

## FOREWORD

# TRAINING LAW STUDENTS FOR THE FUTURE: ON TRAIN WRECKS, LEADERSHIP & CHOICES

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It's ironic, isn't it? Student interest in legal education remains high<sup>1</sup> and close to two hundred law schools have been accredited by the American Bar Association.<sup>2</sup> At the same time, the way we teach lawyers is significantly under fire. *Educating Lawyers*,<sup>3</sup> a recent report of the Carnegie Foundation for the Advancement of Teaching, calls for legal education to develop a modern sense of the nineteenth century legal apprenticeship. Other critics see lawyers as alienated and attribute much of that problem to the character of law students' first year training.<sup>4</sup>

Into the mix of ideas for change comes the following important symposium on the "train wrecks" that legal education may soon experience. I have known three of the principal authors—Professor Tom Ulen of the University of Illinois, along with Professor Neil Hamilton and Dean Tom Mengler of the University of St. Thomas—for many years, and I have known the fourth—Professor Francesco Parisi of the University of Minnesota—by reputation. Each is a keen observer, and each brings twenty years or more experience to his assessment of how we teach prospective lawyers.

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1. In academic year 2008–09, the number of Law School Admission Tests (LSAT) given was 151,398, up 6.4% from 2007–08 and higher than in any of the last twenty years other than 1990–91. See Law School Admission Council, Data, LSATs Administered, available at <http://members.lsac.org> (follow "Data" hyperlink; then follow "LSATs Administered" hyperlink).

2. See American Bar Association, Alphabetical School List, <http://www.abanet.org/legaled/approvedlawschools/alpha.html> (last visited June 1, 2009) (current list of ABA-accredited law schools).

3. WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

4. ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* (2007); Nancy B. Rapoport, *Is "Thinking Like a Lawyer" Really What We Want to Teach?*, 1 J. ASS'N LEGAL WRITING DIRECTORS 91, 103 (2002).

The “train wreck” image may seem alarmist when things are apparently going well for law schools. But think of the economic debacle the nation is experiencing. Many Americans who felt wealthy a year ago are now justifiably anxious about their future. A sunny morning can be overcome by a storm before sunset, and train wrecks happen when we least expect them. It is important, then, for each of us who cares about legal education to look ahead as the fine articles in this symposium help us do.

Professor Ulen tells us that in a rapidly changing world, legal education has changed very little.<sup>5</sup> His “train wreck” image is derived from the revolution in the commercial world that followed development of the steam-powered railway engine in 1712. Professor Ulen believes that same kind of revolution—this time in the intellectual world—is likely to follow from the development of the analytic tools created by the law and economics movement in the 1960s.<sup>6</sup> Even as intellectual tools become available with which to understand the world that law seeks to regulate, Professor Ulen asserts that law professors tend to parse cases in the same way their great-grandfathers did. Rather, he suggests, law schools should understand that law is a project in “social governance” and a law school’s job is to assess the success of that social enterprise.

Professor Parisi, in turn, attributes part of the problem Professor Ulen observes to the failure of common law courts to see law as a scientific enterprise.<sup>7</sup> This requires, in Professor Parisi’s view, social science analysis—such as that provided by economics—to provide the missing analytic structure. He notes, however, that even economic analysis is not a single field, and several schools provide alternative ways law and economic analysis might be done.

For his part, Professor Hamilton explains that when all is said and done, one of the most important roles of lawyers and the legal profession is leadership in government and private institutions.<sup>8</sup> The current financial cri-

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5. Thomas S. Ulen, *The Impending Train Wreck in Current Legal Education: How We Might Teach Law as the Scientific Study of Social Governance*, 6 U. ST. THOMAS L.J. 302 (2009).

6. I take some issue with Professor Ulen’s dating of the origin of the law and economics movement as 1960. That is indeed the date of Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). However, two volumes of the *Journal of Law and Economics* obviously preceded the Coase article, suggesting that the field began earlier. Indeed, Professor Coase’s at least equally important *The Nature of the Firm* was published in *Economica* in 1937. Ronald Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937). Also, the highly-influential Aaron Director began teaching law and economics at the University of Chicago Law School in 1946. It is certainly true, however, that the expansion of law and economics beyond corporate and antitrust issues awaited the prodigious output of writers such as Guido Calabresi, Richard Posner, and Gary Becker in the 1960s and 70s, followed by the “summer camps” in which Henry Manne, Armen Alchian, and Harold Demsetz trained non-economist law professors and, later, judges in how to use economic analysis in their teaching, writing, and decision making.

7. Francesco Parisi, *Multidisciplinary Perspectives in Legal Education*, 6 U. ST. THOMAS L.J. 347 (2009).

8. Neil Hamilton, *Ethical Leadership in Professional Life*, 6 U. ST. THOMAS L.J. 358 (2009).

sis was caused in large part, he posits, by bad leadership, and he worries that lawyers are being insufficiently trained to act as better gatekeepers and to develop leadership skills sufficient to minimize future crises. Leadership is not a single, simple concept, Professor Hamilton argues, and some conceptions of leadership are better than others. Servant leadership, he concludes, has the most promise as both a moral and practical model for lawyers, and he calls on legal education to provide training in such leadership skills.

Dean Mengler's article,<sup>9</sup> in turn, sounds a cautionary note. He suggests, first, that his fellow authors may have lost some perspective on things that law schools do well. While valuable, analytic tools such as law and economics that turn law schools into social science departments may go too far, he argues. Instead, a greater problem may be law schools' lack of ethical grounding and moral compass—what Dean Mengler calls “professional schools without professionalism.”<sup>10</sup> Finally, Dean Mengler argues, the most serious problem of all may be the homogeneity of law schools—the American Bar Association's seeming requirement that each school become a “research-intensive” institution, often at the expense of each institution building upon its own unique and special character as the University of St. Thomas, for example, has done.

My summary of these excellent articles only scratches the surface, and in the remainder of this introduction, I want to suggest three ideas to keep in mind while reading the articles for yourself.

First, in reading any proposal, the question in the back of one's mind must be “instead of what?” As economists have long recognized, a key principle of cost is opportunity cost.<sup>11</sup> The cost of doing A, in short, is the benefit foregone by not doing B, the next best thing, instead. In the case of law schools, the cost of teaching more law and economics or of doing more leadership training, for example, might be the time rendered unavailable for doing more training in traditional legal analysis and providing more exposure to substantive law.

Of course, economics also teaches that one measures gain and loss at the margin rather than on an absolute or average basis.<sup>12</sup> Thus, one might well say that the marginal loss of a little doctrinal training from what might otherwise be three years of such training would be quite low, while the marginal benefit of some economic, leadership, or other non-doctrinal training might be relatively high. The authors of the main articles sometimes tend to write in more absolute than marginal terms, however, and as you read the articles, I would suggest that questions of “how much” non-tradi-

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9. Thomas M. Mengler, *Maybe We Should Fly Instead: Three More Train Wrecks*, 6 U. ST. THOMAS L.J. 337 (2009).

10. *Id.* at 340.

11. *See, e.g., Cost*, ENCYC. BRITANNICA 663 (15th ed. 2005).

12. *Id.*

tional training should be done, and “what would such training replace” should not be far from your mind.

Second, the articles occasionally seem to suppose that students come to law school knowing nothing and that law school will be their entire education. These experienced authors do not believe that, of course, but a focus on legal education alone can leave such an impression. It may not even be a bad assumption to make, given the almost complete lack of prerequisites required today for law school admission. Imagine, on the other hand, that as a condition for law school admission, a student had to have already taken college-level courses in empirical methods, microeconomics, and leadership styles and skills. A limited number of such requirements would not interfere with a student’s choice of an undergraduate field of study, nor would they preclude additional training in law school. Prerequisites to law school could go a long way toward reducing or eliminating a law school’s need to assume that students come to it as *tabula rasa*, and it would allow law schools to retain an ability to teach traditional legal skills more fully than some of the proposals found in these symposium articles might suggest.

Third, one of the biggest challenges legal education faces in the immediate future is to reduce its cost. Educational debt for many law graduates now exceeds \$100,000.<sup>13</sup> When students could assume they would earn more than \$100,000 a year soon after graduation, law schools could get away with making the education expensive. The assumption of universal riches was never true for most students, of course,<sup>14</sup> but one need only look around to see that expecting wealth is likely to be even more naïve in the future. For example, many law firms are currently laying off lawyers and deferring the hiring of new ones. Hence, the conclusion seems inevitable that most law schools—for whom cutting costs will have to be a significant issue—will not be able to do everything for everyone. In a cost-conscious world, the “compared to what” question will loom larger than ever.

I believe Dean Mengler’s article sees the world most clearly. Law school uniformity, largely demanded by the American Bar Association, is ultimately going to be the law schools’ problem.<sup>15</sup> Professors Ulen and Parisi are right that law and economics and other social sciences are effective ways to teach law and lawyers, but why should all schools have to select

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13. See, e.g., John A. Sebert, *The Cost and Financing of Legal Education*, 52 J. LEGAL EDUC. 516 (2002).

14. Data on lawyer incomes is surprisingly hard to determine. In 2004, however, the most reliable report concluded that half of American lawyers earned less than \$108,790. U.S. BUREAU OF LABOR STATISTICS, 2004 NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES 211 (2004), available at [http://www.bls.gov/oes/2004/may/oes\\_23Le.htm](http://www.bls.gov/oes/2004/may/oes_23Le.htm).

15. Only law schools accredited by the American Bar Association can give their graduates a credential with which to take the bar examination in most U.S. states. For standards applied by the ABA to determine accreditation, see American Bar Association, 2008–2009 Standards for Approval of Law Schools, <http://www.abanet.org/legaled/standards/standards.html> (last visited June 1, 2009).

that route? Likewise, as Professor Hamilton wisely argues, the world is well served by law schools that stress servant leadership, but the number of schools like the University of St. Thomas and the intensity with which they approach leadership training may properly vary. What Dean Mengler correctly sees, then, is that every school cannot do everything at a uniformly high level of quality. Reading the following articles—while perhaps keeping the “compared to what,” the “could it be done prior to law school,” and the “cost consciousness” issues in mind—will prove both satisfying and rewarding.