

THE WAY FORWARD FOR LEGAL EDUCATION →

The Way Forward *for*



Carolina Academic Press · Durham, North Carolina



Legal Education

DAVID I. C. THOMSON

Professor of Practice and
John C. Dwan Professor of Online Learning
University of Denver, Sturm College of Law

Copyright © 2023
David I. C. Thomson
All Rights Reserved

Library of Congress cataloging-in-publication data is available at catalog.loc.gov

LCCN 2022051422
ISBN 978-1-5310-2396-6
eISBN 978-1-5310-2397-3

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
(919) 489-7486
www.cap-press.com

Printed in the United States of America

For Kathy

and

for Fred

Contents

| | |
|---|------|
| Introduction | xi |
| Dedication | xvii |
| Acknowledgments | xxi |
| One · The Worrisome State of the Profession and the Academy | 3 |
| Introduction | 3 |
| The Legal Profession | 4 |
| The Legal Education System We Have | 8 |
| The Criticism of Legal Education | 12 |
| Conclusion | 16 |
| Two · The Old and New Models for Legal Education | 17 |
| The Old Model | 17 |
| The University | 18 |
| The Bifurcated Status of Faculty | 20 |
| The Buildings We Have | 22 |
| A New Model for Legal Education | 22 |
| We Must Dispense with the LSAT | 23 |
| We Must Redesign the Admissions Process | 25 |
| We Must Have a Culture of Measurement in Law Schools | 27 |
| Simplifying Assessment: It's a Process | 30 |
| Multiple Choice Tests Are Not Formative Assessment | 34 |
| Conclusion | 37 |

| | |
|---|-----------|
| Three · We Must Integrate the Formation of Professional Identity | 39 |
| Introduction | 39 |
| What Is Formation of Professional Identity? | 42 |
| Yes, This Can and Must Be “Taught” | 46 |
| Teaching Simulations Supports Formation | 51 |
| We Need More Simulation Courses | 53 |
| Conclusion | 55 |
| Four · We Must Expand Experiential Learning in Law School | 57 |
| Introduction | 57 |
| A Brief History of Experiential Learning | 60 |
| It Is Not Just the Clinic | 61 |
| A Proposed Definition of Experiential Learning | 64 |
| Applying the Definition | 66 |
| Conclusion | 70 |
| Five · The Future Is Hybrid | 71 |
| Introduction | 71 |
| The Hybrid Work World | 72 |
| We Need More Hybrid Teaching | 75 |
| We Need More Hybrid Textbooks | 77 |
| Conclusion | 79 |
| Six · Online Learning Is Part of Our Future | 81 |
| Introduction | 81 |
| Teaching Law Online | 82 |
| Online Learning Can Help Us Dispense With the LSAT | 86 |
| The First Year Course Content | 87 |
| A Proposed Model Curriculum | 89 |
| First Year of Law School | 89 |
| Second Year of Law School | 91 |
| Effective Online Pedagogy— We Can Do This | 92 |
| Online Learning and Assessment | 94 |
| Benefits of Hybrid Course Design | 95 |
| The Importance of Clear and Regular Communication | 97 |
| Asynchronous versus Synchronous Learning | 98 |
| General Online Teaching Tips | 100 |
| Not All Content Fits in All Containers | 101 |
| Conclusion | 102 |

| | |
|---|------------|
| Seven · We Must Reorient Law School Around the Preparation for Service | 103 |
| Introduction | 103 |
| The Goal of Legal Education Should Be Service | 105 |
| How to Create a Service Orientation Across the Curriculum | 106 |
| How to Create a Service Orientation in Each Class | 107 |
| Lack of Faculty Equity Undermines a Service Orientation | 112 |
| Conclusion | 113 |
| Eight · The Usual Objections Are Unfounded | 115 |
| Introduction | 115 |
| Overnight Change Is Not Necessary | 115 |
| Removing the LSAT Will Not Cause Other Problems | 116 |
| Academic Freedom and Scholarship Remain Imperative | 117 |
| Retooling the Faculty May Be Necessary to Some Degree | 117 |
| This Will Boost Law School Rankings | 117 |
| Net Tuition Revenue Does Not Change | 118 |
| LLLTs Will Continue to Expand | 120 |
| We Might Need to Change Some Classroom Configurations | 121 |
| Expansion of Experiential Learning Will Not Markedly Increase Expenses | 121 |
| Law School Will Not Become Commodified | 122 |
| The Bar Examination Is Already Changing, and We Will Have to Respond | 123 |
| Conclusion | 125 |
| Nine · Conclusion | 127 |
| Epilogue · The Students of Today and Tomorrow | 133 |
| Meet Jerrold and Irene | 133 |
| Jerrold, a Law Student in the Present | 134 |
| Irene, a Law Student in the Future | 135 |
| Index | 137 |

Introduction

Two decades into the twenty-first century, it now seems likely that among the most influential developments of the century will be the increasing ubiquity of technology, and in particular the democratization of information access and creation through the delivery system of the Internet. This influence is already far-reaching—from the crowd sourcing of a vast encyclopedia to the democratization of information using a system of messaging limited to 280 characters at a time. And on the negative side, it has allowed the manipulation of what is reliable news, and this has had significant consequences as well, including the undermining of our democratic institutions. Not long ago, we were mostly content consumers, while now an unprecedented number of us are content creators as well. The impact of these changes will only increase and be felt well into the future. In many ways, the impact of this seismic shift in communication will define our future.

We are now coming to understand that the educational system we have today was created at a time when information was scarce. But information is no longer scarce, and that simple difference will have a profound impact on the educational system we will have in this century, and—in many ways—it already has. The question for this book is, what changes can we implement that will position legal education as we know it for a new educational paradigm that remains to be determined?

Technological fear and resistance has always been with us. Socrates was suspicious of books, fearing that they would become a substitute for wisdom, and teachers of the late nineteenth century railed against the evil of blackboards, fearing that students would not focus on the lecturer if he turned his

back on them. We consider these examples of technological resistance foolish today. Allan Kay wisely said: “Technology is anything that wasn’t around when you were born.”¹ In other words, the car was technology to your great-grandfather, but to us, it seems commonplace. Further, it is hard—if not impossible—to foresee the full impact of a new technology when the prototype is in front of us. Few understood what the invention of the telephone would allow, and who would even want one, and for what purpose. The CEO of Digital Equipment Corporation laughed when presented with the PC, famously commenting: “There is no reason for any individual to have a computer in his home.”²

Because of fear, resistance, and inability to understand future impact of new technology, we often react to it in a binary fashion. We believe that the new thing will completely replace the old, and we fear that. We fear it because there are good things about the old way of doing things, and we fear losing those. But the history of technology tells us that rarely does the new technology completely replace the old. While we have many fewer landline telephones, we still have many of them, even while we have hundreds of millions of cellphones. Well before the Kindle—which merely made them easier to purchase and read—we had electronic books, and yet we still have millions of print books being printed and read in that form today. There was so much hand-wringing that bookstores would all die.³ They have not died.⁴ There are numerous other examples, but what is important is that we let go of thinking that the embrace of the new always comes with the death of the old. More common is a hybridization of the two, or in some cases, simple co-existence, interplay, and mutual growth.

In 2020, we learned some of these lessons in education through the impact of COVID-19 related shutdowns. Fortunately, we all had computers in our homes, and internet access, and we were able to adjust, and rapidly. Was it

1. Paul Ashcroft & Garrick Jones, *Digital Humans: Thriving in an Online World* 8 (Wiley 2022).

2. Christopher Cerf & Victor Navasky, *The Experts Speak: The Definitive Compendium of Authoritative Misinformation* 209, 338 (Pantheon 1984).

3. Lev Grossman, *The Death of the Bookstore was Greatly Exaggerated*, *Time*, June 30, 2022, at 54–55.

4. Mike Peed, *Booksellers Fight Back as 5 New Stores Open*, *NY Sun* (January 15, 2007) <https://www.nysun.com/article/arts-booksellers-fight-back-as-5-new-stores-open>; see also Lewis Buzbee, *Back on Main Street: A Writer Takes Comfort in Independent Bookstores, Which Seem to be Rebounding*, 102 *Phi Kappa Phi Forum* 20, 20–21 (2022).

perfect? Of course not. We have much yet to learn about how to facilitate deep and optimized learning at a distance.

In education—when a student learns something—that event happens through the interplay of knowledge, guidance, and coaching. When these connections take place, it is a moment of alchemy. Universities facilitate thousands of these moments every day. Indeed, this is one of the reasons most teachers work in educational settings and do the work they do: because of the alchemistic nature of these moments they are hard to pin down, describe, and put in a box. It is like trying to describe what makes something funny. We must be wary of purported precision in our work. The many moments of alchemy that happen in educational settings are precious, and space for them must be preserved.

But to think that seriously engaging with methodologies for hybrid and online learning will by definition destroy those precious moments is both short-sighted and not supported by the history of technology. Indeed, such a position has been widely disproven in the maelstrom of the Covid pandemic (although admittedly not perfectly for all students all the time). And so the interesting conversation is how to nurture—and even strengthen—these moments of connection, surprise, and knowing while simultaneously looking for ways to make more of them possible in a new world, and work out the few bugs that remain. This requires deep engagement and experimentation. Without that, we will be lost. The option to do nothing is still an option, but it is becoming increasingly clear what the result of that choice would be—stagnation and unbearable cost pressure. There may be strategies available to run out the string a little bit longer, but the ultimate result of doing nothing is not in question, and it is not good.

We have some time, probably more than we think. There is always a “Chicken Little” aspect to these discussions, particularly from vendors and evangelists. But the change we are wrestling with will not happen overnight; it will be gradual. It took forty years for the zipper to move most clothing construction away from button fasteners.⁵ On that scale, we are only half-way through this transition. But the course we set now will be determinative of the place we end up.

At the same time, a two-pronged reckoning is coming to legal education, and we must address both sides more urgently. First is that our democratic

5. Robert Friedel, *Zipper: An Exploration in Novelty*, 13, 123 (W.W. Norton and Company 1994).

institutions are under attack. There are those who believe that if the “system” will not change the way they want, they must burn it down.⁶ We have learned throughout the world in the last century (in particular) that an autocracy is the inevitable result of the breakdown of democracy, and in an autocracy, there is much reduced need for lawyers, and law schools. We must take this threat more seriously than we have and build up the legitimacy of the law school enterprise to help insulate it—and our democracy and the rule of law—from further attack. Second is the long-overdue broadening of our understanding of systemic racism and legal education’s role in perpetuating it. It is a fact that the vaunted halls of law school—for most of its 130-year history—have been closed to all but a comparative trickle of students who are members of historically underrepresented groups. We underserve the society of the future if this continues. Instead, we can strengthen the legitimacy and extend the proper purpose of legal education if we address systemic racism embedded in the structure of law schools boldly and forthrightly. Some dramatic changes must be made to address these issues—slow change will not fix them.

So not only *how* we educate, but *who* we educate in law schools must change.

Like all authors, I can only offer this book from the perspective of someone with my particular background in the law and legal education. I practiced law for twenty years—mostly litigation in a large New York firm, and at the Department of Justice as a trial attorney—before switching to full-time teaching nineteen years ago. During my practice, I served as an adjunct professor at two schools for seven years, so I have taught in a law school setting for twenty-six years total, the first time being thirty-eight years ago. Although I have taught Administrative Law and Civil Discovery Law, my primary teaching load is to teach the first year Lawyering Process course. I have written and presented about law school pedagogy and teaching with technology for most of the last nineteen years, throughout the U.S., and in China, Moscow, Canada, Japan, the U.K., Australia, and the Czech Republic.

This book offers a vision for the near future of legal education. It is, in some ways, a “follow up” or a “follow on” book to my previous book about legal education, *Law School 2.0—Legal Education for a Digital Age*. That book—written

6. Ronald Radosh, *Steve Bannon, Trump’s Top Guy, Told Me He Was ‘a Leninist*, Daily Beast (Aug. 22, 2016), <https://www.thedailybeast.com/steve-bannon-trumps-top-guy-told-me-he-was-a-leninist>.

a year before the financial “Econolypse” of 2009 and eleven years before the Covid pandemic—predicted many of the forces that converged on legal education after its publication. This one seeks to do the same—and to describe, as that one attempted to do, our best path forward.

David Thomson
Denver, Colorado
November 1, 2022

Dedication

This book is dedicated to Federico (Fred) Cheever, my colleague on the Denver Law faculty, and friend. Fred, a dedicated environmental lawyer and teacher, died—in June 2017 at the age of 60—too young, doing something he loved: river rafting on the Green River in Northwest Colorado with his family. It was a tragedy, but one of those tragedies that is deeply multi-layered, like the geological strata of the surrounding Rocky Mountains. His death was, of course, a terrible loss to his wife Mary, whom he loved immensely and for whom he hung the moon. And also a terrible loss to his two daughters, Elizabeth and Laurel, whom he loved with a particular intensity—one we both shared that was borne by our emotional suffering as children and our determination to break the cycle with our own. Both of his daughters were just emerging into an adulthood in full flower, but still benefiting from the love and steady advice of their father.

A terrible loss to the faculty at Denver Law. Every faculty—whether in law or not—has one Switzerland, one member with modest gravitas who can see the sometimes contentious issues from both sides and articulate a through path that respects all concerned. Fred was that faculty member for us. A terrible loss for his many colleagues, both at the law school and not, who admired him and his work at the university level in the Faculty Senate, and in establishing the Sustainability Council and many other such initiatives over his more than two decades of service to the university. Fred was that kind of selfless giver of his time to university initiatives that he was, at times, taken advantage of—about which he complained not.

A terrible loss to the community of environmental scholars, of whom he was a leader, mentor, and guide. He worked hard to articulate through paths in the intricate and overgrown area of environmental law that worked and made sense to many of his colleagues, and were built upon and expanded by them, and will continue to be. A terrible loss to his future students, who will not have the benefit of his magical admixture of deep knowledge, skilled teaching, and warm affection which he freely offered to all of the several thousand students he did touch during his time at Denver Law. Here is a picture of Fred, speaking with a student at a faculty advising event a few months before he died, which offers well more than a thousand words of his genuine loving engagement with students.



Photo by Wayne Armstrong

Some said of Fred that he had become the consummate Westerner. Riding his bike to work every day—which one student described to me after his death as “righteous”—and hiking the paths and rafting the rivers of Colorado, which he did often. But there were two people, at least, who knew this was mostly wishful thinking and mere adaptation. As two exiled New Yorkers, we knew better. As he said of us: we weren’t Westerners and never would be, we were “refugees.” One of my many sorrows about his death is that Fred will no longer be able to glory in the natural world of our adopted state which he had come to love doing so much.

Each layer of immense loss is a reason alone to dedicate this book to Fred, but none of them are why I am doing so. This book is dedicated to Fred because, simply put, without him it would probably not exist. As a second-class citizen of the academy, I have often been overlooked and underestimated as a scholar, and as I switched from practicing law to teaching it, I bought in to much of that view. But it was Fred who saw the first book in my work and thinking—*Law School 2.0: Legal Education for a Digital Age* (2009)—and prodded me to write it. And I dedicated it to him in gratitude for his insistence that I write it and for giving me the confidence that I could. When I was nearly finished with it, he reviewed a draft manuscript and made a few suggestions, but mostly he just said this: “You have found your voice.”

In the intervening years, as law schools entered their decade of significant trial—after the Great Recession that started just as the book went to press, and more recently, responding to Covid—and while he served as our Associate Dean for Academic Affairs, he continued to encourage me and hear me out on further ideas that I had about the future of legal education. He read links I sent him, and he sent me some himself. We discussed the maelstrom of attacks on legal education and some of the wild suggestions for its improvement over innumerable end-of-day meetings over a beer. He continued to prod me to write this book: the follow up to *Law School 2.0*, but a significant expansion of it. He was disappointed it was taking so long. I had several articles and two textbook updates to do first, and he was still impatient. I was still working out my thinking on some of these issues, and he was still impatient. I probably got impatient with him for being impatient with me. “It matters what we get on paper, David,” he would say. So, we continued to meet almost every week and discuss life and politics and the law school and the university, and this book.

Fred has been gone several years as I write this dedication, and there is quite a bit of thinking in this book that I never got to sufficiently discuss with him. In some ways, in parts of this book I am partially writing *to* Fred. Sometimes, when we met for a beer, he would—as a good colleague should—challenge my thinking, and on some level I would walk away believing I had not gotten through, that he did not fully understand what I was trying to say. We certainly did not agree on everything. And then he would occasionally offer Zen koans like this: “I have seen the future, David, and it involves more of you than it does of me.” He was speaking of more contract faculty and fewer tenured faculty on law faculties of the future. Or was he?

So, this book is dedicated to Fred because I miss my friend and colleague, and because I loved him, and because it would not exist without him, but also—and finally—because it completes a more than ten-year conversation I had with him. Everything I have is in it, Fred. I hope I still have my voice. I am devastated beyond measure that we have lost yours.

Acknowledgments

No book of any size or worth comes together without the support to the author offered by many others.

One of the smartest things I have done in my life is to ask my wife Kathy to marry me, and I am blessed beyond measure that she said yes. This book is also dedicated to her. Our daughters Angelina and Sarah-Jane have blessed the two of us every day of their lives. For me, the foundation of family has allowed me the base from which to think and to write, and I am deeply grateful to them for that, and so much more.

I have many colleagues—in addition to Fred—who have acted as supports and sounding boards for so much of what you will find in this book. Among them are Cliff Zimmerman (Northwestern), Ian Gallacher (Syracuse), Carol Wallinger (Rutgers), Steve Daniels (ABF), Paul Maharg (Osgood), Wan Meng (Beijing FSU), Svetlana Tyulkina (New South Wales), Greg Brandes (St. Francis), Sara Berman (Touro), Akira Fujimoto (Nagoya), Linda Edwards (UNLV), Varvara Maslova (Moscow State), my colleagues at Denver Law Marty Katz, Roberto Corrada, and Scott Johns, and judges Bob McGahey and Russ Carparelli. I am profoundly grateful to them all. I am especially grateful to Ian and Carol for providing comments on an earlier draft, and to Steve for sourcing the data for the tuition calculations in Chapter Eight.

My earliest work on this book was developed while I was hosted as Visiting Scholar at the Institute for the Advancement of the American Legal System (IAALS) in 2013 during a sabbatical. While there, I had the privilege of working with Bill Sullivan, Rebecca Kourlis, Logan Cornett, and the late Alli Gerkman. I am grateful to IAALS for giving me workspace during that semester, and for our many collaborations around the Educating Tomorrow's Lawyers project.

Most of my scholarship over the last fifteen years has centered around the topics addressed in this book, so it is not surprising that it contains some excerpts from articles first published in law reviews. All of the excerpts are included here with permission of the journals that originally printed them, and I am grateful to the editorial staffs of each of them: the *Syracuse Law Review*, the *St. Louis University Law Journal*, the *Journal of Law and Education*, *Perspectives*, the *Journal of Experiential Learning*, *Regent University Law Review*, and *Elgar Publishing*.

All of my thinking on this book has been informed by my nearly 1,000 students at the University of Denver in the last 25 years. I have learned so much by working with them. Truly everything you read here was influenced by my experiences with my students, who each and every one—even the occasionally difficult ones—have blessed me with their attention.

Among those students, I am particularly indebted to my teaching and research assistants over the years. I have been immeasurably lucky to get to know even better those who have stepped up to assist in my work, whether teaching or writing (or both). Among those are Megan Embrey, Kendra Beckwith, Chad Grell, Nicole King, Ian London, Katy Mika, Cody Barela, Kelsey Covert, Megan McCulloch, Jeff Sparhawk, Ellen Blatt, Thomas Galloway, and Kelsey Wilcox.

I am also blessed with incredible research support from our faculty support librarians over the years, particularly Diane Burkhardt and Michelle Penn. I am grateful to my publisher, Carolina Academic Press, and their support of my work over the years since they took my books over from LexisNexis.

Finally, I am grateful to my in-laws, Flora Rodriguez Russel and the late Dan Russel, who made their Casita in Santa Fe available to me over the last 15 years so that I could get away for periods of unstructured writing time. This book would likely not exist without that simple gift.