How Law and Economics Was Marketed in a Hostile World: A Very Personal History

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GEORGE MASON UNIVERSITY LAW AND ECONOMICS RESEARCH PAPER SERIES

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12. How law and economics was marketed in a hostile world: a very personal history

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This chapter is by its nature somewhat autobiographical. I suppose that I am the only person who has been almost a full-time missionary for law and economics from the first glimmerings of that subject. Along the way I hope that I also contributed something to substantive scholarship in the field. But that part of my career is not directly relevant to the present subject, and it is probably not as important, except to a few corporate economics buffs.

Most legal academics today take for granted that there is a ‘field’ of law and economics. And, while that field is controversial in various respects, it is firmly established today as part of the world of legal scholarship. This was not always so, and I would like to expound some of the history that tells how we reached the present situation. It is not always a pretty story, but it has its share of drama, surprises, colorful characters, brilliant scholars, academic villains, incompetent administrators, and a very large number of willful or uncomprehending adversaries.

The story of the beginnings of modern law and economics scholarship at the University of Chicago Law School in the late 40s is well known and probably needs no elaboration here. It started when the dean Wilbur Katz did some creative ‘deaning’ in 1947 to secure the brilliant economist, Aaron Director, a place on the law faculty. Probably if Director had secured his PhD, he would have gone to some economics department and very likely never looked at a law book. So in one sense you are reading this today because Aaron Director suffered what appeared to be a chronic writer’s block and never completed a PhD thesis.

Law schools at that time were very different institutions than we know today. They were bastions of anti-intellectual vocationalism. Most professors’ guiding light was the organized bar and its needs, and their idea of ‘legal reform’, still seen occasionally in bar association newsletters, might be a call for doing away with the ‘remnants of equity pleading’. Legal scholarship, if I may call it that, was rarely, if ever, analytical in its
discussions, and most policy issues were not thought to be the province of lawyers, whether practicing or academic.

While the American legal realists had long decried this situation, they did not have analytical tools powerful enough to make a dent in the prevailing law school culture. None of the prominent legal realists was familiar with or sympathetic to economics.²

That may have been just as well. Prior to the late 50s, the science of economics was not adequate to the task of forming a comprehensive new interdisciplinary field with law. There were few important works of ‘applied economics’ largely because many of the tools needed to do convincing analysis had not yet been invented.

Clearly a major part of the intellectual history of law and economics (the part not being pursed here) was the timely development of some powerful new analytical tools especially relevant to the needs of legal scholars. Much of this is what modern economists refer to as ‘property rights’ or ‘transactions costs’ economics, particularly the magnificent contributions of Director (an oral more than a written influence), Ronald Coase, Armen Alchian, and Harold Demsetz. Jim Buchanan and Gordon Tullock must also be mentioned for opening the field of public choice, another essential ingredient of serious law and economic scholarship.

At any rate by the early 1960s all the substantive pieces were in place for a new field to develop and be recognized. And normally that is what would have happened. New discoveries usually generate new paradigms, new heroes, a rush of acolytes, and voilà, a new field. That stage is followed, of course, by textbooks, new courses, conferences, academic associations, foundation grants, and even, outside of law schools, new departments. That is what happened, for instance, in such areas as microbiology, linguistics, women’s studies, and mathematical economics. But it is not what happened with law and economics.

In the first place, by the early 60s very few people in the law school world thought that anything significant had happened. If one were to judge by the most commonly expressed attitudes, the whole thing was a bad joke, and an ideologically conservative joke at that. The mandarins of academic law all knew very well that if the economics came out of Chicago, it must be ideology masquerading as scholarship.

In the early 60s before the works of Coase or Calabresi appeared, I had begun, quite naively as I look back on it, writing about the economics of corporation law, a writing spurt that was substantially over by 1967. During that period of five or six years, I was probably the most reviled law professor in America. As far as I know, with an exception for antitrust, no other law professor was then writing in anything like the modern law and economics idiom. Antitrust was, of course, a popular subject for both economists
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I was writing in an unfamiliar fashion about one of the most intellectually hidebound legal areas, corporation law. The ‘leaders’ of that field reacted harshly, as academics are wont to do. William Cary, Louis Loss, and Richard Jennings, among others, in effect declared me at best as irrelevant and certainly not worthy of appointment to any respectable law faculty. Oddly the person who should have been most upset by my writing was apparently the most intellectually honest of the lot. Adolph Berle, author of the then prevailing paradigm in corporation law, made a serious effort to have me appointed at Columbia Law School. But that was too much for Bill Cary, later Chairman of the Securities and Exchange Commission, and the idea went nowhere.

Clearly law and economics was not to experience the usual course of development of a new field. The problem was not so much the usual protection of academic turf, or even the normal problem of securing funding for a new field, though both these existed. There were different problems for law and economics. First was the ‘loyalty’ of practicing lawyers to the specific kind of education they had experienced. No other part of academia experiences the academic influence of alumni that law schools do. This results largely, I believe, because law professors themselves have traditionally aligned themselves more with the profession of law than with the hard intellectual pursuits of other disciplines. In any event law and economics has always encountered strong resistance from the older generations of lawyers.

The second, and far more serious hurdle to the development of law and economics as a recognized field of scholarship, was an ideological one. There was a popular, pseudo-scholarly view, now happily waning, that market economics could have nothing useful to say, since in theory and fact markets had been proved never to work. Only very unsophisticated or very evil people claimed to see any virtues in the very ideas of private property and free markets. And this belief was held with a degree of certainty usually reserved for religious dogma. It may be hard for younger people, especially those who came to political consciousness in the last ten years, to believe the intense hatred and ridicule that defenders of private property and free markets experienced just a few years back. But it was so, and to experience it as an academic was not fun.

This attitude was especially prominent among professional intellectuals, especially academics. Law and economics had the ‘misfortune’ to have been born at the University of Chicago, then the only center of serious study of market economics in the world. The phrase ‘Chicago Economics’ was often uttered with the same contempt that commonly characterized unsavory
ethnic and religious epithets. That alone would have been enough to prevent law and economics from having the normal development of a new field.

It was very frustrating to be writing what I thought was important scholarship only to have it either ignored or ridiculed by the leading law professors in my field. It is no wonder then that I turned to a more hospitable audience, that of economists, and began to publish important new works in economics journals. Then something very reassuring occurred. Well-known economists began to praise my work and I began to receive from economists the kind of recognition that I certainly was not receiving in the law school world. This included invitations to nice conferences, guest lectures (and paid ones), invitations to be on important panels at the meetings of the American Economics Association, membership in honorific societies, requests to write for serious popular journals, and even a nomination to be vice-president of an important regional economics association (I lost). Most important, however, a distinguished economist, Alan Wallis, then President of the University of Rochester, offered me a chair professorship, teaching economics and corporate theory to graduate and undergraduate students; I left law teaching in 1968 with few personal regrets.

Subsequently, I believe in large part because of the incredible popularity and raw intellectual power of the works of Milton Friedman and Frederick Hayek, the phrase ‘Chicago Economics’ came to be heard less and less. It almost became impolite, or at least disingenuous, in the more serious academic law circles to use that phrase in a pejorative fashion. After all, Guido Calabresi did law and economics, in torts no less, and he certainly was no Chicago Economist. Subsequently ideas like deregulation and privatization gained a certain intellectual cachet, even though each of them had some very respectable Chicago or public choice genesis. Finally the collapse of the Soviet Union and the complete and obvious failure of socialism left intellectuals with little choice but grudgingly to embrace free markets. But I am getting ahead of the story, since these last things came too late to help the cause of law and economics.

By this time, perhaps quite naturally, I had become extremely sensitive to the abysmal level of economic understanding on the part of most law professors (Manne, 1970). Partly this was self-interest, as I still wanted a larger and better-informed law school audience for my own writings. But it was also disturbing that more and more law professors by 1970 were taking a more policy-oriented and ideological approach to legal issues. And the ideology almost inevitably reflected a bias against private property and free markets. That is why I began to think of ways to overcome the economic illiteracy of law professors.

Among other responsibilities that I had at the University of Rochester was the task of designing a new law school for the University. The program
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that I proposed, basically what later became the George Mason University School of Law, was to have a heavy, though not then an exclusive emphasis on economics as an integrating discipline. There was opposition to the plan for a new law school from local attorneys who feared increased competition and from a segment of the faculty who thought that the idea might cost them some of the University’s endowment. To this day the University of Rochester does not have a law school.

During the optimistic phase, however, I proposed to the President that we begin a summer program in economics for law professors, with the idea of jump starting the reputation of a future law school. I also had a hidden agenda. In time, the bar, the bench, and perhaps even (one can dream) the legislature, might grasp the simple but powerful lessons of open markets, free contracts, and private property if we could reach their teachers. I was myself so excited about the newer developments in microeconomics that I was sure that most law professors would respond favorably once they understood what it was all about. Happily I was right about that.

But the first problem was how to get the horse close enough to the water that it could drink if it was thirsty. Two things seemed necessary, intellectual appeal and some sort of non-intellectual attractiveness. The first was by then (1971) getting a bit easier. The *Journal of Law and Economics* was important, even if not quite flourishing, Coase and Calabresi had done their important introductions to the economics of tort law, and there was a new text by Professor Richard Posner entitled *Economic Analysis of the Law*. Physical attractiveness was not Rochester’s strong point, however, so, in timeless economic fashion, we substituted money. Presumably the ‘price was right’, as we filled the first class.

Many of the first participants claimed that they would have attended even if we had paid them nothing. However, I have always had my doubts about that, since a lot of them tried to negotiate for more. The fact was that we paid everyone the then princely sum of $1000, plus all expenses and some very fancy meals. We did, however, ask people to suffer the indignities of living in a dormitory and taking all meals together. Complaints were few, and morale was high.

I selected the members of that first class very carefully. I wanted participants who would be seriously trying to learn economics, not to argue about ideology or first causes. And for future ‘advertising’ purposes, it was important to have professors from elite law schools. The program could never achieve its goals if it got a reputation as a ‘boondoggle’ for second-raters. For that matter, it could not be a boondoggle even for the first-raters. The program had to gain a reputation as a severe intellectual workout, stimulating, convincing, and very demanding. There were, as I recall, in the first class, three professors from Yale, two from Harvard, five
from the University of Virginia, and multiple representation from Illinois, Indiana, Duke, and several other schools.

For quite a few years I would not admit a professor who would then be the only economics devotee on his or her faculty. Multiple applications from one school were looked upon favorably, since this prevented the ganging up on a lonely scholar that I had myself experienced. In a related move, recommendations from previous graduates were always given favorable attention, as it usually meant that the earlier graduate was enthused enough to be engaged in active recruitment.

The whole experience was so intense that for years after, when the Law and Economics Center held its annual cocktail party for alumni during the annual meeting of the Association of American Law Schools, ‘reunion’ clusters of professors, by year of attendance, were a noticeable feature. The program was so popular that we were able to reduce the ‘pay’ by some amount in every subsequent year of the program. In the last few years of the program, ending in 1995, law schools actually paid for their professors to attend.

For a variety of reasons we used the innovative and stimulating first edition of Alchian and Allen’s *University Economics* as the assigned text. This was the most rigorous microeconomics text available, and it was the only textbook, at the time, that included some of the newer ideas on property rights economics. Its focus was on the application of economics to a variety of policy issues, and it was not overly mathematical in its presentation. Armen Alchian was a mainstay of the faculty from the beginning to the very end. He claimed that the law professors were the best students he ever had.

Over the years we tinkered with subject matter, the hours of the program, the various lectures, the amount of readings, and the amenities. But no change was ever made in the fundamental proposition that we were offering a rigorous course in microeconomics, not ideology. In all the 25 years that I was associated with this program, no more than two graduates ever raised serious objections that the materials were slanted or biased, although that was undoubtedly the common view of most law professors who did not attend the program. The materials and the teaching were too intellectually exciting and relevant for that sort of comment to be acceptable to the actual students.

One of the two disgruntled students I mentioned later wrote me perhaps the most satisfying ‘appreciation’ letter that I ever received. He said that he had come to the program to show it up and that he left still convinced of my perfidy in trying to propagandize naive law professors. But then he said, a peculiar thing happened. In every lecture he gave the next fall he found that he was drawing on concepts from ‘Economics Summer Camp’. Ideas came out of his mind and mouth that he had not planned on espousing.
But he found the ideas irresistible. As he put it, ‘Once you take a bite of the apple…’. Eventually he came to look at the program as the most valuable thing he had ever done. That letter came 14 months after he attended the program.

In the five years that the program was held at the University of Rochester, where it was nicknamed ‘Pareto in the Pines’, it became almost a ‘required course’ for intellectually active law professors. Important articles in every major field of law, but especially torts, were becoming unintelligible to anyone not conversant with economic concepts and vocabulary. But, unlike ten years earlier, that had become a high price for a professor to pay. The age of the Philistine law professor was virtually over. Applications to Economics Summer Camp skyrocketed. Not surprisingly, a lot of the new articles with an economics flavor were authored by students from earlier sessions of the program, such as Ralph Winter, Warren Schwartz, Robert Ellickson, Glen Robinson and Jerry Mashaw.

I always told the groups two things at the end of the sessions. One was that they were the best group we had ever had. (For some reason a group’s rating by the faculty was a matter of considerable concern to many of the participants. But, after all, they were professors.) The second was that they should return home and try to teach a course in economics in their law school. Quite a few followed that advice, which may explain causally why a number of law schools began to offer a law and economics course, often co-taught with an economist. My strategy of ‘wholesaling’ economics to professors who could then ‘retail’ it to students seemed to be working.

The program at Rochester was funded by ten or twelve large corporations, most of which were concerned about antitrust matters. General counsels of many of these companies were aware by then of how helpful ‘Chicago Economics’ was in antitrust cases, and indeed some of them had become quite sophisticated about economics. Large corporations usually had professional economists on their staffs, though they were rarely used in legal matters. But as corporate lawyers and economists became more aware of the academic development discussed here, and of each other, their relationship began to change dramatically. It is a little-known aspects of the whole law and economics movement that it greatly encouraged broad ranging cooperation between professional economists and lawyers, both in and outside of corporations. Principals of the Chicago economic consulting firm, Lexecon, have more than once expressed their appreciation to me for substantially boosting their business.

The success of the summer program had been heady stuff for me, and I found myself wanting to enjoy even more of the same kind of accomplishment. My interest in legal education was also being rekindled. Clearly there were other ways besides formal courses to import free market
ideas into law. I began thinking of something more ambitious than a summer course for law professors.

At about this time, 1973, my writings of ten years earlier began to garner more sympathetic attention from law professors. It was a little late, however, for me fully to savor their acclaim. Memories of earlier reactions still colored my feelings. Thus when Professor, now judge, Ralph Winter called me with an invitation to join the Yale law faculty, I told him that he was five years and two weeks too late. I explained that two weeks earlier I had agreed to set up what would eventually be called the Law and Economics Center, at the University of Miami Law School, and that it was five years too late for me to give a damn. I was destined then for a new career in administration.

My idea was to establish a center within a law school that would use a variety of approaches to encourage the integration of law and economics. I received some preliminary indications that this idea would receive favorable responses from several foundations, and I was confident that the corporations that had been supporting the Rochester program would continue to do so at Miami. The Center for Studies in Law and Economics, as it was originally named, was to have several components, all described in a prospectus that I developed for fund-raising purposes.

Incidentally we noticed in the first months of the Center’s existence that the name was too cumbersome for secretaries answering the phone, and they would simply say ‘Law and Economics Center’. We decided to so rename the venture. Little did we know that this bit of telephonic shorthand would in fact name a whole discipline, for, as the Law and Economics Center became well known, people began to assume that the field we were working in was also called ‘law and economics’. Of course, there was the earlier Journal of Law and Economics, but its founder, Aaron Director, acknowledged that this title was shorthand for a combined Journal of Law and Journal of Economics. No one had assumed that its title referred to a new field of study until after the Law and Economics Center came into being.

To secure funding for the new center we had to assure contributors that the Economics Institutes for Law Professors would continue, but we would also do the converse and offer a Law Institute for Economists. By this time, such an idea made sense, though five years earlier it would have been ridiculed. And just as the former program was a straight course in economics (it was many years before we added a Law and Economics component to the program) so the latter was a straight, substantive survey of about ten or twelve different fields of law. A little jurisprudence was often thrown in for good measure, but there was little pursuit of law and economics as such.

This program ran for about 18 years and in some ways was just as successful as the program for law professors. However, in the United States, unlike in Europe, law and economics never became a widely recognized,
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separate field of specialization for economists. The entrepreneurial efforts in Europe were greater on the economics side than on the law side; though I do not understand why this should have been so.

The second component in the Center’s prospectus was a research program in economic analysis of law. This necessitated hiring a number of research economists (in addition to Roger Leroy Miller, the nominal co-founder of the Center) and giving joint appointments with the Law School to some law professors, including Timothy J. Muris and the late James Mofsky. There was also to be a program of distinguished visiting professors, which was to include in time such luminaries as Friedrich Hayek, Bertrand de Jouvenal, and Herbert Frankel of Oxford. A short-term, guest-lecture series brought any number of rising and established stars, including James Buchanan and Ronald Coase, just to mention two of the six Nobel laureates who were eventually to grace Center programs. The academic and administrative staff of the Law and Economics Center by 1977 numbered nearly 20 people and had an annual budget of about $1 million.

But the heart of the plan for promoting law and economics was publications, the obvious road to academic fame. The staff was to write for an audience (probably not yet significantly in existence) of law and economics specialists. The Center did not publish its own monograph series, but works carrying some sort of Center imprimatur or author affiliation with the Center were published in recognized journals or by commercial publishers as separate books. The large flow of high quality publications coming from this very specialized research faculty alone accounted for a good part of the Center’s growing reputation in law and economics as an important new field of study.

But it was a third component of the Center prospectus that probably did more than the resident staff’s publications to feed the growing interest (or curiosity) about law and economics. True to any academic center’s mission (the phrase ‘think tank’ had not yet become current), there were to be conferences on various law and economics topics with both lawyers and economists participating. Little did anyone realize how important this component would prove to be.

One of the major problems, certainly in the days before internet chat groups, of trying to develop a new academic ‘field’ was communication among the would-be participants. There were, by late 1975, over 100 graduates of Economics Summer Camp, a small but powerful group of economists who were heavily into the new ‘property rights’ economics, and a few self-selected law and economics types (mostly at Chicago). But they rarely had any opportunity to meet and discuss their work with one another or to develop a sense that they were a part of a totally new field of scholarship. And few, apart from devotees of Richard Posner’s
Economic Analysis of Law, had any idea how rich the opportunities were for exciting new research. As a partial solution to this problem the Center published a quarterly newsletter called *LexEcon* (and entered a ‘no conflict’ understanding with the consulting firm of the same name) which, at one time went to 1800 avid or curious subscribers. In this sense the Law and Economics Center could claim to be the precursor of the modern American Law and Economics Association.

It happened that at about the time the Center began, the board of the Liberty Fund, Inc. of Indianapolis had made the decision to become an operating, not a grant-making foundation under IRS rules. But it found itself in the odd circumstances of having a lot of money for conferences and not many specific, substantive ideas of how it should be spent or its conferences managed. At their request I prepared a memorandum suggesting to them that it would be within IRS rules for an operating foundation to contract with others to run programs for them. That way they could contract out the intellectual and administrative job that they would have difficulty managing in-house.

I also suggested a format that I thought would conform to their own idiosyncratic preferences. This all passed muster with their tax counsel and their board. Further, as luck would have it, the President of the Fund was a Dr Neil McLeod, an economist with a good imagination and strong sympathy for what I was trying to do. And so was born the now almost ubiquitous Liberty Fund seminars and, some would add, law and economics as a field.

Over the next ten years (1975–85), the Law and Economics Center contracted with the Liberty Fund to administer about 35 seminars, all on law and economics topics. Anywhere from twelve to twenty economists and lawyers were invited to attend the day-and-a-half programs. These always followed the same pattern: an original, commissioned central paper on a specified topic and four discussion papers were distributed in advance to participants so that the discussion, according to a set agenda, would be well-informed and lively.

The transcripts of these seminars were edited, and 33 of them were published as symposium editions of law reviews or as separate books. A few of the topics, totally new to law and economics scholarship at the time, included such standards in today’s literature as punitive damages, federalism, public choice aspects of antitrust, bankruptcy law, tort liability of public officials, landlord–tenant law, the rule against perpetuities, product safety legislation, and immigration law. It was easy to find interesting and uncharted law and economics topics because the field had hardly been plumbed at all.
Both economists and lawyers were stimulated by these small conferences and by the opportunity to meet other professors from all over the country who were interested in some of the same things. There was an exhilaration about these seminars that would be hard to recapture today. There was a true sense for many of the participants of being present at the beginning of something important, and invitations to LEC’s Liberty Fund programs were much sought after.

A large number of the participants were graduates of their respective LEC Institutes.\textsuperscript{5} But many, especially economists, were selected as likely prospects to begin work on law and economics topics they had not previously addressed. Occasionally, an important law professor, not otherwise interested in law and economics, would be invited just so we could demonstrate what important new work was going on in this person’s own field and perhaps even embarrass that person into learning a little economics. New acquaintanceships formed at these programs often resulted in collaborative work. This commonly occurred between lawyers and economists teaching at the same university but who had not met prior to the program. We were matchmakers as well as conference coordinators.\textsuperscript{6}

Undoubtedly the most celebrated program of the Law and Economics Center was not included in the prospectus, even though I had been mulling the idea over for some time. This was an extension of the idea of the Summer Economics Institute for Law Professors to federal judges. The very idea was enough to strike terror into the hearts of most law professors who heard it. There were doubts that it was even ‘legal’ to offer such programs to judges, and certainly, given the intellectual hostility to free market ideas in the country, there was sensitivity galore to this idea. I decided not to include it in the prospectus, as I was not at all confident that I could deliver.

However, the idea took hold, and in 1976 the Center offered the first of the Economics Institutes for Federal Judges. A great deal has been written about this program, and I will not describe it in any detail here. I would make a few observations, however. First, I never considered this program as being as important for the development of law and economics as the Institutes for Law Professors. The ultimate intellectual payoff, while perhaps more immediate, could never be as great as would teaching the teachers.

Second, the program could never have been started without the experience of the law professors’ program. When we encountered hesitation on the part of the first judges contacted, we sent them the list of all law professors in their state who had attended Summer Camp and suggested they contact the ones they knew for further information. Every single one of the judges considering attending did this, and the effect was dramatic. They got exactly the additional encouragement that they needed. None of the judges in the
first class ever failed to comment on the positive reaction they received from
the law professors whom they had called.

We were, of course, extremely sensitive to the possible charge that the
program was biased or in some sense not completely intellectually honest.
After all, my entire academic career had been beset with the ‘Chicago
Economics’ calumny, and there was no reason to suppose that it was
not going to follow me into the judges’ educational chambers. It did, of
course, this time in the form of a front-page, factually incorrect story in
the *Washington Post* saying that we were ‘brainwashing’ federal judges
(Barbash, 1980).

Careful advance preparation for just such an eventuality starved serious
damage to the program. Plans for the program had been vetted in advance
by the most professionally powerful judge in the country, Irving Kauffman
of the Court of Appeals in New York, as well as by the Director of the
Federal Judicial Center. Both gave warm encouragement to the venture, as
did a later Federal Judicial Conference Committee responding to a judge
concerned about the *Post* story. This committee examined every aspect
of the program in considerable detail. Their report not only ‘cleared’ the
program, it actually encouraged all judges to attend.

Paul Samuelson, a most distinguished and avowedly liberal economist
lectured on the program, as did the more neutrally viewed Martin Feldstein
of Harvard and Paul McAvoy of Yale. In fact Milton Friedman was the
only lecturer formally connected with the University of Chicago,7 and the
first judges’ program (1976) was his first stop on returning to the US after
collecting his Nobel Prize in Stockholm. It took some effort in the early
years to keep Samuelson on the straight path of positive economics and not
normative policy. But he came to appreciate what we were trying to do and
never missed a program for 17 years. By the end of the first program judges
were asking, in a perplexed tone, what the issue was, since Paul Samuelson
seemed to be teaching the same economics as Armen Alchian.

Two comments by judges who attended that first program summarized
for me all I wanted judges to get from the program. One was by a former
Chief Judge of the US Court of Appeals for the Eighth Circuit. One night
at dinner, as judges were excitedly discussing the day’s lesson, he pounded his
fist on the table and exclaimed, ‘What I want to know is why in hell hasn’t
anyone told me about this before now.’ Great question! The other comment
came from a very liberal judge from the Southern District of New York
while attending his third advanced course. He said, ‘Henry and I don’t see
eye to eye on a number of policy issues, but he has made me understand for
the first time that everything I want has its cost.’ Every economics course
should be so fortunate!
The judges’ program did have some far-reaching effects, though I think they were not specifically what the foundations supporting the program might have hoped for. Certainly the judges came out of this intellectual boot camp with a significant appreciation for market realities. Many judges and lawyers have told me that the general quality of courtroom argument about economic issues was noticeably improved by the program. And certainly there was a new appreciation of the power of economics to enlighten judges on issues they addressed.

But the greatest influence was on the law professors, and that was actually what I intended. After all, if a large percentage of the most important judges in the country were going to study economics, then perhaps the professors should be taking it more seriously as well. There is no question that the judges’ program did increase academic attention to the role of economics in law. That could actually be the most lasting contribution of the judges’ program to the development of law and economics. As I always told the judges in my session-closing remarks, ‘If you are doing your job right, there really should not be many different results in your cases. But you will have a better understanding of the law because of the insights economics offers, and that will help you be better judges.’ Well, enough about the judges’ program.

Another important part of the Center prospectus was the proposal for a specially designed law degree for PhDs or near-PhDs in Economics. At the time there was no organized program for the production of new law and economics scholars. There were, of course, a few people in law teaching who had advanced degrees in Economics. But some of them were too mathematical in their orientation to be of much practical use in the popular interdisciplinary work, since ultimately the value of this scholarship would be in its use to judges and practicing lawyers. Others had specialized in macroeconomics and, therefore, substantially disqualified themselves from most serious law and economics work. So there was not a reliable source of future law and economics scholars, and, unless such a source could be guaranteed at this critical stage, the field could easily fizzle out.

This argument for producing future scholars appealed to a new law and economics enthusiast by the name of Frank O’Connell, a lawyer, who, as it happened, was the President of the then newly active John M. Olin Foundation. O’Connell presented the entire prospectus of the Law and Economics Center to Mr Olin, who himself then became an enthusiast for the field and agreed to fund five three-year fellowships for economists to attend law school under the Center’s aegis.

The existence of high-quality graduate students gave the Center a panache and an excitement that it did not have before – or after. Ultimately there were 33 of these John M. Olin Fellows at Miami and Emory, at least 16 of
whom ended up in academia, a pretty good percentage even for Harvard or Chicago but almost unbelievable for Miami and Emory. Some of these have enjoyed truly brilliant careers, including the four who were or still are at George Mason University School of Law.\footnote{8 

It is difficult to conceive of the fellowship program that ever delivered more successfully on its promise. But perhaps even more important, the John M. Olin Foundation’s enormous financial support for law and economics in major universities all over the country dates from this initial involvement with the field. However, the fellowship program was very expensive (around a million dollars a year in 1979). Consequently, after Mr. O’Connell left the Foundation and after Mr. Olin died in 1982, there was insufficient support for such an expensive program at what seemed to be a less than major law school, and it was discontinued. The final group of Olin Fellows graduated from Emory in 1986.\footnote{9 

The Olin Fellowship program also was the occasion for a growing animosity between the Law and Economics Center and the Dean of the University of Miami Law School, Soia Mentschikof. She had been very pleased to accept my offer to start the Center at the Miami Law School and was very cooperative, especially in allowing us to design the specialized curriculum for the John M. Olin Fellows. However, as the Center became more successful, she seemed to think that it posed some sort of threat to the Law School, and she unilaterally rescinded her prior agreement to a special curriculum (in merely one-sixth of their courses) for the Olin Fellows.

Happily, however, other universities and law schools were by then eager to secure such an illustrious enterprise as the Law and Economics Center. Professor Thomas Morgan, an early Economics Summer Camper and a well-known law and economics scholar became Dean of the Emory Law School in 1980. He worked closely with me and his own university administration to effect the transfer. Six months later the Law and Economics Center, after some difficult administrative and personnel problems connected with moving the operation, ended its six-year stay at Miami and moved to Emory. The Center remained at Emory until it was moved to George Mason when I became the Dean there in 1986.

At Emory the Center continued most of the programs initiated at Miami and even started one new one, the \textit{Supreme Court Economic Review}, brilliantly edited by the late Peter Aranson. However, the level of funding would no longer support a large research program. Significant competition for Liberty Fund programs appeared all over the country, and the demand for Olin Foundation money for new Law and Economics Centers grew in accordance with Say’s Law. This coincided with a general downturn in stock prices leading many corporations to reduce or even stop contributions altogether.
But by this time a significant reduction in funding for the Center, which
would in earlier years have spelled the demise of the law and economics
field, had little effect on the rapid expansion of the field. By 1986 every
major law school in the country (and several in Canada) had an organized
program in law and economics, many of them funded by the John M. Olin
Foundation. There were five or six journals devoted exclusively to law and
economics (and at one count over 25 per cent of the major articles in the ten
leading law journals in the country), probably eight textbooks, numerous
conferences, and recognition for research grants by the National Science
Foundation. A professional academic society was still years off, but in truth
what the field of law and economics really lacked now was a law school
base of its very own.

The University of Chicago Law School had served that function for many
years. It would be hard to overestimate the importance to the development
of law and economics of a single, intellectually powerful institution where
economic thinking pervaded every aspect of its life. 10 But, for whatever
reason, economics did lose its almost exclusive intellectual hold on Chicago,
even though Chicago’s strength in that field was and remains formidable.

It appeared then that law and economics scholarship would simply be
divided up among a number of fine law schools, each with some strength
in the area but in none of which it would be completely dominant. This
arrangement, though it is the norm for other mature approaches to law,
would certainly reduce the momentum and the significance of law and
economics. Neither Miami nor Emory could possibly have secured the
faculty cooperation necessary to change the nature of its law school, and
there seemed to be no logical successor to Chicago as a law school that would
be heavily and exclusively focused on the law and economics paradigm.

I thought that nothing short of a totally new school could ever fill this
niche, and I made a few cursory and totally unsuccessful efforts to find money
for such a venture. Typically, a dislike of lawyers trumped any preferences
for training new ones, even if they were the rare sort who understood free
markets, private property and the rule of law. On the other hand, and in
all fairness to those foundations I approached, no one can commit a law
school to continue anything permanently, and a mere change in deans can
result in a radical change in direction. University administration is not a
regime of enforceable contracts.

Then one of those wonderful accidents of history, intellectual and
otherwise, occurred to change my fate and perhaps that of law and
economics. My good friends, Gordon Tullock and James Buchanan, had
moved their renowned Public Choice Center to George Mason University
from the Virginia Tech. They were both friendly with the President, George
Johnson. Each of these professors, whom I respected and admired greatly,
urged me to seek the deanship of the Law School. At the time, the George Mason University School of Law, though then recently accredited by the ABA, had some really profound problems and was being run in a kind of ‘academic receivership’ by the Provost of the University.

But Buchanan and Tullock both believed that there was a possibility of making something significant out of the Law School. I assumed that they were simply unaware of how difficult it would be to deal with an intransigent law school faculty, especially one almost totally ignorant of the model I had in mind for a law school and where most of the professors had tenure. When I first looked at the School, I was surprised that they had received accreditation at all, but that was before I understood what a sham the whole accreditation process is. So, more as a favor to my friends than out of any interest in the position, I agreed to talk to the President and Provost as a consultant on what I thought George Mason’s Law School might try to do.

I believe that George Johnson understood my personal intellectual ambitions, though clearly he did not have a clue about law and economics or for that matter any aspect of legal education. But he knew that he wanted a law school that would achieve the kind of popular attention that was becoming the hallmark of his administration at George Mason. He rightly assumed that the plan I laid before him – substantially the plan that I had developed 18 years earlier for the University of Rochester – would accomplish that goal.

He and I shared certain ideas about universities, primarily that the chance for quality innovation in an institution is inversely related to the power that the faculty exercises. So, as part of the ‘package’ he offered me to accept the deanship, he ‘guaranteed’ that I could develop whatever model of legal education I wanted, with no interference from the faculty. Interestingly, he told the Provost that whether they got Henry Manne or not, this plan was what he would like to do in the Law School. That is proof enough that he did not understand much about the law school world … or think much of property rights.

I was still left with a practical problem. George Johnson could ‘guarantee’ not to allow interference from the faculty, but it was I who would have to deal, up close and personal, with a faculty only one member of which, Bob Anthony, I had ever met or even heard of. Still I agreed to be interviewed by the faculty of the Law School, something that Johnson claimed was a mere formality. Then something wonderful happened. I learned that the faculty was so disorganized, so disaffected, and so demoralized that it should be possible to make radical changes without any organized resistance. Maybe I could have my ‘new’ school after all.
How law and economics was marketed

I told the faculty that I planned to introduce what came to be called the ‘track’ system and that the Law and Economics Center would be moved from Emory to George Mason. Whether the faculty was already cowed by Johnson, or whether they really liked the ideas and wanted me, I do not know. Of course, I did not tell them – and apparently they did not figure out – that I planned not to renew the contracts of any of the untenured professors. And I would use the money that Johnson promised – and whatever other means I could dream up – to terminate the contracts of as many tenured professors as I could. There was no other way to start the new kind of law school that I wanted.

After I came on board, in the summer of 1986, I told George Johnson what I planned to do with the faculty. His response was both welcome and insightful. He said, ‘Whatever you plan to do, do it right away because by next spring the faculty will be organized in opposition.’ He was prescient, and happily I followed his advice.

By the end of my first academic year at George Mason, 14 members of the old faculty were gone and several more were starting the process of leaving. The faculty was not happy with this turn of events; a ‘bloodbath’ I believe they called it. As Johnson said later, ‘I might have thought that it was possible to get rid of 14 professors in one year, but not without a lawsuit.’ He always said that he did not want to know what I was doing with the discretionary money he allowed me. But he knew.

As Johnson had predicted, by the spring of 1987 serious opposition started to develop. The faculty were urging students and alumni to resist, which they did, even without much urging. There was even a rumor of a planned legislative inquiry in Richmond. But all this was too late to be effective. The academic Rubicon had already been crossed.

I was in a particularly good position to find people suitable for the ‘new’ Mason Law School. Personal networking is the name of the game in this kind of recruiting. Over 500 law professors had by that time been through the Economics Institute for Law Professors. Many of these had developed a real sophistication in law and economics, and, though I had not kept detailed notes over the years on participants who impressed me, I still knew where a lot of likely prospects for George Mason were. I also knew a number of other prospects through Liberty Fund conferences, and, of course, there were the John M. Olin Fellows.

Eleven new appointments were made in my first year; all my personal ‘law and economics’ selections and all committed to an economics-oriented law school, with specialty tracks. By the next academic year Mason had five PhDs in Economics on its law faculty, more than any other law school in the country, and it was well positioned to develop its new program and to become an important law school.
I had long favored specialization in legal education as the only sensible educational response to changes that have occurred in modern law practice. And I am convinced that the only thing that stops its universal development in the existing law schools is faculty intransigence and self-interest. Probably no stronger argument can be made against strong faculty governance than its use to resist innovation in education.

A specialty system requires teachers to be willing to subordinate their own teaching preferences to exigencies of a course-coordinated program. Personal sacrifice for some greater good is not a characteristic found in large supply in law schools or, for that matter, in universities in general. But because we were hiring new faculty to fill specified needs in a new curricular program, the usual problems of academic innovation were finessed. Amazingly, in just my second year as Dean at George Mason, we were all hard at work developing the nuts and bolts of the first specialized or ‘track’ system.

That system was not, however, what I considered the central feature of the new Mason Law School, though, as I had hoped, it did gain an enormous amount of popular attention for the School. I was primarily interested in the exclusive law and economics intellectual orientation that the School would have. That orientation was guaranteed in this case by generally hiring only law and economics scholars for the faculty. Everything else, including some ‘non-conforming’ hires and even the track system, was for me to some extent mere window dressing. I was confident that a law school exclusively and rigorously specialized in law and economics would necessarily join the front ranks of legal scholarship very quickly and that such a law school would perform a crucial function that no other law school in the country seemed to want.

No other intellectual paradigm in legal education could begin to match the power of law and economics, in spite of feeble protests to the contrary by devotees of critical legal studies, feminist law, multiculturalism, or bio-ethics. As long as one law school in the country remained true to this intellectual lodestone, economics, and ultimately human freedom, would have to be taken seriously by every other school in the country. I hoped to make that my legacy.

NOTES
1. The most reliable version of the early history of law and economics at Chicago is undoubtedly Edmund Kitch (1983). This was an edited transcript of a conference run by the Law and Economic Center, then located at the University of Miami, and most of the participants in the early development of law and economics were present. Also see Manne (1993).
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2. Karl Llewellyn joined the Chicago faculty in 1951 and was visibly shocked at the kind of economic analysis he found in the Law School. This was probably more from ignorance than ideology, though certainly ‘Chicago Economics’ was already suspect to academic liberals by this time. Llewellyn seems to have urged Edward Levi, then the Dean, to de-emphasize economics and not without some effect.

3. In 1966, shortly after my book, Insider Trading and the Stock Market was published, I was introduced, for the first time, to Harvard Professor Louis Loss, then the reigning guru of corporation and securities law. Without even acknowledging the introduction, he simply said: ‘We didn’t need a book on insider trading. I know it’s bad’ and walked away. Such was the level of scholarly discourse in those days.

4. The alumni of the George Mason University School of Law were particularly aggressive in fighting the development of a law and economics oriented program at that school, even though few of them had even graduated from an ABA-accredited law school.

5. A program in Law for Economists was added in 1976. See infra.

6. Contrary to what the Washington Post reported, no corporate money was used to fund these programs. For very insightful discussions of these and other aspects of judicial education programs, see Weinstein (1999: 424); Weinstein (1994).

7. Professor Harold Demsetz, by then at UCLA, had taught earlier at the University of Chicago.

8. Two of these, Fred McChesney and Henry Butler, hold distinguished chairs respectively at Northwestern Law School and the University of Kansas School of Law.

9. A worthy, though smaller successor program was cobbled together through judicious use of private and state money at George Mason University, where a 1995 graduate, Dr Robert Levy, generously contributed a million dollars for the purpose.

10. Conversely it would be hard to overestimate the extent to which Chicago’s prominence today results from its previous dominance in law and economics.

REFERENCES


