data suggests that debt aversion plays a role in shaping law students' job selection. According to a 2002 study, "[E]ducational debt prevents many graduates from choosing careers in which they are interested but that provide lower salaries—results that have a broad impact beyond individual student career tracks or new recruiting trends."³⁹ Interestingly, one study suggests that debt plays an outsized

35. See Michael A. Olivas, *Paying for a Law Degree: Trends in Student Borrowing and the Ability to Repay Debt*, 49 J. LEGAL EDUC. 333, 333 (1999) (noting that law school tuition increased by a factor of seven between 1975 and 1997).

36. See Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. REV. 829, 830, 891 (1995) (arguing for the importance of "such other factors as income in different sectors of the legal profession, race, performance in law school, and career plans prior to and during law school" as eclipsing the significance of law school debt affecting job choice).

37. Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 347 (2011).

38. SANDY BAUM & PATRICIA STEELE, GRADUATE AND PROFESSIONAL SCHOOL DEBT: HOW MUCH STUDENTS BORROW 7–8 (AccessLex Inst. & Urban Inst. 2018), <http://www.urban.org/sites/default/files/publication/95626/graduate-and-professional-school-debt.pdf> [<https://perma.cc/95P4-EBUJ>]; see also *id.* at 12 (citing AARON TAYLOR ET AL., DIVERSITY WITHIN DIVERSITY: THE VARIED EXPERIENCES OF ASIAN AND ASIAN AMERICAN LAW STUDENTS 11 (2017), <http://ssse.indiana.edu/wp-content/uploads/2015/12/Diversity-within-Diversity.pdf> (showing how debt burdens vary amongst subgroups within different racial affiliations)).

39. EQUAL JUST. WORKS, NALP, & P'SHIP FOR PUB. SERV., FROM PAPER CHASE TO MONEY CHASE: LAW SCHOOL DEBT DIVERTS ROAD TO PUBLIC SERVICE 9 (2002), <https://ourpublicservice.org/wp-content/uploads/2002/11/d78f7d25982f43c5eeb5a0c8bfa107b-1414079178.pdf> [<https://perma.cc/4LC4-B9B7>].

role in shaping career choices, beyond what is economically rational. This study found that law students were more likely to make choices favoring public interest careers when they had scholarships that covered tuition than when they had loans that would be forgiven in exchange for terms of public interest work.⁴⁰ The difference may not be economically rational—scholarship and forgiveness both come out at the same place—but it suggests the impact that debt aversion has on career choices.

Some have argued that the concern about the cost of legal education is misguided when analyzing access-to-justice issues. According to this line of argument, the problem is not so much that people are deterred from going into public interest law as that there aren't enough public interest or public service positions to meet the needs. As it is, getting a full-time position in public interest law is quite competitive despite the relatively low pay.⁴¹

Where the sole concern is increasing the supply of public interest and public aid lawyers, this critique is a powerful one. But that is not the main concern of my argument. Public interest and public aid lawyering is just a starting point—providing a service for people with the least resources, but far from enough to really meet the broad access-to-justice needs.⁴² To provide meaningful access to justice, one also needs lawyers in regular private practice who are willing and able to practice in areas that might not be the most lucrative. Imagine two hypothetical lawyers:

Michael has a background in counseling and would be happy to work in family law, which he would find very fulfilling. But given the choice between personally fulfilling family law and a practice serving small businesses, his financial risk aversion might push him toward the less rewarding, but more secure, practice serving businesses.

Elizabeth has a background in accounting and is interested in a practice involving financial planning and tax. She has a choice between joining a practice that serves modest-sized businesses or a practice serving clients with elder law issues, including wills and estate planning. The business clients pay a bit better, but she finds the interpersonal interaction with

40. See Erica Field, *Educational Debt Burden and Career Choice: Evidence from a Financial Aid Experiment at NYU Law School*, 1 AM. ECON. J.: APPLIED ECON. 1, 2 (2009) (describing two financial aid packages given to students in the study and how the packages affected their career choices).

41. See Christa McGill, *Educational Debt and Law Student Failure to Enter Public Service Careers: Bringing Empirical Data to Bear*, 31 LAW & SOC. INQUIRY 677, 677, 704 (2006) (concluding that educational debt is not the primary limiting factor preventing law students from obtaining public interest jobs).

42. See Hadfield, *supra* note 31, at 156 (arguing for structural reform in order to address the problem of access to justice); see also Fern A. Fisher, *Why Judges Support Civil Legal Aid*, DÆDALUS, Winter 2019, at 171, 172 (discussing how many courts are trying to simplify legal forms and processes for individuals without a lawyer).

elderly clients particularly fulfilling.

In either of these cases, one might imagine that debt burdens could push the lawyer to pick a career path that maximizes financial security rather than personal fulfillment. But pursuing personal fulfillment might in turn have led these lawyers to work in areas with greater needs for legal services. And it's worth noting that these are not practice areas where the lawyer would have to compete to get one of the handful of full-time, paid positions working as a legal aid-lawyer. Instead, the search for financial security and the pressure of debt could tip the balance in choosing between two different paths in private practice, one of which is more likely to aid (at least at the margin) groups that are underserved, the other less likely to do so.

The pressure on lawyers like Michael or Elizabeth is exacerbated because the practice areas they *might have* pursued don't bring them any of the breaks of pure public interest practice. Law school graduates who take traditional public interest jobs usually qualify for loan forgiveness programs. Not so for lawyers who go into private practice in sorely needed but relatively less lucrative fields like family law. These lawyers are left with their debt burdens because they are working for their own profit. It's one more burden that encourages them to maximize their earnings rather than pursue greater fulfillment at somewhat less pay.

C. Distance Education Could Help Lower the Costs, Increasing Supply and Distributing It More Evenly

Distance education could reduce the costs of legal education. That would increase the supply of lawyers and help meet the access-to-justice demand. Exactly *how* distance education lowers costs, and how big a difference distance education makes in accomplishing this end, depends on how far law schools (and regulators) are willing to go with reforms. We'll turn to this issue in Section D.

Reducing the costs of legal education would increase the availability and accessibility of law school while decreasing the debt burdens of graduates. Those graduates then would have less pressure to pursue only the highest-paid jobs, more flexibility to pursue fulfilling but less remunerative positions. With costs reduced, law school is more likely to look like a reasonable investment for more people. The net result will be more supply—a supply of lawyers who are willing and happy to offer legal services at lower costs. Whether this ends up facilitating more lawyers willing to take public interest jobs depends on funding for those jobs, which is another matter. But it can make it more likely that there will be more lawyers in private practice willing to serve populations that pay relatively less. On the whole, this would be a win for access to justice.

It's not as though there are no downsides. An obvious one is that

America already has too many lawyers, according to some critics.⁴³ What that really means, and how to solve the problem if it is one, is beyond the scope of this paper.⁴⁴ The modest point about access to justice is that America has a lot of lawyers because America has a lot of law. (It might have too much law because of too many lawyers, but again, that's a complicated story about causation that is more than we can get into at present.) As long as it has a lot of law, the country needs a lot of lawyers. The problem right now is that it needs more of them who are willing and able to represent people who can't pay top dollar. That's something distance learning for lawyers can help accomplish.

Another downside is that more lawyers willing to take cases for less money puts pressure on the lawyers already serving the lower-price-point clients. One could imagine a number of situations with less-than-optimal outcomes from the perspectives of attorneys: maybe a new wave of low-cost lawyers will drive down prices and put the current generation of lawyers balanced precariously on the brink of financial ruin out of business. Or maybe a new wave of lower-cost lawyers overestimate demand for the services they can offer—perhaps because the demand for legal services is “lumpy”⁴⁵ and, at some point, people who aren't used to going to a lawyer just won't get a lawyer, even if they could theoretically afford one. These are all plausible concerns. One might suspect the organized bar is likely to be especially sensitive to the possibility that cost-reducing reforms could lead to downstream pressures on practitioners to reduce what they charge. The history of the organized bar is one of economic self-protection.⁴⁶ The organized bar, not to put too

43. See, e.g., Eric Posner, *The Real Problem with Law Schools*, SLATE (Apr. 2, 2013, 2:50 PM), <https://slate.com/news-and-politics/2013/04/the-real-problem-with-law-schools-too-many-lawyers.html> [<https://perma.cc/SZT6-PG45>] (discussing how some legal educators believe the legal market is at a breaking point with too many law graduates).

44. We do have far more lawyers than we can absorb in the existing professional structures, at costs that can be paid by persons who need those services. The unmet need for legal services is very large and growing. Program after program designed to fund legal aid for the poor has been cut or extinguished. Even in a profession that is as crowded as our own, there is always room for the very best, the dedicated and the least selfish. The house of the law is a house of many mansions, with rooms enough to accommodate each person who has the determination, the imagination and the skill to find the key.

Shirley M. Hufstедler, *Is America Over-Lawyered?*, 31 CLEV. ST. L. REV. 371, 382–83 (1982).

45. On lumpiness as an analytical category, see generally LEE ANNE FENNELL, *SLICES AND LUMPS: DIVISION AND AGGREGATION IN LAW AND LIFE* 2–4 (2019).

46. See, e.g., Hugh C. MacGill & R. Kent Newmyer, *Legal Education and Legal Thought, 1790–1920*, in 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 64–65 (Michael Grossberg & Christopher Tomlins eds., 2008) (discussing how increases in state licensing requirements were sought to cut out the “undesirables” from the legal profession and help preserve the “dignity” and “stature” the bar desired); see also WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* 86 (1994) (explaining how prominent nineteenth century lawyers believed increasing formal requirements for bar admission would prevent

fine a point on it, is a form of cartel.⁴⁷ One might reasonably suspect that concern for self-protection will be the first instinct of many bar associations.

But if the goal is access to justice, reducing legal costs is the essence of the project.⁴⁸ Right now there are a lot of people who can't afford legal services. Some can't afford to pay at all. Others would pay *something* for those services but not enough to get a lawyer at going rates. Pro bono services are part of the solution but there is no way it is going to be enough to meet the need. Legal aid is part of the solution, but it is far from enough. Affordable legal services have to be part of the solution. The problem is figuring out how to achieve this.

One idea is to extend the right to counsel. Criminal defendants have a right to counsel, and, in *Gideon v. Wainwright* (1963), the Supreme Court held this requires courts to appoint counsel for indigent defendants.⁴⁹ As everyone who watches police shows on TV knows, if you're taken into police custody and can't afford a lawyer, one will be provided.⁵⁰ Some access-to-justice advocates argue there ought to be an equivalent right to counsel in at least select civil cases that impose great risks to parties' liberty interests (such as, for instance, some family law matters).⁵¹

overcrowding and the easy access to the profession from the lower classes); RICHARD L. ABEL, *AMERICAN LAWYERS* 44 (1989) (stating that concern about the multiplication of lawyers was an important stimulus for professional bar associations in the late nineteenth century); TERENCE C. HALLIDAY, *BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT* 76 (1987) (noting that the organized bar started out as a small, noninclusive body of lawyers who desired exclusivity and rigorous admission procedures).

47. See Richard A. Posner, *Theories of Economic Regulation*, 5 *BELL J. ECON. & MGMT. SCI.* 335, 344 (1974) (stating that when the value of cartelization is greater, the demand for the industry's product is less elastic and new entry into the industry is slower); Frank H. Stephen, James H. Love, & Neil Rickman, *Regulation of the Legal Profession*, in *ENCYCLOPEDIA OF LAW AND ECONOMICS* 648 (2d ed. 2012) (discussing how professions with self-regulation are characterized as potentially having the effect of a cartel "by controlling entry to the market and setting an agreed price above the competitive price").

48. See Deborah L. Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 *GEO. J. LEGAL ETHICS* 989, 1016 (1998) (contending that lower legal costs provide increased access for the elderly, immigrant, low-income, and juvenile clients who have substantial unmet legal needs); Neil M. Gorsuch, *Access to Affordable Justice: A Challenge to the Bench, Bar, and Academy*, *JUDICATURE*, Autumn 2016, at 46, 48 (arguing that reducing the cost or increasing the output of legal services will make access to justice more affordable).

49. See *Gideon v. Wainwright*, 372 U.S. 335, 334–35 (1963). The Sixth Amendment provides that criminal defendants have a right to counsel in federal prosecutions; *Gideon* was also about incorporation of this principle against the states.

50. See *Miranda v. Arizona*, 384 U.S. 436, 472–73 (1966). *Miranda*'s right to counsel is an inference from the Fifth Amendment rather than the Sixth.

51. See, e.g., *ABA Resolution on Civil Right to Counsel*, 15 *TEMP. POL. & C.R. L. REV.* 507, 521–22 (2006) (arguing that there are some interests so fundamental as to require governments to supply attorneys to persons who cannot otherwise obtain counsel); Debra Gardner, *Justice Delayed Is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases*, 37 *UNIV. BALT. L.*

A handful of creative approaches to this problem are already underway. Several states have launched promising programs or modified rules to facilitate nonlawyers providing certain (carefully delimited) legal services that had previously been limited to lawyers. The State of Washington was a pioneer in this, changing its practice rules in 2012 to allow nonlawyers who meet training and certification requirements to provide assistance with filling out forms and providing clients with some basic guidance on navigating the legal system.⁵² More recently, Arizona and Utah launched programs to allow nonlawyer legal “paraprofessionals” to provide basic legal services in carefully delimited areas.⁵³ Legal profession scholars have argued for more initiatives that innovate in the laws regulating the provision of legal services.⁵⁴

Another set of proposals from scholars is to change the adversarial, lawyer-driven approach in particular areas of law.⁵⁵ Maybe American society should have fewer adversarial legal proceedings that most require lawyers. This, of course, would be a major reform and would require

REV. 59, 69–70 (2007) (stating that child custody disputes are among the most basic human needs to which a civil right to counsel should be afforded). For a critique of this view, see Rebecca Aviel, *Why Civil Gideon Won't Fix Family Law*, 122 YALE L.J. 2106, 2114–19 (2013), theorizing that family law matters are better suited for less adversarial and less technical forms of dispute resolution than utilizing attorneys.

52. See, e.g., WASH. STATE CT. RULES: ADMISSION & PRAC. R. 28 (2019) https://www.courts.wa.gov/court_rules/pdf/APR/GA_APR_28_00_00.pdf [<https://perma.cc/LKF7-HZK6>] (describing the legal assistance limited license legal technicians (LLLTs) can provide in Washington); see also Stephen R. Crossland & Paula C. Littlewood, *The Washington State Limited License Legal Technician Program: Enhancing Access to Justice and Ensuring the Integrity of the Legal Profession*, 65 S.C. L. REV. 611, 611–12 (2014) (stating that limited license legal technicians in Washington, operating within stringent licensing requirements, can give legal advice within a defined scope of authority); Jack P. Sahl, *Cracks in the Profession's Monopoly Armor*, 82 FORDHAM L. REV. 2635, 2662 (2014) (“Washington’s LLLT rule promotes competition from . . . nonlawyer technicians . . . who are outside the bar.”).

53. Sara Merken, *Arizona Clears Way for Non-Attorney Law Firm Co-ownership in Bid to Boost Access*, REUTERS LEGAL (Aug. 28, 2020), [https://today.westlaw.com/Document/I7a5f76a0e97a11eaa288d206be067cde/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://today.westlaw.com/Document/I7a5f76a0e97a11eaa288d206be067cde/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0) [<https://perma.cc/L94M-7YRF>] (noting that Arizona’s recent changes allow nonlawyers to provide limited legal services to clients, filling an access-to-justice gap); *To Tackle the Unmet Legal Needs Crisis, Utah Supreme Court Unanimously Endorses a Pilot Program to Assess Changes to the Governance of the Practice of Law*, UTAH COURTS (Aug. 13, 2020), <http://www.utcourts.gov/utc/news/2020/08/13/to-tackle-the-unmet-legal-needs-crisis-utah-supreme-court-unanimously-endorses-a-pilot-program-to-assess-changes-to-the-governance-of-the-practice-of-law/> [<https://perma.cc/HG5D-WY66>] (describing how the Utah Supreme Court’s pilot program to allow nonlawyers to practice in some contexts).

54. See, e.g., Andrew M. Perlman, *Towards the Law of Legal Services*, 37 CARDOZO L. REV. 49, 51–52 (2015) (contending there should be more regulatory innovation authorizing more people to deliver legal assistance without a traditional law license).

55. See, e.g., Aviel, *supra* note 51, at 2013 (arguing that although lawyers are necessary to provide guidance and advice in family law-type cases, attorneys should shift their focus to a swift, collaborative dissolution rather than an adversarial one).

significant changes to areas under consideration—for instance, family law courts.

The suggestion in this article is a more modest one: that distance education should take a place alongside other approaches for reducing costs of legal services.⁵⁶ (This can coexist with any number of other reform proposals.) The assumption is that there are people who would go to law school and pursue a fulfilling career providing affordable legal services, but who are deterred from doing so by the fact that they would have to go deeply into debt. Distance learning could help reduce that cost.

D. How Distance Education Can Reduce Costs

The extent to which distance learning reduces the cost of legal education depends on exactly how it is used and how radical the law school and the regulators wish to be about reform.

1. Simply Offer Courses Online

The simplest version is that the more semesters one could do distance education, the more flexibility students have in selecting their living situations. A law student from Alaska could live at home rather than rent an apartment in a far-away city. If the entire degree could be done via distance education, there would be no need to relocate at all. A law student with an affordable home in a relatively rural area would be spared the expense of moving to a more expensive college town. “[D]istance learning can provide flexibility not available in conventional ‘bricks and mortar’ education. For example, second career students may have substantial family, work, and other commitments that make it difficult to devote three (or more) years to a residential education program.”⁵⁷ Simply by offering a distance education option, schools would allow students to save on the cost of living while in law school, as well as time, effort, and expense from moving.

2. Offer Distance Education Courses at a Discount

A more radical move would be for law schools to offer distance education courses at a discount. It could be more or less substantial depending on how the school makes this work.

Does distance education save the law school any money—savings that could then be passed along to students? Maybe not if one just imagines distance education students taking the places of on-campus students. For various reasons, law schools may decide to keep class sizes identical and

56. See, e.g., Steven C. Bennett, *Distance Learning in Law*, 38 SETON HALL LEGIS. J. 1, 6 (2014) (asserting several ways that distance learning could lower the cost of legal education).

57. *Id.* (discussing the benefits of distance learning to students).

just swap out a certain number of in-person students for distance education students. (For instance, this maintains a law school's selectivity for purpose of the U.S. News rankings that are the bane of every dean's existence.) Maybe there would be one section of the first-year class that is entirely distance education.

Having fewer people physically on campus could lead to some marginal reductions in cost: less wear and tear on the building, for instance. But buildings are sunk costs—so savings will be modest at best, maybe even invisible.

Meanwhile, doing distance education well no longer requires a lot of fancy technological tools. It can be done via the laptop computers that every law student and professor use anyway. The instructor can improve the experience with modest investments in an external camera, microphone, and light. Most already have a supply of these on hand after a year of off-and-on distance education. It has long been thought that there would be substantial entry costs in terms of technology and equipment to do distance education well.⁵⁸ But that should not be a concern anymore.

Suppose, though, that the distance education students allow the school to take in a few more students than it would have done otherwise. Maybe the school makes the distance learning component a part-time program so that students admitted there won't count toward the U.S. News statistics, eliminating one concern that so often shapes admissions decisions. Distance education then allows the school to expand its part-time program. But it can do so without expanding its facilities. Now cost savings for the school could be substantial.

Again, there's a potential downside: one might worry that economies of scale will lead to a decreasing quality of education. There is also a risk of overproduction of lawyers, leading to an across-the-board increase in competition for legal jobs and on-average worse employment outcomes. But the supply-demand problem is a fundamental one for efforts to increase legal services. Again, the goal here is to figure out how to increase supply but at lower cost. There is a need that currently goes unmet because it is priced out of the market. The legal field is roughly analogous to the automotive industry before the Model T.⁵⁹

58. See, e.g., Katie Ash, *Experts Debate Cost Savings of Virtual Ed.*, EDUC. WEEK (Mar. 16, 2009), <https://www.edweek.org/policy-politics/experts-debate-cost-savings-of-virtual-ed/2009/03> [<https://perma.cc/D22J-8R96>] (noting various factors affecting the cost of entry to distance learning). When analyzing the extent of the entry costs for virtual education, factors such as what curriculum is used, whether it is a full- or part-time program, the location, and how many students need to be served, should be considered. *Id.*

59. The Model T was the first mass-produced automobile, bringing the cost of a car within the

3. Distance Education Coupled with Other Changes in Regulations and Accreditation Standards

Suppose a school could offer distance education alone, and regulatory and accreditation standards took into account the fact that the distance education students won't be using a school's physical library.⁶⁰ (Alas, physical library materials aren't used much by law students at any school these days.) What if the school could offer law classes taught by either full- or part-time faculty but without any need for more physical facilities than a handful of administrative offices? Costs could be dramatically reduced.

It is not hypothetical. California allows unaccredited law schools to offer distance education courses without the physical facilities (especially library) expenses required by ABA accreditation. Concord Law School's annual tuition is under \$14,000 for the four-year, part-time online program.⁶¹ Tuition at Oak Brook College of Law is an incredibly low \$6,000 per year (also for a four-year program).⁶² These bargain rates are possible because of the minimal overhead at both schools. It would probably be ideal to have *more* infrastructure than these schools have; for instance, a school like these could plausibly increase tuition to develop a more robust and innovative career services team. This investment would pay off for students. And even with a little more tuition expense, the school could still be a bargain. These California schools have a unique set of regulations and limitations, above all the inability of their graduates to take the bar exam in most other states (which generally require ABA accreditation). If ABA standards changed so that these schools could get accreditation, the value of the degree would of course only go up.

III. WHAT THE REGULATORS OF LEGAL EDUCATION CAN DO

Up to this point, this paper has argued that there is an access-to-justice problem, that the high cost of legal education makes legal services more difficult to obtain, and that distance education is one way to lower costs. If this is right, then the regulators of legal education should take steps to

reach of middle-class Americans. *See, e.g.*, RUDI VOLT, *CARS AND CULTURE: THE LIFE STORY OF A TECHNOLOGY* 22–28 (2004) (recounting how the mass production of cars revolutionized the industry).

60. For criticisms of the expensive law library requirements imposed by the ABA, *see* Gorsuch, *supra* note 48, at 53.

61. Tuition is listed at \$13,500 for the first two years, then as averaging \$12,420 for the remaining two years. *Law School Tuition*, CONCORD L. SCH., <https://www.concordlawschool.edu/tuition/> [<https://perma.cc/YT2P-UKZJ>] (last visited June 29, 2021).

62. Tuition for the Juris Doctor Program is currently \$6,000 per academic year, absent fees and other costs. *Juris Doctor Program*, OAK BROOK COLL. OF L., <https://www.obcl.edu/juris-doctor/> [<https://perma.cc/S3AK-8BKV>] (last visited June 29, 2021).

ensure distance education remains a long-term option for law schools.

A. *The Easy Steps*

The ABA can start by clarifying its position on distance education. Rather than just deleting the section on distance education, it should reenact a provision that makes explicit that interactive distance education will count interchangeably with in-person instruction.

New York should similarly change its rules, which independently limit eligibility to take the state bar exam among law students who have received distance education. The New York Bar has already issued waivers of the distance-learning limitation during the pandemic.⁶³ This is the time to discard the unnecessary rule that prompted the waivers in the first place.

B. *More Creative (and Radical) Possibilities*

Those are the easy steps. The regulators could certainly consider more radical steps, too. For instance, the ABA could modify its library requirements. Few law students and fewer lawyers use physical library resources for standard legal research. This is simply the practical reality of legal research today (even if, for both aesthetic and intellectual reasons, some of us think that the decline of libraries is tragic).

Still more radical steps could be taken by a state bar, getting ahead of the ABA in liberalizing the treatment of distance education. Take, for instance, California's willingness to license unaccredited law schools offering distance education options. There are all sorts of fascinating nuances to the California regulatory scheme. The unaccredited schools only have to require a minimum number of undergraduate credits as a prerequisite to admission, making it possible for students to graduate from law school without an undergraduate degree. There's a debate about whether law ought to be a graduate degree at all.⁶⁴ California imposes an exam at the end of the first year of legal education (the "First-Year Law Students' Examination," nicknamed the "baby bar exam") to compensate for the lax entry requirements to legal education.⁶⁵ (The failure rate is

63. Press Release, State of New York, Court of Appeals, Academic and Bar Dispensations (June 4, 2020), <https://www.nycourts.gov/ctapps/news/PressRel/BarExamLegalEdUpdate.pdf> [<https://perma.cc/5NSP-68TN>]. For J.D. students enrolled in an ABA-accredited law school in New York during the Fall 2020 semester whose courses were converted to distance learning, those courses were not counted toward the 15-credit hour limitation on distance education courses. *Id.*

64. See, e.g., John O. McGinnis & Russell D. Mangas, *An Undergraduate Option for Legal Education*, 38 INT'L REV. L. & ECON. 117, 118–119 (2014) (arguing that states should license individuals to practice law after a four-year undergraduate degree).

65. See CAL. BUS. & PROF. CODE § 6060(h) (West 2021) (laying out that law students attending unaccredited schools, studying through the Law Office Study Program, or attending school without

notoriously high.⁶⁶) The California system could be critiqued for all kinds of reasons. But it is one way of putting additional options on the table.

The California approach is only feasible for a very large state bar willing to tackle larger regulatory issues than most. Suppose a state (understandably) doesn't want to get into this morass but wants to expand opportunities for prospective law students. A state bar could permit students who received distance education to take the state bar if they have passed the bar in any other state. This allows any state to take advantage of existing distance education options, so long as one other state (like California) allows the distance-learning-educated to take its bar exam.

CONCLUSION

Law schools are rightly celebrating the opportunity to go back to in-person classes this fall. All other things being equal, there is nothing like in-person education for the best and most immersive school experience. But all other things are not equal. So even as schools gear up to return to the classroom, they should be able to continue to develop distance education options, building on what they learned about distance education during the pandemic. Regulators of legal education should take this into account.

The goal of this paper is not to flesh out more radical possibilities for redesigning legal education, creating the ideal-world version of distance-based legal education, nor to establish which aspects of particular distance-learning experiments (such as California's) have and have not worked. The goal is simply to make the case that distance learning ought to be an option, for the underappreciated reason that it could ultimately

two years of undergraduate work must take the exam after completion of their first year of legal study); *see also* CAL. STATE BAR R. 4.204(D) (2007) https://www.calbar.ca.gov/Portals/0/documents/rules/Rules_Title4_Div3-UnAcc-Law-Sch.pdf [<https://perma.cc/65UC-598B>] (defining the "First-Year Law Students' Examination"); *First-Year Law Students' Examination*, CAL. STATE BAR, <http://www.calbar.ca.gov/Admissions/Examinations/First-Year-Law-Students-Examination> [<https://perma.cc/DWM8-LLPR>] (last visited June 15, 2021) (noting that applicants who are required to pass the "baby bar" in California will not receive credit for any law study until the applicant passes the exam).

66. This was made famous most recently by Kim Kardashian's failure to pass the exam. Lisa Respers France, *Kim Kardashian Says She Failed the "Baby Bar" Exam*, CNN (May 26, 2021, 1:19 PM), <https://www.cnn.com/2021/05/26/entertainment/kim-kardashian-law-exam-failed/index.html> [<https://perma.cc/AB7J-FSDK>]. "This one actually is harder, I hear, than the official bar," Kardashian said. *Id.* She conflates the failure rate with the difficulty of the exam. Derek T. Muller, *California's "Baby Bar" Is Not Harder Than the Main Bar Exam*, EXCESS OF DEMOCRACY (May 28, 2021), <https://excessofdemocracy.com/blog/2021/5/californias-baby-bar-is-not-harder-than-the-main-bar-exam> [<https://perma.cc/J8TS-3PN6>] (noting that although raw passage statistics appear to show the "baby bar" is tougher than the official bar, the passage rates of the official bar from students graduating from unaccredited versus accredited law schools differs dramatically).

help facilitate greater access to justice.

Law schools have now all had experience with distance education. It had its flaws. But it also served law students in a time of great stress and uncertainty. The students of distance education are taking bar exams and joining the ranks of the legal profession all over the country. If in the future distance learning can help other students enter the legal profession, why stop them? If it can save costs, why not let them save? The profession has long lamented the difficulties of meeting the need for legal services in America. Distance education won't solve the problem, but it could help. It is within the bar associations' power to make a change. The ball is in their court.