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THE SEVEN PRINCIPLES FOR GOOD PRACTICE IN [ASYNCHRONOUS ONLINE] LEGAL EDUCATION

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> Come mothers and fathers
> Throughout the land
> And don't criticize
> What you can't understand
> Your sons and your daughters
> Are beyond your command
> Your old road is rapidly agin'
> Please get out of the new one if you can't lend your hand
> For the times they are a-changin'[1]

I.   INTRODUCTION

It is to state the obvious that the internet has significantly altered how we obtain and use information and products. In the past, we would spend a Saturday morning driving to a market to pick up groceries, stopping by a bookstore for a weekend read, and picking up a newspaper at a convenience store. Now, with a few clicks, we can have our groceries delivered, download an e-book, and read the newspaper online, all from the comfort of our sofa.

The Internet has also impacted the delivery of higher education. The initial online higher education market was dominated by for-profit institutions geared towards older, working adults.[2] However, in recent years, brick-and-mortar institutions have entered the market, and students of all ages are pursuing degrees online.[3] Perhaps most prominently, Arizona State University now has over 25,000 online students working towards undergraduate degrees ranging from information technology to electrical engineering; the majority of these students are under the age of thirty and over one-third of the students are under the age of twenty-five.[4] Institutions of

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1.   BOB DYLAN, THE TIMES THEY ARE A-CHANGIN' (Columbia Studios 1964) (Bob Dylan is a singer, songwriter, and the 2016 Nobel Prize winner in Literature).

2.   *See* Karen D. McKeown, *Can Online Learning Reproduce the Full College Experience*, HERITAGE FOUND.: CTR. FOR POL'Y INNOVATION, Mar. 2012, at 1, http://thf_media.s3.amazonaws.com/2012/pdf/CPI_DP_03.pdf (stating that the original constituents of online education were "older, working, and other nontraditional students").

3.   *See id.* (stating that online education is now "attracting traditional students who formerly would have attended brick-and-mortar colleges").

4.   Ariz.   State   Univ.,   *At-a-Glance*,   ASU   ONLINE   (2016), https://asuonline.asu.edu/ sites/default/files/ASU%20Online%20Infographic%20Fall%202016.jpg   (last

all calibers now offer online programs. A *U.S. News and World Report* ranking of the best online graduate nursing programs included Duke, Ohio State, and Johns Hopkins in the top five.[5]

Further, the impact is noticeable not only in fully online degree programs, but also, and perhaps even more so, in the ubiquity of online courses at brick-and-mortar educational institutions. In the fall of 2014, approximately 2.8 million undergraduate students took at least one online course, with almost ninety percent of those students enrolled at public institutions and the remaining ten percent enrolled at not-for-profit private schools.

Legal education in the United States has been slow to embrace online education. But in recent years, the American Bar Association (ABA) has indicated that it is more willing to embrace online legal education. For example, the ABA increased the number of credits a student may take online from twelve to fifteen and removed the previous limit of four credits of online education per term.[6] Further, the ABA gave provisional approval to William Mitchell College of Law, which shortly thereafter became Mitchell Hamline School of Law, to offer a "hybrid" J.D. degree option, which involves students studying online for most of the semester, but then spending an intensive week or more on campus.[7] The school began offering the program in January 2015, and now other ABA approved institutions are considering and implementing similar hybrid programs that take advantage of online instruction.[8]

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visited Oct. 8, 2017).

5. *Best Online Master's in Nursing Programs*, U.S. NEWS & WORLD REP., https://www.usnews.com/education/online-education/nursing/rankings (last visited Oct. 8, 2017).

6. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2016–2017, at 19 (2016), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_aba_standards_and_rules_of_procedure.authcheckdam.pdf [hereinafter ABA STANDARDS 2016/17].

7. *Hybrid J.D. Program*, MITCHELL HAMLINE SCH. L., http://mitchellhamline.edu/academics/juris-doctor-program/hybrid-j-d-program/ (last visited Oct. 8, 2017).

8. *See Online and On Campus*, LOY. U. CHI. SCH. L., http://www.luc.edu/law/degrees/jurisdoctor-part-time/onlineandoncampus/ (last visited Oct. 8, 2017) (explaining that Loyola offers a blended weekend J.D. program); *Reduced-Residency J.D. Degree*, VT. L. SCH., http://go.vermontlaw.edu/jd-online?utm_ source= google&utm_medium=ppc&utm_campaign=Google_RRJD_2017&gclid=CjwKEAiA _9nFBRCsurz7y_Px8xoSJAAUqvKCT9a6FiU0_wtBUtjUYabxQkIRxy0Mu1lErNhTzI 0RoC93bw_wcB (last visited Oct. 8, 2017) (explaining that Vermont Law School offers a reduced residency J.D. program in which students take their first fifty-nine

While now common in higher education, this article seeks to answer the question of whether an online course can be an *effective* component of a law school's curriculum. This article will examine this question by looking back at a series of articles from 1999, *The Seven Principles for Good Practice in Legal Education*, and applying the principles proffered in these articles to online legal education. Moreover, this article uses this author's experience developing and teaching online courses over the past ten years for examples and applications of these principles.

This article first explores the origin of the articles mentioned and examines their impact on legal education reform and scholarship.[9] This article then introduces this author's online courses, presents his organizational structure, and covers an overview of the instructional materials and assignments.[10] The article is next divided into subsections, and addresses the principles for good practice.[11] The majority of the analysis is included in the first three subsections and focuses on three principles that are the subject of significant scholarship in legal education: Principle 3 on active learning,[12] Principle 2 on cooperative and group exercises,[13] and Principle 4 on prompt feedback, with a primary concentration on formative assessment.[14]

At the outset, a few items should be noted. To begin, this article focuses solely on asynchronous and not synchronous, online courses that are part of an ABA approved law school curriculum. Synchronous learning requires students and teachers to be online at the same time because the learning activities happen at set times, while asynchronous classes give students a time frame to complete the learning activities on their own.[15] While some of the discussion may be useful as applied to a synchronous online course, the course development and pedagogy of an asynchronous course differs

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credits at the law school, then take fifteen credits online, and then spend a semester in practice, for which they receive thirteen credits).

9.   See *infra* Part II.
10.   *See infra* Part III.
11.   *See infra* Part IV.
12.   *See infra* Part IV(A).
13.   *See infra* Part IV(B).
14.   *See infra* Part IV(C).
15.   Synchronous   vs   Asynchronous   Learning,   EDUC.   DYNAMICS, https://www.elearners.com/education-resources/degrees-and-programs/Synchro nous-vs-asynchronous-classes/ (last visited Oct. 26, 2017).

significantly.[16] Additionally, the article assumes that the course is being taken by a student who has had the typical first year in-class law school experience rather than a student who is taking an entire legal education program online. Finally, the article necessarily slips in and out of first and third person because much of the discussion and analysis bounces back and forth with this author's own experiences and courses.

II.   THE ORIGINAL ARTICLES

During the 1980s, there was a growing dissatisfaction with the state of instruction and learning in U.S. undergraduate institutions.[17] After a series of conferences and reports, two board members of the America Association of Higher Education, Arthur Chickering and Zelda Gamson, sought to create a set of guiding principles to improve undergraduate education.[18]

Through a grant from the Johnson Foundation, a group of leading scholars met at Wingspread in Racine, Wisconsin, to develop a set of general values and philosophies, which could be broadly applied to undergraduate education.[19] The group drafted a set of seven principles and published a report on these principles in 1987 in the American Association of Higher Education Bulletin.[20] The principles became widely read by those in higher education, and by 1996, several hundred thousand copies had been sold and distributed to colleges and universities.[21]

In 1991, the Institute for Law School Teaching (ILST) was formed,[22] and, along with the 1992 MacCrate Report,[23] was a vehicle

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16.   *See* David C. Powell, *Five Recommendations to Law Schools Offering Legal Instruction Over the Internet*, 11 J. TECH. L. & POL'Y 285, 296–97 (2006).

17.   Gerald F. Hess, *Seven Principles for Good Practice in Legal Education*, 49 J. LEGAL EDUC. 367, 367 (1999).

18.   *Id.* at 367–68.

19.   *See id.*

20.   *Id.* at 368.

21.   Arthur W. Chickering & Stephen C. Ehrmann, *Implementing the Seven Principles: Technology as Lever,* AM. ASS'N FOR HIGHER EDUC. (Oct. 1996), https://www.aahea.org/articles/sevenprinciples.htm. Interestingly, this article highlighted some of the advantages to using distance learning in undergraduate education. *Id.*

22.   *Institute History,* INST. FOR L. TEACHING & LEARNING, http://lawteaching.org/about/institute-history/ (last visited Oct. 8, 2017).

23.   AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION:

for analyzing and improving the program of legal education in law schools. In 1998, the ILST sponsored a conference titled "Seven Principles for Good Practice in Legal Education."[24] From that conference arose a set of eight articles in the Journal of Legal Education—an *Introduction and Overview*,[25] along with articles on each of the seven principles advanced at the conference, which assert that good practice in legal education:

    (1) Encourages student-faculty contact,[26]
    (2) Encourages cooperation among students,[27]
    (3) Encourages active learning,[28]
    (4) Gives prompt feedback,[29]
    (5) Emphasizes time spent on tasks,[30]
    (6) Communicates high expectations, and[31]
    (7) Respects diverse talents and ways of learning.[32]

The articles have been highly influential and are cited frequently by legal education scholars.[33] The articles continue to be relevant, with ongoing citation in legal scholarship.[34] The articles,

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NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT].

    24.   Hess, *supra* note 17, at 370.

    25.   *Id.*

    26.   Susan B. Apel, *Principle 1: Good Practice Encourages Student-Faculty Contact*, 49 J. LEGAL EDUC. 371 (1999).

    27.   David Dominguez, *Principle 2: Good Practice Encourages Cooperation Among Students*, 49 J. LEGAL EDUC. 386 (1999).

    28.   Gerald F. Hess, *Principle 3: Good Practice Encourages Active Learning*, 49 J. LEGAL EDUC. 401 (1999).

    29.   Terri LeClercq, *Principle 4: Good Practice Gives Prompt Feedback*, 49 J. LEGAL EDUC. 418 (1999).

    30.   R. Lawrence Dessem, *Principle 5: Good Practice Emphasizes Time on Task*, 49 J. LEGAL EDUC. 430 (1999).

    31.   Okianer Christian Dark, *Principle 6: Good Practice Communicates High Expectations*, 49 J. LEGAL EDUC. 441 (1999).

    32.   Paula Lustbader, *Principle 7: Good Practice Respects Diverse Talents and Ways of Learning*, 49 J. LEGAL EDUC. 448 (1999).

    33.   A Westlaw search on June 14, 2016, showed that the articles were cited a combined 185 times in law review and journal articles. The *History and Overview* was cited 25 times, *Principle 1* was cited 23 times, *Principle 2* was cited 52 times, *Principle 3* was cited 17 times, *Principle 4* was cited 33 times, *Principle 5* was cited 4 times, *Principle 6* was cited 8 times, and *Principle 7* was cited 23 times.

    34.   A Westlaw search on June 14, 2016, showed that for the *History and Overview*, *Principle 2*, *Principle 3*, and *Principle 4*, the last citation was in 2015; for *Principle 1* and *Principle 2*, the last citation was in 2013; and for *Principle 5* and *Principle 6*, the last citation was in 2010.

along with the aforementioned Institute for Law School Teaching, the MacCrate Report, and the Report on Best Practices for Legal Education,[35] have paved the way for legal education reform over the last several years.[36]

III. THE AUTHOR'S ASYNCHRONOUS ONLINE COURSES

My path to teaching and developing online courses was paved by both happenstance and my curiosity about the role technology can play in legal education. I was always curious about whether technology could help duplicate certain wrote fundamentals of my Legal Research and Writing course, such as uses and definitions of legal research tools and elementary citation skills. I found myself, either through a teaching assistant, or directly, repeating the same information about basic research tools to my class year after year. After all, the basic definition of a law review, ALR, or restatement does not change from year to year. I thought there should be an effective way to convey this static information to students by using technology. So I began to educate myself on the ABA rules on distance learning by attending a conference on distance learning and teaching.

My first opportunity to utilize distance learning came in an Employment Law course I taught for a couple of years in a live classroom. The first year I developed a small online unit of the course, equal to two weeks of in-class time. I started small—both due to my uncertainty as to this new form of teaching and because the materials development was solely my responsibility—without any technical support. The distance-learning component was well received by my students, and the exam performance on those items was similar to that of live classes.[37]

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35. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (Clinical Legal Educ. Ass'n, 1st ed. 2007) [hereinafter BEST PRACTICES].

36. *See* David I.C. Thompson, *Defining Experiential Legal Education*, 1 J. EXPERIENTIAL LEARNING 1, 6 (Univ. of Denver Sturm Coll. of Law, Working Paper No. 14-50, 2014) ("The current blossoming of experiential learning in legal education was guided and emboldened over the last 20 years by four primary sources: The MacCrate Report, The Carnegie Report, The Best Practices Report, and the American Bar Association's law school Accreditation Committee.").

37. The unit covered non-compete agreements and included the same readings required in previous iterations of the course. The exam included several multiple-choice and true-false questions that were exact repeats of the previous year's exam.

During this timeframe, a group of my weekend law students[38] approached me and asked if I was interested in teaching Employment Law in a truncated, one-month period in the summer. The students explained that they needed to continue to earn credits to stay on track to graduate in a reasonable period of time but did not want to attend weekend courses all summer long. I agreed and developed additional units to make the course into a one-third distance learning course,[39] which made covering three credits worth of material over a one-month period of weekends reasonable. The following summer, I expanded the course into a half distance-learning course. In the summer of 2010, I finally made the leap to a fully online course, which I have taught in the summers ever since. I also occasionally taught the course during the regular school year.

The course is asynchronous and divided into eight or nine week units each summer.[40] Each unit is structured the same and students begin each week by reviewing a weekly checklist that lists, in order, the items covered that week. Most weeks are divided into two or three subunits, and each subunit focuses on a different topic. Each subunit has the same basic structure and components: a short video or audio lecture, assigned readings (primarily case law), questions regarding the readings, and short answer/essay questions which ask the students to apply what they learned from the readings. Each week, there is also a group discussion question, a longer exam-style essay question, or occasionally, both. In total, students will answer 500 or more questions, answer thirty to forty short answer or essay questions, draft three to four exam-style essay question responses, and participate in several group discussions with classmates. Details and discussion of the pedagogy underlying the course structure and materials are provided throughout the remainder of this article.

The second JD level distance-learning course I developed was a Transactional Drafting course, which I first taught in the fall of

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38.   Hamline University School of Law had a unique weekend option where students only attended courses on Saturdays and Sundays. THE PRINCETON REVIEW, THE BEST 169 LAW SCHOOLS 138 (2016 ed. 2015). Students who only went during the fall and spring terms would graduate in about four and a half years. *Id.* I developed the weekend Legal Research and Writing course and taught it for the first nine years of the program.

39.   Under the ABA rules, this meant the course still did not qualify as a distance-learning course. *See* ABA STANDARDS 2016/17, *supra* note 6.

40.   When I have taught the course in the regular school year, I generally kept the eight-week units and simply expanded them into two weeks per unit.

2012.[41] A couple of years prior, Hamline University School of Law (Hamline) had adopted a required three-semester legal writing requirement. Students were given the option of two courses to fulfill the third semester writing requirement: a traditional course focused on appellate briefs or a Transactional Drafting course. I was asked to develop an online version of the Transactional Drafting course, primarily to give greater flexibility in scheduling for weekend students. The course was a live brick-and-mortar course for two semesters before transitioning into an online version. Since I had significantly more experience in developing distance learning course materials and had a year's advance notice of when the course would first be offered in the distance-learning format, I was able to teach the course fully online from day one.

The course structure was similar to the Employment Law course. Each week, the students began with a checklist of items, and each week normally included one or more video lectures and readings. Since the course was a skills course, it differed from the Employment Law course in that students answered fewer questions about the readings, but were instead assigned activities designed to develop the necessary skills to draft the required course documents. Additionally, students were required to complete tasks as part of the drafting process for graded course assignments. Depending on the week, these tasks ranged from drafting the actual graded assignments to researching statutes, case law, and legal forms. On several occasions throughout the semester, students were required to work in small groups or with a partner to complete an exercise or assignment. As with the Employment Law course, details regarding course structure, assignments, and the pedagogy underlying the Transactional Drafting course will be discussed throughout the remainder of this article.

IV. THE SEVEN PRINCIPLES APPLIED TO ONLINE LEGAL EDUCATION

Rather than addressing each principal in its original order, this article will first address the three principles that are prominent topics within the legal education field and are widely implemented in law school classrooms and courses: Principle 3 on active learning; Principle 2 on cooperative and group exercises; and Principle 4 on

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41.   I also developed two distance-learning courses for Hamline's Masters of Law program and another for a joint Masters of Organizational Leadership program that Hamline had with Saint Catherine University.

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prompt, formative assessment. The remaining four principles are addressed in numerical order.

A.   *Principle 3: Good Practice Encourages Active Learning*

This article leads with Principle 3 because it has become a universal truth that active learning is a necessary and important part of legal education.[42] The original article on Principle 3 was written by Professor Gerald Hess,[43] a true pioneer and leader of law school teaching.[44] Hess, who defined active learning as anything beyond listening to a lecture, began the article by articulating four benefits of active learning.[45] First, active learning is an effective way to develop higher-level thinking skills such as analysis and synthesis.[46] Second, active learning aids content mastery by giving students the opportunity "to articulate and test their understanding of" course concepts.[47] Third, active learning provides a vehicle to develop certain professional skills, such as interviewing and negotiating, that are difficult to learn alone.[48] Finally, active learning also creates

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42.   *See* Floyd et al., *Beyond Chalk and Talk: The Law School Classroom of the Future*, 38 OHIO N.U. L. REV. 257, 268 (2011) ("If there is one universal principle to be derived from research into learning, it is that active learning is more effective than passive learning." (citing Linda S. Anderson, *Incorporating Adult Learning Theory into Law School Classrooms: Small Steps Leading to Large Results*, 5 APPALACHIAN J.L. 127, 130 (2006))); *see also* Charles B. Sheppard, *The Grading Process: Taking a Multidimensional, "Non-Curved" Approach to the Measurement of First-Year Law Student's Level of Proficiency*, 30 W. ST. U. L. REV. 177, 188–89 (2003) (citing Laurel Currie Oates, *Beating The Odds: Reading Strategies of Law Students Admitted Through Alternative Admissions Programs*, 83 IOWA L. REV. 139 (1997)) (noting that empirical evidence supports the notion that students who rely solely on passive learning are likely to underperform their entrance indicators (LSAT and GPA), and that students who engage in active learning techniques are more likely to perform highly on their entrance indicators). Therefore, law professors should inform students about the necessity for active learning and provide guidance on using active learning techniques outside of the classroom. *Id.*

43.   Hess, *supra* note 28, at 401–03.

44.   *See* GERALD F. HESS & STEVEN FRIEDLAND, TECHNIQUES FOR TEACHING LAW (1999); MICHAEL HUNTER SCHWARTZ, GERALD F. HESS & SOPHIE M. SPARROW, WHAT THE BEST LAW TEACHERS DO (2013). Hess was a founder and initial director of the Institute for Law Teaching and Learning. *See Institute History, supra* note 22.

45.   Hess, *supra* note 28.

46.   *Id.* at 402.

47.   *Id.*

48.   *See id.* at 403.

better student attitudes towards the course and promotes student tolerance of diverse viewpoints.[49]

Hess identified several barriers to implementing active learning in the law school classroom.[50] One is an institutional priority that rewards scholarship over teaching and thereby reduces the incentive for professors to invest the time necessary to develop active learning exercises.[51] Another barrier is that law professors tended to self-identify as an expert, whose role is to transmit knowledge to students rather than guide a discussion or activity between students.[52] Other barriers include large class sizes, particularly in the first year, and the need to cover a certain amount of content.[53]

Hess's article identified several types of active learning occurring in law schools, including group discussions and in-class writing exercises.[54] Additionally, the article discussed the use of simulations and computer exercises as forms of active learning.[55] Perhaps most notably, the article discussed the Socratic method as a form of active learning.[56]

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49.   *See id.*
50.   *Id.* at 403–06.
51.   *Id.* at 403.
52.   *Id.* at 405.
53.   *Id..*
54.   *Id.* at 407–10.
55.   *Id.* at 410–12.
56.   *Id.* at 406–07.

1. Socratic Dialogue and the Case Method

The Socratic method[57] has long been a dominant feature of legal education.[58] It is the primary teaching technique for the case method, and has long been considered the signature teaching method for law schools.[59] Over the last twenty years, there has been much discussion and debate about the efficacy of the Socratic method in law school teaching, fueled in part by the influential MacCrate and Carnegie reports.[60] Critics of the method argue that while it may be an active learning experience for the student engaged with the professor, the other students have a passive experience. Detractors have even labeled the Socratic method as the "vicarious learning/self-teaching" method.[61] Detractors also argue

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57. While this article will use the conventional term "Socratic method" to refer generally to the process of question and answer commonly used in the law school classroom, the use of the term "Socratic method" is criticized by many commentators who argue that "Protagorian" method or "Langdellian" method would be more accurate. *See* Jamie R. Abrams, *Reframing the Socratic Method*, 64 J. LEGAL EDUC. 562, 563 (2015) ("Core features of the modern case-based Socratic method in law schools include its (1) inquisitional format; (2) use of appellate cases; and (3) objective to teach students to 'think like lawyers.'"); Joseph A. Dickinson, *Understanding the Socratic Method in Law School Teaching after the Carnegie Foundation's Educating Lawyer*, 31 W. NEW ENG. L. REV. 97, 101 (2009) (citing William C. Heffernan, *Not Socrates, but Protagoras: The Sophistic Basis of Legal Education*, 29 BUFF. L. REV. 399, 399 n.1 (1980)); Vernellia R. Randall, *Increasing Retention and Improving Performance: Practical Advice on Using Cooperative Learning in Law Schools*, 16 T.M. COOLEY L. REV. 201, 205 (1999).

58. *See* Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 28 (1996) (reporting that out of 383 first-year law professors, 370 (97 percent) "used the Socratic method at least some of the time in first-year classes"); Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 518 (1991) (asserting that the case method became the dominant teaching method just after the turn of the century).

59. *See* WILLIAM M. SULLIVAN ET AL., THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 47–87 (2007) [hereinafter CARNEGIE REPORT].

60. *See id.*; *see also* MACCRATE REPORT, *supra* note 23.

61. Rogelio Lasso, *From the Paper Chase to the Digital Technology Chase: The Challenge of Teaching 21st-Century Students*, 43 SANTA CLARA L. REV. 1, 28 (2002) ("[The] vicarious learning/self-teaching model . . . does not work well for most, completely fails some, and is frustrating to all students."); *see also* Michael T. Gibson, *A Critique of Best Practices in Legal Education: Five Things All Law Professors Should Know*, 42 U. BALT. L. REV. 1, 30 (2012) ("The main impediment to improving law school teaching is the enduring over reliance on the Socratic dialogue and case method." (citing BEST PRACTICES, *supra* note 35, at 133)).

that the Socratic method focuses too much on the analysis of judicial opinions at the expense of other key legal skills, including the application of the analysis to an oral argument or to advising a client.[62] As a solution, one commentator proposes that the Socratic method be altered, so as to have a client-centered focus, with students in the role of the attorney.[63] The course would include the teaching of legal skills such as research and problem solving.[64]

Proponents of the Socratic method tend to agree that active learning produces higher-quality learning than passive learning, and postulate that the Socratic classroom is an active learning experience for all students.[65] Proponents argue that "when the teacher asks a question, each student has to utilize the [same] six cognitive capacities used . . . daily" by a practicing lawyer: "listen, hear, understand, evaluate, formulate a response, and stand ready to articulate and defend it."[66] They argue that the dialogue, properly orchestrated,[67] is "the 'discourse of the law' and essential to its practice."[68] Further, because each student has to stand ready to jump into the conversation at any time, the mental attributes of attention and alertness are honed.[69]

2. *An Overview of Adult Learning Science*

The complex neuroscience underlying how adults learn has become a focal point for many law professors' scholarship in recent years.[70] A full presentation of the underlying science of learning is

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62.   Abrams, *supra* note 57, at 568. *But see* Elizabeth Garrett, *Becoming Lawyers: The Role of the Socratic Method in Modern Law Schools*, 1 GREEN BAG 2d. 199, 201 (1998) (discussing the use of the Socratic method to teach analogy).

63.   Abrams, *supra* note 57, at 568–72.

64.   *Id.*

65.   Donald G. Marshall, *Socratic Method and the Irreducible Core of Legal Education*, 90 MINN. L. REV. 1, 9 (2005).

66.   *Id.*

67.   *See* Dickinson, *supra* note 57, at 104 ("The teacher must be aware that while lawyers may often be required to speak their views in public, knowing those views will be subject to critique and criticism, new students are likely not practiced in that skill. They are in a law school class to acquire and practice that skill.").

68.   *Id.* at 99.

69.   Marshall, *supra* note 65, at 10.

70.   *See* Kari Mercer Dalton, *Their Brains on Google: How Digital Technologies are Altering the Millennial Generation's Brain and Impacting Legal Education*, 16 SMU SCI. & TECH. L. REV. 409 (2013); Larry O. Natt Gantt, *The Pedagogy of Problem Solving: Applying Cognitive Science to Teaching Legal Problem Solving*, 45 CREIGHTON L. REV. 699

beyond the scope of this article, but in simple terms, "adults learn by paying attention, processing information, and using it."[71] Step one, paying attention, is obviously critical to the learning process but can also be a difficult first step.[72] This is because the brain is constantly being bombarded with stimuli from our five senses: smell, taste, touch, sight, and hearing.[73] Much of the stimuli encountered by the brain is necessarily ignored,[74] and at any one point, only certain stimuli will actually enter into the senses, a process known as "selective attention."[75] For example, imagine sitting in a crowded restaurant with a group of friends eating, drinking, and listening to music. At any particular point you will only be able to focus on a few senses, such as the music and the taste and smell of your food. The brain uses attention to focus on or away from stimuli based on an assessment of its meaningfulness.[76] Meaningfulness may be determined based upon intrinsic importance ("That food looks good.") or extrinsic importance ("I want to do well on the exam so I better pay attention."). Attention based upon extrinsic importance is generally more difficult to maintain.[77] Garnering student attention and focus in the classroom has been a significant issue for many law

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(2012); Shailini Jandial George, *Teaching the Smartphone Generation: How Cognitive Science Can Improve Learning in Law School*, 66 ME. L. REV. 163 (2013); James B. Levy, *Teaching the Digital Caveman: Rethinking the Use of Classroom Technology in Law School*, 19 CHAP. L. REV. 241 (2016); Deborah J. Merritt, *Legal Education in the Age of Cognitive Science and Advanced Classroom Technology*, 14 B.U. J. SCI. & TECH. L. 39 (2008); Elizabeth Adamo Usman, *Making Legal Education Stick: Using Cognitive Science to Foster Long-Term Learning in the Legal Writing Classroom*, 29 GEO. J. LEGAL ETHICS 355 (2016).

71.   George, *supra* note 70, at 173 (citing Hillary Burgess, *Deepening the Discourse Using the Legal Mind's Eye: Lessons from Neuroscience and Psychology that Optimize Law School Learning*, 29 QUINNIPIAC L. REV. 1, 23 (2011)).

72.   *See* Levy, *supra* note 70, at 256.

73.   *See also id.* (first citing WINIFRED GALLAGHER, RAPT: ATTENTION AND THE FOCUSED LIFE 25, 146, 163 (2010); then citing JOHN J. RATEY, A USER'S GUIDE TO THE BRAIN 185–95 (2001)) (explaining that information "enter[s] the brain as raw sensory data").

74.   *Id.* (first citing GALLAGHER, *supra* note 73, at 9; then citing RATEY, *supra* note 73, at 108) (noting that the brain has nowhere near the capacity to handle every sight and sound in our immediate vicinity).

75.   *See* George, *supra* note 70, at 173.

76.   *Id.* at 257 (citing JOHN MEDINA, BRAIN RULES: 12 PRINCIPLES FOR SURVIVING AND THRIVING AT WORK, HOME, AND SCHOOL 32 (Pear Press 2008)).

77.   *Id.* (citing DANIEL KAHNEMAN, THINKING, FAST AND SLOW 41 (2011)).

professors in light of the proliferation of technology available to law students.[78]

Information enters the brain through the short-term memory.[79] Neuroscientists tell us that only a limited amount of information can be stored in short-term memory at any given time,[80] and information may be stored in short-term memory for about thirty seconds.[81] After that thirty-second window, some information is discarded (forgotten) and the other information is moved to long-term memory in a process known as encoding.[82] While short-term memory has a very limited amount of storage capacity, neuroscientists consider long-term memory storage virtually limitless.[83] However, information stored in the long-term memory must be brought back to the short-term memory for use or further learning.[84] In that way, there is a constant exchange of information between long-term and short-term memory.[85]

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78.   *See, e.g.*, Dalton, *supra* note 70, at 431 (asserting that massive exposure to digital technologies has altered modern law students' ability to concentrate and read on a deep level); Steven Eisenstat, *A Game Changer: Assessing the Impact of the Princeton/UCLA Laptop Study on the Debate of Whether to Ban Law Student Use of Laptops During Class*, 92 U. DET. MERCY L. REV. 83, 84–89 (2015); Kevin Yamamoto, *Banning Laptops in the Classroom: Is it Worth the Hassles?*, 57 J. LEGAL EDUC. 477, 485–86 (2007).

79.   *See* George, *supra* note 70, at 174.

80.   *See id.* Scientists historically believed that about seven pieces of information could be stored in short-term memory at any one time. *Id.* However, recent research may indicate an even smaller storage capacity. NICHOLAS CARR, THE SHALLOWS 124 (2010) (highlighting new evidence which suggests an ability to process only two to four elements at once); George, *supra* note 70, at 174 (classifying immediate memory as "absolute judgment" and explaining the ability to maintain judgment for seven stimuli (citing George A. Miller, *The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information*, 63 PSYCHOL. REV. 81, 90 (1956))); *see also* Jennifer Lee et al., *The Impact of Media Multitasking on Learning*, 37 LEARNING MEDIA & TECH. 94, 95–96 (2012).

81.   George, *supra* note 70, at 174 n.84.

82.   *Id.* at 174; *see also* Levy, *supra* note 70, at 258 (noting that the discarding of information from short-term memory means "information that does not make it past students' short-term memory—either because they did not attend to it very well or their attention was interrupted—is gone and cannot be learned.").

83.   Floyd et al., *supra* note 42, at 265 (citing Richard C. Atkinson & R. M. Schriffrin, *Human Memory: A Proposed System and Its Control Processes, in* 2 KENNETH W. SPENCE & JANET T. SPENCE, THE PSYCHOLOGY OF LEARNING AND MOTIVATION 13, 15 (1968)).

84.   George, *supra* note 70, at 175.

85.   Floyd et al., *supra* note 42, at 275; George, *supra* note 70, at 175.

Thus, information stored in the long-term memory is only useful if it can be "found" and brought back to the short-term.[86] If information has been memorized through repetition or rehearsal, it can be accessed by the short-term memory through "automaticity"[87] (think of your phone number).[88] Other information is stored and retrieved because it was connected to other, previously learned, information by a process referred to as "chunking" or "schemata."[89] Think of having a casual lunch with two people, one being a close friend and the other being someone you have just met. If they both order salads topped with their respective favorite dressings, three months later you are more likely to remember the dressing ordered by your close friend, because the information is more important to you and because it can be attached to other information about your friend's likes and dislikes. The more easily information can be connected to existing information, the more likely it is to be learned and retrievable.[90]

Another conceptualization of the process of learning can be found in the commonly cited Bloom's Taxonomy—a structure used to explain the human learning process.[91] This conceptualization is a pyramid under which comprehension and understanding increase as learners move up each level:

    (1) Knowledge,
    (2) Comprehension,
    (3) Application,

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86.   George, *supra* note 70, at 174–75.

87.   Russell A. Dewey, *Psychology: An Introduction*, PSYCH WEB, http://www.psywww.com/intropsych/ch07-cognition/automaticity.html (last visited Oct. 8, 2017) ("*Automaticity* is the ability to do something without thinking about it. It occurs with virtually all *overlearned* behavior.").

88.   George, *supra* note 70, at 174; *see also* Levy, *supra* note 70, at 258 ("To truly become 'learned,' however, it usually requires that the neurons comprising the relevant pathways be fired again and again through practice and effort to reinforce and strengthen them."); Usman, *supra* note 70, at 362 (noting that "retrieval cues" are strengthened through repetition).

89.   George, *supra* note 70, at 174.

90.   *Id.* at 174–75; *see also* Cynthia Ho et al., *An Active-Learning Approach to Teaching Tough Topics: Personal Jurisdiction as an Example*, 65 J. LEGAL EDUC. 772, 782 (2016) (citing GRUNERT O'BRIEN ET AL., THE COURSE SYLLABUS: A LEARNING-CENTERED APPROACH 4 (Wiley, 2d ed. 2009)) (summarizing active-learning research).

91.   BENJAMIN S. BLOOM ET AL., TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOALS: HANDBOOK I: COGNITIVE DOMAIN (Benjamin S. Bloom ed., 1956).

(4) Analysis,

(5) Synthesis, and

(6) Evaluation[92]

For law students, knowledge and comprehension of black letter law are basic starting points to a legal education, but it is the application of that knowledge to a set of facts which begins the process of thinking like a lawyer.[93] The law student must be able to

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92.   One legal commentator broke down the six levels:

The *Taxonomy*'s six levels of learning, from simplest to most complex, are:

(1) Knowledge (*knowing and remembering* "ideas, material, or phenomena");

(2) Comprehension (*paraphrasing* that information into one's own words; *interpreting* it by making inferences, generalizations, or summaries; and *extrapolating* or predicting trends or tendencies by applying the information to a concrete situation);

(3) Application (*using* the information in a new situation, without being told the information is relevant, and without being shown how to use it);

(4) Analysis (*breaking down* information into parts, realizing how those parts relate to each other, and recognizing which parts are significant in a given situation);

(5) Synthesis (*putting together* elements and parts "in such a way as to constitute a pattern or structure not clearly there before," usually by combining the information with new material); and

(6) Evaluation (*making judgments* "about the value, for some purpose, of ideas, works, solutions, methods, material, etc.").

Gibson, *supra* note 61, at 7–8 (citing BLOOM ET AL., *supra* note 91, at 62, 89–90, 120, 144, 162, 195).

A group of educational researchers proposed a revised taxonomy in 2001 with new pyramid levels:

(1) Remember,

(2) Understand,

(3) Apply,

(4) Analyze,

(5) Evaluate, and

(6) Create.

A TAXONOMY FOR LEARNING, TEACHING, AND ASSESSING: A REVISION OF BLOOM'S TAXONOMY OF EDUCATIONAL OBJECTIVES § 3.2(D), at 29 (Lorin W. Anderson & David R. Krathwohl eds., complete ed. 2001); *see also* George, *supra* note 70, at 182 (noting that law students would benefit from an understanding of cognitive learning principles, including Bloom's Taxonomy, and that law professors should include such teaching within the law school curriculum).

93.   *See* Gibson, *supra* note 61, at 9–10 (noting that the difference between comprehension and application for a law student is similar to a medical student who has memorized the symptoms of a particular disease. It is one thing for the medical student to be able to answer the question if the patient has that disease and quite another for the student to have memorized hundreds of diseases and their accompanying symptoms and be able to answer, "What disease does the patient

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identify and sort all of the black letter law, legal principles, analysis, and be able to diagnose a legal problem or even write a law school essay exam.[94] The ability to transfer knowledge learned from a particular case, statute, or other legal source and apply it to a variety of situations and contexts is the cornerstone of a legal education.[95]

3.   *The Case Method and Asynchronous Online Courses*

It is then evidence that the case method, whether taught through the Socratic method or otherwise, is a necessary component of a legal education because the ability to pull relevant rules, analysis, and policy from a judicial opinion is a core function of legal education.[96] It is also evidence that active learning is both a best practice in legal education, and a regular and important teaching technique in modern legal education.[97] The question, then, is whether active learning principles generally, and particularly as applied to case law analysis, can be utilized in an online course.

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have?”).

94.   One method for law school students to organize their course knowledge is to outline. *See id.* at 11 (“[W]e encourage students to create their own outlines, instead of merely reading commercial outlines. Creating an outline is Synthesis (Level 5); reading one is Knowing and Remembering (Level 1).”).

95.   *See* Tonya Kowalski, *True North: Navigating the Transfer of Learning in Legal Education*, 34 SEATTLE U. L. REV. 51, 52 (2010) (“‘Transfer of learning’ is at the very essence of what lawyers do every day. The most classic example comes from formal legal analysis, where attorneys take both concrete rules and analogies from precedent and apply them to new legal problems.”).

96.   *See, e.g.*, Brandon R. Ceglian, *Bridging the Gap Between Law School and Law Practice*, COLO. LAW., May 2008, at 59, 61 (“The case method . . . is a tried-and-true method of helping first-year students understand and apply precedent.”).

97.   *See* Dale Dewhurst, *The Case Method, Law School Learning Outcomes and Distance Education*, 6 CAN. LEGAL EDUC. ANN. REV. 59, 62 (2012) (“(1) [L]aw should be taught as a science, not a trade; (2) students learn the law best through active reading, analysis, and discussion; (3) students must develop analytical skills and independent learning skills . . . .” (citing Jeffrey D. Jackson, *Socrates and Langdell in Legal Writing: Is the Socratic Method a Proper Tool for Legal Writing Courses?*, 43 CAL. W. L. REV. 270, 274–75 (2007))); Floyd et al., *supra* note 42, at 269 (“Cognitive psychology has taught us the need for active processing of information. In order for concepts first to make it into short-term memory, and then—just as importantly—to be stored in long-term memory for retrieval and use, active learning activities are crucial.” (citing Robin A. Boyle, *Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student*, 81 U. DET. MERCY L. REV. 1, 7 (2003))).

My online Employment Law course is a case method course where almost all of the readings are judicial opinions. Most subunits consist of three to four cases, which is similar to what I normally cover in an individual brick-and-mortar class session. For each assigned case there are several questions each student must answer. These questions closely resemble the type of questions I would ask in a live classroom. Questions follow a common pattern in the law school case method dialogue. The questions cover procedural history, key facts to the court's holding and reasoning, key legal standards, and policies supporting the decision. Some examples from my course are as follows:

Key facts of the case:

In *Frampton v. Central Indiana Gas Company*, which of the following best describes the circumstances under which the employee as terminated?
- o   1. The employee was fired prior to filing a claim for 30% loss of use in her arm, but after she inquired about compensation for the loss.
- o   2. The employee was fired after filing the claim for 30% loss of use in her arm; the company informed her she was being terminated for poor work performance.
- o   3. The employee was fired after filing a claim for 30% loss of use in her arm; the company did not tell her why she was terminated.
- o   4. The employee was fired after filing a claim for 30% loss of use in her arm; the company informed her she was being terminated as part of a general layoff for economic reasons.

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The court's holding:

Which of the following best describes the court's holding and reasoning on the clarity element?

- o 1. The court found that there were three clear public policies which met the clarity elements; a public policy encouraging citizens to help law enforcement could be found in a series of four statutes. The court also assumed there was a clear public policy encouraging citizens to be good Samaritans and help those in need. The court also determined that there was a clear public policy on the protection of human life.
- o 2. The court determined that there was a clear public policy encouraging citizens to help law enforcement found in a series of four statutes, but there was not a general policy of helping those in need to be found in the rescuer doctrine. The court also determined that there was a clear public policy on the protection of human life.
- o 3. The court found that there was not a clear public policy to aid law enforcement as public policy is not furthered by encouraging citizens to jump into every criminal situation. The court assumed there was a broad good Samaritan public-policy encouraging citizens to aid others in need. The court determined that there was a clear public policy on the protection of human life.

Key facts that led to the court's holding:

Which of the following is true regarding Indiana's Workers Compensation Act? (Mark all which apply)

- o 1. One purpose of the act is to transfer from the worker to the industry a greater portion of the economic loss due to industrial accidents and injuries.
- o 2. The act is for the benefit of the employer because the employer is no longer faced with a threat of tort claims from its employees for injuries suffered on the job.
- o 3. The act is to be liberally construed in favor of the employee.
- o 4. The act is to be liberally construed in favor of the employer.

Key legal standards that the court cited to support its holding:

> Which of the following were part of the court's reasoning in finding for the employee? (Mark all which apply)
> o   1. The court relied upon case law from other jurisdictions where an employee was terminated for filing, or threatening to file, a workers' compensation claim.
> o   2. The court noted that there were no other cases involving termination in retaliation for filing worker's compensation claims in Indiana or anywhere else.
> o   3. The court analogized this case to landlord tenant cases of retaliatory evictions.
> o   4. The court determined that the issue of whether the termination was for retaliation was a question for the court.
> o   5. The court reasoned that allowing an employer to discharge an employee for filing a claim would allow employers the ability to coerce employees from exercising a statutory right.

Policy underlying or supporting the court's holding:

> Fill in the blanks of the following, which sets forth the basic limitation on the public policy exception:
>
> "In creating a public policy tort action, (this court) cautioned the exception should be _____ construed in order to guard against frivolous lawsuits:
>
> In determining whether a _____ mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes a letter or _____ of a constitutional, statutory, or regulatory provision or scheme.
>
> Prior judicial decisions may also establish the relevant public policy. However, *courts should proceed _____ if called upon to declare public-policy absent some prior legislative or judicial expression on the subject.*"

There is no doubt that the above questions are not a replication of the Socratic method. The student is not put on the spot, sitting in front of her classmates with a professor awaiting a prompt response. Instead, the student has ample time to go back to the case to find the proper responses. In fact, I encourage each student to read through

a case once before going to the questions, but then have the case open nearby to reference as she goes through the questions. The above process also does not replicate the Socratic method of allowing a professor to meander down the path of multiple hypotheticals that are based upon responses from the student being questioned.

What this version of the case method does accomplish is to address a few primary concerns raised about the Socratic method. First, this is not "vicarious learning" because every student has to answer every question. While a student can be unprepared in a brick-and-mortar classroom, hoping either to not be called upon or to "pass," in the online course, a student cannot avoid reading the cases and answering the questions. Each student must be active with the case material and must be able to identify, for example, the key legal rules that I want the student to take from the case.

The other concern that this online version of the case method addresses is removing the "attention" factor, or perhaps better stated, the "lack of attention" factor discussed above.[98] A student may drift in and out of attention during a Socratic dialogue, live lecture, or even a small group discussion, thereby permanently missing anything discussed or presented during that time. However, in the online environment, a student's lack of attention during any particular time period has no real detrimental effect. If the student stops answering questions about a case to respond to a text, she can go right back to the questions without missing anything.

This is an active learning process. Each student must review the text and then test her understanding of the material by answering questions. For most question sets, a great majority of students have to repeat the questions two or more times before having a complete enough understanding to obtain the required score. A student must receive no more than one incorrect response per set of questions to receive credit and move on to the next assignment. Ultimately, through this process, I can be confident that each student is directly exposed to the key legal standards and analysis from each case, which provides the student with the necessary foundation to engage in further active learning exercises.

Applying Bloom's Taxonomy, the above method of questioning meets the first and second levels of the pyramid. Each student is required to gain knowledge of key standards and reasoning, and

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98.   *See supra* note 78 and accompanying text.

must comprehend the material enough to answer the questions correctly. That foundational knowledge can then be used by the student to complete active learning exercises which meet the other levels of Bloom's Taxonomy: application, analysis, synthesis, and evaluation. It is clear that, particularly in the context of legal education, these levels tend to overlap,[99] and exercises may certainly meet the criteria for more than one level.[100]

At the application level, I want a student to be able to apply and use the law to advise clients and solve problems in "new" situations, meaning fact patterns that differ from those in the cases the student has just read. Throughout the online course, students are required to regularly complete exercises that involve application of the law, including applying the law to short hypotheticals, interviewing and advising a client,[101] and investigating a violation of the law.[102]

The exercise would likely meet the criteria for the analysis level as well. In a case method course, at the analysis level, I want a student to understand the cases thoroughly enough so as to be able to break down a court's reasoning and analysis well enough to compare it to

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99. Gibson, *supra* note 61, at 9–10 (explaining that levels of learning under Bloom's Taxonomy may substantially overlap).

100. *See id.* (describing levels).

101. A sample exercise from the course:

Sam Stone works in the insurance adjusting business. He and nine coworkers recently left ABC Adjusting at the same time to join XYZ Adjusting. Sam will be the supervisor and the nine others will work under him. They are scheduled to begin work tomorrow. Yesterday, ABC sent Sam a letter stating they would file suit against him for breach of the duty of loyalty and offered to take him and the nine co-workers back. The case would be venued in United States District Court, District of Maryland. Sam is coming into your office for an interview and to be advised as to how he should proceed.

What questions will you ask? Provide at least four (non-introductory) questions you might ask and a brief description as to why each question is relevant.

102. Sample question:

Penny Plummer worked for XYZ Plumbing. Her job was to install plumbing fixtures in new construction housing and commercial properties, which were always solo jobs. Penny arrived at XYZ every morning at 7:30 a.m. and received one or more assignments to fill her day. Her job was full-time, 40 hours per week, and she never made a claim for overtime on her weekly timecard, which she submitted every Monday morning for the previous week. She was terminated after working there for two years and then brought a claim for unpaid overtime wages. You can assume that she worked, on average, an extra five hours per week. You are an investigator for the Secretary of Labor. Today you will be interviewing both Penny and Sally Jones, Penny's manager at XYZ.

What questions will you ask (at least two for each) and why?

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other cases. For example, beyond the types of application exercises noted above, a student might be asked to reconcile two cases,[103] advise a company on how to change its procedures after losing a lawsuit, [104] or draft a contract clause.[105]

The synthesis level is key for a law student. This is because ultimately, legal analysis, used to advise a client or to argue before a judge, requires the student to bring together legal principles garnered from multiple sources into a coherent statement of the law, particularly as applied to a client's situation.[106] At this level, the online course provides opportunities that are difficult to replicate in a live classroom. In my Employment Law course, synthesis is required from each student multiple times throughout the semester. Each student is required to write responses to several exam style essay questions. Additionally, shorter exercises are utilized, which require a student to bring together rules and their exceptions garnered from multiple cases. For example, a short fact pattern can be created to require a student to understand and provide both a basic rule and the numerous exceptions to that rule. The exceptions would have to be pulled from numerous cases covered over a period of one to two weeks.[107]

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103.   Sample exercise:

At first glance the facts of *Mohs* and *Weber* appeared to be highly similar. Analyze and discuss how and why you feel the courts reached different decisions in each of the cases. As you do, provide at least two factual similarities between the two cases and at least two factual differences that helped lead to the court's decision. Explain how the factual differences led to the outcome.

104.   Sample exercise:

Right after the *Steeltek* decision, the company hires you to advise them on their hiring practices and procedures. What are (at least) two things you advise they change?

105.   Sample exercise:

Pretend you are the attorney for Union Pacific and can go back in time. Draft a clause to be placed in the agreement that would have protected the company in the *Mower* case.

106.   *See* Gibson, *supra* note 61, at 11 (describing what learners must do to effectively synthesize information).

107.   Sample exercise:

Acme is constructing a large casino resort about 20 miles outside of town on the edge of a small community of approximately 1,000 people. The project is being constructed on 300 acres of previously undeveloped forest and grassland and is set back approximately two miles from Main Street. The company has employed approximately 300 workers at the site, working full-time Monday through Friday, 8:00 a.m.–5:00 p.m. shifts, for approximately the last two years.

Sally Supervisor was driving home from the construction site on a summer

The final level of Bloom's Taxonomy, evaluation, also can be addressed in an online course, and again, the online format provides certain advantages over the live classroom. Evaluation requires learners to make judgments, consider ideas and solutions, and mull over the economic and social influences that shape the law.[108] It is the place where policy lies, and where a student is asked to consider the function of the law and how the law may need to be expanded or restricted to meet society's needs. The online format provides each student the opportunity to ponder and consider these questions in exercises, such as proposing legislation.[109] In addition,

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Monday evening after having worked a 14-hour day. Sally had become a bit drowsy after working a long day spent primarily in the sun on a 90-degree day. Her car drifted over too close to the side of a gravel road and the edge gave way, causing Sally to slide off into the ditch. She injured her wrist and knee, causing her to miss work. The road into the resort is a single lane each way, without a shoulder. The road is owned and maintained by the county.

Sally is in charge of supervising the approximately 25 welders at the construction site of the resort and casino. Her crew rarely works more than an eight-hour day. She spends the majority of her day outside with the welders but does spend some time inside an air conditioned construction trailer (for about one hour on the day in question), putting together schedules and plans for the workers (although sometimes she does this at home).

Sally will sometimes obtain work supplies necessary for the welders to do their work and was going to stop on her way home from work on the night in question to obtain four pairs of work gloves at a local home store, where she also needed several items for her garden. She is required to have her phone on during her 40-minute commute to and from the worksite and receives work related calls a couple of times each week.

Should Sally receive workers' compensation benefits? What is the applicable general rule? Which exceptions to the rule are, at least arguably, applicable? Provide both the applicable definitions of each exception and an analysis of the relevant facts.

108.   *See* Gibson, *supra* note 61, at 11 (citing BLOOM ET AL., *supra* note 91, at 185) ("Evaluation . . . [requires learners to make] 'judgments about the value, for some purpose, of ideas, works, solutions, methods, material, etc.'").

109.   Sample exercise:

You have been elected to the Minnesota House of Representatives and are on the public safety committee. In your meeting today, you are going to debate a bill potentially making employers liable for a criminal act committed by an employee while the employee is off-site. There are three positions to be debated:

(1) No liability for employers for employee's criminal act
(2) Employers liable in all circumstances
(3) Employers liable in certain situations

Which position do you advocate and why? Why is your position superior to the others? Consider the economic ramifications of your position.

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group discussions of these topics can be enlightening, which is why I regularly utilize group discussions for these types of questions, as discussed in the next section.[110]

B.   *Principle 2: Good Practice Encourages Cooperation Among Students[111]*

Professor David Dominguez's article on Principle 2 set forth the benefits of cooperation among students as threefold: (1) academic excellence, (2) professional skill development, and (3) public service.[112] The article utilizes the term cooperative learning throughout noting that: "[t]he research on cooperative learning makes a powerful case that working in small groups promotes students' critical thinking, academic achievement, attitudes toward the course, and understanding of different viewpoints."[113]

The concept and implementation of cooperative learning was quite common in all levels of education in the 1980s and '90s.[114] The formal application of cooperative learning principles is probably inapplicable to most law school classrooms. This is because the definition of cooperative learning, as well as implementation of the concept, is more structured than the type of group learning which normally goes on in a law school classroom—certainly in my courses.[115] Further, the implementation of cooperative learning is

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110.   *See infra* notes 110–41.

111.   Dominguez, *supra* note 27.

112.   *Id.* at 387.

113.   *Id.* at 388 n.10 (citing Gerald F. Hess, *Student Involvement in Improving Law Teaching and Learning*, 67 UMKC L. REV. 343, 350 (1998)).

114.   *See* SCOTT M. MANDEL, COOPERATIVE WORK GROUPS: PREPARING STUDENTS FOR THE REAL WORLD, at xviii (2003) ("Cooperative learning [was] emphasized throughout the educational world in the 1980s and 1990s.").

115.   A common definition of the elements of cooperative learning was developed by cooperative learning pioneers Roger and David Johnson:

(1) **Positive interdependence.** Team members are obliged to rely on one another to achieve the goal. If any team members fail to do their part, everyone suffers consequences.

(2) **Individual accountability.** All students in a group are held accountable for doing their share of the work and for mastery of all of the material to be learned.

(3) **Face-to-face interaction.** Although some of the group work may be parceled out and done individually, some must be done interactively, with group members providing one another with feedback, challenging one another's reasoning and conclusions, and perhaps most importantly, teaching and encouraging one another.

(4) **Appropriate use of collaborative skills.** Students are encouraged and

often a central concept upon which an entire course is developed, which, again, is not often the case in law school.[116]

The type of group work which most frequently occurs in the law school classroom would best be classified as collaborative learning, defined as when "[s]tudents work together and learn from each other as each student brings his or her own ideas to the process,"[117] and is "a loosely structured coordination between or among students."[118] Collaborative learning can be distinguished from cooperative learning where "[s]tudents participate in activities more structured and planned than those in collaborative learning opportunities."[119] For the purpose of this article, the distinction is not important, and the term "group learning" will be used throughout the remainder of this section to encompass three types of activities: (1) students working together as a team to solve a problem or create a document; (2) students grouped to discuss opposing points of a legal issue, such as when students are assigned to roles as opposing attorneys and asked to argue the application of

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helped to develop and practice trust-building, leadership, decision-making, communication, and conflict management skills.
   (5) **Group processing.** Team members set group goals, periodically assess what they are doing well as a team, and identify changes they will make to function more effectively in the future.
RICHARD M. FELDER & REBECCA BRENT, COOPERATIVE LEARNING IN TECHNICAL COURSES: PROCEDURES, PITFALLS, AND PAYOFFS 1 (1994) (citing DAVID JOHNSON ET AL., ACTIVE LEARNING: COOPERATION IN THE COLLEGE CLASSROOM 3:16 (2d ed. 1991)).

116.   *But see* Clifford S. Zimmerman, *"Thinking Beyond My Own Interpretations:" Reflections on Cooperative and Collaborative Learning Theory in the Law School Curriculum,* 31 ARIZ. ST. L.J. 957, 1015–20 (1999) (discussing using collaborative learning throughout an entire first-year legal writing course, except for the actual writing component).

117.   Roberta K. Thyfault & Kathryn Fehrman, *Interactive Group Learning in the Legal Writing Classroom: An International Primer on Student Collaboration and Cooperation in Large Classrooms,* 3 J. MARSHALL L.J. 135, 139 (2009) (citing David R. Arendale, *A Glossary of Developmental Education and Learning Assistance Terms,* 38 J. C. READING & LEARNING 10–16 (2007)).

118.   *Id.* (citing LINDA B. NILSON, TEACHING AT ITS BEST: A RESEARCH-BASED RESOURCE FOR COLLEGE INSTRUCTORS 83–119 (2003)).

119.   *Id.* at 139–40 (omissions in original) ("Cooperative learning focuses upon: "(1) positive interdependence among . . . participants; (2) individual accountability . . . ; (3) appropriate rationale and task purpose . . . ; (4) structured student interactions with designated activities rather than free-form discussion; (5) instructor or expert peer facilitation; and (6) attention to development of social skills such as interpersonal communications and leadership development." (citing Arendale, *supra* note 117, at 16)).

the law to a set of facts on behalf of a fictional client; and (3) students grouped to discuss a legal issue or problem but are not assigned a particular role, such as in a chat room. No matter the label used, the key is that in each type of activity there is a shift from professor-centered teaching, such as a lecture or Socratic dialogue, to student-centered learning. The professor goes from a sage on a stage to a guide on the side.[120]

The benefits of group learning are undisputed, with proponents noting that all learning is "inherently social."[121] Through group

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120.   As Dominguez noted, the concept of group learning and the traditional competitive learning environment in law school are not mutually exclusive, and group learning can supplement the traditional individual and lecture-driven learning in the law school curriculum. Dominguez, *supra* note 27, at 388.

121.   Zimmerman, *supra* note 116, at 959. One law professor categorized the benefits of cooperative learning as follows:

Cognitive
- Students learn how others write and learn
- Students learn how others reason
- Students hear different opinions

Substantive
- Results in a higher level of individual achievement
- Results in greater analytical ability (higher level of thinking)
- Increases reflective thinking
- Develops problem-solving techniques
- Grasps relationship between background information and tasks in carrying out

  the process
- More readily embraces the task of learning
- Students' questions change from need for step-by-step instruction to more

  general guidance
- Results in better retention of subject matter

Emotional/Psychological
- Students get to know each other better
- Students work together to overcome disagreements
- Students receive and provide support to each other
- Passivity disappears
- Students feel less anxiety
- Students gain greater self-esteem
- Students learn how to work with each other

Michael I. Meyerson, *Law School Culture and the Lost Art of Collaboration: Why Don't Law Professors Play Well with Others?*, 93 NEB. L. REV. 547, 578–79 (2015) ("Hundreds of studies document the benefits that accrue from using cooperative and collaborative learning and trace that use back several centuries." (quoting Elizabeth L. Inglehart, Kathleen Dillon Narko & Clifford S. Zimmerman, *From Cooperative Learning to Collaborative Writing in the Legal Writing Classroom*, 9 J. LEGAL WRITING INST. 185, 187 (2003))).

learning, "students learn more, establish a community of peers, and develop a process in which they present their beliefs to others. Those beliefs are justified to and challenged by others; ultimately, the beliefs develop into 'new paradigms of perception, thought, feeling, and expression.'"[122] Collaboration can be found in all professional fields, particularly in the legal field.[123]

In terms of mastery of material, the core reason why group learning is effective in law school curriculum can be found in the same principles that underlie the effectiveness of active learning: students must manipulate rules and legal principles learned in readings and lectures and apply that knowledge to a fact pattern or to solve a problem.[124] Group learning has the additional social benefit of having one's ideas and understandings challenged and developed by classmates.[125] In that way, group learning not only helps to develop and sharpen understanding but also provides a formative assessment.[126]

Although the Socratic method still predominates, group learning has become common in the law school curriculum, particularly in first-year doctrinal courses.[127] Numerous articles and books have been published with teaching exercises and ideas for group learning.[128] Dominguez's article sets forth group learning

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122.   Zimmerman, *supra* note 116, at 997 (citing Kenneth Bruffee, *Collaborative Learning and the "Conversation of Mankind"*, 46 C. ENG. 635, 645 (1984)).

123.   *Id.* at 959, 961 (noting that an attorney who works with colleagues in the process of developing, drafting, and editing of a brief is likely to create a stronger work product than an attorney who works alone); *see also* Michael Hunter Schwartz, *Teaching Law Students to be Self-Regulated Learners*, 2003 MICH. ST. DCL L. REV. 447, 471 (2003) (noting that law students must be taught in a collaborative manner, amongst other styles, to be fully capable, lifelong, self-regulated learners).

124.   *See generally* SCHWARTZ ET AL., *supra* note 44, at 211–17.

125.   *See* Ira Steven Nathenson, *Navigating the Uncharted Waters of Teaching Law with Online Simulations*, 38 OHIO N.U. L. REV. 535, 558 (2012).

126.   *See id.* at 558–59.

127.   *See* Nancy Levit & Douglas O. Linder, *Happy Law Students, Happy Lawyers*, 58 SYRACUSE L. REV. 351, 363 (2008) (citing the Law School Survey of Student Engagement in which eighty percent of law students surveyed responded that they collaborate at least occasionally with other law students, although only thirty percent responded that they collaborate frequently).

128.   *See, e.g.*, COOPERATIVE LEARNING AND STRATEGIES FOR INCLUSION (Joanne W. Putnam ed., 1993); DAVID W. JOHNSON & ROGER T. JOHNSON, COOPERATION AND COMPETITION: THEORY AND RESEARCH (1989); David W. Johnson & Roger T. Johnson, *Cooperative, Competitive, and Individualistic Learning Environments, in* INTERNATIONAL GUIDE TO STUDENT ACHIEVEMENT (John Hattie & Eric M. Anderman eds., 2013);

exercises such as role-playing a union leader in a Labor Law course or a business attorney in a Business Association course.[129] The article also analyzes other group learning techniques and exercises, such as grouping students together to draft a written answer to a proffered question or having two students each draft an initial written response and then exchange to provide a critique.[130] At least one professor has utilized cooperative learning in her exam process.[131] Other popular and proven group learning techniques include peer editing; group legal research exercises; and various forms of exercises where a student reads and researches, and then teaches what the student learned to a classmate.[132]

Can similar exercises, and more importantly similar benefits, be duplicated in an online form? My experience indicates that many of the educational benefits can be replicated in the online format, and in some respects, the online format provides benefits that exceed those found in the brick-and-mortar classroom. The use of online learning was even foreshadowed by Dominguez: "[t]he Internet's 24/7 accessibility gives every student the opportunity to contribute

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David W. Johnson & Roger T. Johnson, *An Educational Psychology Success Story: Social Interdependence Theory and Cooperative Learning*, 38 EDUC. RES. 365 (2009); Thyfault & Fehrman, *supra* note 117; Zimmerman, *supra* note 116.

129.   Dominguez, *supra* note 27, at 391.

130.   *Id.* at 390.

131.   Carol Goforth, *Encouraging Cooperative Learning with a Non-Traditional Examination Process*, 42 N. KY. L. REV. 47, 52 (2015). One law professor describes how, in her Advanced Corporations course, she encouraged cooperative learning to prepare for the final examination. *Id.* She gave her students two lengthy fact patterns in advance of the final examination and, while she did not give the students the exam questions, informed them that the exam would not be a discuss-all-issues type of an exam. *Id.* While each student was required to take the exam individually, students were encouraged to prepare together and were allowed to bring in prepared materials. *Id.* The professor reported that a group of four students who studied together received the top four scores and submitted exams that were stronger than normally submitted by any student working alone in the course. *Id.* at 53. Four other students submitted exams that were equal to the highest caliber normally read by the professor, giving the course a far higher percentage of top performers. *Id.* Anecdotal evidence the professor collected through discussions with students yielded mostly favorable reviews of the process. *Id.* at 53–54.

132.   *See* HESS & FRIEDLAND, *supra* note 44, at 131–56 (discussing both the theory underlying collaborative learning as well as numerous exercises and techniques for incorporating collaborative learning into the law school classroom); Thyfault & Fehrman, *supra* note 117, at 155–64.

in a way not imaginable in a classroom setting where students raise their hands and vie for limited minutes."[133]

Early in my Drafting course, I run an exercise for both the brick-and-mortar and online formats. The exercise, titled the Townhouse Lease Exercise, is an approximately one-page set of facts for students to play the roles of attorneys at a law firm. The factual scenario is that an out-of-town corporate client has inherited a townhouse. The client has decided to lease out the townhouse and has two prospective clients: either a local corporation that wants to utilize the townhouse for short-term visiting executive housing, or a distant family member and her family. The students, who under the facts of the exercise have no significant experience in real estate law, are told to prepare for an upcoming meeting in which the client is going to be flying in for one day and wants their advice and actual preparation of a lease for her to sign before she leaves. Students are told to prepare as fully as possible for the meeting.

The purpose of the exercise is a basic "jump in the water" experience where students start working through the process of recognizing issues, preparing to draft, and actually drafting a document for a client. In the brick-and-mortar classroom, I give students twenty-five to thirty minutes and tell them to take as many steps as they think necessary and possible within that time to prepare for the upcoming meeting with the client. The groups of three to four students are generally lively and they tend to make some good progress on preparing for the client meeting. Oftentimes, students will recognize key issues such as zoning regulations, planned community bylaw issues, and practical issues such as managing a rental from a remote location. In some instances, students will even begin research into lease forms. At the conclusion of the exercise period, we have a general class discussion about the process of drafting a document, the steps that they were able to take, and the steps they would have needed to take to actually draft a document for the client. The exercise provides a nice launching point for the semester.

In the online course, students are also put into small groups of three to four students and given the exact same fact pattern. The students use a group blog format to enter in their ideas and work

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133.   Dominguez, *supra* note 27, at 389. Dominguez cites an article by Richard Warner, Stephen D. Sowle, and Will Sadler that was cutting-edge at the time, but has a title that now seems very quaint: Richard Warner et al., *Teaching Law with Computers*, 24 RUTGERS COMPUTER & TECH. L.J. 107, 156–58 (1998).

product. Almost uniformly the responses of the online student groups are much more extensive than those of the brick-and-mortar student groups. While work product varies, of course, many student groups not only begin to recognize the issues but also have significant brainstorming sessions where they begin to flesh out all of the issues and consider ways to address them. For example, quite often I will have groups who actually research the city code to find out if short-term housing is allowed. Students will also routinely begin researching and finding forms that they could use to draft the lease for the client. The students tend to reach much deeper and fuller conclusions on how to advise the client relative to the brick-and-mortar students.

One could argue that the online students simply spent more time on the project than the twenty-five to thirty minutes allowed in the classroom setting. While it is possible this may be the case for some students, overall it appears that the more extensive work product is simply a result of the online format. Unlike in a classroom setting where all thirty minutes are spent together, students in the online format have the opportunity to really digest what the other students have written and then spend ten to fifteen minutes responding to the posts.[134] What you end up with is four thirty-minute individual work sessions, building off of the previous sessions, rather than one thirty-minute combined session. This results in a much more in-depth treatment of the exercise.[135]

Additionally, in the online format, a student is better afforded the opportunity to fully present and flesh out ideas and arguments.[136] Most of the online group sessions, and certainly the more successful group sessions, begin with one student setting forth numerous ideas and issues, sometimes a dozen or more. There is no way, in a brick-and-mortar group setting, that one student would be

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134.   *See* Max Huffman, *Online Learning Grows Up—and Heads to Law School*, 49 IND. L. REV. 57, 78 (2015) ("[S]tudent comments may be more fully considered and therefore more thoughtful.").

135.   *See* Steven I. Friedland, *Trumpeting Change: Replacing Tradition with Engaged Legal Education*, 3 ELON L. REV. 93, 114 (2011) ("[Discussion posts] provide the opportunity for student and teacher reflection, as compared to time-pressed interactions in class.").

136.   *See* Joseph A. Rosenberg, *Confronting Clichés in Online Instruction: Using a Hybrid Model to Teach Lawyering Skills*, 12 SMU SCI. & TECH. L. REV. 19, 47 (2008) ("[Online discussions] encourage and facilitate thoughtful and reflective posts and responses in ways that may not be possible in the often quick, back and forth, interject, react, and respond nature of face-to-face discussions.").

allowed to dominate for that period of time. In the online format, however, each student gets the chance to respond equally by building on and critiquing those ideas and by suggesting additional issues and steps. Through this process, beyond simply mastering a technique, students develop the socialization and group consensus skills that are so important to the practice of law.[137] They also receive a formative assessment from classmates as to the student's understanding of the material at that point in the course.

Since my Drafting course is a skills-based course, the group work is interactive and requires students to work together to master a skill component or to create a document. In my doctrinal Employment Law class, some of the group interaction perhaps would not fall under the traditional definition of collaborative education because students are often asked to debate an application of the law or extension or development of the law. For example, I might pair students off and ask them to debate a fictional piece of legislation designed to address conflicting case law or a gap in the common law. In these active learning exercises, students develop a greater mastery of course materials and develop critical professional, written communication skills. Certainly there are numerous instances of collaborative learning in the doctrinal course as well. For example, using the above scenario, instead of giving a pair of students a piece of proposed legislation to debate, they can be asked to jointly draft legislation.

Through the use of technology and the extra available time it creates, asynchronous online group exercises provide additional, unique opportunities beyond mere replication of the brick-and-mortar classroom. For example, two law professors from Canada and Australia developed their own course because they were concerned

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137.   *See, e.g.,* Carrie Menkel-Meadow, *When Litigation is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering,* 10 WASH. U. J.L. & POL'Y 37, 50–61 (2002); Lawrence E. Susskind, *Keynote Address: Consensus Building, Public Dispute Resolution, and Social Justice,* 35 FORDHAM URB. L.J. 185, 196 (2008) ("[A] switch to a consensus-oriented approach will be as, if not more, democratic" than other problem-solving models); Phyllis Bernard, '*Consensus Building Handbook' a Monumental Contribution to the Field,* 6 No. 2 DISP. RESOL. MAG. 28, Winter 2000, at 28 (citing THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT (Lawrence Susskind et al. eds., 1999)). *But see* Jennifer Gerarda Brown, *Hope and Misgiving About Lawyers, Consensus-Building, and Social Problem-Solving,* 5 NEV. L.J. 370, 371 (considering Menkel-Meadow's theories, but arguing that "lawyers should continue to consider it their primary role to insure access to courts and legislatures as central destinations for most public disputes.").

that legal issues arising from globalization "were not being adequately addressed in the mainstream law school curriculum."[138] The course was designed around a website which allowed, and required, students from the two law schools to interact, collaborate, and discuss issues with their Trans-Pacific peers.[139]

Another professor utilized a live website in a Cyber Law course.[140] In this course, students represented a fictitious client who found a website that potentially infringed upon the client's intellectual property rights.[141] The students completed fact investigation on a real website.[142] The website was continually changed and updated to raise new potential issues such as defamation, free speech, and fair use.[143] While this assignment was part of a brick-and-mortar course, this exercise, or anything remotely similar, could not be duplicated within the confines of a brick-and-mortar class period.

Similarly, one of my favorite, and I believe most effective, exercises in the online Employment Law course is one that would be difficult to assign in a brick-and-mortar classroom. The exercise comes at a point in the course where students have finished work on the "at-will" relationship, from hiring to firing to postemployment restrictions. In the "Moon People" hypothetical, a group of beings has quickly sprung to life on the moon, and they need to formulate a set of employment laws. The students are given four different scenarios, ranging from a pure employment at-will system to all employees belonging to a union. Students are asked to debate which system the Moon People (who are all of the same race and religion and are unisex) should adopt. The exercise is in part a formative assessment, because it requires students to incorporate several weeks of cases and coursework into the exercise.

The exercise can be varied to favor group consensus work or individual analysis and peer critique. In one version, I assign each group of three to four students to one of the four scenarios and require them to develop an argument as to why that scenario is best,

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138.   Ruth Buchanan & Sundhya Pahuja, *Using the Web to Facilitate Active Learning: A Trans-Pacific Seminar on Globalization and the Law*, 53 J. Legal Educ. 578, 579 (2003).

139.   *Id.*

140.   *See* Nathenson, *supra* note 125, at 540.

141.   *Id.* at 553–56.

142.   *Id.* at 544.

143.   *Id.* at 555.

and why the others are not as effective. An offshoot of this format allows the group to select one scenario through consensus and then develop the argument. Yet another way to run the exercise is for each student to select which scenario to support and then require the students to debate the pros and cons of each scenario in a group blog format.

The exercise can certainly be used in a brick-and-mortar classroom, and I have done so. However, the depth of analysis that I hear amongst students in the brick-and-mortar classroom in the thirty to forty minutes given to work through the exercise is not nearly as in-depth as what I see in the online format, where students are clearly going back through case law notes and have the opportunity to fully articulate and support their positions.

The following is a list containing a few logistical tips for creating and administering online group exercises, drawn from my experiences:

(1) Utilize small groups. Groups of three, for projects such as drafting or editing a document, or four, for a discussion or to debate an issue, are ideal.[144] More than three for a group project generally means that one person does not contribute as much. Similarly, groups larger than four tend to be ineffective for discussing a legal issue or opinion on a topic because it is difficult to draft an issue with more than four realistic viewpoints. This leads to more repetition in larger groups.

(2) Set deadlines for initial participation. Within a day or two of the exercise period, require that each student makes contact with the other group members. For example, my normal week runs Tuesday through Monday, so I require students to contact group members by the end of the business day on Thursday. While most of the work will still occur during the last few days of the week, I found that this approach greatly reduced the number of students who do not participate at all, or who only participate at the very end.

(3) Require responses in a blog or wiki format. As much as possible, it is best to create exercises or discussion groups where the students type responses on a blog or wiki. If you have exercises that require, or even allow, students to discuss and work outside of the course website, it can be difficult to ensure full participation of the group members. I normally utilized the platform Blackboard for my online

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144.   Janet Weinstein et al., *Teaching Teamwork to Law Students,* 63 J. LEGAL EDUC. 36 (2013).

courses. Blackboard provides an easy tool to create group areas with blogs or wikis.[145]

(4) Reduce or eliminate grading on group work. Two things occur when a professor decides to grade group work: (1) the assignment must be complex enough to allow for score differentiation, and (2) students' anxiety increases dramatically because of worry about individual scores and worry about whether group members are contributing equally. In my experience, it is far better to have regular, small group projects and discussions than to have one or two large graded group projects in a semester. In my courses, students interacted very regularly, almost on a weekly basis, particularly in the first two-thirds of the course. Instead of direct grades, I set aside a number of "participation and effort" points, where students are given an overall total. The overall total is based on whether they contribute in a timely and significant fashion to group discussions and projects. Most students end up receiving all of the "participation and effort" points because they enjoy the group work and do not want to appear unreliable or unprofessional to their classmates. I encourage strong group participation by emailing individual students and entire groups for significant and insightful contributions to group assignments and projects. Early in the semester, I will also email students a sample of a strong group effort (with the group members' identities redacted).

(5) Assign graded group work earlier in the semester. If you assign graded group work, I have found that students tend to have more time and energy to expend on larger group work assignments in the earlier part of the semester. In my Drafting course, I have a couple of graded assignments, an interrogatory drafting exercise, and a group contract edit. This work is assigned within the first five or six weeks of the course.

C.   *Principle 4: Good Practice Gives Prompt Feedback*

The original article on Principle 4 was written by Professor Terri LeClercq, who began by quoting the Chickering article: "Knowing What you Know and Don't Know Focuses Learning."[146] The

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145.   *See generally* Joan Macleod Heminway, *Caught in (or on) the Web: A Review of Course Management Systems for Legal Education,* 16 ALB. L.J. SCI. & TECH. 265 (2006) (discussing pros and cons of different electronic course management systems for legal education).

146.   LeClercq, *supra* note 29, at 418.

introduction further quoted and cited Chickering for students' need to assess existing knowledge and competence and for the ability to self-assess.[147] The article noted that prompt feedback is particularly helpful because it allows for a mid-term course correction.[148]

"Feedback can be summative, formative, or sometimes both."[149] Summative feedback is designed to measure student comprehension of course material, both in comparison to individual expectations and to other students.[150] It is embodied in the classic end-of-the-semester law school exam.[151] Formative assessment is designed to help the student improve understanding and learning in an ongoing process.[152] Formative feedback is defined as "information communicated to the learners that is intended to modify their thinking or behavior for the purpose of improving learning."[153] Further, formative assessment is designed to increase students' motivation by giving them feedback about both current and desired levels of performance.[154] An assessment may be both summative and

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147.   *Id.*

148.   *Id.* at 421.

149.   *Id.* at 422.

150.   *See id.*

151.   *Id.* Interpretation 314-1 to the recently passed ABA rule 314 provides this definition: "Summative assessment methods are measurements at the culmination of a particular course or at the culmination of any part of a student's legal education that measure the degree of student learning." ABA STANDARDS 2016/17, *supra* note 6, at 23.

152.   LeClercq, *supra* note 29, at 422 n.8 (citing Nancy Soonpaa, *Using Composition Theory and Scholarship to Teach Legal Writing More Effectively*, 3 LEGAL WRITING 81, 97 (1997)). There are at least seven categories of formative feedback: correcting, emoting, describing, suggesting, questioning, reminding, and assigning. *Id.* at 422.

153.   Elizabeth M. Bloom, *A Law School Game Changer: Transformative Feedback*, 41 OHIO N.U. L. REV. 227, 233 (2015) (quoting Valerie J. Shute, *Focus on Formative Feedback*, 78 REV. EDUC. RES. 153, 154 (2008)).

154.   Carol Springer Sargent & Andrea A. Curcio, *Empirical Evidence That Formative Assessments Improve Final Exams*, 61 J. LEGAL EDUC. 379, 381 (2012) (first citing MICHAEL HUNTER SCHWARTZ, SOPHIE SPARROW & GERALD HESS, TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM 137 (Carolina Acad. Press 2009); then citing Alison Rushton, *Formative Assessment: A Key to Deep Learning?*, 27 MED. TCHR. 509 (2005); and then citing D. Royce Sadler, *Formative Assessment and the Design of Instructional Systems*, 18 INSTRUCTIONAL SCI. 119, 120–21 (1989)); *see also* Elizabeth M. Bloom, *supra* note 153, at 232 ("An assessment activity is formative if it can help learning by providing information to be used as feedback, by teachers and by their students, in assessing themselves and each other, to modify the teaching and learning activities in which they are engaged." (quoting Paul Black

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formative, such as a graded midterm exam after which the professor provides significant feedback.[155] The terms summative and formative "indicate the purpose rather than the content of the materials."[156]

One important component of formative feedback is, as noted in LeClercq's article on Principle 4, that the feedback be provided promptly.[157] As one commentator noted "[w]hat makes formative assessment *formative* is that it is immediately used to make adjustments so as *to form* new learning."[158] It is the promptness of communication to students which helps to "form learning."[159]

As with Principles 2 and 3, the principle of prompt formative feedback is now much more widely used and accepted within law school classrooms and curriculum.[160] That is not to say that utilizing formative assessment in non-skills-based courses has become the norm in law school because many courses still only utilize the traditional end-of-semester exams to deliver a final grade.[161]

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et al., *Road Maps for Learning: A Guide to the Navigation of Learning Progressions*, 9 MEASUREMENT 71, 74 (2011))).

155.   *See* Elizabeth Ruiz Frost, *The Shortcomings of Model Answers as Formative Feedback*, 65 J. LEGAL EDUC. 938, 943 (2016); *see also* Sargent & Curcio, *supra* note 154 ("Numerous studies suggest that [formative] feedback may be more effective if ungraded because students tend to focus on grades, not suggestions for improvement." (citing Paul Black & Dylan Wiliam, *Assessment and Classroom Learning*, 5 ASSESSMENT IN EDUC.: PRINCIPLES, POL'Y & PRAC. 7, 23 (1998))).

156.   Sargent & Curcio, *supra* note 154 (citing Paul Black & Dylan Wiliam, *In Praise of Educational Research: Formative Assessment*, 29 BRIT. EDUC. RES. J. 623, 623 (2003)).

157.   *See* LeClercq, *supra* note 29, at 422.

158.   Elizabeth M. Bloom, *supra* note 151, at 232 (quoting Lorrie A. Shepard, *Formative Assessment: Caveat Emptor,* THE FUTURE OF ASSESSMENT: SHAPING, TEACHING, AND LEARNING 279, 281 (Carol Anne Dwyer ed., 2008)).

159.   Olympia Duhart, *"It's Not for a Grade": The Rewards and Risks of Low-Risk Assessment in the High-Stakes Law School Classroom*, 7 ELON L. REV. 491, 498 (2015) (quoting Memorandum from Richard K. Neumann, Jr., Professor of L., Maurice A. Deane Sch. of Law at Hofstra Univ. to Council of the ABA Section of Legal Educ. & Admissions to the Bar (Jan. 31, 2014), http://www.alwd.org/wp-content/uploads/2014/02/Chapter-3-Neumann.pdf).

160.   Elizabeth M. Bloom, *supra* note 151, at 232 (citing Paul Black & Dylan Wiliam, *Assessment and Classroom Learning*, 5 ASSESSMENT IN EDUC.: PRINCIPLES, POL'Y & PRAC. 7, 10–15 (1998)) (noting the benefits of formative assessment and feedback); Liz McDowell et al., *Evaluating Assessment Strategies Through Collaborative Evidence-Based Practice: Can One Tool Fit All?*, 45 INNOVATIONS EDUC. TEACHING INT'L 143, 144 (2008); Dylan Wiliam et al., *Teachers Developing Assessment for Learning: Impact on Student Achievement*, 11 ASSESSMENT EDUC. 49, 50 (2004).

161.   *See* Duhart, *supra* note 159, at 496 ("Since the nineteenth century, American law schools have relied on the high-stakes final exam as the only

However, reliance only on an end-of-semester exam for assessment and feedback is facing criticism within the academy,[162] with at least one scholar noting that "[l]aw school may be one of the few spots on campus still using a comprehensive exam for the entire course grade."[163] Further, since the LeClercq article, and particularly within the last decade, a growing number of legal scholars have suggested that law professors use formative assessment[164] and empirical studies supporting the efficacy of formative assessment in teaching law students.[165]

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assessment most students experience in a doctrinal course. The Langdellian tradition of case method and high-stakes final has been the norm of most law professors."); Steven I. Friedland, *Outcomes and the Ownership Conception of Law School Courses*, 38 WM. MITCHELL L. REV. 947, 949 (2012); Rogelio A. Lasso, *Is Our Students Learning? Using Assessments to Measure and Improve Law School Learning and Performance*, 15 BARRY L. REV. 73, 80 (2010) ("In most law school courses, particularly in the critical first year, the only assessment most students experience is a three or four hour end-of-the-semester final exam." (first citing BEST PRACTICES, *supra* note 35, at 236; then citing Steve Sheppard, *An Informal History of How Law Schools Evaluate Students, with a Predictable Emphasis on Law School Final Exams*, 65 UMKC L. REV. 657 (1997))).

162. *See* Duhart, *supra* note 159, at 495. One law professor provides an interesting analogy:

> Imagine being told in January that you will be performing in a summer music concert in front of a huge crowd. The first thing you are likely to do is establish a rigorous practice schedule that will ensure that you are ready for your big day. Very few people—even the most accomplished musicians—would wait until the start of the concert to play the featured song for the very first time. Even thinking very hard about the concert or listening to recordings of other artists will not prepare you well for your own performance. To figure out where you need work, you would have to sit down and play the song yourself. And you would probably have to practice several times to get it right. Once would never be enough.

Id.

163. Sargent & Curcio, *supra* note 154, at 379.

164. CARNEGIE REPORT, *supra* note 59, at 164–67; Sargent & Curcio, *supra* note 154, at 380 (citing SCHWARTZ, SPARROW & HESS, *supra* note 152, at 135–37).

165. *See* Andrea A. Curcio et al., *Developing an Empirical Model to Test Whether Required Writing Exercises or Other Changes in Large-Section Law Class Teaching Methodologies Result in Improved Exam Performance*, 57 J. LEGAL EDUC. 195, 197 (2007) (finding that multiple practice exams combined with peer and self-assessment of annotated sample answers improved the ability of first-year students to perform legal analysis); Andrea A. Curcio et al., *Does Practice Make Perfect? An Empirical Examination of the Impact of Practice Essays on Essay Exam Performance*, 35 FLA. ST. U. L. REV. 271, 279–80 (2008) (finding that multiple practice exams combined with feedback improved performance in a first-year Civil Procedure course); Sargent & Curcio,

One such study compared the effect of formative assessment on the performance of two groups of second and third year law students taking an Evidence course in consecutive spring semesters.[166] The students took the same course from the same professor, who had been teaching the course for over ten years, and utilized the same casebook and course materials.[167] The first course, the control group, utilized the traditional case method and single end-of-the semester exam.[168]

The following spring, the second group, the intervention group, covered the same breath of material, but there were five hours of class time devoted to a variety of formative assessments, including quizzes and practice questions.[169] Students were also required to complete reflective self-assessment exercises designed to help the students assess their comprehension of the course material in preparation for the final exam.[170]

The study's authors concluded that "the final exam scores of students in the intervention group on eleven common questions increased from six to nine percentage points for about 70 percent of the class as a result of providing" the formative assessment and feedback exercises.[171] The authors noted that students who were in the top two-thirds of the class based on undergraduate grade point average or LSAT score, even if they were below the median with their first-year law school grades, tended to show improvement.[172] The authors hypothesized that this benefit could have accrued disproportionately to those students because of their "ability to adjust to feedback" and "their higher confidence in their own ability to effectively use feedback."[173]

Advocates for formative feedback in the law school curriculum also point to the importance of feedback in the development of "self-regulated learners."[174] Educational psychology defines self-regulated

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supra note 154, at 400–01.

166.   Sargent & Curcio, *supra* note 154, at 395.
167.   *Id.*
168.   *Id.* at 395–96.
169.   *Id.* at 385–86.
170.   *Id.* at 396.
171.   *Id.* at 400.
172.   *Id.*
173.   *Id.*
174.   *See* Elizabeth M. Bloom, *supra* note 151, at 230–35; Joi Montiel, *Empower the Student, Liberate the Professor: Self-Assessment by Comparative Analysis,* 39 S. Ill. U. L.J. 249, 250 (2015).

learning as "an active, constructive process whereby learners set goals for their learning and then attempt to monitor, regulate, and control their cognition."[175] Of course, more than just feedback is needed to fully develop a self-regulated learner.[176] However, there is no doubt that a critical component to becoming a self-regulated learner is the ability to receive feedback, learn from it, and improve the understanding of the material and ability to self-assess performance.[177] Becoming a self-regulated learner is particularly critical to law students as they will need the skill throughout their careers to be successful attorneys.[178]

1. *Formative Feedback in an Online Course*

The use of prompt formative feedback and assessment is an important tool for law teachers and is a growing component of the law school curriculum.[179] Prompt formative feedback also helps students develop the necessary self-regulated learning skills needed for a successful legal career. The question here, then, is whether prompt formative feedback can be delivered in the online format. Interestingly, LeClercq, the author of the original article on

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175.   Elizabeth M. Bloom, *supra* note 151, at 230 (quoting Ian Clark, *Formative Assessment is for Self-Regulated Learning*, 24 EDUC. PSYCHOL. REV. 205, 216 (2012)).

176.   *See* E. Scott Fruehwald, *How to Help Students from Disadvantaged Backgrounds Succeed in Law School*, 1 TEX. A&M L. REV. 83, 118–23 (2013) ("Self-regulated learning involves three stages: forethought, performance, and reflection" and that the actual learning incorporates "three processes: (1) 'attention-focusing,' (2) 'the activity itself,' and (3) 'the self-monitoring the [learner] performs as she implements her strategies and begins to learn.'"). Developing these self-regulated learning skills is especially important for students from disadvantaged backgrounds whose education may not have provided them the opportunity to develop these skills. *Id.*

177.   Patience A. Crowder, *Designing a Transactional Law Clinic for Life-Long Learning*, 19 LEWIS & CLARK L. REV. 413, 439–40 (2015).

178.   *Id.* at 433 ("[B]eing life-long learners [is essential and] crucial to [students'] future success as attorneys, regardless of the nature of their practice."); Montiel, *supra* note 171, at 251 ("Self-Assessment encourages the student to reflect on, monitor, and adjust his own process, requiring him to self-regulate his learning, as he will need to do in practice.").

179.   Hess, *supra* note 17, at 369 ("Students are most likely to succeed in school if they engage in a variety of active learning methods, receive periodic feedback on their performance, are allowed to demonstrate their learning in ways that play to their strengths, and are held to high expectations.").

Principle 4, referenced the growing availability of "Computer Programs" to provide feedback.[180]

I have found that my online courses, particularly the doctrinal Employment Law course, provide a significant amount of prompt, formative feedback, and that the online format provides certain advantages over a brick-and-mortar class. To begin with, for every case there is an accompanying set of questions, as discussed above,[181] which lead students through the key facts, procedural history, legal principles, and the court's decision and reasoning. While this is similar to what occurs in the brick-and-mortar classroom, there are several advantages to the online format.

First, there is an immediacy that cannot be matched. As soon as the student finishes reading a case, or even while she is reading the case, she is answering questions and receiving feedback based on her understanding of the case. Presumably within minutes of reading the case she knows if she understood, for example, the legal rules that form the basis for the court's opinion. Further, the student must answer all questions correctly. Therefore, if the feedback should indicate that the student misunderstood, or lacked full understanding of, the legal principles, she must return to the case and correct her understanding. This is a hallmark of developing the skills of a self-regulated learner.

The second advantage of the online format is a certainty that all students have acquired, or at least correctly answered questions regarding, the principles that I want them to take from the case. A student cannot skip the reading, miss a class, or zone out during a class discussion. Not only does this certainty provide its own inherent benefit, it is also critical for two additional reasons.

First, since most doctrinal subjects follow the common legal schema of basic principles and then numerous exceptions or developments off of that basic principle, the online format ensures that the student starts with a firm grasp of that basic principle. This, in turn, gives the student a clear basis for understanding the exceptions and developments.

Second, this understanding enables the student to more effectively address the other types of formative assessment in the course: the short essay and exam style questions.[182] These

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180.   LeClercq, *supra* note 29, at 426.
181.   *See supra* text accompanying notes 96–97.
182.   *See supra* Section III.

assessments require the student to apply the legal principles learned in the case to a set of facts, solve a problem, or complete a lawyering skills task. Without an adequate understanding of the basic principles, a student cannot effectively apply those principles through legal analysis. Certainly, a law professor who teaches doctrinal courses has experienced calling on a student who has not read or understood a case and watched the student struggle to apply legal principles to hypothetical facts. This lack of understanding is rare when reading student responses to formative assessments in my online course.

An example of these advantages can be found in the unit on the fundamental principles of workers' compensation law. To understand the nuances of workers' compensation law, the student must begin with a firm grasp of the underlying legal concept, often referred to as the *quid pro quo* of workers' compensation: in exchange for prompt and certain payment for injuries occurring at the workplace, the employee forgoes the right to certain types of remedies in tort, and the employer forgoes the common law legal defense of employee negligence.[183] The student who does not have the initial understanding of that basic principle is likely going to struggle when the course turns to the various exceptions to the rule and the legal issues which arise in applying the basic rule. For example, the course explores which workers are going to be considered employees and thus covered under workers' compensation. If the student does not understand the starting principle of workers' compensation law, the student may not understand why in certain situations the employer may want the worker to be considered an employee (such as when tort damages may greatly exceed workers' compensation benefits). Similarly, the student may not realize why an employer may want the worker not to be considered an employee (such as when a worker's own negligence is responsible for the workplace injury).

Based on my experiences, the following are best practices to follow in developing and implementing formative assessments in an online course:

(1) Separate questions from the readings from questions applying the law. My experience has shown that it is best to require students to first answer the questions regarding the case law and other types of

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183.   *See, e.g., Practicing in the Evolving Landscape of Workers' Compensation Law,* 14 LAB. LAW. 73, 74–75 (1998).

reading, such as legislation and law review articles, before allowing them to answer the questions applying the law. When both are combined within one question exercise, some students will not have the complete and accurate understanding of the fundamental legal principles necessary to properly and fully answer the short essay and exam style questions. Requiring completion of the questions (and retaking when necessary) ensures adequate understanding of the fundamental principles.

(2) Grading the short answer and exam style questions is unnecessary and may be counterproductive. I do not grade the short answer essay and exam style questions for several reasons.[184] First, I provide feedback in the way of model answers, which not only provides prompt feedback, but also helps students develop self-regulated learning skills.[185] Second, ungraded assessments may provide more effective formative feedback because the student's focus is on learning and content mastery rather than the grade, and ungraded assignments also reduce student anxiety.[186] Finally, requiring extensive grading and critique of every writing assignment would be overly burdensome on the faculty member, resulting in fewer such assignments being included in the course. However, every assignment is read, and any student who fails to meet the "reasonable effort" standard or who demonstrates a significant misunderstanding of the law is contacted. This facet of the course is time intensive for the professor.

(3) General feedback is also useful.[187] While I do not grade each writing assignment, I do acknowledge strong performances on each week's assignment by emailing those students with a general "well-done" and often include a note about a specific point made or

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184.   Of course, since mastery, or near mastery, is required for the "questions" portion of each assignment, no grading is necessary for that portion of the course.

185.   *See* Sargent & Curcio, *supra* note 154, at 385–86, 400 (finding that students who used multiple quizzes and assignments with model answers improved exam performance). *But see* Frost, *supra* note 155, at 965 ("While model answers can provide a helpful learning tool for students in some contexts, model answers are not a particularly effective method for conveying formative feedback. Metacognitive barriers and other student characteristics cause many students to distort the message in a model answer or misunderstand their own work in relation to the model answer.").

186.   Duhart, *supra* note 159, at 494.

187.   *See* LeClercq, *supra* note 29, at 422–23.

portion of the assignment. Most students enjoy receiving this type of note, as positive feedback is not the norm in law school.[188]

Throughout the semester, I keep a running notation of which students performed above average on a particular writing assignment. I use these notes to determine positive grade bumps at the end of the semester. I also use more general feedback for students who, while may meet the "reasonable effort" standard, could perform better on the writing assignments. For those students, I will send a short note with a specific comment or two on why an assignment was lacking, along with a sample of a more effective student submission.

D.   *Principle 1: Good Practice Encourages Student–Faculty Contact*

The original article on Principle 1 was written by Professor Susan Apel who began by quoting the Chickering article about frequent student-faculty contact inside and outside the classroom being the "most important" factor in student success.[189] While some law school academics may disagree and point towards factors such as those discussed earlier in this article as being more important to student success,[190] there is also no doubt that law schools regularly,

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188.   *See id.* at 422; *see also* Anne Enquist, *Critiquing Law Students' Writing: What the Students Say is Effective*, 2 LEGAL WRITING 145, 166–69 (1996).

189.   Apel, *supra* note 26, at 371.

190.   This author is in that camp because factors such as the professor's content mastery, course design, and teaching skills, are going to outweigh the amount of student-faculty interaction outside of the classroom. This is particularly true when, as the Apel article notes, only a small percentage of students visit a faculty member in any certain course. Additionally, this author has, as have many other faculty members, frequently had students perform at or near the top of a brick-and-mortar course who have not sought out the professor outside of the regular class hours. *See* Justine A. Dunlap, *"I'd Just as Soon Flunk You as Look at You?" The Evolution to Humanizing in a Large Classroom*, 47 WASHBURN L.J. 389, 396 (2008) (noting that a teacher with an open and "humanizing" demeanor can still be a bad teacher because she "nonetheless lacks the ability to explain clearly, suffers from poor organization, and has neither love nor knowledge of the topic"); *see also* William J. Rich, *Balance in Legal Education: Pervasive Principles*, 60 J. LEGAL EDUC. 122, 123 (2010) ("Student-faculty interaction was more strongly related to students' reported gains in analytical ability than time spent studying, co-curricular activities, or even the amount of academic effort they put forth . . . . It surprised me to learn that the time students spend interacting with faculty may be more important than the time spent in rigorous interrogation during class." (citing IND. UNIV., LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, ENGAGING LEGAL EDUCATION: MOVING BEYOND THE STATUS 11 (2006))).

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as Apel notes, point towards the importance of student-faculty contact in their admission's marketing materials and website.[191] Student-faculty contact is certainly far more than just a marketing tool, as one commentator noted, "[t]he heart of teaching lies in the student-teacher interaction. Students crave time and attention. They want their teachers to care about them as students and as people."[192]

While this article focuses on best practices for online teaching in law schools where students will take the majority of their courses within a brick-and-mortar classroom, much of the student-faculty contact and communication is the same whether the course is offered in-person or online. The professor can still have the same amount of office hours. Students who are otherwise on campus can still stop by during those office hours or otherwise make appointments to meet with the professor. There may be, however, factors within the brick-and-mortar classroom that either encourage or discourage students from seeking contact with the faculty outside of the classroom, and it is those factors that will be explored below.

The Apel article contends that the classroom environment and the professor's demeanor within the classroom play a role in how likely students are to seek out the professor outside of class.[193] While there are no hard statistics cited within the article to support this notion, it certainly is logical on its face. A professor who creates a highly interactive classroom that seeks out and allows for conflicting viewpoints and otherwise provides for a collaborative experience is more likely to find that the open dialogue continues outside of the classroom. On the other hand, the article contends, a professor whose classroom teaching style is primarily lecture-based and focused on content mastery with a more passive student role is less likely to encourage student interaction outside of the classroom.[194]

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191.   Apel, *supra* note 26, at 372.

192.   Mary Kate Kearney & Mary Jane Kearney, *Reflections on Good (Law) Teaching*, L. Rev. Mich. St. U. Det. C.L. 835, 836 (2001) (noting that despite the perceived importance of student-faculty contact outside of the classroom, "many college and law school teachers lament that even though they try to be accessible, students do not approach them with questions. One of my colleagues commented that his office hours can be the loneliest time of the week. The reasons for this apparent contradiction may rest on students' perceptions of their teachers. Many students look at the imbalance of power in the relationship and are reluctant to take the first step in forging a relationship.").

193.   Apel, *supra* note 26, at 372. Professors are categorized as either "high-interactive" or "low-interactive." *Id.*

194.   *See id.* at 373.

Two factors are noted by legal academics as important in creating the type of classroom environment that fosters students seeking faculty interaction outside of the classroom are: (1) respect for the student, and (2) a classroom environment which allows and encourages students to express their viewpoints. As one commentator noted, while the professor must address student errors in the classroom, doing so in a respectful manner that acknowledges effort and does not embarrass the student in front of classmates creates a classroom environment in which all students will feel comfortable in sharing opinions and responses.[195] As another noted, "[S]tudents want their teachers to create a classroom environment where they can take risks without fear of penalty or reprisal from the teacher."[196]

One study quantified the importance of a respectful classroom and the importance of professors being approachable outside of the classroom.[197] In this study, the author surveyed every student at the University of Colorado Law School (1L–3L) and 1L evening law students at the University of Nevada at Las Vegas Law School.[198] The students were asked to rate the importance of a number of professorial skills and traits on a scale of one to seven.[199] On average, approximately ninety percent of students rated being treated respectfully in the classroom as being important or very important, which was the highest percentage in the study.[200] Further, approximately seventy percent rated the professor being

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195.   B. Glesner Fines, *The Impact of Expectations on Teaching and Learning*, 38 GONZ. L. REV. 89, 117 (2002–03) ("A warm emotional climate, however, need not be free of criticism. It need only provide respect for effort and a communication of expectations for increased achievement. A teacher should not simply ignore student errors. However, a teacher can correct students' mistakes by first acknowledging student efforts ("thank you" or "nice try"), correcting the error ("no"), and providing a detailed, educative follow-up (which helps students identify where their reasoning went wrong, acknowledges that the error is a common mis-step, or simply identifies the response as creative, though ineffective)."); *see also* Dunlap, *supra* note 190, at 396, 402–03 (noting the importance of respect and understanding for student perspectives).

196.   James B. Levy, *As a Last Resort, Ask the Students: What They Say Makes Someone an Effective Law Teacher*, 58 ME. L. REV. 49, 98 (2006).

197.   *Id.* at 84 (citing Kenneth A. Feldman, *The Superior College Teacher from the Students' View*, 5 RES. HIGHER EDUC. 243 (1976)).

198.   *Id.* at 66.

199.   *Id.* at 65–66.

200.   *Id.* at 79–80. The students were asked: "How important is it to you that your teachers treat students with respect during class?" *Id.* at 79.

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approachable outside of the classroom as being important or very important.[201]

While the connection between student-faculty contact outside of the classroom and student achievement is not as clearly demonstrated by formal studies as other factors noted above in this article, there can be no doubt that some students benefit greatly from interaction with professors outside of the classroom.[202] Additionally, it seems clear that the classroom environment itself can help foster student-faculty interaction outside of the classroom.[203] The question, then, is whether the online classroom can create a similar atmosphere that would encourage students to seek out their online faculty, who should be just as available as brick-and-mortar faculty.

There certainly are some disadvantages to the online environment when it comes to creating a connection between professor and student. There is no opportunity for the type of spontaneous connection that can occur in a classroom, such as the professor overhearing two students discussing an issue before the start of class and jumping into the conversation. Additionally, there is no opportunity for even simpler connections with students such as noticing a city or university on a sweatshirt and striking up a conversation. Students cannot stop by the podium right before or after class for a quick comment or chat.

However, there are opportunities, and even some advantages, for the online professor to create the type of learning environment conducive to students seeking out the professor for additional help on a class related topic or other faculty interaction. For example, the chance that a student will feel disrespected is reduced in an online class because any feedback given to that student is done individually. An online student in my course receives continuous feedback, either through automatic grading of questions or through my individual feedback in response to essays and exam style writing assignments.[204] But that feedback does not take place in front of classmates. Further,

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201.   *Id.* at 86–88. The students were asked: "How important is it to you that your teachers are friendly and approachable outside of class such as during office hour visits?" *Id.* at 84.

202.   *See* Nancy McClure, *Developing Specific Skills, Competencies, and Points of View Needed by Professionals in the Field Most Closely Related to this Course*, IDEA CTR. 1, 2–3 (2006), https://ctfd.sfsu.edu/sites/default/files/IDEA_Paper_Rapport.pdf.

203.   *Id.*

204.   *See supra* notes 177–83 and accompanying text.

while student misunderstanding of the law or analysis must always be corrected, the online format facilitates such correction in a professional, respectful manner. In a live classroom occasionally my words in a quick response to a student's comment may unwittingly seem curt or disrespectful (even though unintentional), particularly to a more sensitive or less confident student. In the online format, a written response is more measured and can easily be altered before being sent to a student.

In some respects, it can also be more challenging to present myself as an individual, rather than just a professor, in the online law course than in the regular classroom. In a classroom it is easier and more natural to share short anecdotes about my family or just my weekend. Those type of anecdotes would be inappropriate to share via e-mail or a short weekly introductory video, but I can share my professional interests with the students. For example, I will routinely and regularly share links to news articles, videos, and websites regarding current cases, news, or legislative action, which are topical to the course. Often I will include a short snippet of my analysis or opinion on the piece. After I do this a few times in the semester, I normally start to receive similar types of links in return from my students.

A few tips to encourage student-faculty contact in an online course:

(1) Send weekly correspondence to your students. Each week, I start by sending out a weekly overview to my students. Sometimes this weekly overview is in the format of an e-mail, and other times I have a short video link. This overview helps provide an orientation for the week and allows me to make a personal connection to each student. I find that a high percentage of e-mails seeking additional interaction originate from this weekly e-mail.

(2) *Regularly encourage students to contact you with questions.* In the first few weeks of the semester, I end virtually every e-mail I send to the class with a note reading something like ". . . and, as always, please do not hesitate to contact me if you have questions or would like to discuss a class topic."

(3) *Send a personal e-mail to each student a few weeks into the course.* After about three weeks, I send an individual e-mail to each student for the purpose of simply checking in to make sure the student is feeling comfortable in the course. The body of the e-mail may be similar from student to student, but I also try to add in a few unique and individual words of encouragement to each student by noting a

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strong assignment the student may have turned in or substantial participation in a small group discussion. This e-mail can go a long way in making students believe you are open to questions and that you care about them as students and individuals.

E.   *Principle 5: Good Practice Encourages Time on Task; and Principle 6: Communicates High Expectations*

Principles 5 and 6 are combined for the purpose of this article because, on the classroom level, for today's students, there is unquestionably a strong link between time on task, high expectations, and achievement. Students spend far less than the recommended two to three hours per class hour in preparation, with a precipitous drop in preparation time spent for second and third year students (the only students allowed under ABA rules to take online courses).[205] Additionally, students are spending significant time working, which is understandable considering that the average law student graduates with $97,000 in debt, with one-third of law students having in excess of $120,000 in debt.[206]

The original article on Principle 5 encouraging time on task was written by R. Lawrence Dessem, who began the article with Chickering's mathematical computation: "Time plus energy equals learning."[207] While the article also discusses the larger issues of faculty time on task, institutional time on task, and even time on task within legal education,[208] the focus on student time on task is most relevant to this discussion. Dessem cited then-current ABA requirements of length of time on legal studies, both during the academic year and in the course of study, as evidence of the necessity

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205.   IND. UNIV. BLOOMINGTON CTR. FOR POSTSECONDARY RESEARCH, LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, EVALUATING THE VALUE OF LAW SCHOOL: STUDENT PERSPECTIVES   9   (2013),   http://lssse.indiana.edu/wp-content/uploads/2016/01/LSSSE_2013_
AnnualReport.pdf (stating that the average law student spends twenty-one hours per week preparing for class in the first year and that amount drops to thirteen hours in the third year).
206.   IND. UNIV. BLOOMINGTON CTR. FOR POSTSECONDARY RESEARCH, LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, LOOKING AHEAD: ASSESSMENT IN LEGAL EDUCATION 9,   11   (2014),   http://lssse.indiana.edu/wp-content/uploads/2016/01/LSSSE_2014_Annual
Report.pdf.
207.   Dessem, *supra* note 30, at 430.
208.   *Id.* at 433–40.

of student time spent on task to properly assimilate a legal education.[209]

There has long been a concern about students spending sufficient time on task in the classroom. Recently, much of that concern has focused on the distracting impact of laptops, tablets, and phones.[210] There is also an issue of students not spending sufficient time on task outside of the classroom in preparation, particularly in the third year. Indeed, one student survey reported that 21 percent of third-year students regularly come to class unprepared.[211]

Principal 6: Good Practice Communicates High Expectations was written by Okianer Christian Dark, who began by noting that "[e]xpecting students to perform well becomes a self-fulfilling prophecy."[212] Two key components to communicating high expectations to students are to "clearly articulate . . . [the teacher's] expectations," and to communicate expectations "repeatedly, in a variety of ways."[213] Furthermore, those high expectations should be communicated to all students, not just the well prepared and highly motivated.[214] Additionally, Dark noted that faculty must be careful to battle racism and sexism in communicating high expectations to students of all races and gender.[215] The principles encompassed in communicating high expectations can also be found in the ABA's adoption of a learning outcomes requirement for law schools.[216]

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209.   *Id.* at 430–31.

210.   *See supra* note 78 and accompanying text.

211.   IND. UNIV. BLOOMINGTON CTR. FOR POSTSECONDARY RESEARCH, LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, STUDENT ENGAGEMENT IN LAW SCHOOL: KNOWING OUR STUDENTS 19 (2007), http://lssse.indiana.edu/wp-content/uploads/2016/01/EMBARGOED__
LSSSE_2007_Annual_Report.pdf.

212.   Dark, *supra* note 31, at 441; *see also* Fines, *supra* note 195, at 90–91 ("Nearly a century of research has established that teachers' expectations of their students can become self-fulfilling prophecies: high expectations are correlated with high achievement, low expectations with low achievement.").

213.   Dark, *supra* note 31, at 441.

214.   *Id.* at 442.

215.   *Id.* at 445–46.

216.   Janet W. Fisher, *Putting Students at the Center of Legal Education: How an Emphasis on Outcome Measures in the ABA Standards for Approval of Law Schools Might Transform the Educational Experience of Law Students,* 35 S. ILL. U. L.J. 225, 229–31 (2011) (arguing that providing students with clear learning outcomes for a course will create high expectations).

In many ways, an effectively organized online course meets the general goals set out in Principles 5 and 6. High expectations are clearly articulated on a weekly basis and communicated to every student through the weekly checklist. Each student understands what the professor requires to be covered during that week.

The online environment also requires time on task. There is no being "unprepared" for an online class, because questions have to be answered before class. Student performance varies, but no student can sufficiently meet the basic class requirements if the student has not read and comprehended the basic principles the questions are based on. Students can allow themselves to be distracted while watching the online lectures, just as with regular lectures, but the potential for distraction can be minimized by keeping the videos short (approximately ten to twelve minutes).

The online environment also addresses, at least peripherally, issues raised in the Dark article about sexism and racism in the classroom. In an online course, because all students answer the same questions and, at least for a large portion of their participation, receive the same feedback, the expectations do not vary from student to student. While there is some instructor feedback individually on short answer and essay questions, it seems unlikely that the professor's critique to these types of questions would have the same likelihood of perceived notions of racism or sexism that can occur in a free-flowing discussion.

Tips to create high expectations and require time on task:

(1) As noted above, keep video and audio lectures short whenever possible. Additionally, consider including a question or two that the students will only be able to answer if they watched the video. These two items will help ensure that students watch each of the lectures.

(2) Create a firm rule that a student who falls behind by a certain amount (perhaps two weeks) will be withdrawn from the course. Make sure this is a well-publicized rule at the start of class and, even though it may occasionally result in a tough decision, hold firm. In addition, have a rule requiring that all course assignments must be completed or the student will not be allowed to take the final exam. Occasionally a student may miss an assignment or two along the way (unlike falling totally behind on whole-week units), but the rule will require completion

prior to being released for the exam and, again, the rule must be firmly enforced.

F. Principle 7: Good Practice Respects Diverse Talents and Ways of Learning

At the start of the final article in the series the author, Professor Lustbader, defines diversity by going beyond the usual categories to include "diverse learning styles, forms of intelligence, previous experiences, levels of preparation for learning, external environments, values, and goals."[217] Much of the article focuses on broader institutional practices and goals related to all types of diversity, including classroom climate, admissions and selection criteria, academic policies, and composition of the faculty and staff.[218] Significant improvement has taken place since the article was written—led in part by the decision in *Grutter v. Bollinger*,[219] which resulted in minority enrollment in law schools doubling from 1990–2014.[220]

1. Nontraditional Students

The article also argues that law school academic policies have to reflect another type of diversity. Specifically, that of the adult learner who has responsibilities beyond that of the perceived "traditional" students who are in their twenties, unmarried, without kids or significant work obligations.[221] There have always been some law schools that have provided opportunities for the students through part-time and weekend classes.[222]

A school with several asynchronous course options respects these types of students by giving them the flexibility and time

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217. Lustbader, *supra* note 32, at 448.

218. *Id.* at 449–54.

219**.** 539 U.S. 306, 306 (2003).

220. *Diversity in Law School*, L. Sch. Admissions Council, http://www.lsac.org/jd/diversity-in-law-school/racial-ethnic-minority-applicants/minorities-in-legal-education-statistics (last visited Oct. 8, 2017) (reporting that enrollment increased from 17,330 in 1990–91 to 34,584 in 2013–14).

221. Lustbader, *supra* note 32, at 451.

222. Edwin J. Butterfoss, *Part-Time Legal Education: It's Not Your Parents' Old Oldsmobile*, 35 U. Tol. L. Rev. 25 (2003) (discussing the market conditions which led to the creation of a weekend law school option and the program's ABA accreditation process).

management options provided through an online course.[223] Instead of attending classes three nights per week, perhaps the student can attend only two nights per week, providing the opportunity to have more family time for dinners and attending children's sporting and school events. It also may mean one less night fighting traffic to get to a law school class by 6 o'clock.[224]

As noted above, while an asynchronous online course does not reduce the overall workload, it does give the student the control to spread the work out over different times. In particular, a student can use weekend, late night, and early morning times to complete readings and assignments. While certainly most part-time and evening students already use these to complete readings, an online course also allows them to complete the actual in-class time on their own schedule.

2. *Students With Disabilities*

While not specifically mentioned in the Lustbader article, another group of students on a diverse campus that could benefit from online course programming are students with disabilities.[225] If designed properly, both pedagogically and technically, an online course can remove the need for people with disabilities to be "singled out for accommodation. Instead, we're all end-users, regardless of abilities . . . ."[226]

As this article is about the role of asynchronous online courses within the structure of an ABA approved law school curriculum and not a fully online program, we are focused on students with disabilities who are taking courses in the regular curriculum. This is not to categorize every student with a disability as one who would prefer to take an online course. However, it is not too difficult to imagine the benefits to students with disabilities who could be relieved of the possible stress and added complications inherent in a classroom.[227] A deaf student could take a course without the need

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223.   Abigail Cahak, *Beyond Brick-And-Mortar: How (Cautiously) Embracing Internet Law Schools Can Help Bridge the Legal Access Gap*, 2012 U. ILL. J.L. TECH. & POL'Y 495, 527–28 (2012).

224.   *Cf. id.* (arguing that online legal education can make the legal profession accessible to older students).

225.   Susan D. deMaine, *From Disability to Usability in Online Instruction*, 106 L. LIBR. J. 531, 551 (2014).

226.   *Id.*

227.   *Id.* at 535.

of a sign language interpreter and transcriptionist accompanying her in the classroom.[228] Because the entire course could be provided using a screen reader, a blind student could take a course without having to worry about text on a PowerPoint, a professor's notes on a whiteboard, or a handout for an in-class exercise.[229] For those students with low vision, magnification may be sufficient to create stress-free full participation.[230] A student needing a wheelchair may find less stress over potentially commuting to campus one less day per week.[231]

A student with a cognitive impairment, such as dyslexia, can benefit from a well-designed course with "logical organization, readable text, strong contrast, and proper spacing . . . ."[232] And a student with attention deficit disorder or hyperactivity disorder could benefit from the time management control an asynchronous course provides.[233] The student could break the book down into much smaller chunks than the 60–120 minute brick-and-mortar class period.[234] Even those who speak English as a second language (while that is certainly not a disability) could benefit from an online course environment that provides captioning (perhaps available in the non-native speaker's native language) and the organizational benefits noted for students with cognitive impairments.[235]

The key to providing a barrier-free online course is the concept of universal design.[236] Universal design is the "idea that environments (virtual or physical) can be designed from the outset to accommodate all comers" so that impairments are no longer barriers.[237] Universal design of an online course would require a

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228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 536–37 (citing JEREMY J. SYDIK, DESIGN ACCESSIBLE WEB SITES: THIRTY-SIX KEYS TO CREATING CONTENT FOR ALL AUDIENCES AND PLATFORMS 23–24 (2007)).

233. *Cf. id.* ("Principles of good design such as logical organization, readable text, strong contrast, and proper spacing go a long way in helping students with cognitive impairments.").

234. *See id.*

235. *Id.* at 537. *See generally* Debra D. Burke et al., *Accessible Online Instruction for Students with Disabilities: Federal Imperatives and the Challenge of Compliance*, 45 J.L. & EDUC. 135, 161–67 (2016) (discussing course website accessibility for students with disabilities).

236. deMaine, *supra* note 225, at 546.

237. *Id.*

course designed with technical expertise beyond that of most law professors.[238] For example, text would need to be coded to allow for changes in size and readability by a screen reader,[239] and videos must include close captioning.[240]

Institutions and professors considering developing online courses, or even in evaluating already developed online courses, should be cognizant that the Americans with Disabilities Act (ADA) may be interpreted in the near future to mandate equal access to website accessibility.[241] While some would argue that the ADA already makes equal access applicable to websites,[242] the stronger likelihood is that enforcement will take place through the Department of Justice (DOJ) rule making. The DOJ originally proposed changes in ADA enforceability to website accessibility with the comment period opening in 2010.[243] The DOJ sought additional public comment in 2016,[244] and it is expected that the DOJ will issue

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238.   *See id.*

239.   *See id.*

240.   *See id.* at 546.

241.   *Cf.* Stephanie Khouri, *Disability Law – Welcome to the New Town Square of Today's Global Village: Website Accessibility for Individuals with Disabilities After Target and the 2008 Amendments to the Americans with Disabilities Act*, 32 U. ARK. LITTLE ROCK L. REV. 331, 345 (2010) ("Website accessibility is an issue that the courts cannot ignore. Based on the fact that Internet use is on the rise and will more than likely continue to become more and more prevalent in today's society, websites must be accessible to individuals with disabilities . . . . The ADA Amendments of 2008, enacted in January 2009, call for a broad interpretation of the ADA which should more readily permit courts to find that Congress intends for websites to be included in the list of public accommodations.").

242.   *See* Deeva V. Shah, *Web Accessibility for Impaired Users: Applying Physical Solutions to Digital Problems*, 38 HASTINGS COMM. & ENT. L. J. 215, 220 (2016) (arguing that the text of the ADA "never specifically excludes 'virtual' places from 'places of public accommodation.' There is also nothing apparent in the specific intent of the ADA to indicate that 'virtual' places were exempt from application. Congress specifically noted in the Act that the list should not and would not include every type of public accommodation required to comply with Title III of the ADA.").

243.   Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities, 75 Fed. Reg. 43460 (proposed July 26, 2010) (to be codified at 28 C.F.R. pt. 35, 36); Meredith Mays Espino, *Website Accessibility for Persons with Disabilities: The Why & How*, A.B.A.: BUS. L. TODAY (Dec. 2016), https://www.americanbar.org/publications/blt/ 2016/12/07_espino.html ("The DOJ announced in 2010 that it was considering amending its regulations implementing Titles II and III of the ADA to require website accessibility and sought public comment.").

244.   Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities, 81 Fed. Reg.

rules in 2018.[245] In the proposed changes, the DOJ specifically mentions institutions of higher education.[246]

V. CONCLUSION

A well-organized and properly developed online course can be an effective offering in a law school's overall curriculum and fulfill many of the Seven Principles.[247] While not a substitute for personal, in-class interaction between professors, students, and amongst classmates, the online course has many advantages over brick-and-mortar courses.[248] In particular, advantages can be found in the critical principles of active learning,[249] cooperative learning,[250] and formative assessment.[251]

The requirement that each student answer every question posed in the course means that there are no missed classes or days off, and that each student has active learning experiences throughout the entire course.[252] Further, each student is provided with continuous, formative assessment through immediate feedback on the student's understanding of the course material and application of that

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28657 (proposed May 9. 2016) (to be codified at 28 C.F.R. pt. 35) ("In 2010, the Department issued an Advance Notice of Proposed Rulemaking . . . titled *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations.* The purpose of this Supplemental Advance Notice of Proposed Rulemaking . . . is to solicit additional public comment specifically regarding the regulation implementing title II, which applies to State and local government entities."); Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities, 81 Fed. Reg. 49908 (proposed May 9, 2016) (to be codified at 28 C.F.R. pt. 35); *see also* U.S. Dep't of Justice, Statement Regarding Rulemaking on Accessibility of Web Information and Services of State and Local Government Entities (2016), https://www.ada.gov/regs2016/sanprm_statement.html.

245.   Espino, *supra* note 243.

246.   Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities, 81 Fed. Reg. 49908. *But see* Exec. Order No. 13,771, 44 C.F.R. § 1 (2017), *reprinted as amended in* 31 U.S.C. §§ 1101, 1105; 3 U.S.C. § 301 (2017). It seems possible that this executive order by President Trump, reducing regulation, could result in the DOJ scrapping its plan for a website accessibility regulation.

247.   *See supra* Part IV.

248.   *Id.*

249.   *See supra* Part IV(A).

250.   *See supra* Part IV(B).

251.   *See supra* Part IV(C).

252.   *See supra* Part IV(A).

understanding through writing assignments and projects.[253] In addition, group exercises in the online format allow for greater individual contemplation time, which results in stronger overall group output and understanding.[254]

There can be little doubt that online legal education will continue to grow in the coming years, fueled by a multitude of factors. Growth will be driven by the sheer fact that online education, particularly at the graduate level, continues to expand. If a nurse can receive this training online and the medical researcher can receive her graduate training online, it will become more and more difficult for law schools and the ABA to deny that legal education can be effectively delivered in an online format. Further evidence will be provided when graduates of the hybrid program at Mitchell Hamline, and other experimental programs, begin passing bar exams in various jurisdictions. There is also the benefit of expanding access to a law degree to rural and disabled students. We are likely to see, while perhaps not a widespread expansion of exclusively online law degrees, a significant loosening of ABA restrictions on online courses in law school curriculums. As this occurs, law faculty developing online courses can use the Seven Principles to ensure that the advances in the quality of legal education made over the past two decades continue in online courses.

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253. *See supra* Part IV(C).
254. *See supra* Part IV(B).

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