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The Case Against Tamanaha's Motel 6 Model of Legal Education

Jay Sterling Silver

ABSTRACT

The radical overhaul of legal education espoused in Professor Brian Tamanaha's new, widely read book, *Failing Law Schools*, would represent a disastrous step backward in legal education. Tamanaha and his supporters argue that the current crisis in legal education—rampant unemployment among debt-laden law graduates and plummeting law-school applications—requires a dramatic reduction in law-school tuition by substituting a yearlong apprenticeship for the final year of law study and replacing tenured, full-time legal scholars in the classroom with low-cost, part-time practitioners at non-elite law schools.

This Essay examines Tamanaha's model in light of the pedagogical needs of law students, the interests of the clients of fledgling attorneys, and the role law professors have traditionally played in championing legal reform and the rights of the disenfranchised through enlightened scholarship. Who will replace the law professor—protected by tenure, unbound to clients or special interests, and able to reflect on abuses of power from the Archimedean point of the academy—as the critic of injustice? I contend that Tamanaha's argument for apprenticeships disserves clients and is pedagogically unsound. And that Tamanaha's "differentiated" legal education, with elite, three-year programs training corporate lawyers and less expensive two-year schools for local practitioners, would limit the choices and opportunities of law students from the start.

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INTRODUCTION

We've heard the criticism before from students and laypersons, sometimes gently put—"That's a nice work schedule"—and sometimes stated bluntly—"Professors write too much and teach too little." I hadn't, until now anyway, heard it from within the academy.

As it turns out, though, some legal educators share that opinion. The current crisis in legal education—with debt-laden law graduates not finding work and law school applications plummeting—has generated proposals to reduce law school tuition by trimming faculty salaries, curtailing tenure, substituting an increased course load for time previously devoted to research and writing, and replacing the third-year of classroom instruction with apprenticeships. The traditional model of legal education, in which scholarship is the most important of the three supposedly equal dimensions of faculty performance and students are taught *how* to think, not just what to think, is thus turned on its head. Perhaps some within the legal academy also share the unfortunate notion that, since professors with J.D.s never wrote dissertations, they should stick to training students to practice law instead of attempting to produce scholarship.

In his new book, *Failing Law Schools*, Washington University law professor Brian Tamanaha argues that a "run-up" in faculty salaries and modest teaching loads are the *effects*, rather than the cause, of skyrocketing law school tuition and the resultant debt crisis among graduates.[1] Like those who see the causal relationship the other way around, however, Tamanaha espouses a trade-school model of legal education in which the faculty at most law schools would teach more, write less, and do without tenure, advocating that "[t]he standards [of the American Bar Association for the accreditation of law schools] written in for the benefit of faculty must be deleted: those that mandate law schools to rely heavily on tenure-track, full-time faculty, those that require support for faculty research, and those that provide job security for professors."[2] (Never mind that Tamanaha's "exposé," like his strong and prolific scholarship that preceded it, was a product of the very emphasis on scholarship that he now opposes and that, without tenure, the book might have cost him his job.)

1. BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 15 (2012).
2. *Id.* at 173.

I. THE CURRENT CRISIS

Much like the bubbles in the housing and derivatives markets that resulted from the long-time exploitation of market forces, the debt crisis of law graduates traces back to the once-endless supply of law school applicants, ubiquitous student loans, the tendency of university administrations to bleed law schools through hefty "overhead" charges,[3] and, as Tamanaha points out, the Pied Piper effect where elite law schools set tuition at whatever the market will bear and the remaining law schools follow suit.[4] In the last dozen years alone, law school tuition at private schools has nearly doubled and at public schools has more than doubled.[5]

Faculty salaries, according to Tamanaha, were simply one of the spots where the revenues landed.[6] As law school administrators know only too well, however, most law teachers take a sizable pay cut when they join the academy from practice, and the bulk of any alleged windfall ends up in university coffers rather than in faculty salaries. It is no secret that law schools are cash cows for financially strapped universities. The central university's take of gross law school revenues normally exceeds 20 percent,[7] and is considerably more at many schools,[8] explaining the steady increase in law schools over time in good and bad economies.[9] With unemployment high among recent law school graduates, the trend can't be attributed to the supply and demand for lawyers.

The law school bubble is about to burst in a perfect storm of market corrections. Applications are plummeting for the second straight year. According to the Law School Admission Council, an almost 13 percent downturn this year followed a precipitous drop in 2011, with no quick end in sight.[10] Many law schools have

3. *See* Thomas L. Shaffer, *Commentary: Four Issues in Accreditation of Law Schools*, 59 WASH. U. L.Q. 887, 895 n.38 (1981).
4. *See* TAMANAHA, *supra* note 1, at 130–32.
5. *See* Karen Sloan, *Book Gives Law Schools Failing Grade*, NAT'L L.J. (June 18, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202559659082.
6. *See* TAMANAHA, *supra* note 1, at 127–28.
7. *See, e.g.*, Shaffer, *supra* note 3, at 895 n.38.
8. *See* Denis Binder, *The Changing Paradigm in Public Legal Education*, 8 LOY. J. PUB. INT. L. 1, 20 (2006); Childs Walker, *University of Baltimore President Responds to Ousted Dean*, BALT. SUN, Aug. 1, 2011, http://www.baltimoresun.com/news/maryland/bs-md-law-dean-response-20110801,0,1206152.story.
9. *See* ABA Section of Legal Educ. & Admissions to the Bar, *ABA-Approved Law Schools by Year*, AMERICANBAR.ORG, http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/by_year_approved.html (last visited Oct. 30, 2012).
10. *Three-Year ABA Volume Comparison*, LSAC.ORG, http://www.lsac.org/LSACResources/Data/three-year-volume.asp (last visited Oct. 30, 2012).

experienced much steeper declines, some in excess of twice the national average.[11] As applications fall, so do entering credentials.[12] The long-term effect of lower credentials should begin to show up in the form of lower bar-passage rates as graduating classes sit for the bar a couple of years from now, further depressing law school applications. And the recent signals that the ABA is thinking of stiffening bar passage standards for law schools[13] will only hasten what is shaping up as a shakedown in third- and fourth-tier law schools.

As with the housing and derivatives catastrophes, the signs of impending doom, which were everywhere, went conveniently unheeded. Years ago, for example, when a consortium of private lenders threatened to curtail student loans to students at law schools whose graduates had high default rates,[14] it was painfully evident that legal education was a house of cards perched atop unstable market forces.

II. THE PROBLEMS WITH TAMANAHA'S MODEL

A. Faculty Scholarship, Tenure, and the Needs of Society

The solution? For starters, all law schools, particularly lower-echelon schools, must tighten their belts, reducing the size of incoming classes, cutting administrative costs, and forgoing faculty hiring for a while.[15] In the process, however, we must not forget, as Professor Tamanaha has, that legal scholarship enriches teaching as it refines the practice of law and advances justice and that the traditional emphasis on scholarship requires the academic freedom provided by tenure and the time furnished by customary teaching loads.

Indeed, all of the rights we enjoy today or are struggling to achieve were once just ideas. The immediate, real-life impact of legal scholarship—whether

11. *See, e.g.*, Karen Farkas, *Law Schools Reduce Classes as Applications Drop in Wake of Fewer Legal Jobs*, CLEVELAND.COM (July 23, 2012, 6:16 AM), http://www.cleveland.com/metro/index.ssf/2012/07/law_schools_see_drop_in_applic.html.
12. *See* Debra Cassens Weiss, *Law Schools Could Be Admitting 80 Percent of Their Applicants This Fall, Statistics Suggest*, A.B.A. J. (Aug. 9, 2012, 6:45 AM), http://www.abajournal.com/news/article/law_schools_could_be_admitting_80_percent_of_their_applicants_this_fall_sta.
13. *See* Mark Hansen, *ABA Committee to Revisit Bar Passage Accreditation Standard*, A.B.A. J. (July 16, 2012, 2:41 PM), http://www.abajournal.com/news/article/aba_committee_to_revisit_bar_passage_standard.
14. *See* Chris Klein, *A Leading Creditor Says It Will Make Student Borrowing Tougher*, NAT'L L.J., Nov. 25, 1996, at A16; Ken Myers, *With Loan Default Rate Jumping, Officials Are Becoming Nervous*, NAT'L L.J., Mar. 11, 1996, at A16. See also Professor Dan Morrissey's excellent exposition of the crisis, Daniel J. Morrissey, *Saving Legal Education*, 56 J. LEGAL EDUC. 254 (2006).
15. *See* Farkas, *supra* note 11.

the author advocates a particular change in law or policy or provides a new theoretical paradigm—can be immense. (Recall Kurt Lewin's remark that "[t]here is nothing so practical as a good theory."[16]) And who will replace the law professor—protected by tenure and unbound to clients or special interests—to reflect on and identify abuses of power and solutions to perplexing social problems from the Archimedean point of the academy?

As a wise colleague pointed out to me not long ago, "The legal professoriate develops suggestions for law in the common interest that are not produced by the powerful lobbies generating laws today. If we are reduced to teaching automatons, we would leave the field to those who buy their spokespersons."[17] Stripping law faculties of the time to contemplate the weaknesses of the law and the injustices of the legal system, and discarding the tenure necessary to instill meaning in the words "academic freedom," reduces a vital social resource to a cog in the current structures of power. Under the guise of fiscal management, law professors willing to take on the wielders of power in the public and private sectors would be silenced.

Tamanaha, however, doesn't see the point in Lewin's remark. He complains that "[t]heory has scholarly cachet. . . . Theories of constitutional interpretation, normative arguments about what the law should be, legal philosophy, critical race theory, sociological studies of law, legal history, economic analysis of law, quantitative studies of judging . . . occupy legal academics. Most of this is not immediately relevant to the daily tasks of judges and lawyers . . . ."[18] To Tamanaha, lawyers and judges are like car mechanics: they are employed to fix a narrow problem, and the only legitimate purpose of legal scholarship is to serve as the parts manual.

Holmes, of course, had a different view. He told us that "[t]he law is the calling of thinkers."[19] If so, then law teaching is the calling of scholars, and Tamanaha's complaint that "law professors . . . are scholars more than lawyers"[20] should be reassuring. And Tamanaha's point that there are some shirkers within the academy who don't write much[21]—a point that probably holds true in every academic discipline—is hardly an argument to dispense with scholarship and tenure. That's called throwing the baby out with the bathwater.

16. KURT LEWIN, *Problems of Research in Social Psychology*, *in* FIELD THEORY IN SOCIAL SCIENCE: SELECTED THEORETICAL PAPERS 155, 169 (Dorwin Cartwright ed., 1951).
17. The colleague, as humble as he is wise, prefers to remain anonymous.
18. TAMANAHA, *supra* note 1 at 57.
19. Oliver Wendell Holmes, Jr., The Profession of the Law, Lecture to Harvard Undergraduates (Feb. 17, 1886), *as reprinted in* THE OXFORD DICTIONARY OF AMERICAN QUOTATIONS 372 (Hugh Rawson & Margaret Miner eds., rev. ed. 2006).
20. TAMANAHA, *supra* note 1, at 172.
21. *Id.* at 5.

B. The Needs of Students and Clients

Tamanaha assures us that "[t]he law school parallel . . . of vocational colleges and community colleges . . . , many [of which will be] of two-year duration . . . is not the race to the bottom prophesied by AALS. It simply recognizes that every law school need not be a Ritz-Carleton [sic]. A Holiday Inn–type law school would provide a fine education for many, adequate for the type of legal practice they will undertake."[22] Tamanaha somehow overlooks the fact that it wouldn't be adequate for many of the clients, often unable to afford alumni of the Ritz-Carlton law schools, who'd be represented by graduates of the abbreviated, Holiday Inn–type program—which, in reality, would be more like a Motel 6 model.

1. Limiting Student Choice and Opportunity

Tamanaha touts his "differentiated" legal education, where a handful of elite law schools remain three-year research institutions and the rest morph into cut-rate, two-year trade schools, as a means by which "[p]rospective students will be able to pick the legal education program they want at a price they can afford."[23] He adds, tellingly, that "[a] law graduate who wishes to engage in a local practice need not acquire, or pay for, the same education as a graduate aiming for corporate legal practice."[24] Law students, in other words, would no longer be able to select freely among the various career paths within the profession after exposure to the different areas of law in law school. Instead, based on their ability to pay, they'd either attend a school from which they might emerge onto Wall Street or one where they'd have no choice but to hang up a shingle on Main Street.

Legal education Tamanaha-style would reproduce hierarchy in a way Duncan Kennedy never imagined,[25] reducing choice and opportunity under the guise of expanding it. Tamanaha unabashedly concedes it: "Liberal egalitarians will likely protest that the . . . two-year law schools advocated here would be dumping grounds for here the middle class and the poor. This is true. Few children of the rich will end up in these law schools, if they are allowed to exist."[26]

22. *Id.* at 172, 174.
23. *Id.* at 174.
24. *Id.*
25. *See* Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982).
26. TAMANAHA, *supra* note 1, at 27.

2. The Need to Teach Beyond Blackletter Law

In proposing to convert the final year at his cut-rate law schools to legal apprenticeships, as in the days of frontier justice, or lopping it off altogether,[27] Tamanaha misconstrues the central mission of the legal educator. The law professor's principal task is not to teach would-be attorneys how to fill out forms, or whether to turn left or right in the courthouse to find the Registry of Deeds. It is to teach students to "think like a lawyer," to learn and hone the very skills of legal analysis and advocacy necessary to achieve their clients' goals and protect their rights and dignity. More than teaching students *what* to think, the law professor must—like the old adage about teaching a man to fish so he can feed himself for a lifetime—teach students *how* to think. Whether the client is a corporation whose counsel would've emerged from one of Tamanaha's elite, three-year programs or an average Joe whose lawyer was herded through a cut-rate, two-year school, *all* clients need and deserve a lawyer who thinks as well as she can.

3. Replacing the Third Year With Apprenticeships

Support outside the academy for apprenticeships, and complaints like that of the presiding partner at New York's Cravath, Swain & Moore that training law students "to think like lawyers . . . doesn't work anymore,"[28] can be seen as part of a longstanding, shortsighted effort of law firms to slough off the training of fledgling attorneys in local procedure onto law schools, which must train students to practice outside of any particular locale. The assertion that law school lasts a year too long[29] gives short shrift to this process and ignores the need of well-rounded attorneys to have taken many of the core, bar-tested courses that simply can't be squeezed into the second year. The bar review courses in which a graduate of a two-year program would be forced to learn vital subjects are wholly inadequate means of teaching of complex concepts and promoting intellectual rigor. And the criticism, like that in the *New York Times*, that elective courses such as "Voting, Game Theory, and the Law" and "Nietzsche and the Law"[30] are frivolous reflects a hostility to theory and

27. *Id.* at 172–75.
28. *See* Peter Lattman, *N.Y.U. Law Plans Overhaul of Students' Third Year*, N.Y. TIMES DEALBOOK (Oct. 16, 2012, 6:58 PM), http://dealbook.nytimes.com/2012/10/16/n-y-u-law-plans-overhaul-of-students-third-year (internal quotation marks omitted).
29. *See, e.g.*, TAMANAHA, *supra* note 1, at 26–27; Lattman, *supra* note 28.
30. Lattman, *supra* note 28 (describing courses at NYU).

thoughtful reflection—a vision of the lawyer as a filing clerk.[31] As with any other discipline, good teaching blends theory and practice.

The time-honored Socratic and casebook method of legal instruction, administered by professional educators, is a snug fit with the pedagogical needs of future attorneys. (Oddly for one proposing to overhaul a pedagogical enterprise, but with great candor, Tamanaha concedes in the preface of the book that he "do[es] not go deeply into pedagogical issues."[32]) And the real victims of the skills and information lost by prematurely removing the advocate-in-training from the classroom laboratory would be the trainee's future clients.

Tamanaha exhibits callous disregard for the clients of new lawyers trained in bargain-basement programs, telling us that "[t]he best way to learn how to practice law is to actually do it. Lawyers learn by being given tasks, struggling to do them, watching others around them, and learning from mistakes."[33] The victims of such mistakes, whether wrongly incarcerated or relieved of their property, might not endorse the training of attorneys, quite literally, through trial and error. Tamanaha's advice that "new tasks are learned as they come"[34] is no less a prescription for failure with fledgling lawyers than it would be with heart surgeons.

Tamanaha's proposed evisceration of the traditional model of legal education, including his advocacy of apprenticeships in lieu of the third year,[35] is not to be confused with the bulk of today's curricular reform, which includes the development of curricular tracks leading to competence in specialized areas of practice and additional emphasis on international law and foreign study, joint degrees, and clinical education—the last of which, when done correctly, is labor intensive and costly.[36]

31. Consider these two courses for a moment. In applying game theory to law, a course like "Voting, Game Theory, and the Law" seeks to enhance our understanding of how law affects human behavior, hardly a frivolous endeavor for those who will shape, interpret, and apply law. And, in light of the great relevance of Nietzsche's work to the Western legal tradition, as evidenced by respected tomes like NIETZSCHE AND LAW (Francis J. Mootz III & Peter Goodrich eds., 2006) and *Cardozo Law Review*'s multipart symposium, *Nietzsche and Legal Theory*, 24 CARDOZO L. REV. 497 (2003), a course such as "Nietzsche and the Law" that leads the future purveyors of justice to examine their most basic assumptions about law can also be a useful activity.

32. TAMANAHA, *supra* note 1, at xii.

33. *Id.* at 172.

34. *Id.*

35. *Id.* at 173 ("The bar's position a century ago made consummate sense: two years of book learning followed by a one-year apprenticeship, then admission to the bar."); *id.* at 175 ("[S]chools that avowedly embrace the mission of training capable lawyers at an affordable price can still accomplish this by transforming the third year into a genuine year of practice experience.").

36. Given the intensive nature of in-house clinical instruction and the need to help draft and file motions and appear in court, clinical instructors are able to teach only a fraction of the students that classroom teachers can.

Recent changes to the third-year curriculum at schools like Stanford and NYU[37] represent, by and large, enhancements of the traditional model, rather than a reversion to the dark days of apprenticing with practicing attorneys who lack the time and teaching skills of professional educators. (Legal externships—also rolled into the third-year changes at Stanford and NYU—normally lack the close supervision by trained, full-time clinical educators provided to students in in-house clinics, and remain a weak link pedagogically in curriculum reform.)

CONCLUSION

Despite all its problems, Tamanaha's plan has found some support among the ranks. In his endorsement on the back cover of Tamanaha's book, for example, James Chen, the former dean of the University of Louisville School of Law, asserts that legal education "exalts and enriches law professors at the expense of lawyers, the legal profession, and most of all the students whose tuition dollars finance the entire scheme," and that Tamanaha's proposals will "lead legal education back into the service of its true stakeholders."[38] If the true stakeholders of legal education and our system of justice were "those who buy their spokespersons,"[39] then Chen would be correct. If they were law students, Chen would be misguided, since cut-rate law schools will provide cut-rate education. But since the true stakeholders are all members of society affected daily and deeply by our laws and our legal system, Chen is wrong altogether.

Troubled times needn't lead to shortsighted measures. Jettisoning the noble model of the law faculty committed to vital scholarship and the teaching of critical-thinking skills in favor of pedagogically unsound apprenticeships and a two-tiered system that constrains choice and opportunity and disserves the clients of those pushed through the inferior version is simply too great a price to pay.

37. *See, e.g.*, Debra Cassens Weiss, *NYU Law School Will Offer New Study and Internship Options for 3Ls*, A.B.A. J. (Oct. 19, 2012, 6:00 AM), http://www.abajournal.com/news/article/nyu_law_school_to_offer_foreign_study_specialty_tracks_and_internships; *Stanford Law School*, DENV. U.: EDUCATING TOMORROW'S LAW., http://www.educatingtomorrowslawyers.du.edu/schools/detail/stanford-law-school (last visited Nov. 25, 2012).

38. *Failing Law Schools, Brian Z. Tamanaha*, UNIV. CHI. PRESS BOOKS, http://www.press.uchicago.edu/ucp/books/book/chicago/F/bo14279340.html (last visited Oct. 31, 2012).

39. *See supra* note 17 and accompanying text.