

2009

Maybe We Should Fly Instead: Three More Train Wrecks

Thomas M. Mengler

Bluebook Citation

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

This Article is brought to you for free and open access by UST Research Online and the University of St. Thomas Law Journal. For more information, please contact lawjournal@stthomas.edu.

ESSAY

MAYBE WE SHOULD FLY INSTEAD: THREE MORE TRAIN WRECKS

THOMAS M. MENGLER*

I. INTRODUCTION

For many years now, I, as his colleague, dean, and friend, have been privileged along with the legal academy to enjoy the engaging writings of Professor Tom Ulen. From the mid-1980s when Professor Ulen, at that time a professor in the economics department at the University of Illinois, audited most of the first-year curriculum at its College of Law, he has brought critical insight to a wide array of legal issues through the theoretical lens of economic analysis—and he has done so masterfully.

Professor Ulen's scholarly contribution to this issue of our Law Journal, *The Impending Train Wreck in Current Legal Education: How We Might Teach Law as the Scientific Study of Social Governance*,¹ is no exception. Here, Ulen identifies the greatest contribution of law and economics to be not its theoretical perspective, but rather its importation of empirical testing to the study of law.² As great as law and economics' theoretical contributions have been, Ulen applauds the law and economics movement for what he calls its second step. In Ulen's view, law and economics' historically first step was the articulation of hypotheses to explain legal decision making or the behavior that should rationally result from imposing certain legal rules.³ The historically second and more vital step of law and economics has been the rigorous testing of these hypotheses by means of valid techniques of empirical verification.⁴

As Professor Ulen rightly notes, the legal academy has received this empirical approach to the study of law more warmly than the theory of law and economics.⁵ Many legal scholars still view the theoretical premises of

* Dean and Ryan Chair in Law, University of St. Thomas School of Law.

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

2. *Id.* at 305–313.

3. *Id.* at 305–306.

4. *Id.* at 306.

5. *Id.* at 305–306.

law and economics with deep and—I would add—irrational suspicion, but few scholars express the same hesitation about the utility of empirical studies. What a concept! We may finally be on the way to discarding seat-of-the-pants, armchair empiricism, which seemingly has worked so well in the classroom for so long, in exchange for the scholarly fruits of empirical studies.

Of course, rigorous, not armchair, empiricism is hard work to comprehend, as well as to do. Acceptance of the application of empirical studies to the law is on the horizon, Ulen acknowledges, but widespread acceptance is coming far too slowly. In the classroom particularly, law professors have not integrated the methods and fruits of empirical studies into their lectures and casebooks.⁶ And herein lies the potential for a train wreck, Professor Ulen argues. Ulen raises a red flag, noting that our methods for teaching law students and the materials we teach are still largely mired in the past. Our teaching methods are “seriously out of alignment with” the scientific approach that the legal empiricists, including but not limited to economists, are bringing to the study of the law.⁷

Having identified a pressing problem, Professor Ulen’s main recommendation for heading off this “train wreck” is straightforward. As it relates to law school education, he recommends the development of an empirical methods course as a necessary part of a law school’s core (and presumably required) curriculum.⁸ Law students need to know, Ulen alleges, what constitutes valid techniques of empirical verification, the role of interviews and surveys, how to design and conduct experiments, what constitutes a regression analysis, and how to read results.⁹

I believe Professor Ulen has identified something very important. If, as he predicts, legal argumentation will increasingly be based on empirical data derived from survey instruments,¹⁰ then every lawyer going forward should be able to understand the legitimate methodologies and be able to separate the wheat from the chaff, the good from the bad science.

But is this a train wreck in the making, or just a bump in the road that requires some close attention? Without meaning to diminish the importance of Professor Ulen’s contribution, my own view is that legal education has successfully faced much more daunting challenges in the past—effectively integrating clinical and skills training more fully into the core curriculum being the best example.¹¹ We should certainly be up to the task of develop-

6. *Id.*

7. Ulen, *supra* note 1, at 303.

8. *Id.* at 332.

9. *Id.*

10. *Id.* at 312–313.

11. See, e.g., WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 174 (2007) (recognizing that law schools have responded to the professional bar’s demand for a greater range and number of skills courses in law school curricula; “this complex constellation of competencies has been reflected in the growing number and variety of [lawy-

ing a course on legal empirical methodology and studies. Professor Ulen himself recognizes that he might be widening fissure into chasm: "In describing current legal education as a 'train wreck,' I am indulging in authorial license. But I am also seeking to draw your attention to changes in the gravitational center of legal scholarship that are real and that ought to cause us to rethink our educational mission."¹²

Whether or not Professor Ulen's concern really requires us to call out the legal academy's equivalent of the Federal Emergency Management Agency (FEMA),¹³ there are other, in my view, more serious potential train wrecks looming ahead. In the remainder of this essay, I will briefly sketch the contours of three that I think should worry us all.

II. THE FIRST TRAIN WRECK: LAW SCHOOL AS GRADUATE SCHOOL

Professor Ulen cites Judge Harry Edwards' famous 1992 article regarding the "growing disjunction" between legal education and the legal profession,¹⁴ because Professor Ulen worries about this disjunction as well.¹⁵ In some respects, in the years since Judge Edwards published his deep concerns, legal education has undertaken some nice strides to become more relevant to legal practice. Law schools have responded well to the American Bar Association's 1992 MacCrate Report and its demand for more skills training in the core and elective curricula.¹⁶

Nonetheless, as Professor Ulen frets too, Judge Edwards' critique that legal scholarship should be more useful to the legal profession has largely gone unaddressed. Lawyers frequently tell me and my faculty colleagues that they no longer consult law reviews for help in their law practice.¹⁷

I also worry that this disjunction is worsening, rather than improving, as many of the elite law schools with increasing frequency hire faculty who look more like professors in the college of arts and sciences than law school professors. With greater frequency, elite law school hiring practices are trending to the JD/PhD candidate who lacks any legal professional experi-

ering skills] courses, often using different forms of assessment, that are available to students in the second and third years of law school").

12. Ulen, *supra* note 1, at 335.

13. On second thought, make that the U.S. Marines.

14. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992).

15. Ulen, *supra* note 1, at 304.

16. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP para. 11-13 (1992) (commonly referred to as the MacCrate Report), available at <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html>.

17. Harvard Law Professor Mary Ann Glendon essentially made this point fifteen years ago, in 1994. See MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 203-05 (1994).

ence.¹⁸ As with other movements that have begun at the elite law schools, one can reasonably predict that this trend will eventually penetrate the rest of the legal academy, as little dogs follow big dogs.

I want to be clear about the point I am making. I fully recognize the enormous benefits of interdisciplinary study—both for the education of our law students and for the development of the rule of law. At both law schools in which I have served as dean—the University of Illinois College of Law and the University of St. Thomas School of Law—several faculty have held advanced graduate degrees in relevant interdisciplinary fields.¹⁹ Unquestionably, legal education, legal scholarship, and the legal profession derive benefit from the knowledge and wisdom other fields bring to the analysis of legal issues.

But just as Judge Edwards worried about a faculty of law professors disconnected from and disinterested in the practice of law, I have difficulty understanding how our students are better off with a permanent faculty comprised predominantly of professors who have never worked as licensed attorneys. I find it hard to understand how the overall quality of legal scholarship will improve and, with greater frequency, be relevant to the legal profession if it is authored by scholars who have never practiced law—who have never participated in the transactions that they study and write about. As a general matter, it is better to write about matters with which you have life experience. What works for poets is probably optimal for legal scholars too.

III. THE SECOND TRAIN WRECK: PROFESSIONAL SCHOOLS WITHOUT PROFESSIONALISM

Professor Mary Ann Glendon in 1994 described the conventional wisdom—another term for armchair empiricism—about law students and the development of their professional identities. In *A Nation Under Lawyers*,²⁰ Professor Glendon observed: “Most academic lawyers have regarded character (or its lack) as something that students bring with them when they

18. I undertook an informal empirical study to verify my assertion by looking at the recent appointments at five of the top law schools in the country: California-Berkeley (Boalt), Columbia, Michigan, Northwestern, and Virginia. I looked at the faculty profile website for each of these five law schools to evaluate the legal practice experience of Assistant and Associate Professors who taught anything other than clinical courses. The number of faculty at those ranks who either (1) lacked any legal professional experience or (2) lacked any attorney experience other than a year or two clerking for a judge are as follows: Boalt: 6 of 12; Columbia: 4 of 6; Michigan: 2 of 7; Northwestern: 5 of 9; and Virginia: 4 of 8. Ironically, on its website, Northwestern boasts that more than 95% of its entering students have prior work experience, which enables them to bring their “extensive real world perspectives . . . to the classroom.” Northwestern Law Admissions, <http://www.law.northwestern.edu/admissions> (last visited Mar. 7, 2009).

19. For example, my colleague Tom Berg, who teaches and writes in law and religion and constitutional law, holds masters degrees in religion and in philosophy and politics. My colleague Charles Reid, who writes on legal history, holds a PhD in the History of Medieval Law.

20. GLENDON, *supra* note 17.

come into law school. A typical attitude is that law professors do not form character—that is the job of families and religious or ethical traditions.”²¹ Under this view, the law professor’s sole role with respect to ethical character and professionalism issues is to introduce students to the recognized ethical responsibilities of lawyers and the rules of professional conduct, and to otherwise let nature take its course. Those law students who arrive at law school with exemplary characters will most likely enter and work in the profession as ethical lawyers. They will aspire to finer conduct than the rules of professional conduct minimally require, and, by and large, they will succeed in achieving their higher aspirations. In contrast, those students who arrive with a weak or underdeveloped character more likely will be tempted as attorneys to behave boorishly and break the rules. According to conventional wisdom, law professors cannot do much, if anything, to influence, one way or the other, this mixed bag of outcomes.²²

I have sometimes wondered whether law professors who adopt the conventional wisdom in the behavior really believe it, or whether their axiom, “That’s not my job,” masks disinterest or doubt about how one might help law students along their journeys to ethical leadership. At times we are tempted to deny the existence of a problem we do not know how to address.

Regardless of why so many law professors resist engaging in what might be called the formative side of legal education, mounting empirical evidence suggests that the conventional wisdom is simply wrong. In recent years, moral psychologists have challenged the myth about ethical formation through a series of empirical studies. Although a relatively new field, this research shows that ethical development is a life-long journey and that the moral development of most students, at their age, is at a relatively nascent stage. Rather than arriving at law school as fully-formed ethical actors, a great deal of ethical development lies ahead for the typical twenty-three-year old. Adults, young and old, have the capacity for moral development throughout their lives. Moreover, empirical research demonstrates that, in fact, continuing formation frequently occurs if individuals are nurtured and mentored.²³

This empirical research has gained some notice by those who think about the responsibilities of professional education. Recently, the Carnegie

21. *Id.* at 241.

22. I expressed this same point in essentially the same terms in a prior essay. Thomas M. Mengler, *What’s Faith Got to Do With It? (With Apologies to Tina Turner)*, 35 U. TOL. L. REV. 145, 147 (2003).

23. See SULLIVAN ET AL., *supra* note 11, at 133–35 (discussing empirical studies and concluding that moral identity and ethical commitment can change dramatically well into adulthood); Muriel J. Bebeau, *Promoting Ethical Development and Professionalism: Insights from Educational Research in the Professions*, 5 U. ST. THOMAS L.J. 366, 367 (2008); Neil Hamilton & Lisa Montpetit Brabbit, *Fostering Professionalism Through Mentoring*, 57 J. LEGAL EDUC. 102, 115–19 (2007) (citing and discussing some of the empirical research in the field of moral psychology).

Foundation for the Advancement of Teaching has also criticized the conventional wisdom about moral development and professional education, specifically questioning it in the context of legal education. In 2007, the Carnegie Foundation published a study on legal education, *Educating Lawyers: Preparation for the Profession of Law*.²⁴ The study's purpose was to assess how legal education is conducted in the United States and to recommend needed changes.²⁵

In a largely neglected section, the Carnegie study sharply criticizes American law schools for failing to address the formative side of education—the development among law students of a refined moral compass and of the highest ideals of professionalism, including the ideals of servant leadership.²⁶ The Carnegie study bemoans, “Much of law school’s pedagogical activity presumes that issues of professionalism are somehow, somewhere, being handled.”²⁷ Yet, the study notes, “law schools shape the minds and hearts of their graduates in enduring ways.”²⁸

The question Carnegie asks is whether most law schools help shape students’ “hearts and minds” in an intentional, positive way. Unfortunately, the Carnegie study found—as Professor Glendon asserted in 1994—that the answer is generally “No—not our job.”²⁹ In interviewing law faculty at several schools, the Carnegie study found a “surprisingly prevalent” perspective among law school deans and faculty that “it is indoctrination even to ask students to articulate their own normative positions.”³⁰ One faculty member commented, “I bristle when people from the profession tell us we have to teach [law students] to be ethical.”³¹

If the Carnegie study’s conclusion is correct that American law schools are largely ignoring their students’ formation, that places the University of St. Thomas in a wonderful minority. I am proud to say that here at St. Thomas our faculty, staff, and students have embraced the idea that legal education must involve the whole person and that our duties as law professors are to assist our students along their journeys of becoming strong moral actors in their professional, as well as personal, lives. How professional schools, professors, and professional staff can profitably facilitate student formation is a more difficult and still unanswered question. At St. Thomas, we do not profess to have all of the answers about how to facilitate professional formation. We believe, however—and the empirical evidence supports—that there are four fundamental elements to professional forma-

24. SULLIVAN ET AL., *supra* note 11.

25. *Id.* at 1–20.

26. *Id.* at 128–44.

27. *Id.* at 14.

28. *Id.* at 129.

29. *Id.* at 133–34.

30. SULLIVAN ET AL., *supra* note 11, at 136.

31. *Id.* at 135.

tion: role modeling, experience, group discussion (particularly among members of the cohort), and self-reflection.³²

Through faculty exploration in the classroom, the work of our Holloran Center for Ethical Leadership in the Professions, and the success and national recognition of programs like our Mentor Externship, we are learning how a law school community can assist our students in this critical part of their professional education. I am hopeful that other law schools in the coming years will accept their responsibilities to focus on the human dimension of our students' lives and look to St. Thomas and the Holloran Center for leadership and guidance.

IV. THE THIRD TRAIN WRECK: ONE SIZE FITS ALL

Law students in America are well-advised to attend law schools that are accredited by the American Bar Association's Council of the Section of Legal Education and Admissions to the Bar, which has been the recognized national accrediting agency for the accreditation of programs leading to the JD degree since 1952.³³ The majority of the highest courts of the states rely upon ABA approval of a law school to determine whether the state's legal education requirement for admission to the bar has been satisfied.³⁴ Now almost two hundred law schools have received ABA accreditation.³⁵

Although ABA-approved schools differ in a variety of ways—including their size, curricular focus, and mission—they are stunningly alike too. Many of these similarities are driven, indeed required, by ABA Standards, and compliance with some of these standards is quite expensive.

The most costly of the Standards require, or strongly encourage, the creation of a research-intensive law school, complete with a predominantly tenure-track or tenured faculty of scholar-teachers and a research library. Standard 401, for instance, requires that faculty “possess a high degree of competence, as demonstrated by its education, experience in teaching or practice, teaching effectiveness, and scholarly research and writing.”³⁶ Standard 402 necessitates that a law school have “a sufficient number of full-time faculty,”³⁷ and Standard 403 further requires that the full-time

32. See Neil Hamilton, *Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity*, 5 U. ST. THOMAS L.J. 470, 478 (2008); Hamilton & Brabbit, *supra* note 23, at 115–19.

33. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS iv (2008) [hereinafter ABA STANDARDS], available at <http://www.abanet.org/legaled/standards/ABA%20Standards%20and%20Rules%20of%20Procedure%20Final.pdf>.

34. *Id.*

35. As of January 2008, a total of 199 institutions have been approved by the American Bar Association to confer the JD degree. ABA-Approved Law Schools, Number of Law Schools, <http://www.abanet.org/legaled/approvedlawschools/approved.html> (last visited Mar. 1, 2009).

36. ABA STANDARDS, *supra* note 33, at 32.

37. *Id.* at 32.

faculty “teach the major portion of the law school’s curriculum.”³⁸ Standard 405 essentially requires either that full-time faculty be eligible for tenure;³⁹ or, in the case of clinical faculty, have “a form of security of position reasonably similar to tenure;”⁴⁰ or, in the case of legal writing faculty, have “such security of position . . . as may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction . . . and (2) safeguard academic freedom.”⁴¹ Additionally, because ABA interpretations allow no more than 20% of adjunct or part-time faculty to count toward calculating a law school’s student-faculty ratio,⁴² I would estimate that full-time faculties of scholar-teachers undertake roughly 70 to 80% of the instruction in a law school.

With respect to the law school library, Standard 601 requires every law school to maintain a law library that has “sufficient financial resources to support the law school’s teaching, scholarship, research, and service programs. These resources shall be supplied on a consistent basis.”⁴³ One needs only to do a quick walk-through of any law school’s library to see the investment of enormous resources.

One effect of these and other ABA Standards is the establishment of one model of American legal education—the law school and law school faculty that fits comfortably on the campus of any research intensive university. Full-time faculty members usually teach three or four (and sometimes fewer) courses per year, roughly the teaching load of faculty at Research I universities. This teaching load contrasts with the very different expectations at “teaching” universities or liberal arts colleges, where the typical full-time professor’s teaching load is usually six to eight courses per year. Another consequence is that attending any ABA-accredited law school costs a great deal of money. Maintaining a research-intensive faculty with resources and facilities to support this type of faculty is very expensive, with tuition being more than \$40,000 per year at elite private law schools.⁴⁴

Now, I am not arguing for the abolishment of the research-intensive law school. I have spent my entire career at two such law schools; they are both great law schools, and the faculty members there are, on the whole, outstanding teachers and scholars.

38. *Id.* at 34.

39. *Id.* at 35–36.

40. *Id.* at 35.

41. *Id.* at 36.

42. ABA STANDARDS, *supra* note 33, at 32–34. A hopeful sign is that the ABA is currently considering a proposal to delete these two interpretations. Memorandum from ABA Standards Review Committee on Proposed Deletion of Interpretations 402-1 and 402-2 (Aug. 2008), *available at* <http://www.abanet.org/legaled/committees/comstandards.html> (follow “Notice Regarding Proposed Deletion of Interpretations 402-1 and 402-2” hyperlink).

43. ABA STANDARDS, *supra* note 33, at 44.

44. For example, tuition at Harvard Law School for the 2008–09 academic year was \$41,500. Harvard Law School JD Admissions FAQ, <http://www.law.harvard.edu/prospective/jd/apply/jdfaq.html> (last visited Mar. 1, 2009).

I am arguing, however, against the requirement that every law school must be a research law school. Why do we impose this incredible cost on every individual who chooses to attend an ABA-approved law school? Is it because we honestly believe that only a research-intensive law school can meet the minimum standards the legal profession has a right to expect from its law schools and law graduates? As tuition at ABA-approved law schools continues to rise, I fear a train wreck ahead in which many law schools—not just a few—may price themselves out of the market. Additionally, I fear that we will continue to impose an increasingly huge debt burden on the backs of law students and graduates.

The answer to my concerns would be greater flexibility in ABA Standards, enough flexibility to encourage the development of different models of legal education than the research-intensive model. These other models might include the teaching-intensive law school, in which all or most full-time faculty teach six to eight courses per year. Another model might envision a greater percentage of courses taught by adjunct professors, with a smaller full-time faculty than one finds presently at ABA-approved law schools. Law students, of course, may nevertheless continue to attend the research law schools in significant numbers—either because of their prestige and higher rankings or perhaps because of their more academic, scholarly approach to the law. Nevertheless, the development of alternative law schools requiring lower tuition and, perhaps, less time to graduate are steps that we should consider in order to avoid this third train wreck of legal education.

V. CONCLUSION

In this brief essay, I have tried to honor my friend and former colleague Tom Ulen by extending a measure of praise for his insightful contribution to this *Law Journal* concerning one train wreck in legal education—and for Professor Ulen's career of sustained excellence. I have also outlined a few of my own most significant worries about the future of legal education. First, the disjunction between legal scholarship and practice of law will grow wider if law schools continue to hire JD/PhD faculty with little or no legal experience. Second, contrary to usual thought in the legal academy, law school education can and should help students discern their own moral compasses and professional ideals. Role modeling, experience, group discussion, and self-reflection are four essential elements to such professional formation. Finally, more flexible ABA standards for law schools can encourage the development of just as effective but less costly models of legal education than the current research-intensive model.

As Professor Ulen and I agree, there is more right than wrong about American legal education. I—like Professor Ulen—am enormously proud of my twenty-four-year career in legal education. There are some distres-

sing signs ahead, however, that we need to recognize and to which we should attend.