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Information Technology and U.S. Legal Education: Opportunities, Challenges, and Threats

Peter W. Martin

Overview

Digital technology holds out exciting opportunities to U.S. law schools. They can

- involve academics, lawyers, and judges situated anywhere in the world in their educational program
- offer both less costly and more flexible educational arrangements
- provide access to students currently excluded by cost and distance
- distribute faculty scholarship more widely, at less cost
- share courses and students
- extend their reach to regions and educational audiences previously closed

It also exposes U.S. law schools individually and collectively to severe challenges. Not only may others claim the new opportunities opened by digital technology, but they may also upset the current market for J.D. education. Possible futures include

- the emergence of a few dominant programs, at least for some segments of the already stratified legal education marketplace
- law schools retaining credentialing authority while more and more of the preceding education is delivered by commercial entities
- failure for law schools that cannot deliver value for the added costs entailed in residential instruction
- erosion of the symbiosis between faculty teaching and scholarship

Many schools lack the institutional competence to respond effectively. Among the organizational and cultural elements that handicap law schools in the current environment are

- limited capacity to respond quickly and strategically to external change

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- narrow notions of mission and market
- an approach to academic program planning and governance generally that defers heavily to individual faculty preferences
- little experience in building and teaching courses collaboratively or even with assistants
- inadequate financial and human resources to develop and sustain technology-supported instruction

Introduction

In the U.S. and elsewhere electronic media are transforming how the widely varying activities called “law” are carried out and how lawyers, judges, and others who participate in the making and applying of law perform their respective functions. Undoubtedly the pace and contours of change vary from place to place, but nearly everywhere the impact of digital information technology and digital communication on law-related functions seems both breathtakingly rapid and inexorable. The sights of a judge bringing a notebook computer to the bench, a lawyer searching documents relevant to a case or the transcript of its proceedings in digital form, lawyers situated in scattered offices of a firm collaborating online, or a client consulting with a lawyer via computer network have moved from startling to commonplace in a decade or less.

Electronic media have also begun to transform education at all levels starting even before formal instruction, in the home. Today at the point of entry into U.S. legal education most students identify serious writing with a computer and research with databases, search engines, and the Internet. They also bring familiarity with hypertext environments (significantly the World Wide Web), with computer-based communication, and with interactive multimedia course materials delivered through a computer.

While law schools and their faculties have neither caused nor pressed these changes, they must manage to understand and embrace them at an unaccustomed pace or run a serious risk of losing effectiveness and influence. The time holds exciting opportunities for universities and other institutions performing central roles in legal education. Unfortunately these are opportunities they may have great difficulty responding to in time. This position paper undertakes a brief review of some of the more prominent (1) opportunities, (2) impediments to change flowing from limited notions of institutional role and from structural features that limit the capacity to change, and (3) likely consequences of inertia.

Opportunities

Getting Past Transposition and Transition

One can get a measure of the pace and scale of potential change for legal education by looking at a neighboring sector with which many legal educators closely identify, namely law publishing. Roughly thirty years ago LEXIS introduced a computer-based federal tax library comprising statutes, decisions, and agency material. It was a novelty, greeted at first with huge skepticism.

The established law book publishers were dismissive. In the decades that followed the birth of LEXIS, computer-based law systems moved from being powerful but expensive print supplements used by a few to print replacements relied on by many. Trailing after the initial shock wave came successive others with even greater cumulative impact (inexpensive high-density disk distribution and most recently the Internet). For a brief time—perhaps as long as a decade—it may have seemed to law book publishers and their customers that digital technology allowed both to function largely as they were accustomed to, aided by new tools promising greater functionality and reduced cost (faster, better, cheaper). That was, however, the standard delusion of the ancien regime.

Today the multibillion-dollar U.S. legal information industry is totally realigned. Century-old book publishers are gone, swallowed by multinational enterprises that have assembled full print and electronic distribution capability, but equally the victims of numerous other independent actors, including both governmental agencies suddenly able to reach the public directly without use of commercial intermediaries and new commercial distributors. The informal but pervasive partnership arrangements between courts and other public organs and commercial law publishers involving the exchange of “official” or other special status in the distribution of their output in return for below-market prices on legal information products have begun to unravel.

Legal education appears to be positioned at an earlier point on what may well turn out to be a very similar curve. That means that for some few years to come there will still be a great deal of first-order or transitional change of the sort that characterized law publishing ten to fifteen years ago. Already faculty and students do much of their writing with computers. Because WESTLAW and LEXIS viewed U.S. law schools as a critical marketing venue and managed with remarkable success to penetrate otherwise jealously guarded curricula through offers of free training and equipment accompanied by deeply discounted access, computer-based legal research (on those systems) has achieved a very high level of acceptance. But the large-scale transposition of course materials from print to digital distribution, the substitution of presentation software for chalkboard diagrams, and submission of student work via networks remain in their early stages. Short-term excitement and controversy over these new forms of carrying on deeply entrenched activities will inevitably and understandably draw attention away from potential second- or third-order changes on the scale of those now visible in law publishing.

There is strong temptation to dwell on the transitional issues. They are important and challenging, touching on powerful vested interests and on work habits that are so deeply ingrained most still have trouble separating them from the underlying work itself. But these issues represent the present not the future. To catch some glimpse of what the digital future may hold for legal education in the U.S., we shall assume that digital technology will move inexorably into the reading, research, writing, and communicating of the

principals in legal education—faculty, students, and the rest. What follows takes for granted that

- computers will become central and essential writing and research tools for all law students, inside as well as outside the classroom
- law teachers will rely on networked computers to deliver all sorts of content in support of their teaching into the classroom and beyond it
- course materials will be prepared and distributed in digital form, available in print also, of course, but only as and where print is needed
- distribution of faculty scholarship will follow a similar path
- diverse forms of networked communication will link students and faculty
- new and renovated law school facilities and growing numbers of technical personnel will provide the necessary infrastructure and support for the above

It also assumes that law-making bodies, the information industry, lawyers, and other sectors important to legal education will continue to assimilate digital technology at a rapid pace.

Gaining Some Perspective on Outputs and Methods

It is a widespread and generally useful human tendency to conflate what we do with how we do it. The transparency of tools and institutional patterns to those who have grown familiar with their operation, like the transparency of language and gesture to those who have attained fluency in their use, permits attention to be focused on larger aims, goals, or purposes. At times of profound change, however, it becomes important to separate ends from means and even to consider how currently accepted ends have been constrained or otherwise shaped by means.

For those who have close-hand familiarity with legal education—faculty, students, administrators, regulators—the activity tends to be tightly identified with very specific spaces, practices, people, and institutions. Given the difficulty of gauging educational performance, administrators and regulators, especially, focus on such tangible features. The principal regulatory standards in the U.S. governing legal education stipulate the number of hours students must sit in classrooms, the qualifications of those who preside over those class sessions, and the institutional setting where they take place down to minute physical detail. The definition of legal education they yield is perilously close to “whatever law faculty choose to do with students in regularly scheduled meetings held at a law school site over the course of an academic term of prescribed length, followed by graded exams.” Most definitions of legal scholarship, another important law faculty output, embody a similar tautology.

Given this tendency, it is useful to imagine what we might learn if we asked an outsider to investigate and report back on how the activities of law schools and law faculties relate to the broader phenomena of “law” and “education.”

Among the features of the U.S. legal education enterprise that such a report might help us see are the following.

- University law faculties constitute only one of many agencies providing legal education, even if the field is viewed as limited to formal instruction about the content and process of law.
- Nearly all the educational activities of law schools and law faculties are tightly constrained by time and place.
- Nearly all the educational activities of law schools and law faculties are focused on students pursuing a comprehensive professional degree program.
- The core course-related activities of law faculty instruction include a fairly limited set of interactions, with a faculty-student ratio that severely limits individualized feedback and evaluation.
- Student participation in conventional law school classroom instruction declines sharply after the first year.
- At least as important to the legal education process as faculty-student interaction, though less conspicuous, is peer-peer exchange among students.
- An activity of at least equal priority with instruction for many faculty is some form of scholarly production and communication.

The possible implications of flexible, high-capacity electronic storage, communication, and exchange media for a service sector with these characteristics and activities are numerous. They include but are hardly limited to how instruction of current students is carried out. These are, after all, technologies that pay scant attention to distance, technologies that can penetrate geographical, political, and institutional boundaries that previously seemed utterly defining. In theory they might enable law faculties to expand their reach, to play a role in the education of additional categories of students, both students of the same age and educational background as those they currently enroll—being no longer limited to those who can travel to the university to sit in its lecture halls and use its library—and other groups as well. More generally, they might lead U.S. law schools to a radical change in how they conceive of their student bodies, faculties, and research possibilities. They might, for example, come to view academics, lawyers, and judges situated anywhere on the globe as prospective presenters, commentators, and mentors for students. For their part, students might come to view individual courses or programs offered by widely scattered institutions as accessible components of their legal education, without any thought of having to move from place to place. Significantly, all of this could occur across national boundaries.

Dramatizing the possibilities in a bold way is a new institution, which opened its (virtual) doors in September 1998 on the Internet—the Concord University School of Law. Concord is the first law school based in the U.S. with a URL <<http://www.concord.kaplan.edu/>> but no campus. It offers a four-year J.D. program delivered via the Internet that qualifies its graduates to sit for the California bar exam and, as of January 2002, two LL.M. programs, one in health law, the second in taxation. In the four years since its launch

Concord's online student population has risen from thirty to over 1,000. As Concord's Web site notes, a "critical factor in the evaluation of any institution is the organization behind it." The institution directly behind Concord is the commercial test-preparation service provider, Kaplan, which has decades of experience preparing prospective law students for the LSAT. Kaplan is, in turn, a subsidiary of the Washington Post Company. In short, because of the organizations standing behind this radical model of entrepreneurial electronic legal education, it cannot easily be dismissed as a madcap scheme sure to founder. This is true even though current bar admission and accreditation standards have dramatically limited its initial market. Concord represents a challenging model, one it did not invent but was able to adapt from neighboring educational sectors. Online M.B.A. programs are no novelty. This new version of J.D. education confronts conventional law schools with a deeply threatening question: What is it that they do for resident students that cannot be done effectively, asynchronously, at a distance at lower cost? The very existence of a functioning online law school challenges accreditation standards that are framed almost exclusively in terms of how legal education is accomplished rather than what educational outcomes are achieved.

Potential Instructional Gains

In one sense the pressures for dramatic change in the means of delivering legal education seem large, for the potential gains are enormous and the prospects of competition real. The overhead generated by the physical environment of higher education—the library facilities, classrooms, and student spaces of all kinds along with the staff involved in their operation—constitutes a major part of the explicit cost of university-based legal education. By eliminating these facilities costs Concord offers a provocative answer to the question "How can a student finance a legal education?" Its total tuition and fees for a four-year J.D. program are currently around \$28,000. (And this is a J.D. program that can be undertaken alongside employment, with zero relocation or commutation expense.)

The time and place requirements that limit the formal education process to students who are resident during a term and to groups of students able to assemble in scheduled meetings (not conflicting with other course sessions) impose additional implicit costs on those students who are able to enroll. They also effectively exclude others from the educational process. Less costly and more flexibly scheduled legal education has the potential for being far more inclusive. Since barriers of cost (including not only out-of-pocket expenditures but opportunity and relocation costs) continue to block access to legal education disproportionately for racial and other minorities, this prospect has special importance.

Classroom-centered programs produce a heavy scheduling burden, forcing unhappy tradeoffs on students, faculty, and curriculum planners. Creating the course and exam schedules for a U.S. law school of even modest size is a task of near industrial complexity. And the segmented educational program most legal educators take for granted, one chunked in courses of standard length and pedagogy, is in no small part a consequence of rather than the reason why

we march students through our degree programs in measured time, to a near military beat.

Digital distribution of course materials and networked communication linking faculty with students (and students with each other) have the potential for liberating legal education from many of these costs and rigidities. Students can be offered instruction where they are. Their faculty or instructional team can itself be spatially distributed and include lawyers and judges in addition to resident full-time academics. This should permit students (and legal employers) to mix professional employment and education in ways not presently possible.

Were the reach of individual institutions to expand in this way, the emergence of one or more truly national—indeed, truly international—law schools might well follow. So long as pursuing a degree program at highly selective institutions requires relocating to their sites for several years, local and regional institutions will compete successfully with them for very strong students. Should that locational advantage be eroded, major realignments are likely to occur. The stratification of legal education could well grow more pronounced. On the other hand, the same technology could allow much wider sharing of instructional resources among institutions, greater cooperation rather than less constrained competition.

With the capacity to educate at a distance, law schools could and therefore law schools might expand their reach in other directions, offering programs aimed at a huge variety of new audiences. Since it would be much easier to teach nonresident students, who have not committed to a multiyear program, law faculties might play a greater role in continuing professional education on the one hand and the education of students not headed toward professional roles in law on the other.

*Potential Gains in the Creation and Distribution
of Both Scholarship and Teaching Materials*

The dramatic restructuring of the legal information industry leaves little doubt that electronic publication is, indeed, faster, better, and cheaper than distribution in print. By dropping threshold costs and removing the need to invest in inventory, digital technology allows distribution to be handled at or very close to the source. The production, market aggregation, and shipping tasks print publication entails have generated a costly set of institutional arrangements for both scholarly writing about law and course texts. Beyond direct costs, these arrangements have also generated problematic secondary consequences for individual authors and legal education more generally.

Because the current journal, monograph, and course material publishing systems are costly, for current participants cost recovery seems a serious matter. But remove those costs and the concerns should largely disappear since financial return does not figure prominently among the incentives driving the creation of such works. Most academic authors crave mind share rather than market share or royalties. Consequently, viewed a priori law-school-based Internet publication of faculty scholarship seems highly attractive. Distributed

in print, disciplinary journals have a very restricted habitat. Articles accessible via the Net can reach a far wider audience, without the production delays inherent in print journals. In short, digital media hold out the appealing prospect that the faculties of law schools and of universities more generally may be able to reclaim much of their creative production from costly intermediaries and distribute it to a much wider and more diverse audience.

The dependency of legal education on external publishers for the production and distribution of core teaching materials also rests on distinct features of print distribution. Here too it is quite possible that electronic distribution might allow law schools to eliminate or reduce the role of commercial intermediaries.

Structural Handicaps

Limited Capacity to Respond Quickly and Strategically

Academic institutions are deeply embedded in and affected by the broad cultural, technological, and economic forces at work in the society. On the other hand, compared to many of the sectors to which they most directly relate, including in law the professions to which their students graduate, academic institutions are not agile. They are well suited neither to launching venturesome new initiatives nor to adapting their mission and practices to large-scale external changes. Basically, universities are not coordinated organizations. They are both highly stratified and atomized; the right hand often prides itself on not knowing what the left is up to. In general they lack the capacity to exploit the creations that bubble up in their midst. And in the U.S., at least, they are increasingly surrounded by, even penetrated by, commercial organizations that are more proficient at feeding and provisioning students, publishing teaching materials, compiling and duplicating course packs, and even preparing students for exams.

For individuals and organizations that have difficulty responding to a rapidly changing environment, the immediate future is frighteningly full of hard choices. Their effective resolution will require strategic decision-making, with sensitive attention to the distinctive needs of education, swift response, and—in so fluid an environment—frequent revisiting.

One particularly difficult area illustrates the degree of challenge. The staffing for a technology-based legal education program is likely to look quite different from today's typical faculty roster. Sustainable cost-effective online education involves the conversion of a significant fraction of classroom teacher activity into reusable multimedia content. Creating and subsequently revising (as distinguished from recreating) that educational commodity requires a team rather than an individual teacher and skills few law professors have. To complete the full course package requires diverse forms of student monitoring, guidance, exchange, and evaluation. It is through disaggregating a law school course in civil procedure, criminal law, evidence, or tax into a prepackaged, reusable commodity combined with an interactive service component that online instruction can both keep costs (and tuition) down and offer attractive faculty-student ratios with unusual levels of student evaluation and feedback. The differentiated teaching roles and institutional structure this

would seem to entail are not likely to be swiftly embraced by the faculties of existing law schools. Nor is it clear where research and scholarship fit in a faculty that has been restructured around cost-effective online instruction.

Harder choices still lie on the output side—selection of the optimal targets, scale, and means for teaching and research. Each law faculty is likely to find itself in far more direct competition with other institutions than it has previously known. Deciding on how to focus limited teaching and research and electronic publication resources to maximum effect, and deciding which new opportunities to pursue (if any), will be difficult enough for those institutions that recognize the challenge.

Obviously there is a major difference between the market for legal information and the market for legal education. The latter is, to a degree not true of most other sectors of higher education, surrounded by regulation, accreditation standards, and other barriers that may for a time be deployed by those threatened by the technology-enabled changes sketched here to protect the “quality” of legal education. Mandates laid down in terms of classroom hours, resident faculty and students, size of library collection, and number of seats may for a time defend against virtual courses and virtual libraries. But they cannot and so will not prevent students from being networked. They cannot and will not prevent commercial entities from offering instruction focused in more efficient ways on the exams and other credentials remaining in the control of the formal organs of legal education. History suggests that wherever defensive measures like these are deployed for long, the institutions surrounded by them are the ultimate victims. The longer it is that accreditation standards are used to protect conventional classroom-based instruction from online competitors, the less likely it will be that schools practicing only traditional modes of education will be able to respond to the challenge of online instruction when that barrier is finally lowered. Despite the limited acceptance of nontraditional methods by the new ABA Standard 306 on distance learning, the protective barrier remains high.

A Need to Establish Quite Different Internal Working Relationships

Effective use of digital technology in the educational and research activities of a law faculty will necessitate the addition of significant numbers of technology specialists and the creation of far more collaborative working relationships not only among law teachers (including those with quite different roles in the same course) but with these new professional partners. The culture and status arrangements of most law faculties will make all of this very difficult to achieve. Legal academics are accustomed to a very high level of individual autonomy. While many of their counterparts in law practice have experience working on project teams of substantial scale and duration, most law teachers are accustomed to being stars on their own stage.

Possible Consequences of Failing to Seize These Opportunities

Unless law schools succeed in changing old patterns of teaching, and unless they succeed in organizing their human resources for teaching and research in a networked world, that very connectivity is likely to marginalize their role.

Encourage it or not, law schools will have networked students. Networked students will use computers to connect to products and services offered by publishers and nonacademic educational entrepreneurs. They will pursue courses at a distance offered by other educational institutions. As computers become their central workspaces, key research tools, and communications media, the greater the costs of institutional failure to involve them centrally in work with and for the faculty.

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Law schools represent extraordinary collections of human and information resources. Most have strong traditions of deploying these resources in furtherance of advancing understanding of law, improving the quality of law practice, and reforming the law itself. Compared to other disciplines and other professional schools, they have also placed high value on education and pedagogical issues.

As the means of exchanging knowledge, of communication, and performance of education undergo transforming change, important limits that have defined both how law schools functioned and for whom are falling away. The resulting new opportunities are exhilarating, even as the consequences of not adapting threaten a diminished role.