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# Teaching Law Online: Yesterday and Today, But Tomorrow Never Knows

Ira Steven Nathenson

# TEACHING LAW ONLINE: YESTERDAY AND TODAY, BUT TOMORROW NEVER KNOWS

*Ira Steven Nathenson\**

## ABSTRACT

Although the role of “online” in legal education has grown over the past several decades, online teaching became a lifeline in Spring 2020 when the COVID-19 pandemic shuttered classrooms nationwide. Online teaching is now necessary, but also problematic. Schools and teachers therefore need to carefully consider how to make effective use of online tools and techniques. This essay reflects on the author’s career-long experiences in online law teaching, much of which predates the COVID-19 pandemic. “With a little help” from a Beatles song or two, the essay reflects the yesterday, today, and tomorrow of online legal education. It closes with that most scholarly of prescriptions: The Beatles’ Top Ten hits relevant to teaching online.

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## INTRODUCTION

This is an essay about yesterday, today, and tomorrow. It’s about my experiences with online legal education, starting with my days as a J.D. student, through my early days as an obstinate junior professor, and to the present day as a mid-career professor once again entering the online trenches during the COVID-19 pandemic.

If The Beatles wrote about teaching during the pandemic, they might sing, “Yesterday, all our troubles seemed so far away, but now it looks as though Zoom’s here to stay.” So let

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\* © 2021, Ira Steven Nathenson. Professor of Law and Director of Intellectual Property Certificate Program, St. Thomas University College of Law. This essay is dedicated to educators willing to chuck convention to do the right thing. Stay safe and wear a damn mask!

me set the tone with a bit of Beatles history. In 1966, the Fab Four released *Yesterday and Today*.<sup>1</sup> Decades later, the album is not well-known and can't be found on services such as iTunes or Spotify. Unlike the band's far better-known studio albums such as *Sgt. Pepper's Lonely Hearts Club Band*, *Abbey Road*, and *Revolver*, the album *Yesterday and Today* wasn't new, not in the sense that the band went to the studio to create a new release. It was little more than a money grab by the band's U.S. record label, which held back songs from the U.K. versions of Beatles albums to create an excuse to publish additional Beatles albums.<sup>2</sup>

The album nevertheless included very good songs, such as *Yesterday* (but of course!), *Drive My Car*, *Nowhere Man*, and *Day Tripper*. The most interesting thing about *Yesterday and Today*, however, was not its collection of songs. It was the album's initial cover, which showed The Beatles in white lab coats, grinning and grimacing amongst dismembered baby dolls and red meat. Gross and shocking, even by today's low standards. The "Butcher" cover, as it came to be known, was quickly recalled by Capitol Records, which replaced it with an unoffensive but bland photo of the band lounging around a steamer trunk.<sup>3</sup>

Why did The Beatles select the Butcher cover? Perhaps they were annoyed at Capitol Records for "butchering" songs from their British releases to create additional albums in the U.S. Maybe they were mocking their wholesome mop-top image.<sup>4</sup> Perhaps they were even

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<sup>1</sup> THE BEATLES, *YESTERDAY AND TODAY* (Capitol Records 1966).

<sup>2</sup> See BOB SPITZ, *THE BEATLES: THE BIOGRAPHY* 606–08 (2006). *Yesterday and Today* was cobbled together by Capitol, The Beatles' American record company, a "hodge-podge" of songs from longer, original British albums, along with B-sides and other tracks. See *id.* at 606. By holding back songs from the British versions of albums, Capitol gave itself the ability to put out additional, "new" albums in the United States. *Id.*

<sup>3</sup> Even though Capitol recalled the Butcher version, some of the records with Butcher covers had already been put on the shelves before the recall was issued. Even after the record was re-released with the new cover, fans quickly realized that some of the reissued albums had the new cover glued over the old cover, allowing enterprising fans to steam away the blasé replacement cover to reveal the Butcher cover in all its vagrant glory. Today, Butcher-cover versions of *Yesterday and Today* are worth many thousands of dollars and prized by collectors. See *Variations for Beatles' 'Yesterday and Today' LP Cause Collecting Confusion*, GOLDMINE MAG. (Aug. 21, 2020), <https://www.goldminemag.com/articles/variations-beatles-yesterday-and-today-lp-cause-collecting-confusion>.

<sup>4</sup> John Lennon was "sick and tired of the Beatles' constantly being held up as altar boys in contrast to the scruffy Rolling Stones. It wasn't an accurate comparison—and it needed correcting." SPITZ, *supra* note 2, at 608; see also Kenneth Womack & Todd F. Davis, *Mythology, Remythology, and Demythology: The Beatles on Film*, in *READING THE BEATLES: CULTURAL STUDIES, LITERARY CRITICISM, AND THE FAB FOUR* 103 (Kenneth Womack & Todd F. Davis eds., 2006) ("Beatlemania had become a constraining and self-perpetuating mechanism, and,

trolling their own fans a bit. Who knows? Regardless of The Beatles' motivation, the Butcher cover has always fascinated me as an act that was either monumentally stupid or incredibly bold. Maybe both. It cost the record company a lot of money to recall, reprint, and redistribute the album with the new cover.<sup>5</sup> But perhaps the Butcher cover also signaled a new chapter in the band's career, a subtextual line in the sand marking the band's desire to try new things even if it pissed others off.<sup>6</sup>

Such quietly defiant conduct has always struck a chord with me in my career as an academic and in my focus, even obsession, with online pedagogy. I've been repeatedly cautioned by colleagues and mentors about putting "too much time" into my online teaching efforts: "focus on your scholarship," as the mantra goes. But whether or not my conduct was self-defeating, whether or not I was driven by vision, stubbornness, or even hubris, I have faithfully put significant time and effort into what drives me professionally, which is developing online teaching tools and techniques.<sup>7</sup> Thus, through the years—via websites created as early as law school, to online lessons and supplements, from Google Hangouts to Zoom office hours—online tools and techniques have remained central to my pedagogy. Even prior to COVID, my experience with online teaching became a personal lifesaver due to personal injuries and family tragedies. And in 2020, online teaching became a necessity for our entire profession when legal educators everywhere needed to make a sudden "pandemic pivot" as in-person classrooms everywhere shut down.

Thus, what was once a career-threatening waste of time for me is now the most pressing issue in legal education. As legal educators, we must grapple with how and when to most

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even more pointedly, The Beatles themselves had become visibly jaded by the marketing activities (photo sessions, concert tours, press conferences, and the like) that were necessary to achieve its continuation.").

<sup>5</sup> The band eventually backed down because it was in negotiations with Capitol for a new contract and did not want to spoil the deal. See SPITZ, *supra* note 2, at 608.

<sup>6</sup> Even if the Butcher cover was a horrible idea, the band's subsequent albums each marked increasing artistry, followed by *Revolver*, *Sgt. Pepper*, *The White Album*, and *Abbey Road*. Each and every one a classic.

<sup>7</sup> As *Animal House* character Eric "Otter" Stratton once said, also in an educational context, "I think we have to go all out. I think that this situation absolutely requires a really futile and stupid gesture be done on somebody's part!" NATIONAL LAMPOON'S *ANIMAL HOUSE* (Universal Pictures 1978).

effectively use online tools in legal education. This essay reflects on my experiences on the yesterday, today, and tomorrow of legal education online. Part I discusses my experiences “yesterday” as a law student experimenting with law-school website authoring as well as my efforts as a junior and untenured professor. Part II shifts to my work “today” as a mid-career tenured professor, both before and during the initial COVID-19 semester. Part III addresses what we as a profession ought to be doing “tomorrow” as we prepare to educate students in an ongoing pandemic, as well as beyond. It closes with that most scholarly of prescriptions, a listing of Top Ten “hits,” namely, prescriptions, admonitions, and observations about teaching online, with a “little help” from The Beatles.<sup>8</sup>

## I. YESTERDAY

My love for The Beatles has been nearly life-long, and my interest in technology nearly as long as that. My career-long experimentation with online teaching began years later in law school when, as a student, I created one of the first law student websites. My efforts took a more concerted turn in my early years as an Assistant Professor when I started to use websites and online simulations as part of my teaching methodology. Ironically, although my efforts as a law student were applauded, my efforts as a young professor were met with pushback from colleagues concerned about my development on the tenure track. As The Beatles sang, I went from being a “rich man” to a “nowhere man.” Despite the good intent of my colleagues, I persisted in developing my online techniques and to this day, am glad I did so.

### A. *Wanna-be Musician*

*It's gotta be rock and roll music, if you wanna dance with me.*

—The Beatles, *Rock and Roll Music*<sup>9</sup>

Before I was a professor, or even a law student, I was a musician, although not a particularly successful one. I played in a 1980s Pittsburgh-area heavy metal band. I was also a

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<sup>8</sup> Cf. THE BEATLES, *With A Little Help From My Friends*, on SGT. PEPPER'S LONELY HEARTS CLUB BAND (Capitol Records 1967).

<sup>9</sup> THE BEATLES, *Rock and Roll Music*, on BEATLES '65 (Capitol Records 1964).

computer-store manager and an early adopter of technology. In my pre-law days, I had owned several Commodores (C64 and Amigas) as well as numerous PCs. Back then, my hair was big and dark. Today it is short and grey. I still have my guitars, and in the interim, have owned more than a few computers. Some things never change.

### *B. Law Student*

*Baby, you're a rich man . . .*

—The Beatles, *Baby, You're A Rich Man*<sup>10</sup>

Today a typical law school classroom is filled with dozens of eager stenographers, tapping merrily away at their keyboards to capture the occasional nuggets of wisdom hurled at them by their professors.<sup>11</sup> But back in the mid- to late-1990s, few used technology in or out of the classroom. I took my initial examinations with a typewriter, and even then, was one of only a few typists.

But I soon got a laptop, becoming one of the first at my school to bring one to class. I also learned basic website authoring using WYSIWYG tools, leading to what, in retrospect, was my first crack at online legal education. For no particular reason other than *why not*, I decided to create an online law-student website that I called (quite pretentiously) *The Internet Law School Library*.<sup>12</sup> I hosted it through my law school using free hosting space provided to students by the university. The website was a basic 1990s HTML website with links to other resources. It was, by modern standards, stark and ugly. For that matter, it was pretty ugly by 1990s standards as well.

### Figure 1: Internet Law Student Library from approximately 1996

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<sup>10</sup> THE BEATLES, *Baby, You're A Rich Man*, on *MAGICAL MYSTERY TOUR* (Capitol Records 1967).

<sup>11</sup> Trust me, most things I say in the classroom are not nuggets. More like chicken tenders. But who doesn't like chicken tenders?

<sup>12</sup> The site no longer exists online, nor is it available through the Internet Archive's Wayback Machine, <https://web.archive.org>. I have a partial backup in my own files.



My site was among the first law student websites and garnered media attention from *National Jurist* and others, which was flattering.<sup>13</sup> It also drew attention from my classmates because I was a good student and I posted my course outlines to the site for others to download. Running this site was also one of my first lessons in the benefits and drawbacks of online teaching. What drew people to the site was the *content*, my course outlines. I realized that creating good content was what drew people in and kept them there. But I also learned in a rather visceral way that putting too much time into my content could be detrimental to my professional development. While preparing for my Evidence final, I put too much time into making my course outline beautiful and well-organized so that it would look nice for those who downloaded it later. That was a foolish move, as I did not finish the outline until 4AM the day of the exam, leading to one of my lower law-school grades. For several years afterwards, I winced when other students told me that they used my Evidence outline to get an A. From these nascent experiences, several lessons emerged:

- Lesson # 1: Create good content, and help others.
- Lesson # 2: Don't shoot your career in the foot.
- Lesson # 3: Ignore lesson number two when appropriate.

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<sup>13</sup> See NATIONAL LAW SCHOOLS DEANS' LIST 66–67 (July 1999); Rebecca Luczycki, *Making the List*, NAT'L JURIST, Sept. 1999, at 28, 30, 32.

As the remainder of this essay shows, I have spent a career heeding the first lesson and ignoring the second. I may have paid career prices, but I'd do it all over again.

### *C. Untenured Professor*

*Everybody seems to think I'm lazy,  
I don't mind, I think they're crazy.*

—The Beatles, *I'm Only Sleeping*<sup>14</sup>

After law school, I worked as a law clerk on the United States Court of Appeals as well as an associate attorney at a big law firm. In 2004, I entered the professoriate as a visiting assistant professor at the school I had earlier attended for law school, and in 2006, joined my current institution on the tenure track. My use of technology as a “baby law professor” was unexceptional, focusing on TWEN, Lexis Blackboard, and PowerPoint. I found none of these tools to be well-adapted to my needs. The mid-2000 versions of TWEN and Lexis Blackboard were powerful but had slow, cumbersome interfaces. I needed more control than either could provide, and wanted the ability to create richer online experiences for my students.

I also hated PowerPoint. It encourages two-dimensional teaching of a subject, moving linearly from slide to slide, bullet to bullet. In musical terms, PowerPoint does not encourage improvisation, the creation of law school *jazz*: three-dimensional movement around a subject, calling back to lessons past and forward to lessons yet to come, allowing point and counterpoint between a teacher and students who become dynamic participants in a *performance*, the kinds of interactions that underlie the best classroom experiences. Any day, anytime, I prefer a law school class that plays more like jazz than the mechanical output of music rolls run through a player piano. PowerPoint is mere sheet music. I prefer teaching with a bit of organized chaos.<sup>15</sup>

A few years later, I got an opportunity to shake things up. My then-Dean asked faculty

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<sup>14</sup> THE BEATLES, *I'm Only Sleeping*, on YESTERDAY AND TODAY (Capitol Records 1966).

<sup>15</sup> Lest the reader think I am either a fan or performer of jazz music, I am neither. I am a hack metal musician, one that spent the 1980s with big hair and an electric guitar. On the music stage, I am more Angus Young of AC/DC on a very bad day than I am a jazz performer. But good teaching, for me, *is* jazz. Controlled chaos, with a plan and good organization, and the willingness to take an unexpected journey.



to develop experiential learning modules, or practica, for their courses. Noting the teachings of *The Carnegie Report* and *MacCrate Report*,<sup>16</sup> he encouraged faculty to develop modules that integrated the teaching of legal skills and professional identity development into traditional doctrinal courses. This invitation was like manna to someone lost in the desert. I vastly expanded my use of online tools and techniques. In my Cyberlaw and Intellectual Property classes, I created real and ever-changing websites to serve as the foundation for role-playing simulations for my students. For example, I bought several domain names, one similar to the other. I created a fake trademark registration for the client, and told the students that a third party was engaging in domain name cybersquatting through the second domain. Each student had to figure out who the registrant was using live WHOIS search tools, and later had to draft a cease-and-desist letter to send to the “infringer.” The infringer, of course, was me role-playing as the opposing party, and after each student emailed me their cease-and-desist, I would respond in role, replying differently to each student, thus creating discrete scenarios for every single member of the class.

Through the years, I have used use variations of such simulations to teach topics as different as internet law, defamation, trademarks, copyrights, patents, and more. I can tie the doctrinal subjects to other areas of practice such as procedure (drafting a complaint) and evidence (how to document online conduct). I have been able to incorporate matters of professionalism such as conflicts of interest, dealing with unrepresented persons, and dealing with persons represented by counsel. I have also been able to tie in legal skills such as factual research, building a case file, and even tracking billable hours. These techniques allowed students to role-play as attorneys, learning law in a practical context that ties in ethical dilemmas. The courses were designed as what I later learned were called “capstone” courses,

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<sup>16</sup> See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007); AM. BAR ASS’N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992); see also ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007), [https://www.cleaweb.org/Resources/Documents/best\\_practices-full.pdf](https://www.cleaweb.org/Resources/Documents/best_practices-full.pdf).

courses designed for upper-level students to tie together their entire legal education in a single course. In these simulations, I relied heavily on improvisational techniques, using things done or said by students as springboards for additions to the scenarios. I was making jazz, with a separate performance for every member of the class.

But just like my law-student website that interfered with my studies, there were downsides to my efforts as a professor to create simulations, due to the tremendous amount of time these methods took. Each year I needed to create new online scenarios, and I updated the websites regularly to make them realistic. Each student's scenario was individualized, creating additional work both in creating the scenarios and in grading the projects, each of which was unique. Further, the scenarios needed to be redesigned each year to discourage plagiarism. The amount of work involved, and the opportunity costs to my research and scholarship as a junior professor, were significant.

My colleagues saw tremendous value in my pedagogical innovations. But they also expressed concern at the amount of time I spent on my online simulations and pedagogy. Meaning well, they cautioned me that extra time spent developing online teaching techniques was time that I could be spending on my research and writing. In fairness to my colleagues, I know they had my best interests at heart, and that they simply wanted to ensure I would maximize my opportunities to get tenure and stay for the long haul. I have no doubt that I would have seen the same reaction at any institution. Although law professors tend to be liberal politically, they are conservative institutionally regarding the requirements for entering and staying in the academy, wary of anything that bucks the traditional publish-or-perish model of tenure.

In fact, I did publish, though admittedly with less urgency than a typical junior professor

because I thought my other efforts were more important.<sup>17</sup> Thus, at the time I went up for tenure, I had published four law review articles during my time at the institution, two doctrinal and two about my online simulations.<sup>18</sup> I was nevertheless a source of frustration to my senior colleagues. They had no doubt I was capable of producing high quality scholarship,<sup>19</sup> but they could not understand why I would rather develop my teaching techniques. It is often said that to get promotion and tenure, one must provide teaching, service, and scholarship. But we professors all know that the only thing that an aspiring scholar cannot ignore is *scholarship*. Thus, at a research institution, an obstinate junior professor who spends his (as in my) time on teaching, who produces only two doctrinal articles after joining said institution (that's me), and who spends the rest of his time developing new teaching techniques and publishing about pedagogy (me), such a person (me) willfully stands on less-than-firm ground when their time for tenure comes up.<sup>20</sup> As The Beatles put it, I risked becoming an academic "Nowhere Man."<sup>21</sup>

But in the end, my colleagues concluded that my combination of unique teaching, scholarly output, and perhaps even verve, did merit tenure. But I was also informed that I would have to produce more substantive and lengthier doctrinal scholarship if I also wanted to obtain

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<sup>17</sup> Whether this was due to me being a little older than most junior professors, being highly principled, or simply being clueless, I leave to the reader. If the reader concludes that my conduct is due to "All of the above," I can live with that.

<sup>18</sup> See Ira Steven Nathenson, *Best Practices for the Law of the Horse: Teaching Cyberlaw and Illuminating Law Through Online Simulations*, 28 SANTA CLARA COMPUT. & HIGH TECH. L. J. 657 (2012); Ira Steven Nathenson, *Navigating the Uncharted Waters of Teaching Law with Online Simulations*, 38 OHIO N. UNIV. L. REV. 535 (2012); Ira S. Nathenson, *Civil Procedures for a World of Shared and User-Generated Content*, 48 UNIV. LOUISVILLE L. REV. 911 (2010); Ira S. Nathenson, *Looking for Fair Use in the DMCA's Safety Dance*, 3 AKRON INTELL. PROP. J. 121 (2009).

<sup>19</sup> My most recent theoretical article (from 2020) was selected for republication as one of the top articles on intellectual property of the year by Thomson Reuters. See Ira Steven Nathenson, *The Procedural Foundations of Intellectual Property Information Regulation*, 24 LEWIS & CLARK L. REV. 109 (2020), *republished in* 2020 INTELL. PROP. L. REV. 681. Also, two of my early pieces won national awards from the Brand Names Education Foundation. See Ira S. Nathenson, *Internet Infoglut and Invisible Ink: Spamdexing Search Engines with Meta Tags*, 12 HARV. J. L. & TECH. 43 (1998); Ira S. Nathenson, Comment, *Showdown at the Domain Name Corral: Property Rights and Personal Jurisdiction Over Squatters, Poachers and Other Parasites*, 58 U. PITT. L. REV. 911 (1997).

<sup>20</sup> As always, our dual roles as scholars and educators stand in tension. I presented on these techniques at a number of conferences, including the Institute for Law Teaching & Learning, Law & Society, and the AALS mid-year and annual meetings.

<sup>21</sup> "He's a real nowhere man, sitting in his nowhere land, making all his nowhere plans for nobody." THE BEATLES, *Nowhere Man*, on YESTERDAY AND TODAY (Capitol Records 1966).

final promotion to full professor.<sup>22</sup> I did as they requested with a vengeance, writing a 157-page behemoth on code, intermediaries, and power. Really, it was more of a short book than a law review article.<sup>23</sup> I therefore met and exceeded my colleagues' request, but with a bit of subtext saying that I was not refraining from publishing more often because I *cannot* do it, but that I was focused on other things that I was convinced were *more important*. In this sense, the final article I wrote under promotion review was my own Beatles "Butcher" cover, an act of both compliance and dissent.

To my colleagues' credit, after I published my mini-treatise, I was quickly promoted to full Professor of Law. And ironically, the worries they expressed during the tenure process have never borne out. Until the writing of this essay, my post-tenure scholarship has been entirely doctrinal, normative, or theoretical rather than pedagogical, and I have continued to research and write at my own meandering pace, despite obstructions from multiple major life-events, namely my own near-death in 2016, and the deaths of my parents in 2018 and 2019, all as noted in further detail in the next section.<sup>24</sup>

I am hopeful that the reader finds my perspective to be neither accusatory nor defensive. At worst, I hope I come off as mildly delusional and perhaps a little self-absorbed, qualities that are likely common to academics. I *do* believe in the triumvirate of teaching, scholarship, and service, but I also think, unsurprisingly, that the academy should value quality and innovations in teaching—both in the classroom and in terms of pedagogical scholarship—more than it does. I know for a fact that my colleagues value good teaching highly, and I have little

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<sup>22</sup> Lest the reader wonder, "what is so bad about that," it should be noted that at my institution, the norm has typically been for a professor to seek and obtain both tenure and promotion to full Professor of Law in their sixth year. By granting me tenure without promotion, my colleagues both gave me a vote of confidence as well as a non-negotiable final warning.

<sup>23</sup> See Ira Steven Nathenson, *Super-Intermediaries, Code, Human Rights*, 8 INTERCULTURAL HUM. RTS. L. REV. 19 (2013).

<sup>24</sup> See *id.*; see also Ira Steven Nathenson, *Cyberlaw is Dead and We Will Kill It*, in RESEARCH HANDBOOK ON INFORMATION LAW AND GOVERNANCE (Sharon Sandeen & Christopher Rademacher eds) (forthcoming Edgar Elders 2021) (on file with author); Nathenson, *The Procedural Foundations of Intellectual Property Information Regulation*, *supra* note 19; Ira Steven Nathenson, *Aereo's Errors*, 1 J. INT'L & COMP. L. 171 (2014).

doubt that my pedagogical innovations factored heavily into my positive tenure vote. I also recognize that it is far easier for tenure committees to lean more heavily into scholarship, which has more objective indicia of peer approval (such as placements and citations), than does teaching, which occurs in silos with only the occasional classroom visit.

## II. AND TODAY

Having emerged intact from the tenure and promotion process, I spent the next part of my career figuring out what I wanted to do untethered. I tried new classroom technologies, developed a WordPress-based website with learning content, and created a YouTube channel with screencasts and review videos. I also started to incorporate synchronous video tools into my teaching. Unexpectedly, these techniques shifted from useful to necessary when I suffered a near-fatal injury in 2016, when my parents died in 2018 and 2019, and even more so when COVID-19 spread in the Spring of 2020. My career-long experiment became a professional imperative.

### A. Tenured Professor

*Do what you want to do,  
And go where you're going to.  
Think for yourself,  
Cause I won't be there with you.*

—The Beatles, *Think for Yourself*<sup>25</sup>

My colleagues and administrators, freed of the burden of worrying about my career, could finally express their positive feelings about my pedagogical innovations and were supportive of my efforts. I started an Intellectual Property certificate program, leaning heavily into my role-playing simulations. My Dean made me Chair of Curriculum, which in retrospect may be the highest reward yet for my work in developing innovative pedagogies.

I also experimented incessantly. For example, I incorporated additional technologies into my everyday classes. I started using tablets as my whiteboard, initially an iPad, and later

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<sup>25</sup> THE BEATLES, *Think for Yourself*, on RUBBER SOUL (Capitol Records 1965).

a Microsoft Surface. This allowed me to project onto the screen any statutes, cases, problems, images, or videos I wanted to use. With a stylus, I could annotate those materials. I could mark up cases and statutes, diagram lawsuits, and pull up websites in real-time.

As noted above, I don't like using PowerPoint because it is linear and does not foster jazz-like teaching.<sup>26</sup> But with the Surface tablet, I was able to use another Microsoft product, OneNote, to arrange all my teaching materials by course, class, and topic. I was able to paste statutes, graphics, videos, and more onto a note page, which I could then display, zoom, and annotate during class. Since all my tabs were accessible from the application, I could operate three-dimensionally, moving back and forth through the materials (including materials from past and future classes) without the difficulties that one would have moving around in PowerPoint. It was a godsend. I also on occasion used a Wi-Fi receiver so that I could carry my tablet around the classroom, marking up the "board" from any location in the room. This broke down the hierarchical separation of teacher and student that normal classrooms generate, flattening the room and increasing engagement. Ironically, Zoom would later accentuate this effect, since a grid of faces can all look at one another rather than just at the professor.

I also started using my own website as a teaching tool. Although I had owned the domain name NATHENSON.ORG since 2004, for years I used it only as a content-sparse vanity site. Around 2013, however, I got tired of Lexis Blackboard and decided to shift my teaching materials to my website. Using the WordPress content management system, I started posting numerous teaching materials to the site: syllabi, handouts, practice essays, past exams, flowcharts, problem sets, online simulation guides, IP training guides, and more. When I taught a seminar, I wrote a guide on how to research and write seminar papers. When I taught Civil Procedure bar exam reviews for my school, I created a section for that.

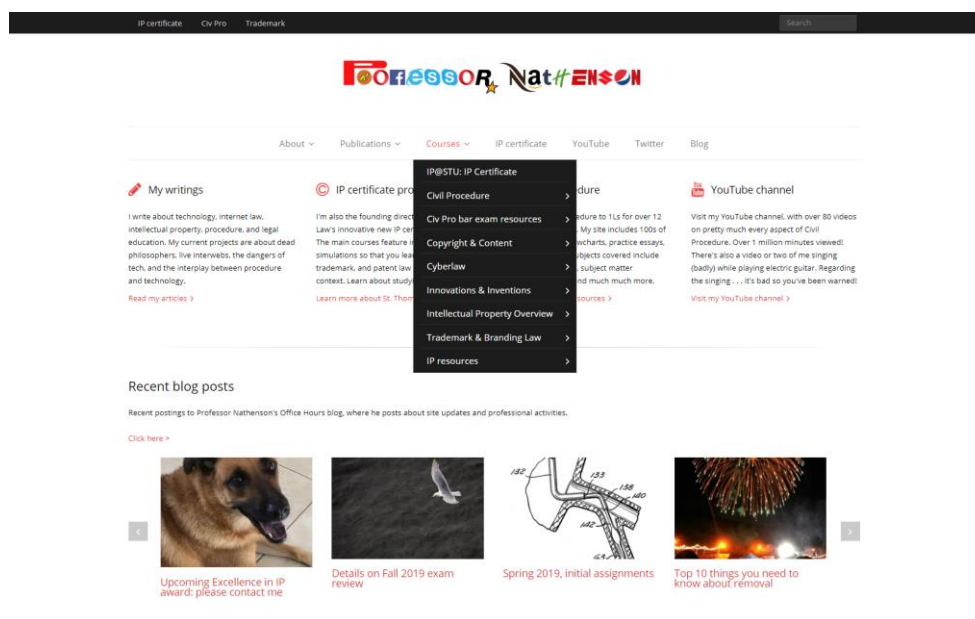
Although I often think of writing a casebook, the truth is that I have already created one

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<sup>26</sup> See *supra* Part I.A (discussing PowerPoint).

at NATHENSON.ORG. As of this writing, the site has over 400 pages of learning resources, and is visited by law students from all over the world. According to WordPress Analytics, I've had nearly 900,000 page visits. By any measure, the quantity of material on the site is equivalent to at least one casebook if not several. I suppose that from a financial perspective, I should have put my efforts into creating a paywalled paper/electronic casebook hybrid, and have in fact had discussions to that effect with casebook publishers. But up to this point, I have preferred the freedom that comes with developing online materials when I want and when I need them, rather than meeting the demands of a publisher's timetable. (The obstinacy, it never went away.) I prefer to work without a leash. And importantly to me, the website is *free* for my students and others to use. I also worked with CALI to develop Civil Procedure lessons that I assign to my students as part of their learning.

Figure 2: Nathenson.org site in 2020, showing drop-down menu

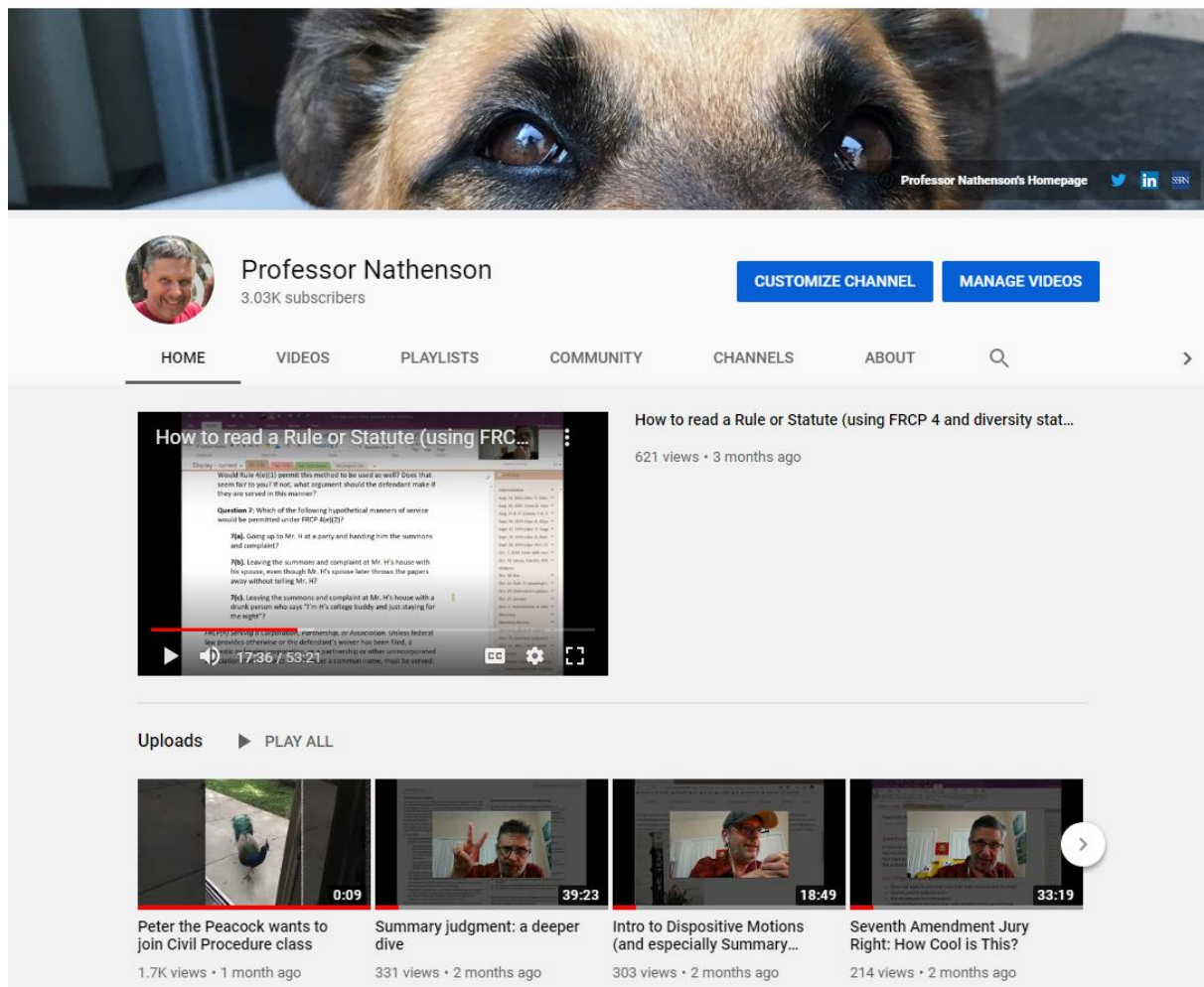


I also started a YouTube channel.<sup>27</sup> At first, the channel had recordings of review sessions I did for my Civil Procedure class, along with recordings of me playing guitar for my students. Today, the site has approximately ninety videos, over 3,000 subscribers, and nearly

<sup>27</sup> Professor Nathenson, YOUTUBE, <https://www.youtube.com/user/IraStevenNathenson/> (last visited Jan. 18, 2021).

300,000 views with over three million minutes of content watched.

Figure 3: Professor Nathenson YouTube channel, showing screencasts



In addition to my taped review sessions, other videos take even better advantage of the streaming YouTube medium. Quite a number are screencast videos created specifically for YouTube (along the same lines of videos done by “Khan Academy”). The videos display statutes, rules, or other materials that I annotate onscreen with a stylus while I speak along.<sup>28</sup> I oftentimes incorporate such videos into my class assignments to asynchronously outsource live instruction so that synchronous classes can focus on application and further exploration of a topic.<sup>29</sup> For instance, I created a playlist of eleven videos that go through discovery topic by

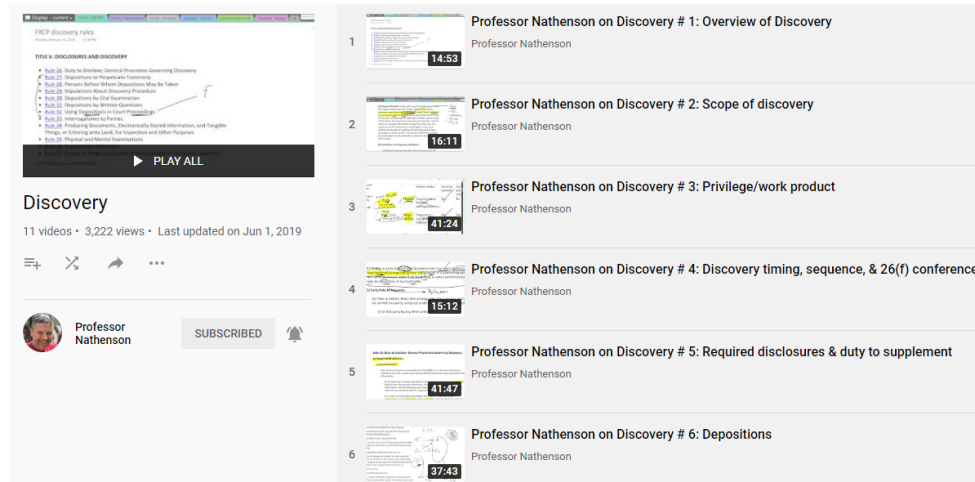
<sup>28</sup> Camtasia is a reputable offering for crafting screencasts, though it is pricey. I use Screencast-O-Matic, which is powerful, stable, and costs me less than twenty dollars a year.

<sup>29</sup> For instance, every year I have done an essay-writing workshop for my 1L Civil Procedure students. This year



topic. In class, we apply the assigned discovery rules and play my version of a “Discovery Game.”<sup>30</sup>

Figure 4: YouTube Discovery Playlist



The reasons I created such materials, whether on my website or YouTube, were always holistic, i.e., to create materials I needed at the time that best fit my evolving pedagogical needs.<sup>31</sup> I used my website and YouTube channel as ways of supplementing the casebook and other materials I assigned. If I felt that the assigned casebook had glossed over something that I felt needed a more detailed, nuanced, or direct explanation, then I made a handout or a flowchart. If I wanted to build or test student knowledge on a topic, I made a problem set, providing explanations as well. And if I wanted to do something in the classroom that was unique, then I just created the materials myself. For example, when I wanted to teach my students how to search and register patents, I simply put together a section of my site dedicated to this project and later supplemented it with videos on my YouTube channel.

I strongly believe in freely available materials. Therefore, I also try whenever possible

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I recorded a video for my students showing how to organize a simple diversity fact pattern, which was pre-assigned to my students prior to the live Zoom workshop.

<sup>30</sup> Students often tell me that they play the videos while running or driving, repurposing them as podcasts, listening to the audio.

<sup>31</sup> At this point in my career, I have so many materials that I rarely assign them all to students, although I keep most of them online for students interested enough to seek them out. Examples include “Coggle” flowcharts that I created on both personal jurisdiction and the *Erie* Doctrine.

to use open-source, freely available, or low-cost online casebooks. As of now, I have found high-quality online casebooks for my Copyright, Trademark, Patent, and Cyberlaw courses. All are available freely or cheaply online in PDF format. This allows students to download the books and print them out themselves. Because the PDFs are typically unprotected, students can also annotate the books on their own computers, without having to use proprietary software that limits how you can use or print out the materials. Although I have yet to find a suitable free online Civil Procedure casebook, I developed my own statutory supplement, which saves students an additional fifty dollars or more.

### *B. Life Happens*

*Blackbird singing in the dead of night,  
Take these broken wings and learn to fly.*

—The Beatles, *Blackbird*<sup>32</sup>

Ironically, one of the smallest additions to my technology-and-teaching repertoire has turned out to be the most important: synchronous online teaching. Important for me personally, important for the profession, and important to our society. In 2016, I started experimenting with Google Hangouts (think Zoom Lite). At first, it was simply a way of having special review sessions or office hours and doing it from home. After all, wouldn't it be nice to sometimes do such things from home on evenings or weekends, rather than making everyone come to campus? As a synchronous multi-user video transmission platform, Google Hangouts allowed me to conduct the occasional class, office hours session, or review session online using video along with screen-sharing.

But Google Hangouts, a cool and occasional teaching tool, was a harbinger of bigger things to come. As a first step, things changed for me in a major way on October 5, 2016. On that day, Hurricane Matthew was headed for South Florida. While installing large hurricane shutters, I suffered a near-fatal injury when a large stack of metal shutters, some over six feet

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<sup>32</sup> THE BEATLES, *Blackbird*, on THE BEATLES (Apple Records 1968).

long, fell on me. I fractured my femur in three parts, requiring middle-of-the-night surgery to insert a titanium rod to repair the breaks. I spent about a week in the hospital and then moved home to recover and start physical therapy to learn how to walk again.

For most academics having such an accident, their semester would be over. Although my Dean would have permitted me to take the rest of the semester off to recover, I had no intention of sitting at home and was determined to get back into the classroom as soon as possible. The virtual classroom, that is. Two weeks after the accident, I was teaching via Google Hangouts, synchronously sharing my screen and interacting with my students in the classroom. I taught from home, and my students were together in the classroom. It was an early version of what we would now call “hybrid” teaching, some in person, some online.

Was online synchronous video a perfect substitute for in-person classes? Of course not. But we could hear and see one another. I could screen share materials from my Microsoft Surface, just like I would have done in the in-person classroom. With the exception of an end-of-semester review session in December 2016, I taught the rest of the semester using Google Hangouts. As noted above, I also recorded a set of discovery screencasts that I posted to YouTube, followed by a live active learning discovery exercise. Technology permitted me to teach while convalescing, both asynchronously (the YouTube videos) and synchronously (via Google Hangouts) when I would have otherwise been unable to be “in the classroom.” This avoided burdening my colleagues with extra classes and avoided my students needing to switch professors halfway through the semester.

Several years later, I had to revisit these video tools when life happened again. Or more accurately, death. My mother died suddenly on October 5, 2018, a date that oddly fell two years to the day from my near-fatal accident in 2016. My life was again turned upside down. Suddenly, I was in charge of my mother’s funeral arrangements, my mother’s estate, and the day-to-day care of my ailing eighty-year-old father and his house, both over 1000 miles away.

Over the next year, I made at least a dozen trips north to handle these matters.<sup>33</sup> My father died soon after in early 2019, and I was additionally responsible for his estate as well, which included the emptying and sale of my parents' home, a house filled with nearly fifty years of accumulated stuff.

Online teaching tools came to the rescue once again. Although I was able to teach in person in the classroom most of the semester, synchronous video tools provided a simple way for me to be "in the classroom" virtually on days when I had to be up north handling family matters. Around this time, I had switched from Google Hangouts to the far superior Zoom platform. Zoom quickly became essential, providing a far more stable and fully featured version of what I had been doing with Google Hangouts. Whether I was on campus or 1,200 miles away, I could teach my courses. I also taught my summer Intellectual Property course fully online, allowing me to be out of town working on the estates and personal matters while also remaining accessible to my students.

### *C. Teaching in the COVID-19 Pivot Semester*

*It's been a hard day's night, and I've been working like a dog.  
It's been a hard day's night, I should be sleeping like a log.*

—The Beatles, *A Hard Day's Night*<sup>34</sup>

As the previous section may imply, I was no fan of 2019. It was a difficult year, and when the New Year rolled in, I bid it a happy, even gleeful, adieu. Surely 2020 would be better! Little did anyone know what was coming. Early in 2020, news reports emerged about a novel coronavirus spreading in the Wuhan region of China that had the potential to go global.<sup>35</sup> By

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<sup>33</sup> On one memorable occasion, I was teaching Trademark Law on Zoom upstairs from my father's house. My father forgot that I was teaching and started yelling for me to open the door for a doctor friend who had come to visit him. My students enjoyed listening to my dad yell—live on Zoom—while I ran downstairs to let in the doctor. This is not entirely dissimilar to the many stories where a person's Zoom class or meeting is Zoom-bombed or otherwise interrupted by real life. For whatever it's worth, one of the highlights of classes during COVID is when a student's dog, cat, or child shows up to interrupt the proceedings.

<sup>34</sup> THE BEATLES, *A Hard Day's Night, on A HARD DAY'S NIGHT* (United Artists Records 1964).

<sup>35</sup> See, e.g., Erin Schumaker, *1st Confirmed Case of New Coronavirus Reported in US: CDC*, ABC NEWS (Jan. 21, 2020, 1:54 PM), <https://abcnews.go.com/Health/1st-confirmed-case-coronavirus-reported-washington-state-cdc/story?id=68430795>.

late February, anybody paying close attention knew that the virus, now dubbed “COVID-19,” was coming and that no human being could stop it. Only fools and magical thinkers might think otherwise.

Around the time of Spring break at my institution, we started to plan. At my school, I am on the libraries and tech committee, but more informally, I’m “that” guy, the one that knows tech and to whom others turn when they have a tech question and would rather ask a colleague than seek tech support. So I was involved in the expected meetings and planning. It quickly became clear to us that the law school might need to make a quick “pandemic pivot,” i.e., to move classes online on a dime. For me, such a switch would be easy. I had years of experience using online tools and more pertinently, lots of experience with Zoom. But now the question was not just moving my classes online, but moving them all, at once, including professors who were total Luddites. Could we do that?

It’s as if my entire professional life was a preparation for a pivot to teaching fully online during COVID-19. And we did it. The university had previously made Canvas available to us. Any professor who wanted to run class asynchronously could record a lecture, post a quiz, or run discussion boards with Canvas modules. Our librarian did a great job of setting up Canvas faculty courses and putting together training materials and sessions. He and his staff also worked tirelessly to help faculty to transition.

Of course, the best parts of legal education are dialectic, requiring direct and immediate synchronous interaction between mentor and apprentice. Therefore, the transition was significantly more complicated for technologically inexperienced faculty who wanted to conduct some or all of their instruction synchronously. Initially, the university hoped to use Echo360,<sup>36</sup> which it had originally installed in classrooms for recording in-person, on-campus

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<sup>36</sup> Echo360 is a video management platform for education. See Echo360, <https://echo360.com/> (last visited Jan. 2, 2021).

teaching sessions for archival purposes. However, I was skeptical that this would work for purposes of live streaming, and volunteered to do a dry run of teaching synchronously with Echo360 during my Innovations (patents) class. I sat in my office running Echo360 using my laptop's webcam. It was a disaster. I could not get the video to run correctly, seeing only infinitely embedded videos of myself, like a crazed mirror house with my face and voice reflecting and echoing ad infinitum. Nor could I hear or see any students. It was maddening. After fiddling with Echo360 for 15 minutes, I gave up and told my students to switch over to a backup Zoom link that I had set up just in case. I reported my findings to our Librarian and Dean as soon as class ended. The law school reacted with responsibility, quickly making Zoom available to all instructors wanting to teach synchronously. Shortly thereafter, the school provided a number of training sessions on Canvas, Echo360, and Zoom. I also ran a training session on Zoom and prepared several training videos that I posted to YouTube.

After that, the remainder of the semester was taught online. For me, that required little adjustment. Been there, done that. I quickly added Canvas to my repertoire and used it to administer regular quizzes to ensure that my stressed-out law students kept up with class preparation.<sup>37</sup> This gave students significant formative feedback and kept them honest (i.e., prepared). But live quizzes can also eat up significant time, suggesting that quizzes might better be administered prior to class, or that professors take other affirmative to ensure engagement and accountability, such as keeping track of who speaks and making sure all are called on regularly. I find that online, it is easier to keep track of such matters.

Equally so, my institutional colleagues performed admirably, quickly making the adjustment to remote teaching.<sup>38</sup> We adopted a modified grading policy for the Spring 2020

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<sup>37</sup> During Zoom classes, I demonstrated via screen share how my students could log into Canvas and access the quizzes. A few minutes after the beginning of each class, the quiz would become available and I would "proctor" the quiz by watching on Zoom while students took their quizzes on Canvas. Because Canvas auto-scores multiple choice, I only needed to score the short answer and essay portions of quizzes.

<sup>38</sup> We ceased live classes on a Thursday. We went live on Zoom the following Monday or Tuesday. It was nuts but it worked.

semester, essentially allowing students either to keep their issued grades as a whole or to change their semester grades to Pass/No Credit after receiving all of their grades. Over the summer, I also taught my Intellectual Property course synchronously using Zoom, and used Canvas for quizzes as well as for the final examination. And by recording class sessions, teachers can easily archive classes for viewing by students who cannot attend synchronously due to family or healthcare responsibilities.<sup>39</sup>

Along similar lines, I quickly decided that student cameras must stay on at all times, barring a legitimate reason for them to be turned off. In years past when teaching online, I had given students the choice of being off cam. But I slowly came to the conclusion “cams off” led to poor engagement, and on occasion, to students not even being “in class” during a Zoom session. More than once, I called on a student whose cam was off because they were not even in class, leading to awkward moments akin to the “Bueller? Bueller? Bueller?” moment in the movie *Ferris Bueller’s Day Off* when Ferris Bueller’s high school teacher keeps calling on an absent Bueller.<sup>40</sup> To avoid the Ferris Bueller effect, I therefore require cams to stay on at all times, keeping students accountable. This also helps to limit potential cheating during quizzes.

Another way that Zoom can be superior to in-person teaching is in terms of leveling the class to foster engagement between students. In a traditional classroom where all students face the instructor, the students are not looking at one another. Many students will tune out other students, focusing only on the professor. But I use discussions as a big part of my teaching, and my upper-level classes are discussion-oriented and often student-led. With Zoom, *all* people can see one another in grid mode. Everybody can see the faces of everyone else, making it easier to discern facial expressions. In a way, that can make emotive signaling easier, not

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<sup>39</sup> Regarding distractions and internet stability, it would seem to me that just as a law student must internalize the costs of tuition, books, and transportation, students taking online classes going forward will need to internalize the costs of quality headphones and a stable high-speed internet connection. And law schools should be quick to factor such expenses into financial aid packages. If online is going to be some part of legal education for at least the near future, then we should all be realistic about what students need to succeed.

<sup>40</sup> FERRIS BUELLER’S DAY OFF (Paramount Pictures 1986).

harder. The professor is just one more face in the group. This has a leveling effect that de-emphasizes the primacy of the instructor, and properly fostered, can empower students to develop their own voice, creating greater engagement and respect between the members of the group.

The COVID-19 pivot also required me to rethink how students should submit work product, and as a result, I now save time and can give better and more timely feedback. In my simulations, I had always required students to submit extensive and organized paper casefiles. Some of them were quite hefty, and a class of thirty students might lead to four or five boxes of case files per semester. In the past, students typically used binders or folders with tabs, or some combination. But when COVID-19 hit, the last thing I wanted was to spend day after day touching dozens of paper files and folders handled by others. I therefore instructed students to submit their projects via PDFs uploaded to Canvas. I also instructed students on how to take dozens of documents (Word, JPEG, PDF, and more) and combine them into a single, organized PDF with a master table of contents.

PDF submissions? I loved it! Switching from paper casefiles to electronic submissions made work significantly easier for both students and for me. Students could take their various documents and organize them into a single PDF; the better students came up with other creative ways to better organize their documents. Rather than spending days printing documents and punching holes, students could spend their time on the substance. And for me, in years past I would either have to meet with a student to show them my comments, or go through the pains of disassembling a paper file to copy it, so I could then email it back to the student. Now, I can easily annotate each PDF with a tablet and stylus, and later email each student their project annotated with my comments. Thus, although the COVID pivot had made some things harder, other things had suddenly become far easier. When we eventually and hopefully return to campus for real, sans masks, I will continue to require all projects to be submitted in this



fashion.

### III. TOMORROW NEVER KNOWS

This final Part looks to the “tomorrow” of online teaching. It looks first at teaching for the duration of the pandemic. Second, it addresses legal education *after* COVID-19, including the role of the ABA and how recent changes to ABA Standards may affect law schools and legal educators. This Part closes with a “Top Ten” list of Beatles hits, musical tips for professors and schools struggling with the continuing adjustment to online teaching.

#### A. Teaching During COVID-19, Fall 2020

*And when the night is cloudy,  
There is still a light that shines on me.  
Shine until tomorrow, let it be.*

—The Beatles, *Let it Be*<sup>41</sup>

I wish I could end the essay here, happily saying *we taught well! The plague ended!* I wish I could say that in August 2020, *we returned to our deserted classrooms and gave each other big hugs! Nice to see you!* I wish I could say that in August 2020 *my colleagues and I celebrated our first faculty meeting back together in person with a big lunch and a bigger glass of wine!* But I can’t. All of summer of 2020 was spent in faculty and planning meetings, all on Zoom. We planned for a Fall of Uncertainty.

So where do we go from here and beyond? Perhaps by the time you read this, we will have widely available vaccines, herd immunity, and life will have returned to some version of normal. But reading today’s headlines, I doubt it. I suspect that some form of masks plus social distancing (and limited-to-no-in-person classes) will be the norm through all of the 2020–21 school year, and possibly some time beyond that. Online learning will remain part of education for the foreseeable future, and beyond.

The previous section discussed what it was like to teach online during the first COVID-

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<sup>41</sup> THE BEATLES, *Let it Be*, on LET IT BE (Apple Records 1970).

19 semester, Spring 2020. The bulk of the drafting of this essay took place in the second regular semester under COVID-19, Fall 2020. As the pandemic continued to spread—more like wildfire than waves—new issues arose such as whether classes might take place in person, and if so, how often and under what conditions. Many law schools went back to campus with 100% online classes; others, however, had some mix of in person and online, with an emphasis on trying to maximize on-campus learning for 1Ls.<sup>42</sup>

As such, the Fall 2020 semester raised additional issues unique to this era, some of which touch on online teaching, and others concerning the additional dynamic of a pandemic. I think that having any in-person classes in an area with high COVID-19 positivity is a mistake from a public-health perspective. Law school faculty, administrators, and staff tend to be older, many with conditions that put them at greater risk. Few law schools have the money or means to quickly expand seating capacity for social distancing and to introduce sufficient ventilation and filtration systems. I am not a public health expert. But I am somebody who loves his job and is very good at it, and I do not want this essay to be my epitaph. As an educator, I will therefore focus on why holding in-person classes during a widespread COVID-19 outbreak is a mistake for additional, *educational* reasons.

The interplay of in-person classes, online classes, and COVID-19 makes for a unique scenario, one that probably demands an entirely separate article. I will limit myself here to some key observations. As a preliminary matter, there is nothing particularly new about hybrid learning, if “hybrid” means combining in person and online. To some extent, legal educators have long used hybrid tools, such as teachers who record in-person classes or review sessions on behalf of sick students or students absent for religious holidays. Similarly, law schools with multiple campuses might schedule some courses to take place in an in-person classroom, while

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<sup>42</sup> Karen Sloan, *Online or In Person? Law Schools Diverge in Fall Semester Plans*, LAW.COM (July 1, 2020, 2:25 PM), <https://www.law.com/2020/07/01/online-or-in-person-law-schools-diverge-in-fall-semester-plans/>.

simulcasting to a second campus via videoconference.

What is unique for Fall 2020, then, is the addition into the mix of a deadly coronavirus pandemic. Some law schools have chosen to go entirely online for Fall 2020. But many schools have announced hybrid models. Hybrid models likely vary considerably depending on factors such as the available number of classrooms and seats (a physical constraint on how many courses and students can be in person and socially distanced on campus at any one time), the number of enrolled students (particularly 1Ls who may benefit most from in-person teaching), the number of courses, the percentage of students unwilling or unable to attend classes in person on campus, and the percentage of faculty unwilling or unable to teach in person on campus. One cannot envy administrators trying to juggle that many considerations, essentially trying to do the impossible twice-over: keeping people safe and maximizing on-campus presence.

But few law schools will have sufficient classrooms and seating to allow very many courses to take place in person with full enrollment and with social distancing. So at best, schools with hybrid programs will either have to reduce enrollment or have at least some courses partly or fully online. Likely schools will give first priority to in-person on-campus courses for 1L students on the theory that in-person classes will lead to better enrollment, better interaction, better retention, and better bar results three years later. The promise of at least some in-person classes likely helped some schools with enrollment, but it is questionable as to whether in-person classes help in the other categories.

Additionally, no school could ever require all students to attend in person on campus. Some students may have compromised immune systems or health problems, or they might live with such persons. Some may become sick during the semester, or fear sickness and stay away, or need to self-quarantine after being exposed to someone who is sick with COVID-19. The same is true of faculty, staff, and administration, many of whom are over fifty and are more

likely to fall into groups more likely to be killed by the pandemic.

Regardless of whether hybrid or fully online, classes need to be small. My normal Civil Procedure courses have had between sixty to eighty students. Fifty-five to sixty students in person is perfectly manageable. But such a number online is chaos. One cannot fit more than twenty-five to thirty students in a Zoom screen. Flipping back and forth means distractions and faces missed. A class that big will make it easy for students to hide or sit idly, or to talk over one another. Thus, a Zoom class should be less than thirty people; ideally, such a class should be twenty persons or less. Smaller classes also make it easier to read student faces, the most important social cue professors have in gauging the engagement, interest, and understanding of their students. Indeed, a small Zoom class can be *superior* to an online class in this fashion, because it is hard to monitor more than a few faces at once in an in-person class. But the “grid” mode of Zoom permits monitoring of dozens of faces at once.

Such considerations call into question whether a class with both in-person and remote students makes sense pedagogically during the COVID-19 pandemic. When I wrote the first draft of this essay, we were still planning for the Fall 2020 semester. But by the time I made the bulk of revisions to this essay, we were halfway through the Fall 2020 semester. At that time, I was teaching Civil Procedure and an upper-level Trademark course. I taught using a variant of hybrid. My Civil Procedure class was split into two sections of 35 or less. On Tuesdays and while wearing several masks, I taught one section of Civil Procedure at 10 a.m. and a second section at 1:30 p.m., in person to masked students in the room as well as via Zoom to students at home. In between, I sanitized and ate my lunch alone in my office, hoping not to infect myself with anything I touched during class. Even going to the bathroom was an adventure in juggling PPE and sanitizer before exiting and re-entering my office. At 3:30 p.m., I rushed home to shower and change clothing for my 5 p.m. Trademark class on Zoom. On Thursdays, I taught all three classes online via Zoom. On Thursday evenings, I collapsed,

exhausted. Teaching an overload at any time is exhausting. Doing so during a pandemic is just a little soul-crushing.

Prior to the beginning of that Fall 2020 semester, I wrote in an earlier draft of this essay:

I imagine a classroom filled with people wearing masks, making it difficult to hear and see faces. Teachers may be dressed like something from a Hollywood disaster film, covered with one or more masks as well as a face shield. Even with a microphone, it may be difficult for students to understand what teachers are saying. Reading faces, those of teachers and students, will largely be lost, depriving classrooms of the emotional immediacy that underpins effective use of Socratic dialogue.

These predictions have proven all too true. This fall, I initially tried wearing a face shield for the first week along with a mask. I additionally taught behind a large piece of plastic, approximately three-feet by four-feet, placed “strategically” (i.e., on top) of the dais for my further protection. I came armed with my own personal stash of Lysol wipes, procured by frequent and often-futile trips to Target and the Home Depot. I wiped down everything. The room was hot. I felt claustrophobic. And despite the multiple layers of PPE, I did not feel safe. It all felt more like Hygiene Theatre than actual safety.<sup>43</sup> And every time I entered the classroom, I went through the same ritual once again, if only for my own sanity.

I am confident that I did my job well. Regardless, there are only so many things that can be done well at once. Teaching in person in the classroom while simulcasting on Zoom is the essence of trying to do two things at once and doing both badly. The professor’s attention is constantly shifted from the in-person students to the remote students, along with the additional responsibility of running both classroom and remote technology. The school does provide teaching assistants to help online “Zoomers” with technical issues and to interject when Zoomers have questions. But on more than one occasion, equipment failures ate up class time. Even when technology worked, paying attention to onscreen students risked ignoring in-person

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<sup>43</sup> See Derek Thompson, *Hygiene Theater Is a Huge Waste of Time*, THE ATLANTIC (July 27, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/scourge-hygiene-theater/614599/>.

students, and vice-versa.

Masks were an additional complication, one that had little to do with online teaching but which affected everything, both in person and online. Masked, I had to wear a microphone so students in the room and on Zoom could hear me. I had to exaggerate my body language and eyes in order to communicate at half the effectiveness I would have without a mask. Because everyone was masked, I could barely hear most in-person students. Thankfully, I did not have any students who refused to wear a mask, although I made it clear in the syllabus and on the first day that I would broach no argumentation regarding masks. I wrote in my earlier draft:

After going through the stress of a muted, face-masked Tuesday, it is likely that everybody will look forward to the easier-to-hear, unmasked online Thursday. But these are not *online* issues, these are *COVID-19* issues. I think that any nostalgia some may feel for live classes will quickly be replaced by relief for a quick return to a fully online semester.

Over the course of the semester, these predictions were borne out. I believe that I was as effective in person as might be expected under the circumstances, but I was far more effective on fully online Thursdays. I was more relaxed and students were much looser. But that is not to say that life online during COVID was all peaches and cream, either. Obviously, online classes during a second COVID semester will share the shortcomings of online teaching that became apparent during the Spring 2020 semester. COVID has made everyone feel isolated. Depression and substance abuse are likely running rampant. This may make paying attention difficult. Not all students may have good internet connections, as evidenced by frequent drops and reconnections during any class session.<sup>44</sup> In addition, students may lack a distraction-free environment in which to attend class.

### *B. Online after COVID-19*

*Been away so long, I hardly knew the place.*

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<sup>44</sup> On more than one occasion, I have had a student who attends online class in a coffee shop, with mask, either because home lacks a quiet or a stable internet connection, or because the poor student is sick of being cooped up in the house all the time.

*Gee it's good to be back home.*

—The Beatles, *Back in the U.S.S.R.*<sup>45</sup>

So what's next? Having spent a career experimenting with online teaching techniques and technologies, and having now spent nearly a year using them under pandemic conditions, such questions are highly pertinent to me, as they are to my colleagues, my institution, and my profession. As a start, it is safe to say that online is here to stay. Just a few years after I graduated law school (and was already experimenting in online tools), the ABA Council on Legal Education (hereinafter, the ABA) started taking baby steps towards allowing online learning to be incorporated into the J.D. Curriculum.<sup>46</sup> In 2002, the ABA created a new rule regarding Distance Education in Standard 306.<sup>47</sup> The 2002 Standard limited distance learning to no more than twelve credits total, with no distance credits permitted prior to the completion of twenty-eight credits.<sup>48</sup> Thus, 1Ls need not apply.

Legal educators tend to be slow to adapt, and it is little surprise that these or similar limitations stood well into the Internet era.<sup>49</sup> Even as recently as 2015, the ABA had boosted the number of permissible distance credits only by three credits, up to fifteen maximum.<sup>50</sup>

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<sup>45</sup> THE BEATLES, *Back in the U.S.S.R.*, on THE BEATLES (Apple Records 1968).

<sup>46</sup> The ABA's Section of Legal Education and Admissions to the Bar, Council and Accreditation Committee is "recognized by the U.S. Department of Education (DOE) as the national accrediting agency" for law schools. The Section and Council are independent of the ABA. *See Legal Education and Admissions to the Bar*, AM. BAR ASS'N, [https://www.americanbar.org/groups/legal\\_education/](https://www.americanbar.org/groups/legal_education/) (last visited Oct. 3, 2020). Regardless, when referring to the Standards for Law School Accreditation, I will refer here more generally to the ABA.

<sup>47</sup> ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 2002–2003 § 306 (AM. BAR ASS'N 2002), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/standardsarchive/2002\\_standards.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/2002_standards.pdf). The interested reader can review archived ABA Standards at [https://www.americanbar.org/groups/legal\\_education/resources/standards/standards\\_archives/](https://www.americanbar.org/groups/legal_education/resources/standards/standards_archives/).

<sup>48</sup> ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 2002–2003 § 306(d)–(e).

<sup>49</sup> *See* ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2013–2014 § 306(d)–(e) (AM. BAR ASS'N 2013), [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) (limiting distance courses to a maximum twelve credits, with no more than four in any semester, and none permitted at all prior to the completion of twenty-eight credits).

<sup>50</sup> ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2015–2016 § 306(e) (AM. BAR ASS'N 2015), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2015\\_2016\\_aba\\_standards\\_for\\_approval\\_of\\_law\\_schools\\_final.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2015_2016_aba_standards_for_approval_of_law_schools_final.pdf) (limiting distance courses to fifteen maximum credits, but removing the bar on more than four online credits per semester).

Again, 1Ls need not apply, as distance credits were prohibited to them.<sup>51</sup> Similar rules were in effect as recently as 2017–18.<sup>52</sup>

The ABA finally started to loosen its Standards in 2018, and considering that COVID-19 was just around the corner, the timing was precipitous. The 2018–19 Standards boosted the permissible maximum distance credits to one-third of credit hours, 10 of which could be in the first year.<sup>53</sup> In addition, schools could create experimental programs with additional online credits by seeking a variance from the ABA.<sup>54</sup> A number of schools did so, even before COVID-19.<sup>55</sup>

Then, COVID-19 hit and the whole world had to immediately pivot online. Such a change would not have been permissible under the express terms of the then-applicable ABA Standards, so the ABA acted quickly. In February 2020, the ABA issued a guidance memo on emergencies and disasters, stating: “Distance learning often may be a good solution to emergencies or disasters that make the law school facilities unavailable or make it difficult or

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<sup>51</sup> *Id.* § 306(f).

<sup>52</sup> ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2017–2018 § 306(e)-(f) (AM. BAR ASS’N 2017), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2017-2018ABASStandardsforApprovalofLawSchools/2017\\_2018\\_aba\\_standards\\_rules\\_approval\\_law\\_schools\\_final.uthcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017-2018ABASStandardsforApprovalofLawSchools/2017_2018_aba_standards_rules_approval_law_schools_final.authcheckdam.pdf) (limiting distance courses to fifteen maximum credits, but barring such credits prior to the completion of twenty-eight credits).

<sup>53</sup> ABA STANDARDS AND RULES OF PROCEDURE FOR LAW SCHOOLS 2018–2019 § 306(e) (AM. BAR ASS’N 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); see also *ABA Accreditor for Law Schools Recommends Expanding Distance Learning Opportunities*, AMER. BAR ASS’N: NEWS (Feb. 12, 2018), [https://www.americanbar.org/news/abanews/aba-news-archives/2018/02/aba\\_accreditor\\_forl/](https://www.americanbar.org/news/abanews/aba-news-archives/2018/02/aba_accreditor_forl/). The 2019–20 Standards read identically in relevant part. ABA STANDARDS AND RULES OF PROCEDURE FOR LAW SCHOOLS 2019–20 § 306(e) (AM. BAR ASS’N 2019), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2019-2020/2019-2020-aba-standards-and-rules-of-procedure.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/2019-2020-aba-standards-and-rules-of-procedure.pdf).

<sup>54</sup> As of late 2019, perhaps 10% of ABA accredited law schools offered some sort of hybrid program, where at least some portion of the J.D. program was offered online; of those, at least five offered more than one-third of their course content online under an ABA variance. *How Online Learning Is Revolutionizing Legal Education: A Discussion with Ken Randall Of iLaw*, ABOVE THE LAW (Nov. 26, 2019, 4:16 PM), <https://abovethelaw.com/2019/11/how-online-learning-is-revolutionizing-legal-education-a-discussion-with-ken-randall-of-ilaw/>.

<sup>55</sup> Mike Stetz, *ABA Expands Online Learning. Will Schools Take Advantage?*, PRELAW (Aug. 17, 2018, 3:19 pm), <https://www.nationaljurist.com/prelaw/aba-expands-online-learning-will-schools-take-advantage> (noting variances granted to Dayton, Mitchell Hamline, Southwestern, and more); Lilah Burke, *Faculty and Pedagogy in the Hybrid J.D.*, INSIDE HIGHER ED. (Oct. 2, 2019), <https://www.insidehighered.com/digital-learning/article/2019/10/02/how-instructors-have-shaped-curricula-two-hybrid-jd-programs> (discussing New Hampshire’s hybrid J.D. for intellectual property).



impossible for students to get to the law school.”<sup>56</sup> This allowed law schools to shift immediately to Zoom.<sup>57</sup> Schools could also seek a more secure footing for their online plans by seeking variance permission from the ABA.<sup>58</sup>

But what about online teaching *after* COVID-19? As The Beatles’ old friend Bob Dylan might say, “The Times They Are A-Changin’.”<sup>59</sup> In particular, ABA Standard 306 for distance education has been deleted, and its relevant parts absorbed into other parts of the Standards. In some senses, the ABA Standards for 2020–21 remain much the same as previous years. The default cap of ten 1L online credits remains.<sup>60</sup>

But in other ways, the changes may be far more significant. Previously, a law school that wanted to provide more than one-third of its credits via distance education needed to apply for a variance under Standard 107, a provision that allowed exceptions that are “experimental or innovative and have the potential to improve or advance the state of legal education,” a provision that made no express mention of distance learning.<sup>61</sup> This provision could nevertheless be used by law schools to seek exceptions to the limitations on distance courses. In a sense, the cap limiting online courses to one-third of J.D. credits still remains in effect.

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<sup>56</sup> See *Managing Director’s Guidance Memo, Emergencies and Disasters*, AM. BAR ASS’N (Feb. 2020), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/20-feb-guidance-on-disasters-and-emergencies.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/20-feb-guidance-on-disasters-and-emergencies.pdf).

<sup>57</sup> As stated by Barry Currier, then the ABA’s Managing Director for accreditation and legal education, “If you look at that memo, you’ll find room in there to believe you can give more online credits than the standard [306] allows because of the emergency or disaster that is the pandemic.” Karen Sloan, *ABA Loosens Reins on Online Legal Education Amid Coronavirus Spread*, LAW.COM (Mar. 12, 2020, 2:13 PM), <https://www.law.com/2020/03/12/aba-loosens-reins-on-online-legal-education-amid-coronavirus-spread/>.

<sup>58</sup> ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2019–20 § 107 (AM. BAR ASS’N 2019), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2019-2020/2019-2020-aba-standards-and-rules-of-procedure.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/2019-2020-aba-standards-and-rules-of-procedure.pdf). Although some schools (such as mine) started Fall 2020 with hybrid learning, other schools shifted fully online and all have presumably sought and obtained ABA permission. See Staci Zaretsky, *Another Law School to Host Fall 2020 Classes Online Without Reducing Tuition*, ABOVE THE LAW (June 2, 2020, 11:43 AM), <https://abovethelaw.com/2020/07/another-law-school-to-host-fall-2020-classes-online-without-reducing-tuition/> (noting that Harvard, Berkeley, Vermont Law, UConn Law, Cooley Law, and U.C. Hastings were holding all classes online for Fall 2020).

<sup>59</sup> Bob Dylan, *The Times They Are A-Changin’*, on *THE TIMES THEY ARE A-CHANGIN’* (Columbia Records 1964).

<sup>60</sup> ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2020–21 § 311(e).

<sup>61</sup> ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2019–20 § 107(a)(2). Variances were also allowed for “extraordinary circumstances” that would constitute “extreme hardship” to schools or their students. *Id.* § 107(a)(1).

Now, however, exceeding that cap is a “substantive” change requiring ABA acquiescence under Standard 105. More significantly, the phrasing of new Standard 105 expressly mentions distance education and seems designed to encourage law schools to develop new, innovative online programs:

(a) Before a law school makes a substantive change in its program of legal education or organizational structure, it shall obtain the acquiescence of the Council for the change. A substantive change in program or structure that requires application for acquiescence includes:

....  
(12) The addition of courses or programs that represent a significant departure from existing offerings or method of delivery since the latest site evaluation including instituting a new full-time or part-time division, [or] *instituting a Distance Education J.D. Program . . .*<sup>62</sup>

So we must next ask, how does the ABA define “Distance Education J.D. Program?”

The ABA defines it as “a program where a law school grants a student more than one third of the credit hours required for the J.D. degree for distance education courses.”<sup>63</sup> So a program that is 100% online would be such a program, but so would a J.D. program that is 50% online. This, in turn, requires consideration of what counts as a “distance education” course, which is defined as a course using synchronous or asynchronous technology through which “students are separated from the faculty member or each other for more than one-third of the instruction and the instruction involves the use of technology to support regular and substantive interaction among students and between the students and the faculty member.”<sup>64</sup> Thus, a course can be a distance education course even if some of its sessions happen in person. A full-time Zoom course would fit the definition,<sup>65</sup> as would a course taught half in person and half online.<sup>66</sup> A

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<sup>62</sup> ABA STANDARDS AND RULES OF PROCEDURE FOR LAW SCHOOLS 2020–21 § 105(a)(12) (emphasis added). The ABA has also revised Rule 2 to authorize “emergency policies and procedures in response to extraordinary circumstances in which compliance with the Standards would create or constitute extreme hardship for multiple law schools.” ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2020–21 r. 2(c). Such “policies and procedures will be effective upon adoption by the Council for a term certain and limited to the duration of the extraordinary circumstance.” *Id.*

<sup>63</sup> ABA STANDARDS AND RULES OF PROCEDURE FOR LAW SCHOOLS 2020–21 at ix.

<sup>64</sup> *Id.*

<sup>65</sup> Such as my Trademark course for Fall 2020, which was live via Zoom.

<sup>66</sup> Such as when I broke my femur in October 2017 and taught the rest of the semester with Google Hangouts. *See supra* Part II.B.

course taught totally asynchronously with Canvas and message board interaction would also fit the definition. But a course regularly taught in person with one or two sessions online would not be a distance education course, so long as the online segments were not more than one-third of the class hours. Because a course may be treated as a “distance education course” even if much of the instruction happens in person, law schools and their deans should be careful not to accidentally and unknowingly operate a Distance Education J.D. program by having too many courses with too many online hours, without seeking and obtaining ABA acquiescence. In addition, the current ABA Standards appear to be unclear regarding a common scenario today: hybrid courses where some students are in person and others are online. Are such courses *both* distance and non-distance on a student-by-student basis?

Considering that distance education courses can vary tremendously in form, one can expect significant experimentation in online curriculum development. Some distance courses may be synchronous and others asynchronous, and yet others might mix the two. Asynchronous components might include canned lectures, screencasts, and even interactive experiences with quizzes and written prompts. Some courses may have both in-person and online sessions. Yet others may blend simultaneous in-person and remote learning. We can also expect more online J.D. programs in the coming years such as hybrid programs and programs where students attend classes in person their first year, completing most or all of their remaining work online.<sup>67</sup>

The ABA now seems to be ready to consider and approve such programs when warranted. In considering acquiescence requests, Rule 24 (also concerning acquiescence) gives the ABA a number of options, which state that the acquiescence “*may* 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.”<sup>68</sup> Notably, under the 2019 variance Standard, the word was not

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<sup>67</sup> See *supra* note 55 (noting examples of schools with online or hybrid programs).

<sup>68</sup> ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2020–21 r. 24(i).

“may,” but “shall.”<sup>69</sup>

The shift from a term of acquiescence that “shall” be indefinite, to a term that “may” be indefinite, might or might not be significant. In theory, the shift to “may” might give the ABA discretion to give initial approval for an *indefinite* online J.D. program, rather than requiring follow-up approval. Perhaps the ABA wanted sufficient room to give the seal of approval to well-developed and well-funded online programs. However, I suspect that most schools should assume that any approval, if given, will initially be for a term certain, with indefinite approval unavailable until the ABA is satisfied by the quality of the program.

Therefore, law schools wanting to jump deeper into online waters should tread carefully. Schools that want to create online J.D. programs subject to ABA acquiescence should consider the need for detailed explanations of how they will fund and provide:

- Sufficient faculty for online courses, particularly for synchronous courses, which benefit from small class sizes.
- Effective faculty technology, including equipment and software, for use both at the school and by instructors working remotely.
- Effective technology to be used by J.D. students, whether on campus or remote.
- Financial aid for access to technology for in-need students.
- Initial and ongoing training for faculty and students.
- Support for faculty and students, including personnel to help create, format, and trouble-shoot online course materials.
- Sufficient bandwidth for faculty and students.
- Upgraded classroom technology that permits meaningful synchronous participation, as well as effective access to archived classes.
- Supervision of the online J.D. program by qualified faculty and administration.

Thus, I doubt that simply telling the ABA that “we have Zoom” is going to suffice for obtaining acquiescence to a J.D. distance education program. Instead, creating such a program will be a significant undertaking for a school’s curriculum committee, faculty, and

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<sup>69</sup> The full text of the 2019–20 variance Standard stated:

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.

ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2019–20 § 107(a)(2) (emphasis added).

administration. Curriculum committee members will need to consider how an online J.D. program might best fit the talents of faculty, the needs of the school's students, and how such a program might complement the school's mission and student constituencies, allowing the school to grow in new directions. Faculty will surely need to be added as online courses should be small to succeed, and such faculty will also need to be technologically adept from the get-go.

Even though many law schools may be administrator-heavy, administrators may nevertheless need to be created to oversee such programs. One could easily see such schools creating an "Associate Dean of Online Learning" or a "Vice Dean, Online J.D. Program" to administer the academic and administrative aspects of an online J.D. program, as well as to provide an interface between faculty, students, and staff involved in technology. Such a program will also require a reliable flow of university funding, with guarantees of startup and future funding, in order to provide confidence to all stakeholders—faculty, students, and the ABA—in the program's creation and continuation.

Despite my strong interest in online teaching, I am also wary of this trend in legal education for five reasons. First, legal education works best in person. I would like to think I am good, very good at teaching online, but this is not true of all professors. Practicing law involves interactions between people. At its core, the practice of law is about people and communication, and communication online often loses something. As noted above, online teaching can gain things as well. Thus, an online program should be put together carefully and not be constructed as a virtual version of a real-world program.

Second, a shift to the creation of online J.D. programs may lead to the rich becoming richer, further entrenching Tier One schools to the detriment of smaller or local schools. The schools most likely to shift online and to do so successfully will likely be the name-brand schools, those with strong technological backbones and the endowments to fund expansions

into new areas of educational opportunity. It is not too hard to imagine a “Harvard J.D.” or “Berkeley Online” being developed using the significant resources belonging to such institutions.

The third set of concerns is financial. It is true that smaller schools with lesser resources may be tempted to develop online J.D. programs in the hopes of increasing revenue. However, fully online J.D. programs will likely require significant investments of financial and human capital, siphoning away funds and instructors from in-person teaching in those institutions that may be least capable of making sacrifices. Further, online J.D. programs from lesser-known schools might feel pressure to charge lower tuition to compete and undercut the brand-name recognition of programs from higher-ranked institutions. This, in turn, would defeat the very purpose of creating such programs, should the true motive be raising revenue. And of course, the more that existing schools enter the online J.D. arena, the fiercer the competition will be, further pushing down prices.<sup>70</sup> Thus, except for the Harvards of the world, a school should attempt an online J.D. program only when it has the funding and drive to develop such a program consistent with its mission, and with a clear vision of the types of students who will benefit from an online program. A program created solely for revenue purposes but without a clear mission and vision—and funding—is unlikely to succeed.

Fourth, if virtual J.D. *programs* will start to arise with more frequency, might we also soon see virtual *institutions*, such as consortiums of professors creating their own fully online law schools? Indeed, one of the biggest expenses in any law school is its brick-and-mortar location: buildings, classrooms, libraries with books and computers. If a law school could be 100% online, then why couldn’t new institutions be founded 100% virtually and seek ABA accreditation and online acquiescence? And how might the economics of such institutions

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<sup>70</sup> Indeed, with fully online J.D. programs, the need for geographic proximity will disappear, making all online schools potential national competitors with all other such schools. It is hard to imagine many big winners in such an economic game.

affect the economics for other institutions? A 100% online law school that lacks any physical classrooms might be able to offer its services significantly cheaper than brick-and-mortar law schools. If online trends lead to this natural conclusion, then the implications for existing law schools may be dire. Consider what Amazon.com did to the viability of department stores and shopping malls. Creative destruction, indeed.

A fifth and final concern may be the corporatization of legal education. Companies like iLaw provide courses for schools to fill holes in their schedules that cannot be taught by existing faculty.<sup>71</sup> As such, they provide a valuable service to schools willing and able to pay. For such firms, the expansion of online teaching during the pandemic is an obvious business opportunity. As scholars and legal educators, however, we must remind ourselves that the primary responsibility for a legal education rests with the faculty and dean of a law school, as laid out in the ABA Standards.<sup>72</sup> We should not be quick to outsource our *raison d'être*.

### C. Top Ten Hits of Online Teaching

*Life is very short, and there's no time  
For fussing and fighting, my friend.*

—The Beatles, *We Can Work It Out*<sup>73</sup>

This essay has covered a lot of history and ground, much of it deeply personal, and much of it tracking the development of the online learning technology that paralleled my legal education and career. Much of this essay is deeply serious. So, we should now “get back” to The Beatles. This last section is a Top Ten list of Beatles songs, repurposed as closing thoughts on online legal education. Ladies and gentlemen: *The Beatles!*

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<sup>71</sup> See iLAW DISTANCE LEARNING, <https://www.ilawventures.com/> (last visited Jan. 3, 2021).

<sup>72</sup> The ABA Standards state:

The dean and the faculty shall have the primary responsibility and authority for planning, implementing, and administering the program of legal education of the law school, including curriculum, methods of instruction and evaluation, admissions policies and procedures, and academic standards.

ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2020–21 § 201(a).

<sup>73</sup> THE BEATLES, *We Can Work It Out*, on YESTERDAY AND TODAY (Capitol Records 1966).

1. ***Revolution*<sup>74</sup>—Experiment, and never forget that content is king:** We don't know what tools and platforms will exist in a year, let alone five years from now. My first website was a paradigm of HTML simplicity. By today's standards it would be a relic, a throw-back. My current platforms include technologies such as a WordPress website, YouTube videos, Canvas, CALI lessons, and Zoom. The technologies will continue to evolve, but the one constant that runs through every platform that I have experimented with is that *content* is the only thing that matters. Whether law school outlines in 1996, website role-plays in 2010, or my most recent YouTube screencast in 2020, I have always started by focusing on the content. Experimentation should be focused on developing useful content, and on exploring how new platforms and tools can foster richer educational experiences.
2. ***With a Little Help From My Friends*<sup>75</sup>—Law Schools and faculty have professional responsibilities to become technologically adept:** Schools must have sufficient technological infrastructure, support staff, and training personnel available to help faculty and students. Similarly, faculty weaned on notebooks and typewriters in the 1960s through 1980s may no longer pretend that it is ok to be technical Luddites. Faculty must become versed in tools such as Zoom and Canvas. Schools should also factor student technology needs into financial aid decisions.
3. ***Don't Let Me Down*<sup>76</sup>—Cybersecurity is classroom security:** Professors need to secure their online classrooms and courses from Zoom bombers and trolls. Passwords and registrations should typically be required and screen sharing should be limited or disabled.<sup>77</sup>
4. ***I'm Looking Through You*<sup>78</sup>—A Zoom room is not identical to an in-person brick-and-mortar classroom, but sometimes, it's better:** The social dynamics are different. Everybody can see everybody else's face, which can foster shared emotional transmission among the group. The power dynamics are different because the professor is just one face among many. This can foster freer discussion, but can also foster chaos if the professor does not pay attention and stay attuned to the discussion. In my opinion, it is more important to *read* a Zoom room than to *control* a Zoom room.
5. ***I've Just Seen A Face*<sup>79</sup>—Cameras promote accountability and engagement:** To avoid the "Ferris Bueller" effect,<sup>80</sup> any form of online learning requires accountability. This means that students must keep their cameras on and show their faces and real names during Zoom sessions, or they will be tempted to take a nap, walk their dog, or scroll Instagram. Faces with real names also encourage students to engage with one another during discussions, since everybody can see one another's faces. Therefore, encourage students to use "grid" mode so that they can see as many faces as possible.

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<sup>74</sup> THE BEATLES, *Revolution* (Apple Records 1968) (released as a B-side single to *Hey Jude*). Another version of the song was released on the *White Album*. See THE BEATLES, *Revolution 1*, on THE BEATLES (Apple Records 1968).

<sup>75</sup> THE BEATLES, *With A Little Help From My Friends*, on SGT. PEPPER'S LONELY HEARTS CLUB BAND (Capitol Records 1967).

<sup>76</sup> THE BEATLES, *Don't Let Me Down* (Apple 1969) (released as a B-side single to *Get Back*).

<sup>77</sup> See ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2020–21 § 511 (requiring verification of student identity).

<sup>78</sup> THE BEATLES, *I'm Looking Through You*, on RUBBER SOUL (Capitol Records 1965).

<sup>79</sup> THE BEATLES, *I've Just Seen A Face*, on HELP! (Capitol Records 1965).

<sup>80</sup> See *supra* text accompanying note 40.



6. ***Maxwell's Silver Hammer***<sup>81</sup>—**Assessment and regular participation are essential:** Professors must administer regular quizzes or other assessments to keep students prepared and engaged. Quizzes can be summative, formative, or simply used to queue up the day's discussion. Require cameras to be on to limit cheating. But regular quizzes in a synchronous class can also be a bit of a time waster. Other techniques, such as pre-class quizzes and keeping careful track of who is called on via discussion logs, can help to foster a shared sense of responsibility and make students more accountable for preparation.
7. ***Think for Yourself***<sup>82</sup>—Think big, but keep it small. Online works best in small groups that maximize personal interaction, social intelligence, reading of emotions, and accountability. A Zoom class should not exceed 30 students and all students should ideally fit on one screen in grid mode.
8. ***Do You Want to Know a Secret***<sup>83</sup>—**The role of research faculty will evolve, whether scholars want it to or not:** I hope that as online instruction more deeply permeates the legal academy, schools will gain greater respect for the importance of developing quality online materials. Perhaps tenure committees will view the development of high-quality teaching materials on a higher level in the research-teaching-service triad of tenure review. Perhaps then the struggles I had early in my career as noted in Part I.C will become a thing of the past. Or conversely, perhaps online schools will become cheap and pervasive, and the number of research-oriented law schools will dwindle, with research faculty limited to elite institutions with big endowments. That would be an unfortunate loss.
9. ***The Long and Winding Road***<sup>84</sup>—The quick pivot to online teaching during the COVID-19 pandemic has served to accelerate trends in legal education that were likely inevitable. Even when the pandemic is over, online teaching in some form will be here to stay in various forms. Some schools will have some classes online, or have components of classes online. Yet other schools will develop J.D. programs that are either partially or fully online. Some schools, particularly the existing "name brand" schools, may be able to leverage their fame to become national brands in online teaching, with potentially tremendous negative consequences for other institutions.
10. ***Rock and Roll Music***<sup>85</sup>—ABA Standard 201(a)<sup>86</sup> places primary responsibility of the J.D. program with the faculty and dean. As law faculties and deans, we have been granted an

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Back in school again, Maxwell plays the fool again, teacher gets annoyed,  
 Wishing to avoid an unpleasant sce-e-e-ene.  
 She tells Max to stay when the class has gone away, so he waits behind,  
 Writing fifty times, "I must not be so-o-o-o."

THE BEATLES, *Maxwell's Silver Hammer*, on *ABBEY ROAD* (Capitol Records 1969). Of course, considering the brutal demise of the teacher in the song, we are ever reminded that assessment must also be fair, including pedagogical purposes of formative and summative assessment.

<sup>82</sup> THE BEATLES, *Think for Yourself*, on *RUBBER SOUL* (Capitol Records 1965).

<sup>83</sup> THE BEATLES, *Do You Want to Know a Secret*, on *PLEASE PLEASE ME* (Parlophone 1963).

<sup>84</sup> THE BEATLES, *The Long and Winding Road*, on *LET IT BE* (Apple Records 1970).

<sup>85</sup>

It's got a back beat, you can't lose it,  
 Any old time you use it.  
 It's gotta be rock and roll music,  
 If you wanna dance with me.

THE BEATLES, *Rock and Roll Music*, on *BEATLES '65* (Capitol Records 1964).

<sup>86</sup> ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2020–21 § 201(a).

important power, the development and supervision of the training of the nation's future lawyers. These responsibilities don't change with the development of an online program. If anything, the novelty of online J.D. teaching and even fully online J.D. programs increases that responsibility. We should resist the temptation to develop online programs for purely financial motivations. Only when the vision is clear and the program well-developed and supported should we create and seek ABA approval of such programs.

## CONCLUSION

As The Beatles sang in *Got to Get you Into My Life*: "I was alone, I took a ride, I didn't know what I would find there."<sup>87</sup> *Yesterday*, that was my career, following a bumpy road while I developed online teaching tools and techniques. *Today*, the rest of us must also join that "ride" as passengers, willingly or otherwise, as we navigate through a pandemic that has also given us license to experiment and innovate. *Tomorrow*, once the pandemic ends, such innovations will remain a continuing professional responsibility. I am confident that "we can work it out."<sup>88</sup>

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<sup>87</sup> THE BEATLES, *Got to Get you Into My Life*, on REVOLVER (Capitol Records 1966).

<sup>88</sup> THE BEATLES, *We Can Work It Out*, on YESTERDAY AND TODAY (Capitol Records 1966).