



Legal Education's Waterloo: The End Game

By Michael Madison

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This is the second part of a promised three-part response to Mark Cohen's recent Forbes.com essay ("**Post-Pandemic Legal Education**") about what confronts legal education today and what awaits it in the future. My initial hot take appeared here, as **Legal Education's Waterloo**. My first substantive reaction, **Legal Education's Waterloo: Urgency**, agreed with the premise that US legal education confronts immense challenges, but it focused on cultural prompts rather than financial ones as likely drivers of change. Those prompts consist of intersections among law schools, law students, and markets for lawyers. What's at stake isn't merely law schools' ability to feed the market for lawyers but all lawyers' interest in how we train the legal experts of the future. The law will be in their hands.

This second substantive comment jumps to the end, evaluating Mark Cohen's vision of the likely future and giving it some important context. The final part of the response is the trickiest, or messiest, which is why it's being held for last: how do we all get from where we are now to wherever it is that we're going?

The End Game

Legal education of the future will almost certainly be more pluralistic, institutionally speaking, than it is today. Right now, there is one path to recognized legal expertise in the US, and that (with only narrow exceptions) is licensure as a lawyer after earning a JD from a law school accredited by the American Bar Association. Look at careers in law as they are experienced in many other jurisdictions; look at other professions in the US. Multiplicity of functions almost always means multiplicity of education and training pathways. Some lead to some form of licensure, and some do not.

Education and certification programs other than the JD are likely to consist of blends of different subject matter ("people" skills; competencies in addition to analytic training and substantive legal knowledge; and role- and function-specific knowledge) and different delivery modes (in-person, online/remote, self-directed, customized or customizable on a per student basis, artisanal, mass-delivery, and/or

scalable). Much of the fluidity and flexibility to be found in these new pathways likely will influence the design and delivery of JD programs. The arrow goes both ways. Much of the innovation that will lead to those things is being tested today, in small ways, in today's law schools.

Will any of that diversity be up and running any time soon? I doubt it, but who knows. Within 5 years? Maybe. Within 10 years? That strikes me as much more likely.

To understand why the pace of change is likely to be so slow, consider two things: where relevant and provocative innovations may come from, and some of the conflicts in the premise that have to be worked out.

Sources

Where are these things coming from? Here's a crude taxonomy.

One, at the high end – first class, which means programmatically rich, thoughtfully designed and executed, expensive and complex to administer, they are coming from US law schools themselves, both inside law school programs and adjacent to them. Law professors aren't known for their disruptive tendencies on the whole, but positive deviants are out there, right now, working on precisely these themes. This is almost always slow going, at small scales, so no one expects anything dramatic to emerge the high end any time soon. At and near any particular school, the efforts of positive deviants tend to be experiments and pilots. Small but dense (and often super tasty) potatoes, in short. It's mostly niche stuff, so it's rare that student demand supports more substantial institutional support and recognition.

Programs that are housed entirely within one or more law schools are often really interesting and useful in labor market terms, even if that utility is intuitive and difficult to measure. By the same token, they are both likely to be one-offs that are difficult if not impossible to replicate elsewhere and also likely to be culturally marginal operations within their own institutional settings – even while they may be celebrated in the worlds of law practice, legaltech, and/or industry.

Some related programs operate mostly outside of law schools, but with faculty relationships and other conceptual and organizational links that make them academic in motivation if not fully academic in execution. To my mind, the **Law Without Walls program (LWOW)** is an example of the first, a rich, innovative program that is explicitly anchored in academia. The **Institute for the Future of Law Practice (IFLP)** is an example of the second. It has strong links to academia but is organizationally independent.

Both these two examples and others in this category tend to have grand visions and ambitions but are executed in highly customized ways. That means that the local piloting that's happening today doesn't have access to a ready-made infrastructure for sharing, scaling, and funding new things *across* law schools or *across* professional schools (even within a given university) or *across* labor markets. Legal education has been, like most of higher education over the last 100 years, every school for itself. Because these efforts tend to be culturally marginalized in their home spaces, they face big challenges in scaling from the inside. Because they don't have access to an existing infrastructure for cross-organizational collaboration, they face big challenges in scaling elsewhere.

Since collaborating will be key to any future success, innovations in this high-end space tend to have to (or try to) build their own infrastructure for institutional collaboration, their operating system, if you will, in addition to trying to build their applications. That's really, really difficult, and at best, it's slow and painful. But perhaps an infrastructure for collaboration will be built, sooner rather than later. Perhaps there are infrastructural innovators out there, to partner with the application innovators.

The mid-range source of innovation – economy class, with an emphasis on economy, meaning standardizing and simplifying the existing services provided in order to offer them to a broad audience rather than to the narrower, affluent top — are current providers of alternative paths to certification and licensure. **These are the law schools not accredited by the ABA; legal studies programs; and online legal education programs.**

The vast majority of non-ABA accredited law schools are based in California, because California offers a pathway to licensure for their graduates. Right now, the organized bar and accredited law schools almost always regard these programs as exploitative and nothing more. If they are innovative in substantive respects, that's because they usually charge low tuition relative to most ABA-accredited law schools for a curriculum that is functionally the same. A pretty significant cultural wall separates these programs from their accredited cousins. If law is going to get serious about diversifying the ranks of those who we identify as legal experts, these so-called "opportunity" schools may have a place in the conversation, simply because they are at least formally able to offer credible content for a comparatively low price. But cultural reapprochement is not on the horizon any time soon.

Also in this middle space are non-professional "legal studies" degrees, which many law schools developed over the last 25 years as ways to generate some supplemental revenue. Law schools learned that they could sell seats in existing classrooms to early- and mid-career non-lawyer professionals who wanted a taste of law and who had the means – usually through an employer – to cover full tuition for a year or two.

Until very recently, law schools treated these programs exclusively as income producers rather than as vehicles to diversify educational programming and outcomes. That may be in the early stages of changing. **Northwestern's Master of Science in Law is an early example.** These programs aren't inexpensive, and revenue generation is still part of the model, because the teaching continues to free-ride in part on existing investments in faculty and curriculum. But they aren't three years long, and they offer substantive pathways into legal careers other than law practice with a JD

The low end source – "no frills" — is educational innovation in industry, in both large and small companies. I tend to look at larger ones, for a number of reasons, and I tend to look at service providers offering both (cultural and/or technological) infrastructure and applications rather than technology vendors. The former are motivated to capture a platform, not simply a product market; the latter, as often

as not, are perfectly happy to profit, even to “disrupt,” within a legacy market model. Among other things, the for-profit world can, at times, move pretty quickly. Back in July, **Google announced that it's launching a suite of “Google Career Certificates,”** alternatives to college degrees for technical training in a variety of areas that Google, as employer, takes a specific interest in. Law isn't on the list. But more than a few innovatively-minded lawyers likely saw Google's announcement and wondered to themselves, if not aloud: What about Google Law School?

To a lot of law professors and more than a few lawyers, that's a horrifying idea, and so far as I know, there's no plan for a Google Law School or anything like it. Industry has a big chasm to cross before it can put a competitive service on the market, so, again, change will come slowly.

But Google is joining **other companies with sophisticated internal large-scale management training programs** that operate largely on a by-employee, self-directed, customizable, virtual basis. (Yay, perhaps.) That's the threatening news. Corporate programs so far tend to exist not simply to teach elementary (or mid-level) management knowledge that's relevant to corporate success but also to replicate and extend a particular company's corporate ideology and culture. (Boo, to outsiders.) That's the news that should keep incumbent legal educators comfortably asleep, at night, at least for now.

Eventually, though, the industrial space looks both interesting (in good and bad ways) and challenging. “No frills” doesn't mean cheap looking; it means a relentless focus on innovation in the name of efficiency. That means that the services as such don't have to be standardized; what matters is the optimal design of a system that gets people to their destination(s). Again, professional educators are likely to be horrified. Google brings to the table sophisticated technical infrastructure, a data-driven mindset, and scale, in ways that higher education and especially legal education simply lack the horsepower even to imagine, most of the time.

Maybe these corporate education programs will keep their successes to themselves. That's been Apple's strategy with Apple University. But if we want to know what works and what doesn't and what may be transferable to higher education and legal education generally, this is the space to watch. There's a lot not to like about Google, but it's not (usually) as secretive as some others in Big Tech. More than a few law professors have wondered about a **Khan Academy for law**. Perhaps the better conceptual model is **Master Class for law**.

Let me re-emphasize the crudeness of that review. The "innovation space" in legal education, if you want to call it that, is small and diverse and in almost all cases it's dominated by energetic individuals rather than visionary organizations. That means that it's messy, and any effort to make it seem orderly is destined to be incomplete. You never know exactly where change will come from, or how.

Conflicts

Wherever change comes from, and however it evolves, change agents and investors and their partners will have to wrestle with a couple of key tensions. Mark Cohen's Forbes.com piece doesn't tease these out, but they're critical.

One is cost. We can't simply assume that delivering education and certification in a new pluralistic future, with lots of remote learning and customizable education on offer at speed and scale, will be inexpensive. Systems of these sorts, even if they're entirely desirable (which is questionable) and feasible (ditto), are expensive to design, expensive to operate, and expensive to staff. One may fantasize about eliminating as many as half of the law schools operating in the US today and getting rid of tenured faculty and other permanent teaching staff at most of the rest. "Content" (quotation marks to indicate that what students learn is only "content" in an entertainment and media industry sense) doesn't teach itself. I can learn to change my oil by watching a YouTube video; I might even be able to learn the elements of a cause of action for breach of contract that way. I can't learn professional judgment or collaboration skills simply by watching **Perry Mason** – even the really excellent reboot – or **Michael Clayton**. Teaching and

learning requires expertise. Experts teach. And real expertise, regardless of what field or fields we're talking about and regardless of whether expertise comes in the form of tenured faculty, costs real money.

Pause briefly to remember that adjunct and other contingent faculty in higher education represent real expertise and are usually not paid much real money. We already know what an educational system looks like when you drain the money out of teaching. This: We deliver a sub-par education to students. We could automate that, perhaps, but there's no reason to suppose that automating it would make conditions and outcomes better. Experience suggests that they would be worse. In law schools, we might swap out (usually well compensated) full-time faculty and swap in even more (poorly compensated) adjunct faculty, that is, practitioners and judges. Right now, we believe that the latter don't need to be paid to teach; we believe (and they sometimes say) that they value the opportunity to give back and the opportunity to recruit. But they also unambiguously value the prestige value of their title. Take away the full-time faculty, and much of that prestige goes with them. Happy free-riding by adjunct professors may disappear. They may want to — and need to — be paid.

Two is scale. Several years ago at a conference at the law school at the University of Colorado, I said that the big challenge for legal education going forward was the transition from mass market education (one classroom with up to 150 students, one professor) to what I called “concierge” education: every student being taught and learning material and skills best suited to that student's interests and goals, over both short and long term. That kind of one-to-one instruction can be overly romanticized, but done well it's clearly the most effective way to guide students onto professional pathways with respect to skills that can't be reduced to propositional forms (the “how,” not the “what”), especially in a heterogeneous labor market. It's also really, really difficult to scale. What we put online, even in self-directed, customizable and “agile” forms, is most likely to be only the basic layer of legal expertise, the “propositional” content-of-the-law layer of legal expertise. The “how to do it” layer, the layer that is best handled one-on-one, is really, really hard to scale.

A Conclusion

I've agreed in broad outline that the future of law and legal education look substantially different, eventually, than the landscape that we inhabit today. But the nuances are different, or might be. The future might be better; it might be worse; it might be both. (My money is on both.) The nuances matter. But the nuances bring messiness, and it's going to be difficult to sort through the messiness to maximize the chances of good outcomes and minimize the chances of bad ones. I'll return to the messiness in my next comment.

The post **Legal Education's Waterloo: The End Game** appeared first on **Madisonian: Michael Madison on Governance and More.**

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