



Heroes Aren't Enough



Professor Monica Teixeira de Sousa critiqued the Obama administration's educational strategy in her December 2009 American Association of Law Schools conference presentation. She was one of four individuals chosen to speak after a national competition among new law professors.

The flawed idea of individual heroes saving troubled schools is driving the Obama education reform movement, says Professor Monica Teixeira de Sousa.

Movies such as *Stand and Deliver* and *Lean on Me* feature principals and teachers entering schools rife with poverty and gang violence; through their never-say-never attitude, they convince students to try harder. The heroes and a group of diligent students turn the school completely around.

It's the type of film that appeals to Americans' sense of optimism and to a belief in the power of the individual to accomplish anything with hard work. But such movies play into dangerous misconceptions about educational reform and the proper role of government, according to Teixeira de Sousa, whose research centers on education reform issues.

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"The idea that the disadvantaged just need to 'pull themselves up by their own bootstraps' is a vast oversimplification and ultimately costs the nation more money by leading to failed social policy," she argues. "There's an assumption in the Obama administration's current educational reform movement that it will be easy to obtain new teachers and administrators—'heroes,' as Secretary of Education Arne Duncan calls them—who will do a better job than the individuals already in place."

"The unrealistic expectation is that somehow through sheer determination and a strong work ethic, these new individuals can make up for all of their students' disadvantages. This myth simply isn't supported by the data."

Magical schools

Teixeira de Sousa isn't jumping on the charter school bandwagon. "Their supporters look at high-achieving examples and say, 'Why can't underachieving schools do as well?'" she argues. "They fail to acknowledge that high-achieving charter schools have by and large attracted a student body with different characteristics than the rest of the school population. Proponents of charter schools assume that changing the building, changing the name, or changing the people running the school will magically address the problems that children and the communities they live in had before. It doesn't make sense, and the research doesn't support it."

Yet at the federal level, President Obama and Secretary Duncan have spearheaded a federal education initiative—the \$4.35 billion Race to the Top Fund—that, for Teixeira de Sousa, embodies the myth of education reform serving as a magic bullet. "Through a state competition for federal education resources," she says, "the plan suggests that if improvements are needed, it is mainly teachers and principals who need to be scrutinized and often replaced. Unfortunately, more holistic approaches that broaden the focus to include poverty, particularly concentrated poverty, aren't part of the dialogue."

Families in crisis that lack affordable housing, job security, food security, and access to adequate healthcare and that reside in neighborhoods torn apart by violence and drugs face obvious challenges in providing their children with the conditions necessary to profit from educational opportunities. "The lack of support for low-income families in the form of child care, increased minimum wage laws, and family leave policies that provide monetary compensation for time lost from work are just a few of the initiatives that are necessary at the federal level for children from low-income backgrounds to climb the socioeconomic ladder," she says.

Great expectations

Hard work is important, but effort alone doesn't seem to be overcoming more entrenched factors. A poor American child has only a 1 percent chance of rising to the top economic tier, according to research cited by Teixeira de Sousa, and the percentages of those moving into the upper middle class are low as well.

Other research, she says, shows that children from low-income families who go to college are no more likely to reach the top rung of the economic ladder than children from high-income families who fail to earn their degrees. The United States is less mobile than we think it is, she argues. "The Brookings Institution reports that we're very optimistic about our chances of bettering ourselves and therefore less likely to demand government programs that address the widening income gap," she says.

The reality behind the American Dream

"I worry that my own trajectory may lead some to dismiss the research," says Teixeira de Sousa, "so I try to explain in my scholarship why others shouldn't see me as living proof of the 'bootstraps argument.'" Of Cape Verdean descent, she immigrated at age eight to Pawtucket, Rhode Island, where her circumstances, at least on the surface, were similar to those of others in her struggling city. She spoke no English at home. Her parents had only high school diplomas and worked in local factories. She graduated from a high school that may well be identified as one of the worst in the state, a dubious distinction that may entitle it to a share of the competitive Race to the Top funding.

These perceived shortcomings didn't stop Teixeira de Sousa from living what many might consider the American Dream, attending Brown University, followed by Georgetown Law and a position as a tenure-track law school faculty member.

"In the United States," she says, "the small fraction that succeeds in climbing multiple rungs often does so because of process variables—the small, hidden advantages possessed by some families and not others."

"Parents who had positive educational experiences when they were young, who know that they should invest the time to learn about their children's teachers and schools, or who are able to help their children with homework will naturally provide a more supportive learning environment for their children," says Teixeira de Sousa. "But there are factors that, regardless of parents' interest, undercut their ability to be involved." These can include time constraints imposed by employers, parents' own negative experiences with education, the presence or absence of support from extended family members, parents' emotional health, and the level of stress and/or stability in the household, among others.

Teixeira de Sousa says, "Unless these factors are taken into account by policy makers, school reform proposals at the federal level will be inadequate."

Not the "civil rights issue of our time"

Individuals as diverse as George W. Bush, R&B/hip hop artist John Legend, and Duncan have united around the statement "Education is the civil rights issue of our time." Teixeira de Sousa rejects the argument, which she contends limits the civil rights agenda for our generation.

"Education is one of many issues that we should be addressing," she says. "The achievement gap is a symptom of a complex set of socioeconomic issues that are much larger than just education." She acknowledges that her conclusion—that a strong social safety net is necessary to narrow the achievement gap between rich and poor—makes some people uneasy. "Politicians would prefer to avoid discussing the need for costly federally funded programs and entitlements. Instead, it's up to us as the voters to demand that our elected officials set the national agenda on civil rights much more broadly."

Say goodbye to Hollywood

Teixeira de Sousa's passion for this issue is leavened with pragmatism. "I understand that it's easier for politicians to focus on a happier story: If little Johnny works hard, he can become the president or a judge. But we need to temper our optimism with a dose of reality. Let's expand the national discussion on education so that it's not just about teachers and administrators but also about the conditions in which Johnny and his family live. The educational proposals are not, on their own, going to enable children to climb the ladder. We need to leave the Hollywood stories behind and focus on the realities of poor children's lives."

Obama's Race to the Top initiative enshrines the idea that a new corps of hard-working teachers and administrators will turn around a troubled school—but that's not so, says Professor Monica Teixeira de Sousa.

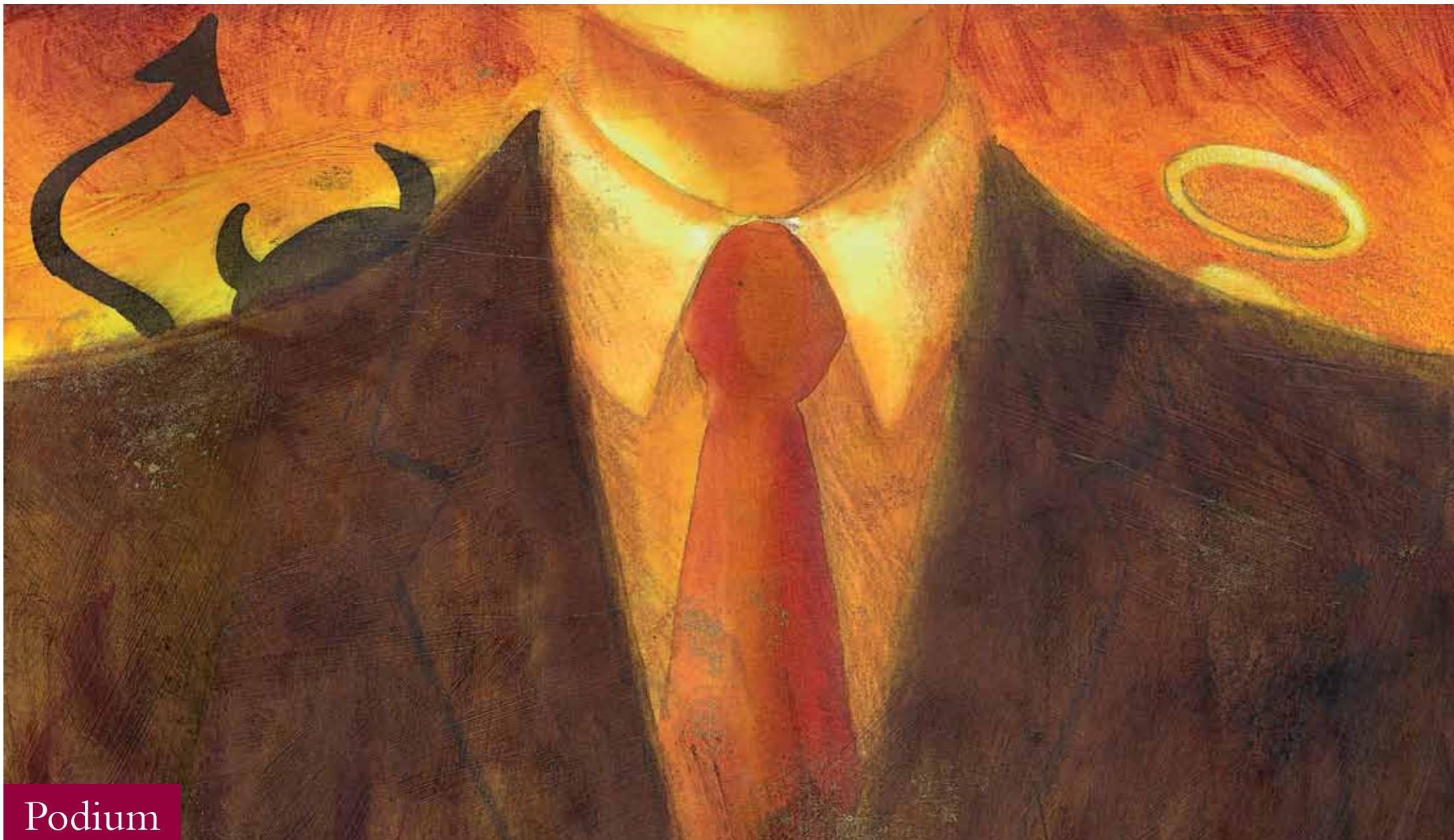
The Race to the Top program outlines four different models for dealing with failing schools, referred to under the regulatory rules as the persistently lowest-achieving schools. In each model, Teixeira de Sousa argues, the school is depicted as a problem to be solved largely in isolation from the families it serves.

In the turnaround model, the school district must replace the principal and at least half of the school staff, while the restart model closes the school and reopens it as a charter school or under new management by an outside provider. The school closure model seems to give up on the school entirely, transferring students to high-performing schools within the district (if they exist).

"Most of these strategies are unproven and representative of failed reform efforts," she says.

Finally, the transformation model includes as one of its firm requirements removing the principal, after which efforts are made to change the school's culture through a broad range of both required and permissible options, some of which could include better teacher compensation, increased course opportunities, or new partnerships with community groups.





Podium

Are lawyers as bad as people think?

Disproving alleged lawyer greed

The Greek philosopher Diogenes could have ended his search for honesty by visiting a modern hospital but not a courthouse. At least, that's what the public believes. Gallup's annual Honesty and Ethics Survey for 2010 places the halo atop nurses' heads, with 81 percent of Americans saying nurses have "very high" or "high" honesty and ethical standards.

Lawyers, far down the list, score 17 percent.

True, it's better than the 7 percent earned by car salespeople and lobbyists, but it's a dismaying report card for a profession that prides itself on being an essential guardian of law and liberty.

Lawyers are driven by unremitting greed, according to the majority view. In a 2002 study commissioned by the American Bar Association (ABA) Section of Litigation, more than two-thirds of respondents concurred with the statement, "Lawyers are more interested in making money than in serving their clients."

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After hearing the profession criticized for years, Professor Paul F. Teich has responded. His new, as-yet-unpublished article, "Alleged Lawyer Greed: The Fees, Collection Practices, Pro Bono Work, and Income of American Lawyers," is filled with charts and data that describe the profession in detail. He notes that average legal fees are reasonable and have risen only slowly in most states over decades, lawyers avoid overbearing collection practices, and practitioners as a group contribute impressively to the common good through pro bono and public service work.

The advocate's advocate

For more than a decade, Teich has taught Contemporary Popular Criticism of Lawyers and the American Legal System, an unusual law school offering. "We cover social problems that lawyers are accused of creating or worsening," he says. "Students and I discuss the genesis of those problems and what lawyers can do to help solve them."

Lawyers' manipulation of the legal and political machinery is thought to have spawned a host of social ills, including overregulation, social discord, a sea of frivolous litigation, and even a supposed decline in American competitiveness. Lawyer tactics are routinely said to be motivated by greed and selfishness.

Teich finds that even law students are not immune from the prejudice. "Teaching the course led to the article," he says. "If students can doubt the decency of the average lawyer, then more empirical work describing the ordinary practitioner's thinking and behavior is absolutely needed."

Lawyers haven't done a good job defending the profession, he asserts. "Even though we're trained as advocates, we haven't been advocating our own case very well. And to the extent that we do help create social problems, it is best to know how and why."

Who's to blame for hyperlexis?

Hyperlexis, or "too much law," is a term coined in the 1970s by Bayless Manning, the former dean of Stanford Law School. Manning, with colorful flair, said that this "disabling disease caused by an overactive law-making gland" was gradually leading to the paralysis of our system. The nation was increasingly awash in rules and lawyers, and Manning's tongue-in-cheek send-up pointed to a problem that many believe is quite real.

Teich uses the term freely in his course. He notes that the volume of litigation has increased dramatically in the United States over half a century and that the amount of written law (both common and statutory) has swelled. And, of course, the size of the profession has been growing too.

Convicted in the court of public opinion

Has the growing reach and influence of the law been driven by lawyer greed and the desire for power? Many Americans would say yes. Teich's analysis stands in opposition to strongly held public attitudes.

Those who believe that lawyers exercise inordinate power can point to a supersized damage award given for spilled coffee or playgrounds closed because of liability concerns. These examples produce strong emotions and worry, which are exacerbated by explosive growth in the legal field. Teich points to a host of factors that explain the increasing use of lawyers and the law, however, including growth in commerce, an increasing belief among Americans that legislation is the way to solve problems, and even an increase in divorce and accident rates.

Teich teaches mortgage law, and he sees the mortgage crisis as a perfect example of the "blame lawyers" phenomenon. "Conservatives succeeded in deregulating financial institutions—a substantial part of the problem—while liberals pressured and helped lenders to make risky residential loans," he says. "So who is to blame? Lawyers, for participating in the foreclosure process? Lawyers also work for lenders, help borrowers get mortgages, and are helping write new regulations that will help prevent future problems. People should look at themselves more often when they wonder who creates America's problems."

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—Professor Paul F. Teich



It goes with the territory

A character in *Henry VI* describes a dream world, adding malevolently, "The first thing we do, let's kill all the lawyers." Though the meaning of Shakespeare's oft-quoted laugh line is open to debate, it nevertheless builds on a long tradition of literary lawyer bashing that extends at least as far back as ancient Rome.

A common thread through the ages, notes Teich, is that people have distrusted "chameleon-like" lawyers who will represent anyone, even the guilty. Modern citizens also mistake the increasing regulation of society for increasing legalization of society.

Printing used to be cumbersome, but today's information-processing technology makes it easy to mass-produce rules and regulations. Teich asks rhetorically, "If a group of high school teachers create a printed rulebook, is it because lawyers made them do it or because they actually wanted the rules? Rules of conduct today are typically created by people other than lawyers, but people feel that their environment is incredibly regulated and think that the problem wouldn't be happening, but for lawyers, it would be."

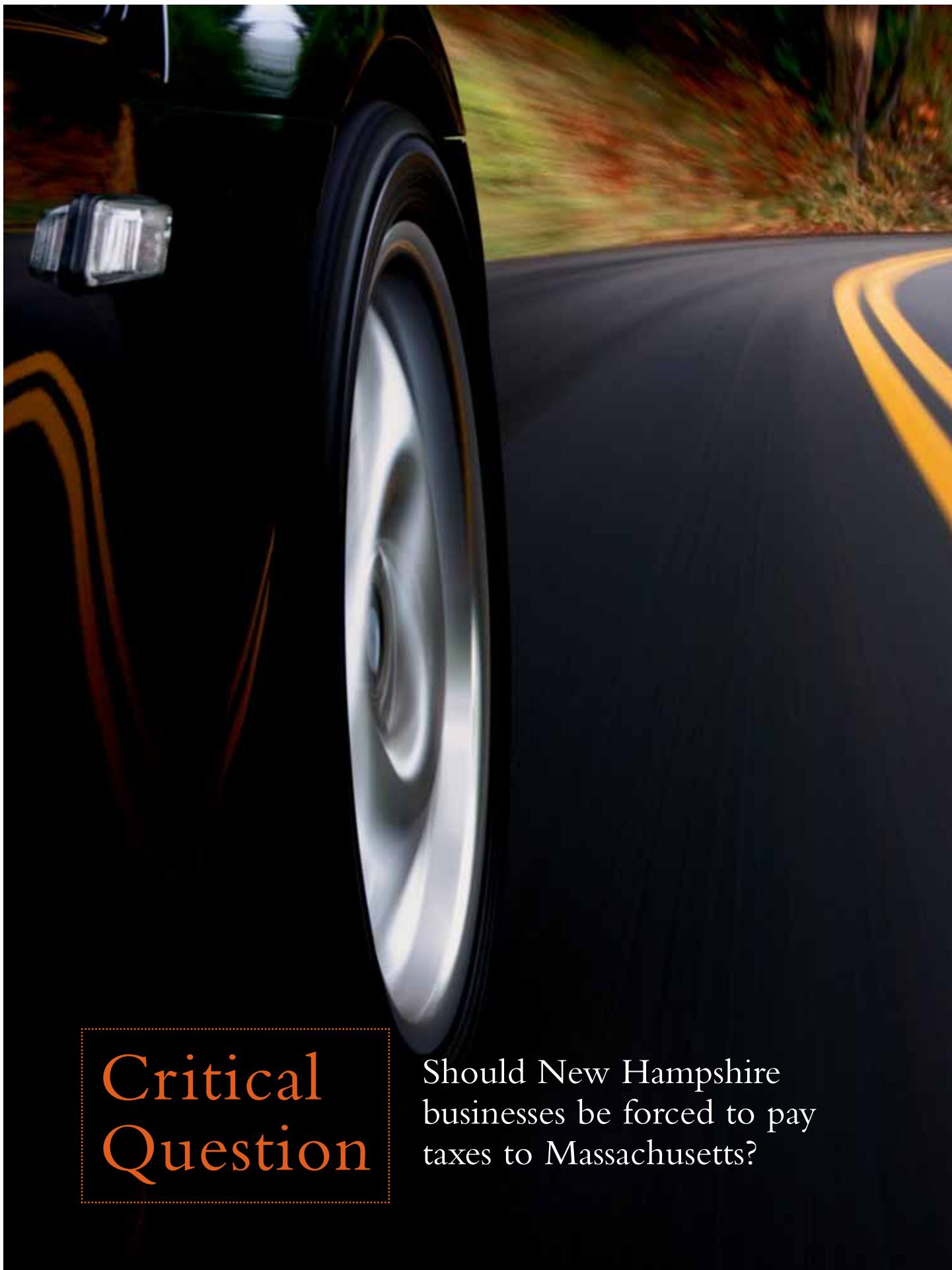
That's not the only reason for casting lawyers as whipping boys. "Teachers, doctors, and police are also 'helping professions' like ours," says Teich wryly, "but they don't bill with hourly charges."

We're the good guys!

By analyzing the profession's dedication to pro bono and civic work, Teich proves that the poster child bad lawyer—greedy, selfish, and money-obsessed—is in the minority.

Teich references a 2003–2004 survey conducted by the ABA Standing Committee on Pro Bono and Public Service, which found a whopping 93 percent of attorneys who "personally believe that pro bono work is something that lawyers should be doing." He then digs into the numbers, estimating that lawyers contribute between \$2 billion and \$3 billion worth of services annually to low-income Americans. Other professionals don't have any self-imposed pro bono obligation, he observes, so lawyers should be walking taller.

Let the word go forth.



Critical Question

Should New Hampshire businesses be forced to pay taxes to Massachusetts?

A man we'll call Bill lives in Massachusetts. He buys a new set of tires in New Hampshire to save money on sales tax. Can the Massachusetts Department of Revenue reasonably require the New Hampshire tire shop to collect and remit a 5 percent use tax on Bill's purchase?

The above question isn't purely hypothetical. Massachusetts has ordered Town Fair Tire Centers' six New Hampshire shops to collect a 5 percent use tax on purchases made by Bay Staters—at least for purchases that will be used in Massachusetts, where the company has 25 shops.

Professor Stan Cox, one of the law school's experts on trade regulation, argues that there's nothing controversial about a use tax. Such taxes allow a state to collect taxes for products purchased out of state but used within its borders, at least when no equivalent sales tax has already been paid on the purchase.

On their tax returns, Bay State residents are asked to report purchases that meet the above guidelines, says Cox. "But a use tax that relies on individual reporting on tax returns is almost impossible to enforce," he adds. "The real controversy, then, isn't about whether you should be taxed for such purchases but rather how the tax ought to be collected."

Town Fair Tire is fighting the use tax in a case before the Massachusetts Supreme Judicial Court, arguing that the tax violates the commerce clause. (The case had not been decided by our deadline.)

According to a February 3, 2009, *Boston Globe* article, Massachusetts tax authorities say the Town Fair Tire case has narrow application. The state has no immediate plans to place a use tax on other products, e.g. big screen TVs, because it's harder to determine where they will actually be used.

"When the tire company puts tires on a car with Massachusetts plates, purchased by a Massachusetts resident," Cox says, "it's hard for the tire company to say that the tires won't be used in Massachusetts." But according to the *Globe* article, Town Fair Tire argues that a consumer

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— Professor Stan Cox

buying tires may not be the owner of the car, and the address of the buyer may not be connected with the vehicle, which might open the company to liability if they charge a tax when it's not warranted.

Cox doesn't think that argument will hold water. "I don't think it's likely that they would be paying a tax that wasn't due for use in Massachusetts," he responds. Still he agrees that there are complications. "Massachusetts can only impose use tax collection liability on a company that has a physical presence within its borders. Let's say you've got a New Hampshire tire store that's part of a Massachusetts-based chain across the street from a purely New Hampshire tire company. A Massachusetts resident comes in and gets taxed in one store and not the other. I think there's a reasonable argument for unfairness there."

The Massachusetts Appellate Tax Board (of which **Frank J. Scharaffa**, adjunct professor of law, is a commissioner) heard Town Fair's case before it went on to the Supreme Judicial Court and found that this particular use tax was appropriate. "The tax board was probably construing case law correctly," says Cox. "Town Fair Tire satisfies the requirement in *National Geographic Society v. California Board of Equalization* of having a physical nexus in the state, so the state has jurisdiction, and the near certain use in Massachusetts seems sufficient to justify the tax."

Governor John Lynch of New Hampshire has recently stated that he will propose legislation that would prohibit any New Hampshire business from collecting other states' taxes on items purchased in New Hampshire stores. "That means you'd potentially be subject to penalties in New Hampshire if you collect the tax and in Massachusetts if you didn't," Cox emphasized. "It's true that prior Supreme Court cases involve situations where customers receive their goods in the same state that imposes the tax. Still, if it's specifically the Town Fair Tire facts, I think the New Hampshire governor's law would have to fall."

Says Cox: "One of the questions that makes this case interesting is: How far will the Massachusetts Department of Revenue push this use tax? Would it be fair for the state to tax a certain percentage of electronics sales, assuming that some percentage of those sales to Massachusetts residents will be used in the state? It will be interesting to see if the Department of Revenue stays narrow in its interpretation."

ASKED | ANSWERED