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# 1 How online learning will transform legal education

*David I. C. Thomson\**

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## INTRODUCTION

Legal education in the United States is under significant threat. In many ways, that threat has been building and growing for at least a decade, but in the last few years it has become more acute. The Great Recession of 2008 created new and significant pressures on law firms, which previously had absorbed many law school graduates but no longer could at the same rates (Sullivan, 2013, p. 146). Complaints of graduates being insufficiently prepared for practice preceded the post-2008 shift, but reached a fever pitch afterwards. Particularly in the years 2010–13, graduates of law schools had a significantly harder time getting jobs than they had in the past (American Bar Association, 2012).<sup>1</sup> In many schools, as many as 50 percent of graduates in those years were unable to obtain jobs which required a law degree. All of this led to the legal academy being criticized broadly in blogs and in the press for offering a law degree at considerable cost without providing what many considered to be appropriate employment outcomes (for example, Tamanaha, 2012; Caplan, 2012, p. 10; Carroll, 2013, p. 6D; Campos, 2013; Leichter, 2014; Mystal, 2013; Patrice, 2014). Law practice has changed significantly in the last decade, with corporate clients – themselves subject to technological transformation and the pressures of global competition – demanding a level of efficacy and efficiency that had not previously been required of their outside law firms. Digital transformations in the outside world are finally putting pressure on the legal academy, which until the recent financial crisis had been mostly immune.

And, to be sure, some schools remain immune. The top twenty or so schools have been little affected by the dramatic (almost 50 percent) drop in the number of law school applications nationwide. The top schools will always do well, and probably always will provide good to excellent employment outcomes for their students. But the post-2008 digital and financial transformations exposed something that had been fairly obvious to many inside legal education for a long time: that mid-twentieth-century legal education – which was still predominantly what was offered at law schools

prior to 2008 – was not going to be sufficient to prepare our graduates for the legal practice of the twenty-first century. While the exposure of this gap has been concerning to many, the gap can be closed. Despite the recent dramatic drop in applications to law school (Sloan, 2012, 2013, 2014), there remains great value to a legal education (Simkovic and McIntyre, 2014). Even so, there is little doubt that the world in which our students will practice – over the course of their forty-odd years as lawyers serving clients – will be substantially and in some areas dramatically different.<sup>2</sup>

Much of the focus of the criticism of legal education has been a lack of practical (sometimes called ‘practice-based’) legal education. Many lawyers and some law professors have long believed that legal education placed too much emphasis on theoretical learning and not enough on practical learning.<sup>3</sup> The charge was made that we were graduating students who could *think* like a lawyer, but were unprepared to *be* a lawyer (Segal, 2011, p. A1). Law firms were expected to – and largely did – fill the gap, by offering essentially a training and transition year (or perhaps two), billing some of that time to their clients. As clients balked at paying for training, this became more difficult. Corporate clients have increasingly demanded that their outside law firms not bill first year associate time to their bills, and that their firms provide a type of technological support previously unheard of even just a decade ago. Corporate clients now often expect law firms doing their work to provide such things as access to case-related documents through intranets, more efficient management of electronic discovery materials in complex lawsuits, and similar digital services. The rise of off-shoring low-level legal work has also contributed to the reduced demand for first-year associates.

If a law firm cannot bill out the services of the first year associate’s work, there must be a reason for that. The reason often provided is that a first year associate, lacking sufficient experience of practice, is not of value to the firms and their clients. And yet law firms still need to have young associates come in to do some of the smaller work on the larger cases. If those first year associates are to be paid, this becomes a financial drain on the firm. The solution often proffered by law firms is to push the first year of this ‘on the job’ or ‘practical’ training back to the law schools.

Legal education has long had strength in doctrinal teaching and – for those students who could avail themselves of a clinical experience – some practical teaching as well. The two aspects of the curriculum often did not interact, but at least we had some strength in both areas. Alas, we have come to understand that the legal practice of the future – and thus good legal training for it – does not operate as a duality but rather involves a rich tapestry with layers of complexity in virtually every day. And thus the best legal education should not operate as a duality either. Purely

doctrinal lecture courses (how Property law is often taught, for example) with the addition of a purely clinical experience do not (alone) make for an integrated learning environment that mimics the diversity of skills and experience needed for competent legal practice.

The problem is that the smaller classes that experiential learning requires, with lower student–faculty ratios, are (generally) more expensive for law schools to offer in quantity. And legal education today is even more expensive than it was even a decade ago. Today, graduates of private law schools graduate with between \$130 000 and \$185 000 of debt. Graduates of many state-supported schools often have less debt, but even there a debt load of in excess of \$100 000 is not uncommon. While graduates of the top 20 law schools might in large number be able to get offers to join large firms that pay well, most law graduates of the remaining 180 law schools do not have – and in many cases do not want – those kinds of jobs. Particularly in schools that serve smaller markets, most of the local jobs available pay in the range of \$60 000 – \$75 000 annually. Thus, we are today graduating many new lawyers who will – for many years – be strapped financially with significant debt they will have difficulty paying off. So, increasing the cost of legal education to provide a more practice-based learning environment with lower student–faculty ratios and more individualized instruction is not a workable solution.

This discussion has become all the more important recently. In early August of 2014 the American Bar Association (ABA), which accredits law schools, passed a resolution that requires all law students to take six credits of experiential courses as part of their course of study (American Bar Association, 2014). In California, a Task Force on Admissions Regulation Reform of the Bar Association has passed a new requirement for admission in California that either a candidate for admission has completed 15 units of ‘practice-based experiential course work’ in law school or a bar-approved apprenticeship or clerkship post-graduation (Task Force on Admissions Regulation Reform, n.d.). The New York Bar Association is considering a requirement of 12 hours of practice-based course work for admission in that state (Committee on Legal Education and Admissions to the Bar Informational Report to New York State Bar Association Executive Committee, n.d.).

So we know that the way to make legal education more relevant to the practice of law of today and of the future is to expand experiential learning opportunities in law school. But the cost of legal education is already high, and may be too high for the employment market to bear sufficiently. We need to reduce the cost of legal education and at the same time increase its value and relevance. The two goals seem opposite to each other, and indeed in conflict.

This chapter suggests that moving more of the foundational first year courses online is probably going to be the most viable solution. There are many topics in law school that law students can effectively learn online and doing so would allow them to be delivered more cheaply, saving money for more experiential opportunities.

## CRITICISM OF LEGAL EDUCATION

In the last 20 years, there have been three significantly critical studies of the design and methods of legal education: the MacCrate Report, the Carnegie Report and the Best Practices Report. Each of these reports has influenced the recent evolution of legal education, and so a review of those reports and their influence provides an appropriate foundation.

### **The MacCrate Report**

This report was issued by a panel of practicing lawyers and legal educators working together.<sup>4</sup> The MacCrate Report offered a list of ten Skills and four Values that it concluded were fundamental to proper training for the practice of law. This list became a guideline for curricular reform at many law schools in the 1990s, and in particular was the genesis of significant growth in the clinical legal education movement (Garth, 2011, p. 264).

The ten fundamental lawyering skills that MacCrate listed and endorsed were such concepts as problem solving, legal research, analysis and reasoning, communication in writing and orally, client counseling, negotiation, and recognizing and resolving ethical dilemmas. The MacCrate Report also endorsed four Fundamental Values of the Profession, which it defined as: (1) provision of competent representation; (2) striving to promote justice, fairness, and morality; (3) striving to improve the profession; and (4) professional self-development (MacCrate Report, 1992, p. 327). Those educators who applied themselves to achieving such learning outcomes with their students quickly discovered that embedded in the Skills and Values list was an assumption that students should learn by working in the role of the attorney, and that this imperative would lead to the need for more experiential learning opportunities.

### **The Carnegie Report**

Starting in the late 1990s, The Carnegie Foundation for the Advancement of Teaching initiated a wide-ranging study of professional education in several fields. The project, called Preparation for the Professions, included

studies of medical, nursing, clergy, engineering, and legal education, and each study issued an extensive report. The report on legal education, entitled *Educating Lawyers: Preparation for the Profession of Law* (referred to here as the Carnegie Report), was published in 2007 (Sullivan, 2007). There is little doubt that just seven years later, the influence of this report has already been significant, with numerous conferences dedicated to study and discussion of the report, significant adjustments being made throughout legal education that were obviously influenced by the report, and at least three initiatives dedicated to promoting one or more of the principles described in the report.<sup>5</sup>

The three principal contributions of the Carnegie Report were first that it identified the ‘three apprenticeships’ of effective legal training, second that it argued persuasively in favor of the integration of all three apprenticeships throughout legal education, and third that it brought attention to the role of professional identity formation. The three apprenticeships it identified in the report were: (1) the cognitive; (2) the practical; and (3) the ethical–social. The cognitive apprenticeship focuses on what has long been referred to as ‘thinking like a lawyer’. The practical apprenticeship focuses on practical lawyering skills, and harkens back to the list of skills in the MacCrate Report. And the ethical–social apprenticeship focuses on the ethical formation of the student as a professional attorney.

The Carnegie Report found that law schools were generally effective, particularly in the first year, inculcating students in the principles of the first apprenticeship through the case method of study, which it called the ‘signature pedagogy’ in law school (Sullivan, 2007, p.23). Concerning the practical apprenticeship, the report expressed concern that there was not enough teaching of legal doctrine in the context of practice,<sup>6</sup> noting that ‘with little or no direct exposure to the experience of practice, students have a slight basis on which to distinguish between the demands of actual practice and the peculiar requirements of law school’ (Sullivan, 2007, p.95). In this way, the Carnegie Report refocused attention on skills needed for practice, as the MacCrate Report did before it.

However, the Carnegie Report reserved its strongest criticism of legal education for the lack of intentional development of its students in the third apprenticeship, the ethical–social, which it also referred to as the students’ formation of professional identity as a lawyer. ‘[I]f law schools would take [this] apprenticeship seriously, they could have a significant and lasting impact’ (Sullivan, 2007, pp.132–3). In recent years, conferences and commentators have begun to focus on this apprenticeship, what it means, and how to teach it.<sup>7</sup> Bryant Garth has suggested that it may have even more of a profound impact on legal education than the MacCrate Report did (Garth, 2011, p.262).

Among the Carnegie Report's most important recommendations was that the three apprenticeships should be integrated throughout the law school course of study. Thus, the report recommends that more courses provide learning of doctrine in the context of practice, and that the legal principles and rules be presented in such a way that students would be exposed to situations that allowed them to begin to form their identities as legal professionals (Sullivan, 2007, pp. 194–7). Achieving this rather lofty goal would require law faculties to profoundly reengineer their courses, programs and course of study, not something easily done or certainly not done overnight, since it was a 'throughout the curriculum' recommendation.<sup>8</sup> It encouraged that more simulation courses be offered, since many of those allow for the integration of the apprenticeships in the same course.<sup>9</sup> And it encouraged more intentional use of externship opportunities, for the same reason.<sup>10</sup>

### **The Best Practices Report**

In the same year that the Carnegie Report was published, the Clinical Legal Education Association (CLEA) published its own report on legal education, entitled *Best Practices for Legal Education: A Vision and A Road Map* (Stuckey, 2007). This report called on law schools 'to make a commitment to improve the preparation of their students for practice, clarify and expand their educational objectives, improve and diversify the methods for delivering instruction, and give more attention to evaluating the success of their programs of instruction' (Stuckey, 2007, p. 7). Chapter 4 of the Best Practices Report provided a comprehensive guide for law teaching at its best and most well designed. It is recommended reading, and re-reading, for all law professors who are invested in their teaching. Like the Carnegie Report, the Best Practices Report endorsed context-based instruction to support the integration of doctrine and skills training (Stuckey, 2007, pp. 146–53).

### **The Relative Costs of Experiential Education**

Experiential education is more expensive than delivery of the typical large class 'doctrinal' course, with one faculty member teaching 70–90 students. But how much more expensive was not known until a recent article by Marty Katz, the Dean of the University of Denver's Sturm College of Law, which explained how to measure the costs of experiential education (Katz, 2014). Dean Katz shows that the cost per student credit hour of a large lecture course (75 students) taught by a tenure-track faculty member is \$253. In contrast, the cost per student credit hour of a clinic (eight

students) taught by a tenure-track faculty member is \$2517. Dean Katz's article also includes a calculation for a small 20-student simulation course taught by a tenure-track faculty member at \$950 per credit hour, and this would be significantly less if that course were taught by a contract faculty member who costs about 55 percent of a tenure track faculty member, as calculated by Dean Katz (Katz, 2014). So, as was suspected, we now know that simply to increase experiential learning opportunities in law school would increase costs substantially. In a world of significant debt loads that are out of step with employment outcomes, simply increasing experiential learning opportunities in law school alone is not the answer. Significant innovation is needed.

### **Barriers to Innovation**

Among the barriers to innovation in legal education perhaps the most important is the regulatory function of the ABA, which accredits law schools. Most states require students to graduate from an accredited law school before they may sit for the bar examination, passage of which is required to practice law in that state. But there are other barriers to innovation, including both the garden-variety resistance to change as well as the particular strain of resistance to change found in academia. Such a move will require some retraining of professors as well, and this takes an investment of time and resources.

But it is important that law schools – even though protected by their regulator to some degree – continue to invest in innovation. Harvard Professor Clayton Christensen has described the process of 'disruptive innovation', and while a regulated market might be insulated from those forces, they are usually insulated only for a limited time. Professor Christensen describes how market innovators initially provide a somewhat inferior product, and take the time to work on making it better. While they are doing that, the incumbent essentially considers the competitor no threat and declines to adopt even relatively minor innovations that might be sustaining to its business. We already have several companies in the legal education space that are providing online courses to law schools that will allow their students to take them, on a 50/50 revenue sharing basis. While this product might be arguably inferior now, it is only a matter of time before it improves, and becomes a truly disruptive force in legal education.

Today, the suggestion that the foundational first-year courses in law school will migrate over time into less expensive online environments is currently a non-starter at schools that receive – and depend upon – ABA Accreditation (as most law schools do). This is because the ABA limits the

number of credits that a student may take online during their studies to 15, or one sixth of their education. That amounts to just one semester, not an entire year, and further none of those credits may be spent during the first year of law school. This is just one of the barriers to innovation for legal education, but it is a big one. Despite this current limitation – which has just recently been relaxed from 12 credits – this chapter suggests that inevitably the ABA will have to relax this limitation further. Indeed, there may be early indications that it will do so.

In the meantime, if a law school were planning on offering online J.D. (Juris Doctor) courses, it would probably need to have a faculty committee that is skilled in reviewing the quality of online courses (perhaps a sub-committee of the Curriculum Committee). This committee would – with the Associate Dean – need to assure itself that there was ‘regular and substantive interaction between faculty member and student’, ‘regular monitoring of student effort by faculty member’, and that there are measurable learning outcomes.

The ABA requirements are not onerous in their detail, but they are highly limiting in two respects: (1) the limitation of 15 credits in total; and (2) the limitation that a student may not take *ANY* online courses in their first year. In the standards, there is no explanation or justification for either limitation. Presumably, it is based on outdated ideas about what can be achieved in an online course, a limited idea of instructional design, and a lack of knowledge about what sort of technology is available.

## TECHNOLOGY SUPPORTING THIS TRANSITION

Distance education has a long history that goes back as far as the correspondence schools that sprung up during the middle of the nineteenth century. In the last forty years, as technologies more advanced than the paper mail system came online, distance educators adopted whatever new technology they could and distance education grew. From the Pony Express to ‘snail’ mail to bulletin boards to email to the web, distance education has been generally opportunistic and platform neutral. However, it was only in the last decade or so that the available technology allowed for a level of instruction that came close to in-class instruction, and the speed and ubiquity of connection was reliable and fast enough to support it.

With the advent of the high-speed and mobile web, numerous technologies became available that support a kind of online instruction that was not previously possible. Enterprising teachers throughout the world have taken to these technologies and made them a part of their research as well as their instruction. One of these is Paul Maharg, Professor of Legal

Education at the University of Northern Australia. He has pioneered the use of virtual worlds for students to interact within a skills-based simulation over the length of a semester or course (McKellar and Maharg, 2010). He has also pioneered the concept of the 'standardized client' in which a series of paid assistants play the 'client' to a set script and set of facts – either live or online – and are reviewed for consistency and accuracy. The standardized client helps to equalize the work being asked of students in online classes with their counterparts in the same 'ground' class and this also helps with uniform assessment methods.

For assessment methods to be useful, they need to be both accurate and reliable, but achieving both of those goals has been a challenge for legal education. Different faculty members at each school might teach the same course in different ways and are even free to cover different subsets of the course material, at their discretion. They also administer different final exams, and grade them differently, and there is no normalization between professors with respect to their grading methods. While academic freedom is something to be valued and even cherished, law schools are behind the times in terms of having comprehensive assessment plans tied to agreed-upon learning outcomes. Standardized clients in online courses can go some way towards improving this.

As we change our teaching methods, it becomes ever clearer that the textbooks that we have been using in law schools for decades need to be adjusted. For many years, the textbooks that professors assign have mostly contained reprinted appellate cases, with a varying amount of interstitial material between them. But as we move to more experiential learning, and more online learning, we will need different teaching materials. Fortunately, some legal publishers are beginning to fill that gap by creating materials designed for more integrated and contextual learning, and by creating hybrid materials that are a mixture of print and online. In such a model, the interstitial material is provided in print so the student can do the 'lean back' reading of the important basic information about the legal principles, and then 'lean forward' and interact with an online companion site designed to work hand-in-hand with the book.<sup>11</sup>

Another technology that illustrates what can now be done in an online environment is adaptive learning modules. An example of this is the product provided by Cerego, which uses brain science to predict when a student needs to review particular sections of course material that they are trying to master. These systems also have predictive and branching capabilities, so that if a student misses a review question it leads to two additional questions (for example) that a student who gave the correct answer to the first question would never see.

Once several law schools have made courses available online, it will only

be a matter of time before two (or more) schools realize the pedagogical benefits of erasing boundaries between them. It would not be difficult, for example, for two faculty members to teach the same simulation course, with students in one school acting on behalf of one side of the transaction and students at the other school acting on behalf of the client on the other side of the transaction. This would allow the simulation to be more elaborate and complex, since two faculty members would be working on developing the problem rather than just one. And students at each school would be operating at a distance from each other in much the same way as they would do in practice, becoming an enriched experience at no additional cost (Thomson et al., 2014).

Despite these potential benefits, because of the ABA's limitations on the amount of online learning it allows in law schools, there is not much that is available in most accredited law schools today. But that is changing. The change is starting in the Master's of Law programs, where conversion of courses is relatively simple and students often need the flexibility to take them around their work schedules. But a place we might look to expand online learning is in the first year of law school.

## REASONS WHY THE FIRST YEAR OF LAW SCHOOL WILL MIGRATE ONLINE

Given the rise in the cost of law school, the difficult job market for many of our graduates, and the need for law schools to produce 'practice-ready' graduates, a common panacea offered is that law school should be shortened to two years by lopping off the third year, thus reducing the cost by a third (Rodriguez and Estreicher, 2013, p. A27). No less than the President of the United States, a graduate of Harvard Law and a former law professor at Chicago Law, has made the same suggestion (Littman, 2013). Proponents of such proposals never seem to explain how the need for practice-ready graduates can be reconciled with removing the year in which students begin the transition into practice and generally receive the experiential opportunities to help them get ready for practice, through clinics, intensive simulations, and externship opportunities. We find ourselves again in the middle of a seemingly unresolvable conflict between needing to reduce the cost of law school and yet providing better and costlier learning opportunities.

Law schools could certainly make better use of the third year, but as this chapter has described, the ways the last year of law school are being used today have evolved substantially in the last 20 years. Now most law schools make available to students – particularly in the third year – experiential

(practice-based) learning, either through simulation-based courses, clinics or supervised externships. At this point, removing the third year would push us backward in meeting the educational needs of our students and properly preparing them for the more challenging market they are about to enter.

However, one of the reasons the idea to reduce law school to two years is so attractive to many pundits is that it would – emphatically and at one stroke – reduce the cost. But it would also reduce preparedness for practice, and no one wants poorly prepared lawyers.

This chapter suggests that a likely resolution to this conundrum is the reduction of law school to two years, accomplished in the opposite way: by removing the *first year*. Or rather, significantly reengineering it, by putting most of it online. The day when well-designed online learning environments achieved outcomes equivalent to or better than ‘ground’ classes has long since passed. The first year classes mostly involve information transfer, and thus are ideally suited to online pedagogy. There is every reason to think there are acceptable ways to teach much of the first year material primarily online.

Not just acceptable ways, but if constructed and executed well, online courses can deliver *better* learning outcomes than the current large class model for most first year courses. Accepting this requires an understanding of what is currently happening in those large classes. While some of them are good and effective, many of them are ineffective. The student who is engaged in dialog with the professor benefits, but the other students are merely watching, and often are distracted by what is on their laptops. The way the student ‘on call’ thinks about a particular problem may not be the way another student thinks about it, and as a result, it is hard for the second student to follow the discussion. It is, in short, the opposite of one-on-one instruction, where the professor is able to individually ‘meet’ the student where they are.

In a recent article, Professor Vickery (2015) noted how use of technology outside class can help law professors teach better (and students to learn better) when there is class time together.

Using well-written, computer assisted instruction, students can be drilled and required to demonstrate the mastery of the black-letter law before they come to class. Then the limited classroom time can be used more effectively, as students more confidently engage in the face-to-face interaction with an expert in the subject area . . .

Of course, as noted, the ABA Standard 306 makes it currently impossible for a law school that wants to receive or retain its ABA Accreditation to migrate its first year of instruction to a primarily online environment.

But what is the basis for banning online learning from the first year?

It is likely to involve a belief that something magical happens in the first year of law school that would be hard or even impossible to replicate online. Even the Carnegie Report refers to the first year Socratic method of instruction as the ‘signature pedagogy’ of law school. Notably, it does not endorse it as the best possible approach, but rather the one that most ‘defines’ what law school currently is.

While it may be true that special things happen in the first year of law school, many of those things can be replicated online, or saved for the second or third year. But some faculty believe that some of those may be difficult, if not impossible, to replicate online. There are several responses to this concern.

First, putting first year doctrinal instruction online in no way precludes the possibility of some hybrid teaching, as Professor Vickery suggests. That is, while students were taking the first year coursework online, they could be attending occasional Saturday classes where the ‘signature pedagogy’ was employed. Second, in the signature pedagogy it is common for one student to be ‘on call’ for much of the class, with the rest of the students watching. Replicating that on video would not be much different. Third, some of the core ‘thinking like a lawyer’ work could simply be moved to the second year of law school. Fourth, it is true that some of the most significant learning that happens in the first year of law school is the learning that happens between students in the same class, and the concern is that this would be lost in an online environment. But such interactions are fairly easy to replicate online – indeed our students are currently doing so in their social lives using ubiquitous software tools on their cellphones. They could do the same thing (and many of them already do) with their law school interactions. Yes, meeting each other in the physical space is important too, so Saturday classes with the teacher would provide a venue in which to have the benefit of that form of interaction and learning.

So, for a substantially reduced cost, law schools could then allow more students to enter the first year online, to study the basic first year courses – Civil Procedure, Criminal Law, Contracts, Property and Torts – at their own pace over the period of a year or even two. Typically, they would be working during this period and thus would not lose the opportunity cost currently forfeited while in the first year of law school, where students are allowed to work outside school only in limited circumstances. Students complete the ‘first’ year when they pass their competency exams for each course. Not everyone would pass, but this would allow for an admissions process based more on suitability for law study than on prior privilege.

Law schools for many years have struggled to enroll a sufficiently

diverse class, one that reflects the surrounding population and the applicant pool as a whole. This has been a perennial problem, but one that has been difficult to solve, and it has led to a less diverse profession that many would hope for and would be reasonable to expect. The world our students are preparing to join will be even more diverse than the one we have today and it is imperative that we provide a learning environment that is diverse and inclusive. But law students are accepted to law schools based primarily on their Law School Admission Test (LSAT) score (a standardized test that every applicant must take), and their undergraduate Grade Point Average (GPA). Because it has been shown that LSAT scores are disproportionately lower for many ethnic groups, this has essentially acted as a barrier to the kind of inclusive profession that we are likely to need to solve the legal problems of the twenty-first century. So, one of the key features of this proposal is to dispense with the LSAT as a barrier, making law school more accessible for minority students at one stroke. Instead of being judged on their LSAT score – a test that has little relationship to what lawyers do – students in the online first year would be judged on how well they learned what lawyers need to know. If some students never advanced, they would have paid a lower cost for a basic understanding of how the law operates, which would be a public good in itself. A certificate of mastery could be offered, and it might be all that those students want or need. Offering such a certificate would serve to provide value in exchange for tuition provided and time expended, something students who only go through the first year of law school currently do not have. Further, it would increase the value of the J.D. by distinguishing it from the first year certificate. Fewer students would make it past this first ‘online’ year of law school, which would also increase the value of the J.D.

If a student wanted to obtain the J.D., and did well enough in the first year to be admitted, the ‘second’ year would include the remaining core courses in the first semester (such as Professional Responsibility, Constitutional Law, Criminal Law, and Administrative Law), and transition to more simulation-based experiential learning in the spring semester, including training in legal research, writing and advocacy. This year would be the first that students were primarily on campus, and in which they would leave their jobs behind. ‘Third’ year would continue with more experiential learning, and add a supervised externship and a clinic.

Law schools adopting such a model could receive nearly the same tuition revenue they currently receive by admitting more students, and there would be room for them, since the ‘first’ year students would not be in the law school building, or only at limited times. While law schools have been criticized for graduating too many into a saturated market, if they were able to practice on day one – and their debt was not so

burdensome – they could help to address another perennial problem: the large numbers of individuals and businesses who need a lawyer but cannot afford one.

Perhaps most importantly, the best work that law schools have always done has been in the ‘high-touch’ work that law professors do in the upper class courses, and less often in the large lectures to 90 students at a time that are common in the first year. Instead of reducing the valuable learning time and attention that take place in the second and third years, we should keep these, and move the fairly routine and basic work of the first year into an environment that is known to work well, is much cheaper, and that will provide a more egalitarian form of access to legal training that is based on suitability to the work that lawyers do. And they will be better prepared for practice as a result.

So, if, for reasons of cost and expediency, we need to get ‘rid’ of a year of law school, it is more likely that schools will make it the *first year*, not the third. Or rather, reengineer law school by transferring those parts of it that are fairly rote forms of information transfer – including parts of the first year – to a well-designed online learning program.

Of course, as noted, such a model for legal education would not currently receive ABA approval. But recently, a significant shift was announced. In the winter of 2014, the ABA granted an application for a waiver of the online learning limitation to William Mitchell School of Law in St Paul, Minnesota, which launched a ‘hybrid’ course of study in the spring of 2015. The hybrid approach they have designed puts a four-year course of study almost entirely online, with each semester beginning or ending (and in some years, both) with an on-campus intensive experiential component in each of the courses. The final ‘Keystone’ semester has online coursework, but adds an externship or clinical component (Hybrid Program Course Sequence, n.d.).

As long as the ABA retains its regulatory authority, this may merely operate as a lower cost – or even temporary – alternative to the traditional conception of law school that serves a limited market. But two forces seem likely to argue against the ABA’s online learning limitations lasting very far into the future.

First, there is no proof that such a design for legal education would be ineffective, and there is reason to believe that it could be effective. Indeed, there is already a fully online law school, Concord Law School, which has been in operation since 1998 and is owned and operated by Kaplan, Inc. It is, obviously, not accredited by the ABA, but several states allow for bar admission without attendance at an accredited law school, including California. There are good reasons to believe that the quality of the instruction being provided by Concord is effective in achieving the

learning outcomes they have, which very closely mirror the outcomes for most ground-based law schools. And Concord has built the platform for delivery of instruction from the ground up for its law school, and built into it are effective tools for assessment and a faculty structure that provides a great deal of feedback and support to its students. They have, in short, demonstrated that it can be done. For now, Concord is filling a niche, serving an underserved market for legal education that might not be able to attend a ground-based law school (active-duty pilots often attend this school), and might be happy to postpone bar admission or be limited to admission in a few states. But when put in the context of the waiver the ABA recently gave to William Mitchell Law School, an accredited school, to put a large portion of its program online, Concord does not seem like such an outlier any more.

Second, as noted above, the work of Clayton Christensen should give us pause as applied to legal education. Christensen's theory of 'disruptive innovation' (Christensen and Eyring, 2011) warns that the market will start to move away from the incumbents when the formerly inferior product improves. Although it may take some time, if online law classes can be shown to be as effective and more efficient over the current model, the ABA is likely to relax its regulatory limitations. While some have considered Christensen's theories inapplicable to education, in a recent book he has made clear he believes the same theories apply to higher education, across the board (Christensen and Eyring, 2011).

## CONCLUSION

While many schools are reducing student enrollment and tightening resources, we have still seen a healthy broadening in the pedagogy of legal education, particularly in the growth of experiential learning opportunities. Despite what the media has suggested in its criticism of legal education, there is still considerable value in having a law degree. But the cost-benefit of a student investing in law school to obtain that degree is under significant pressure, and this is in part why we have seen a dramatic reduction in applications for admission to law schools over the last several years (Sloan, 2012, 2013, 2014). The best way out of this situation is likely to be found in a radical reengineering of the first year of law school, by rebuilding much of it online. This would leave law faculties to do what most of them prefer to do and what they do best: teach students in smaller classes the more complex legal doctrine placed in the context of how it is used in practice, with a focus on what it will take to be an effective lawyer in the twenty-first century.

## NOTES

- \* Some excerpts of this chapter were previously published in an article by the author as 'Defining experiential learning', *Journal of Experiential Learning*, 1 (1) (2015). © David I.C. Thomson, all rights reserved.
1. Although this is hard to measure, since prior to 2012 law schools did not report their employment outcomes in the same ways. This changed when the American Bar Association (ABA) required all law schools to report employment outcomes using uniform reporting methods after the 2011 reporting cycle (<http://bit.ly/1dD7IKW>).
  2. As this author has previously observed, we must prepare our students 'for their future, not our past' (Thomson, 2009, p. xi).
  3. '[O]ne of the less happy legacies of the inherited academic ideology has been a history of unfortunate misunderstandings and even conflict between defenders of theoretical legal learning and champions of a legal education that includes introduction to the practice of law' (Sullivan, 2007). For the remainder of this chapter, this report is simply referred to as the 'Carnegie Report'.
  4. American Bar Association Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development – An Educational Continuum* (1992). Throughout the remainder of this chapter, the abbreviated term 'MacCrate Report' will be used.
  5. The three initiatives are: Educating Tomorrow's Lawyers, an initiative of the Institute for the Advancement of the American Legal System at the University of Denver (<http://etl.du.edu>); The Holloran Center for Ethical Leadership in the Professions (<https://www.stthomas.edu/hollorancenter/>); and the Alliance for Experiential Learning in Law (<http://bit.ly/1GVAAa23>).
  6. See Carnegie Report (2007, pp. 95, 100, 115, 145) (citing favorably to the Best Practices report).
  7. For example, the Regent School of Law hosted a Symposium on the same topic in October of 2014, which was published in Volume 27 of its law review.
  8. '[T]he common core of legal education needs to be expanded in qualitative terms to encompass substantial experience with practice, as well as opportunities to wrestle with the issues of professionalism' (Carnegie Report, 2007, p. 193).
  9. See Carnegie Report (2007, pp. 106–7) (simulations in legal writing classes); Carnegie Report (2007, pp. 158–9) (role of simulations in professional identity formation).
  10. See Carnegie Report (2007, p. 88) (noting also that the ABA has encouraged more use of externships).
  11. Among the book series that use this model is the Skills & Values Series from LexisNexis. The author of this chapter has published two books in the Skills & Values Series: David I.C. Thomson, *Skills & Values: Discovery Practice* (LexisNexis, 2010) and David I.C. Thomson, *Skills & Values: Lawyering Process* (LexisNexis, 2013).

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