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IT and U.S. Legal Education -- Alternative Views of the Law School: Consumer, Marketing venue, Center of Research and Dissemination

I. Introduction

In the U.S. and elsewhere electronic media are transforming how the broad range of activities called "law" are carried out and how advocates, counselors, and judges perform their respective functions. Undoubtedly, the pace and contours of change vary from place to place, but nearly everywhere the impact of digital information and communication on law-related functions seems both breath-takingly 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, 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, at least in part, with database searching. They also bring familiarity with hypertext environments (significantly the World Wide Web) and with computer-based communication.

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 moment 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 paper undertakes a brief review of some of the more prominent: 1) opportunities, 2) impediments to change represented by limited notions of institutional role and even more by limited capacity to change, and 3) likely consequences of inertia.

II. Opportunities

A. Getting Past Transposition and Transition

One can, perhaps, 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. A short twenty-five years ago, LEXIS introduced a computer-based federal tax library, comprised of 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 have come successive others with even greater cumulative impact (inexpensive, high density disk distribution and most recently the Internet). While 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 the standard delusion of the ancien regime.

Today, the multi-billion dollar U.S. legal information industry is totally realigned. Century-old book publishers are gone, swallowed by multi-national enterprises that have assembled full print and electronic distribution capability, but equally the victims of numerous other independent actors, including both public agencies suddenly able to reach the public directly without use of commercial intermediaries and new commercial distributors with names like LOIS and Hyperlaw. 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 for below market prices on legal information products in return have suddenly begun to unravel. These interconnected changes have fueled battles over the

reach of copyright protection to commercial compilations of judicial opinions and statutes and a struggle for vendor and media neutral citation. The sums and energy devoted to these "technical issues" by those favored by past distribution patterns and their new competitors leave little doubt that the stakes are very high.

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 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 have only just begun. 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 these transitional issues. They are important and challenging. They touch 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., I am going to assume (and ask the reader to assume as well) that digital technology will move quite rapidly into the reading, research, writing, and communicating of the principals in legal education -- faculty members, students, and the rest. What follows assumes that:

- computers will become central and essential writing and research tools for all law students, inside as well as outside the classroom
- 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 writings of other kinds will follow a similar path
- diverse forms of networked communication will link students and faculty

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

B. 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 (e.g., the number of student work spaces in a law school's library). The definition of legal education they yield is perilously close to: "whatever law faculty members 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 may be useful to imagine what we would 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 our own enterprise that such a report might help us see are these:

- 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 and focused on students pursuing a comprehensive professional program
- the core course-related activities of law faculty instruction include: setting a sequence of topics, assigning readings (topic by topic), presenting personal organizing, context-setting, and critical reflections, asking stimulating and guiding questions in written and oral form, providing an environment that invites (or demands) that students respond to what they've read and heard, engaging in dialog with each other and the instructor
- at least as important as faculty-student interaction, though less conspicuous, is peer-peer exchange among students
- an activity of at least equal priority for the 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, after all, are technologies that pay slight attention to distance and that can penetrate geographical, political, and institutional boundaries which 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 our institutions 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 brand new institution, which just opened its (virtual) doors this fall, on the Internet -- the Concord University School of Law. Concord appears to be 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 course of study to be delivered via the Internet that should qualify its graduates to sit for the California Bar Exam. 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 Law School Admission Test (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 should severely limit its initial market.

C. 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 -- constitute a major part of the explicit cost of university-based legal education. 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. Classroom centered programs produce a heavy scheduling burden, forcing unhappy trade-offs on students, faculty members, and

curriculum planners. Creating the course and exam schedules for even a modest sized U.S. law school is a task of near industrial complexity. And the segmented educational program we are accustomed to, 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) has 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 can 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 top 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 seem inevitable.

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. With it much easier to teach non-resident students, who have not committed to a multi-year 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.

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

The dramatic restructuring of the legal information industry, noted previously, 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. However, remove those costs and the concerns should largely disappear since financial gain 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 and without the production delays inherent in print journals. In short, digital media hold out the appealing prospect that the faculties of law schools and universities more generally may be able to reclaim much of their creative production from costly intermediaries and distribute it to a far 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 distinctly possible that electronic distribution might allow law schools to eliminate or reduce the role of commercial intermediaries.

E. Some Suggestive Evidence from the LII Experience

In 1992, with a sense of the possibilities opened to a law school by digital media, though far less certain than that sketched here, Thomas R. Bruce and I established the Legal Information Institute (LII) at Cornell. Our experience over the past six years suggests strongly (to us, at least) that we were not mistaken and that if anything we underestimated the pace and extent of potential change. To begin, the ground shift that has transformed law publishing allowed our young institute to become a serious electronic publisher,

strengthened by the collection of human and information resources represented by Cornell's law faculty, library collection, and student body. Today more people visit Cornell Law School electronically in a single day's time than attended the institution during its 110 year history. The LII's e-mail delivered law bulletins, including one carrying case commentaries written by law students under faculty oversight, reach many times the number of subscribers to the school's print law journals. Basic course materials published by the LII on CD-ROM and available for purchase via the Internet are widely used by law students, faculty, and others -- including teachers and students in high school and college settings. Because the Internet not only allows but invites two-way communication we have heard from and learned about the interests and needs of important new constituencies for the school. The LII Collection of Historic Decisions of the U.S. Supreme Court now used in many high schools is a direct result of such exchange. We have embarked upon another CD-ROM and Internet publishing project, the American Legal Ethics Library, that employs a pattern of distributed authorship involving practicing lawyers as well as the school's own faculty that would have been impossible but for the Internet.

Most recently, in 1996-97, the LII undertook to explore how digital technology might be used by law schools to reach students and involve faculty remote from their campuses. Seeking to shape standard law school course educational aims and practices to the Internet's very different environment, the institute offered instruction, for credit, to students at four scattered sites. The participating institutions included Chicago-Kent, the University of Colorado, and the University of Kansas, in addition to Cornell. Some key elements of this experiment were:

- digital course materials (distributed via the Internet)
- e-mail and Web-based written exchange as a continuous means of teacher-student, student-student, and student-teacher exchange
- a once a week Internet-based video conference for "face to face" class discussions (scheduled across four school class schedules and academic calendar and three time zones)

With modifications reflecting growing experience with the pedagogical demands of such non-traditional methods, the course has been repeated twice since. We've already learned enough from this venture to be confident that "distance learning" is not science fiction and that it need not be limited to special cases or commercial startups like Concord. In implementing this course, as with many other institute activities, we've discovered that the cultural and institutional issues and challenges are far more perplexing than the technical ones.

III. Structural Handicaps

A. 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 neither well suited 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. Their lack of coordination is illustrated most vividly by those commercial publishing enterprises that draw creative work from the faculties and research labs of the world's universities, package it in journals and monographs, and then sell it back at huge profit to the libraries, faculty members, and students of those very same institutions.

For individuals and organizations that have difficulty responding to a rapidly changing environment the immediate future is frighteningly full of hard choices. The explosion of legal information products and sources illustrates the more general problem of choice law schools now confront. A law school aiming to give its faculty and students access to the

decisions of the appellate courts of any one of the American states cannot today, as it might two decades ago, acquire those decisions in all available forms. Where there were one or two print versions there are now several commercial on-line services, public or non-profit Internet sources, and often CD-ROM collections from additional publishers. Hard choices like these having to do with institutional inputs -- information, staff, technology are compounding. 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.

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, deciding which new opportunities to pursue (if any) will be difficult enough for those institutions that recognize the challenge.

There is, of course, a large difference between the market for legal information and the market for legal education. The latter is, in most countries, 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, 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 other 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.

B. A Need to Establish Quite Different Internal Working Relationships

Effect 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 among legal experts and these and other professionals. The culture and status arrangements of most law faculties will make 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 professors are accustomed to being stars on their own stage.

IV. Possible Consequences of Failing to Seize the Moment

Unless law schools succeed in changing old patterns of teaching. 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 non-academic educational entrepreneurs. They will pursue courses at a distance from other educational institutions. As soon as permitted they will bring portable computers to class and to exams. 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.

V. Conclusion

Law schools represent extraordinary collections of human and information resources. Most have strong traditions of deploying these resources in furtherance of: 1) advancing understanding of law, 2) improving the quality of law practice, and 3) reforming the law itself. Compared to other disciplines and other professional schools they have also placed high value on teaching and pedagogical issues.

As the means of exchanging knowledge, of communication, and perforce 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. As wide-spread access to law data has exploded -- the capacity to aid in selecting, structuring, explaining, and applying that data has acquired new value. Law schools that

remain stuck in the roles of consumers, searchers, and retrievers may well have an excellent view of others laying claim to functions they once dominated. On the other hand, those that are able to identify and pursue appropriate opportunities to expand their roles as publishers, commentators, points of exchange, and educational centers on law, broadly defined, ought to have exciting futures.