Nebraska Law Review

Volume 77 | Issue 4 Article 6

1998

Teaching Law: An Essay

Barbara Taylor Mattis
Southern Illinois University School of Law

Barbara Taylor Mattis*

Teaching Law: An Essay

TABLE OF CONTENTS

I. INTRODUCTION

> [Myres McDougal] was a great teacher because he was passionately engaged in a life-long process of learning and creating. So his teaching was not simply a matter of imparting knowledge to his students. That was, he felt, beneath them. He taught by incorporating his students in his projects, by assigning them parts, working with them, teaching them as he learned from them. . . . For all of his students, it was a thrill to be part of this large enterprise.[1]

Law professors' duties comprise teaching, research and writing, public and community service, and law school committee work. The greatest of these is teaching. Not all academes agree with this assertion. Some regard the weekly six or so hours spent in the classroom as an interruption of their life of the mind—a life that all too often seeks expression in work in progress for publications to be read only by other academes within the specific interest of the writer.[2] Other law

* Professor of Law Emeritus, Southern Illinois University at Carbondale; Visiting Professor of Law, University of Miami, 1991-93, 1994-96; B.A., University of Alabama; J.D., University of Miami; LL.M., Yale University; Member of the Florida Bar.

1. W. Michael Reisman, *Myres Smith McDougal Remembered,* 45 YALE L. REP. 15, 15 (1998).

2. *Cf.* Harry T. Edwards, Opening Remarks at the Annual Meeting of The American Law Institute (May 19, 1997), *in* THE AMERICAN LAW INSTITUTE, REMARKS AND ADDRESSES AT THE 74TH ANNUAL MEETING, May 19, 1997, at 5; *see also* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession,* 91 MICH. L. REV. 34, 41 (1992)(a thesis of which was that many law schools have abandoned their proper place by emphasizing abstract theory at the expense of practical scholarship and pedagogy); Charles Alan Wright, Introduc-

professors want and need to devote most of their energies to teaching, especially during the early years of their careers. For them, publication is more of a necessity for tenure than a pleasure, but the research and writing does fuel their classroom expertise. Of course, there are a few superstars, who from the outset are inspired writers and inspiring teachers.

Law teaching and learning occur in various arenas: in the classroom during the class hour; at the podium as students gather for a quick question or remark after class; in the hallways after leaving the classroom; in professors' offices; and often where no law professor is present—where students gather to study, where students study alone, or where students study with their computers.

II. CLASSROOM

The classroom is the most efficient arena in terms of exposure of the largest number of students to a single professor's leadership. However, the classroom arena should be limited in terms of time and size. The class hour should be just that: the fifty-minute hour to which most law professors and students are accustomed. The three-hour class, even if it lasts only two and one-half clock hours, is too compressed to allow for mental ventilation. Thoughtful absorption of the amount of ideas and concepts that can be dealt with in three intense hours requires reflection time not possible in the class session. Students need smaller bites with digestion time between classes. However, some professors have found that hour and one-half (seventy-five minute) or two-hour (one hundred minute) class sessions work well. John Hart Ely points out that fewer but extended sessions accomplish a reduction in start-up time (putting the subject matter of the day into context) over the semester. The attention span of most students is adequate for a two-hour class. Students should not be required to go from one extra-long class to another, although part time or night students often are. The decision for one-hour or two-hour sessions might be influenced by the number of credit-hours assigned to the course. In any case, the decision should be made in light of factors other than a professor's desire to dispose of the class in one dose a week.

Limitations on classroom size, in terms of numbers of students, is tremendously important. It is not just a matter of overcrowding; some

---

tion of Harry T. Edwards at Opening Meeting of The Annual Meeting of the American Law Institute (May 19, 1997), *in* THE AMERICAN LAW INSTITUTE, REMARKS AND ADDRESSES AT THE 74TH ANNUAL MEETING, May 19, 1997, at 4 ("[I]n the academy we [are] tending too much to pretend that we [are] a think tank and a graduate school and forgetting that the high percentage of our graduates are going to go into the practice of law and ought know at least a little about what lawyers do and how they ought to do it.").

classrooms, unfortunately, were built to accommodate three hundred students comfortably. If the law school classroom is viewed as a lecture hall, the three hundred or even one thousand student audience might be appropriate. However, the learning most law professors seek for their students does not happen through passive listening to lectures. The goal is preparation for professional, ethical competence. Thinking like a lawyer begins with the power of consecutive thought. Insofar as that power is developed in the classroom, it results from interchange, discussion, and pushing the limits of responsive and creative thinking. We have long thought that the Socratic method is best suited to these ends. The only law professor I have ever known to master the Socratic method (although I am sure there are others, myself not included) is Richard A. Hausler of the University of Miami Law School. Even he summarizes at the end of each class. For most of us, the methodology varies, suited to the subject matter at hand and to our individual styles and strengths. Whatever the professor's classroom techniques are, they should foster active student participation, built on thorough preparation for each class.

All students in the classroom need to feel involved, not just the student who is the immediate focus of the professor's attention. This involvement is lost when the number of students is too large. Opinions of experienced professors differ as to where the size limitation should be drawn. My smallest class was four, not because of any limitation I set, but probably because I was teaching future interests. I taught it in my office, where reference books were readily available and total participation was achieved. Nonetheless, a class of four students is too small and usually unjustifiable in terms of resource utilization. In my opinion, somewhere between forty and sixty students is the ideal class size.

We do not live in an ideal world. My largest classes exceeded one hundred and fifty students, which does not astound my colleagues to whom much larger classes are assigned. However, I found that the classroom intimacy and intensity necessary to my style of teaching were at risk. Given that one must play the hand she is dealt, I tried an experiment that worked relatively well with the too-large class. The device became labeled the "law firm."

All students selected seats on the first day of class. However, four spaces were marked reserved. These were in the middle of the next-to-the-last row, far enough away from me that the students who would occupy them must speak up for me, and consequently for the rest of the class, to hear them. Hearing other students and considering their responses is almost as important as hearing the professor. I had a small index card for each student and selected four at random during the minute before class began. I wrote these names on the blackboard, and these students constituted the law firm for the day. Ques-

tions were directed to these students. The rules allowed the firm members to consult with and to assist each other. The rest of the class was not off the hook, for occasionally I directed a question to a student not on the firm. Volunteers were sometimes permitted to interject responses. The system allowed for the class participation that is essential for mental stimulation and exercise. It furthered a major purpose of class attendance, which is forcing preparation.[3] Students did not know in advance who would be placed on the firm on any given day. Membership on the firm one day did not preclude being called on again because the cards were reshuffled every day. I did, however, keep records of how many times each student had been on the firm, to assure that I made the rounds. On average, students would be on the firm two or three times during the semester.[4]

Closely connected with achieving preparation and participation is a requirement for class attendance. This is a sticking point with adult students, but it comes from a conviction that law school is not a correspondence school. American Bar Association standards require "regular" class attendance.[5] I defined regular as approximately eighty-five percent. In a four-credit property law class, this meant that a student was allowed eight absences. All eight were "excused," that is, no reason need be given for the absence. Whether the student was attending a funeral or playing pool was no concern of mine, so long as no more than eight classes were missed. The ninth absence was of concern, regardless of the reason; it resulted in withdrawal from the class, with no grade penalty. If the course were a required one, the student must take it the next semester. Requiring class attendance in this fashion seems draconian only because so often attendance is optional. To me, the requirement is part of my responsibility to the institution and to the public, in that I certify that the student has completed the course.[6]

Class attendance may be recorded by each student's signing an attendance sheet during class, attesting that the student is physically

3. The faculty of a certain law school was meeting to discuss the school's low pass rate for the state bar. A student representative, the SBA president, asked: "Are you [the faculty] challenging students as much as you used to, and if not, why not?" He told the faculty that he only briefed cases for one class because only that professor required it.

4. Students in one of my courses could say I lacked candor if I did not disclose that some of them beat the system for a while. They would stand at the back entranceway, partially obscured by a walled stairway, until names were written on the blackboard. If a student's name was among them, he or she would flee, taking an absence. I soon caught on and came in myself through the back door, herding the reluctant scholars ahead and closing the door behind me.

5. *See* AMERICAN BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS Standard 304(c) (1997).

6. Successful completion of a course means that tuition has been paid (the registrar handles that detail), the student has attended classes regularly, and the student has passed the examination.

present and prepared for class. Being prepared for class does not mean that a student believes she could respond well to any question posed. It means that two to three hours have been devoted to reading, briefing, and the other mental tasks that go into getting ready for discussion. Sometimes a student has responsibilities that make preparation impossible, or nearly so. For example, a student's child gets sick during the night. If a student is not prepared, he or she need not miss the class, but may attend and not sign the attendance sheet. If that is the intent, to be present but not participate (at the price of using one of the allotted "absences"), the student leaves a note on the lectern, assuring that he or she should not be placed on the law firm that day.

Classroom teaching requires preparation by professors as well as by students. Little can be done to force preparation by professors. The process of achieving tenure usually doffs its hat at the quality of teaching. Unfortunately, in the last analysis research production rules the day. Pride motivates good teachers to prepare thoroughly. Great teachers, for example Dean Wesley Sturges, never stop. After his retirement from Yale, he came to the University of Miami, became Dean, and taught arbitration from his own excellent coursebook. The two hours before class were sacred. No one was allowed to interrupt Dean Sturges' class preparation. The professor who leaves a committee meeting or faculty lunch five minutes before class time hardly measures up to this standard, at least not unless he or she was totally prepared for class before the meeting started. If class is at eight in the morning, the good professor may be at his or her desk at six, even after preparing the night before class. I have noticed that there are three classes for each hour of class—the one for which I prepare, the one I actually conducted, and the best one of all is the one I redo in my mind the following evening. Nevertheless, the class actually conducted will be markedly improved by thorough, repeated preparation.

When the mental rehash of the day's class reveals deficiencies, one can always begin the next class by focusing on them, attempting to clarify that which was left murky. I often began a class by saying, sometimes with humility: "Last time we were discussing . . . . Mr. Jones made a point to which no adequate response was offered, namely . . . . Has that bothered anyone else? . . . Might we ask whether . . . ?" This opportunity for repair and advancement is one of the unique experiences of teaching. If Mr. Jones has caught the professor amiss, so much the better. Neither he nor the rest of the class will ever forget the point under consideration.

III. CURRICULUM

Content counts. That is, the content of a Civil Procedure course should be civil procedure, not just topics that are the intellectual or research interests of the professor at the time. Since academic free-

dom is a valued reality, no one may dictate content in detail. Consultation among professors of related courses can do much to further the students' exposure to various topics that might logically be covered in one course or another, but need not be covered in all. For example, tort liability of landlords or nuisance law might be covered in first-year courses of Property or Torts. Alternatively, many aspects of leases could be covered in Property or in Contract courses. Upper-class courses benefit when their professors have confidence that foundational topics were covered in first-year courses. Students in real estate finance, studying the liability to mortgagees of remote grantees of the mortgagor, need familiarity with contract principles of assumption of prior obligations, subrogation, and third-party beneficiaries. Trusts and Estates professors need to know how much exposure their students have had to donative and testamentary transactions in their first-year Property course. Communication and cooperation among professors of related courses help assure efficient planning for coverage of the essential topics.

Larger than topic content within courses is the issue of the overall curriculum available to students. Faculties tend to pay copious attention to the first-year curriculum. How many credit hours should be devoted to property, torts, and contracts?[7] Should the Ethics or Professional Responsibility course be taught in the first or sixth semester, or in between?[8] Should a statutory course be presented in the first year? What are we going to name the introductory course this time around—Legal Method, Elements, Introduction to Law—and what is its purpose?[9]

Second-year and third-year curricula may get less attention from faculties. This dog is often wagged by the current interests (sometimes esoteric) of faculty members, rather than being determined by the legitimate needs of students to acquire competence to practice law.

---

7. In my opinion, more, rather than fewer, credit hours should be devoted to property, torts, and contracts.

8. Of course, professional responsibility should be taught within all courses. In Geoffrey Hazard's opinion, the best time for the formal course is in the sixth, or perhaps fifth semester. By then, students typically have spent a summer or two working in law practice. They have the basic substantive and procedural law so that they can better understand the context of ethical problems. They are making the transition from law school into a career in law. One of the last impressions we can hope to make should be one of the most enduring, their ethical and professional responsibilities.

9. History of Procedure works well for the introductory course in the first semester. It would include the forms of action, which, although dead, rule us from the grave. And surely the rise of equity and the notion of "legal" as contrasted to "equitable" need to be taught in a fairly comprehensive way. Too many times, in courses from Remedies to Real Estate Transactions, third-year students have pleaded with me for a short answer to: "What *is* the difference between law and equity?"

Moreover, faculties disagree heartily about upper-class curricula. What, if any, courses should be required? What courses should be always available, or at least available once during each student's time in law school (core curriculum)? What courses should be approved only as faculty resources allow and faculty and student interests impel? True enough, the aim of legal education is that students learn a method of thinking about and practicing law. With that method and solid legal research[10] skills, lawyers can master legal specialties of their choice, regardless of whether they "took a course." Nevertheless, taking a course with a beginning, a middle, and an end allows for considering the scope and depth of a subject matter in a way that problem-by-problem individual study in law practice rarely accomplishes.

Formulating an institutional philosophy about curriculum may create controversy, but it should not be left to fester. Every law school faculty should grapple with and resolve (but never, of course, once and for all) the difficult issues of what, if any, courses should be required for a law degree. Every law school faculty should decide whether there are certain non-required but core courses about which it would be embarrassed for a graduate to say: "That course was never offered while I was in law school." Those courses so identified should be covered by competent professors, even if scheduling them requires decanal assignment. This means, for example, that a professor whose latest enthusiasm is for a course in "law in the movies" (worthwhile though such a course might be if faculty resources allow) might be assigned instead to teach the Corporations course. Focused recruiting by the appointments committee might be necessary where no existing faculty member has or is able to acquire expertise in an essential course. Course content and curriculum matter.

IV. INFORMAL ARENAS

The phenomena of students' interacting with a professor at the podium after class, or in the hallways, or in the professor's office deserve a few comments. At the end of the hour when the professor is gathering her materials as if for departure to attend to urgent matters (sometimes not feigned), students will approach the podium with questions or comments. Some students, because of shyness or other reasons, will not voluntarily talk person-to-person to a professor in any other arena. Some students, not pressed by other urgent matters but having no particular question or comment, will come just to hang out and listen. Occasionally, these podium discussions shed light onto the students' comprehension of the subject matter or the professor's comprehension of the students' receptiveness. These interchanges are

10. A good case can be made for the proposition that the course in Legal Research is the most important course in law school.

important enough that sufficient time (more than ten minutes) should be scheduled between classes to accommodate them when possible.

More rare than the podium gatherings are the hallway clusterings of students walking with the professor from the classroom. When they happen, it is a sure sign that the class has stimulated thought. Most gratifying is the interchange among students which the professor merely referees. Fortunately, some law schools are architecturally invitational to this sort of activity. When the impulsion is there, these gatherings will happen even if traffic is blocked. The students and the professor will be oblivious to everything outside the pursuit of the topic at hand.

Interaction with students occurs in a professor's office to a greater or lesser extent according to the approachability of the professor. In my experience, relatively little subject-matter teaching and learning occurs in this setting. The exception is when, close to examination time, study groups are invited to schedule an office session to clarify points they have not been able to work through for themselves. Most professors feel obligated to be available to students in the crucial weeks or days before the exam. Students' questions must be concisely formulated—not "Can you explain to me the rule against perpetuities?" Such a question calls for a reference to a hornbook or to a law review article that the student should have already read. In most cases, formulating a clear question leads the student to find the answer for himself. Beware of time wasters or boot polishers in the office. Experienced professors will have developed devices for dismissing their attempts without excessive ego bruising.

Office interaction is more valuable when a student seeks curricular or career planning counseling. Such counseling is indeed part of the law professor's job description. Students often enter the office with the apology, "I hate to disturb you, but . . . ." When the teacher identifies the need as genuine, the response might be something like: "You are not disturbing my work; you are my work."

Then, there are office sessions when a student comes with a personal or emotional problem. A box of tissues is a standard supply in a law professor's desk drawer. Often the professor's willingness to listen to the problem gives the student some relief. One recurring issue is presented by the student contemplating dropping out of law school. The search for a professor's advice indicates two things. First, he or she is probably serious about wanting to continue with school (otherwise, he or she would be in the registrar's office inquiring about the possibility of a tuition refund) but is feeling unable to continue. Second, he or she trusts the professor whose advice is sought. The thoughtful teacher's advice is not always to "stick it out." There comes a time when a student should be made to realize that a career requiring a law degree is not the only calling. Some people dislike or are not

suited to a career in the legal profession. These people may lead more productive, satisfying lives outside it. A student who has completed the first year, or perhaps just one semester, and who either hates it or is on the verge of failure may need to consider a change in career plans. Advice to persevere in law school is typically right for the student who comes in about six weeks or so into the first semester frustrated and confused about his or her studies. I have found that for many students a "eureka" experience happens, often around Thanksgiving in the first semester, when the mysteries of our method begin to be understood. Not that the learning process will be easy from then on, but a can-do possibility may present itself before the first set of exams. If the emotional or psychological problem is more serious, we professors who are not equipped to deal with it must realize that and provide recommendations of sources where help is available.

V. LEARNING WITHOUT A TEACHER'S PHYSICAL PRESENCE

A. Study Groups

Remember the movie "Paper Chase?" It portrayed, among other things, the impact that a study group can have on the development of a law student. The individuals in a small peer group can teach and learn from each other in a unique way. The grasp of a concept can strengthen in the attempt to explain it to another, especially when the other challenges the explanation. Professors who believe in the value of study groups will support them in reasonable ways, but will emphasize that primarily they are initiated and operated by students. Study group sessions may be most helpful in preparation for the final examination. Essential to this process is the student's *preparation* of his or her own outline for each course. Reading commercial outlines, even with several colored highlighters in hand, will not accomplish the task. Law professors rarely read commercial outlines.[11] The exam taker is fishing for the professor's interests; those interests should be used as bait. Topics of interest to the professor are revealed in the coursebook chosen, in the outside reading assigned, and most importantly, in the students' class notes. These are the materials from which students make their course outlines. Knowing this, professors should conduct class in a manner which makes note-taking possible, especially of the questions and hypotheticals that may well re-appear in some form on the exam. Students need to be told that commercial

11. They often cover topics not assigned or covered in class. If lateral and subjacent support, for example, were not so covered, it would be inappropriate for the teacher to raise the issue on the exam. A student digressing on lateral and subjacent support on an exam answer clearly demonstrates that the student did not create his or her own outline and was not prepared for the legitimate issues.

outlines fail as exam preparation tools because students using them miss the *process* of creating the outline. The process is to force the materials covered into brief, organized, cohesive form. In doing so, whether within a study group or alone, a student begins to realize that he or she is ready for the exam.

B. Students Alone

Real, lasting growth of students' minds happens when students think quietly alone. In former times, the image was of students briefing cases at long tables in the law library[12] or at home late at night, Abraham Lincoln style (albeit now with adequate lighting). "Eureka" experiences are perhaps most likely to occur when one is studying alone.

More and more technical aids are enhancing students' preparation for class, in particular, and the learning process, in general. One computer-assisted teaching device, the use of which professors initiate and monitor, is TWEN, provided by Westlaw. It can serve to extend classroom teaching when the professor is there acting as a guide.[13]

TWEN provides a uniform method for the professor to communicate with everyone in the class. This uniformity, of course, presupposes that all students have a computer or the opportunity to use one provided by the law school. Those suffering computer phobia must overcome that sooner or later, and the sooner the better. TWEN postings and linking can be used in the following ways:

* To provide course supplements. An old case may be available only on microfiche in the law library, but is cited in the coursebook problem or note. It can be downloaded to TWEN. Relevant state statutes can be cited and made readily available, whether or not they will be discussed in class.
* To revise the course syllabus. The one that the professor prepared before the semester began must often be altered as real class time fails to match projected topic coverage and as recent materials are found.
* To alert students to recent pertinent cases, law reviews, or newspaper articles and make those publications available on the students' screens. A note in a Property coursebook referred, for some reason, to Joe Piscapo. The professor posted a "Saturday Night Live" WEB page, circa 1982, to explain who he is. Interesting and fun, albeit not for class discussion.
* To provide fact sheets, instructions, and feedback for class projects, writing, or drafting assignments. One professor posted pending legislation on his

12. It would be optimal if the law library could be open all the time. Southern Illinois University School of Law is small and is located in a rural area. Each student is issued a key to the building, which he or she keeps from orientation until graduation. Rare is the time, even during nights or holidays, when students are not in the law library. Larger, urban law schools, of course, are unlikely to extend such a privilege.

13. Many thanks to Professors Wenona Y. Whitfield and Alice Noble-Allgire, Southern Illinois University School of Law, for ideas and information about using TWEN.

> TWEN page and asked students to critique the proposals on TWEN, with other students criticizing the critiques. Another professor has senior writing seminar students post their papers on TWEN and asks other students to post critiques of their colleagues' work. Collaboration and cooperation are skills that should be fostered, but these are difficult to teach in law school where competition generally rules. Posting the best student works allows the rest of the students to see what they can do to improve their own work.

In addition, TWEN offers exciting potential for enriching the sacred class hour. Before each class students check for postings of hypotheticals the professor came up with during her class preparation time. Advance notice gives students think-time before being called upon to respond in class. Students can engage in discussion with each other by posting their comments on the hypotheticals or main cases assigned for the next class. Conversation among students helps them prepare for class and can raise the level of class discussion substantially.

During the class hour, professors may outline or diagram points on the chalkboard or use an overhead projector. Students feel the need to reproduce these images in their class notes. Now, professors can use PowerPoint slideshows, then post them to TWEN, so that students' note-taking tasks are reduced. More intense attention to the discussion during class results.

After class, TWEN works further to enrich the class hour. Students can post and discuss their own hypotheticals and comments. The professor monitors the discussions and when analysis goes astray gets it back on track with a well-framed question or comment. When the after-class podium or hallway sessions unearth worthwhile ideas, the professor can share them with all students via a TWEN posting. The uniform method of communication through TWEN has a big payoff in fairness and in enriching and extending classroom teaching and learning in general.

VI. CONCLUSION

Mentoring professors in their early years in legal academe is as challenging and important as teaching students. This Essay is my small attempt to share ideas formulated over twenty-five years of teaching law. I wish I could advise beginning professors to focus exclusively for the first few years on the demanding task of teaching students, then to write extensively later on when they have more to say. Realistically that would be bad advice, for the tenure process would result in their having no mature years in the academe. Publish or perish is a rule too entrenched to defy. Nevertheless, those in love with the law and the teaching of it will keep teaching in primary focus throughout their careers.[14] To them I say, "Enjoy."

14. *See* JOHN HART ELY, ON CONSTITUTIONAL GROUND 472-73 n.1 (1996)("[S]omehow I just can't stop teaching.").