Taking Teaching and Learning Seriously: A Tribute to Professor Susan Martyn

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Professor Susan Martyn is an inspiring and dedicated teacher. She inspires me by her teaching, her work with students in the classroom, as well as with lawyers in continuing legal education programs, and her writing for scholars and the public. The invitation to write in a law review edition honoring this amazing professor and scholar provided the opportunity to contemplate a topic that is central to my life and the lives of most who teach: What is good teaching, and how do we increase good teaching and good learning in legal education today?

We are in a time of stunning change, and there is no question that the problems facing legal education today are significant. According to Thomas W. Lyons III, a Rhode Island lawyer who is a member of the American Bar Association’s Task Force on the Future of Legal Education, “There is almost universal agreement that the current system is broken.”1 Numerous commentators and legal scholars have documented the rapid change in today’s legal world2 and articulated problems in legal education.3

Despite the fact that the last 30 years have been lean ones for the majority of American lawyers, more law schools opened, and existing schools relentlessly raised tuition and accepted more students. Between 1987 and 2010, the number of ABA-accredited law schools increased from 175 to 200, and total JD enrollment rose from 117,997 to 147,525. Over the same period law school tuition rose over 440 percent for in-state residents at public institutions and 220 percent at private institutions. Student debt loads have increased substantially as well.4

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3. See generally Brian Z. Tamanaha, Failing Law Schools (2012) (recommending that law schools focus on preparing students for real practice).

4. Benjamin H. Barton, Glass Half Full: The Decline and Rebirth of the Legal Profession 6 (2015) (noting the downward trend in law school applications since 2008). See also Natalie Kitroeff, Law School Applications Set to Hit 15-Year Low, BLOOMBERG BUS. (Mar. 19,
Although the decline in law school applications appears to be leveling,\(^5\) sharp critiques of legal education in this country continue, and some voice longstanding concerns. In 1992, the American Bar Association’s Task Force on Law Schools and the Profession (called the “MacCrate Report” in honor of Robert MacCrate, the chair of the task force) concluded the dominant theory-oriented approach to legal education largely fails to instill the skills and values needed by future lawyers and society.\(^6\) The MacCrate Report encouraged schools to incorporate skills training with explicit emphasis on professional values into the law school curriculum and to provide students with externships with government agencies, judges, and pro bono legal assistance clinics.\(^7\) Similarly, around the same time as the MacCrate Report, *Best Practices for Legal Education*, by Professor Roy Stuckey and others, advocated the use of experiential learning in the law.\(^8\) Legal education should help students develop the skills and knowledge in “the basics” that are important both in law school and in practice.\(^9\)

Preparing students for the practice of law in a time of stunning change in the delivery of legal services to the public presents a related challenge for legal educators.\(^10\) The idea that legal education needs significant reform is not new. Perspectives on the issue range dramatically with regard to both the problems in legal education and remedies. Such debates about educating the next generation of lawyers are unlikely to have a clear winner or reach a durable resolution, particularly as changes in the delivery of legal services and legal education are unlikely to stop or slow down in the near term. One perspective is that law schools should provide the basics and allow the natural order of things to go forward.\(^11\) This perspective holds that highly motivated graduates will ultimately rise to the top.\(^12\) Another view is that law students today expect more guidance and hands-on teaching in law school than ever before, and, accordingly, law schools may flounder in the mission of covering the doctrine necessary for passing the bar and understanding principles of the law.\(^13\)

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7. *Id.*
9. *Id.* at 1.
12. *Id.*
Another dimension arguably overshadows the problems associated with law schools and lawyers: the dearth of lawyers to represent poor and middle-class clients. Many people are unable to afford legal services in either transactional matters or disputes. Incomes of ordinary middle-class citizens have stagnated while the relative price of legal services has risen. Unmet legal needs are on the rise, opening the door for inexpensive, Web-based legal services providers that essentially offer do-it-yourself kits for many personal or business legal needs.

Despite, or perhaps because of, the serious problems and challenges to our legal system, there seems to be a real possibility that legal education may be improved by the current crisis, ultimately benefitting society. The American Bar Association and various state bars are endorsing more practical skills training of the kind the MacCrate Report called for years ago. Numerous law school websites declare a renewed sense of service to clients and society and promise advances in collaborative learning, critical thinking, and professional skills through the law school experience. Law schools have increased course offerings that focus on opportunities for student learning in numerous ways, including simulated hearings and supervised representation of real clients, and most of these offerings seem genuinely committed to experiential learning. Many law schools have added practical experiences to their core curriculum, such as interviewing, counseling, negotiating, and drafting. All of the nation’s law schools provide some clinical training, though most do not guarantee the experience for all interested students. Law schools and law professors are scrutinizing the methods of teaching and considering changes in the way they

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14. See Alfred S. Konefsky & Barry Sullivan, In This, the Winter of Our Discontent: Legal Practice, Legal Education, and the Culture of Distrust, 62 BUFF. L. REV. 659, 728, 743 (2014) (warning of the high cost of legal education, the unmet legal needs of the poor and middle class, and the threat to democracy if legal education becomes “the preserve of only those who are very rich or otherwise advantaged”).


prepare students for the practice of law in order to supplement the traditional model of theory-based education. These innovations include an increased focus on professional responsibility and ethics. As a result, the hedge of, “We don’t teach people the law; we teach them to think like lawyers” may be in danger of replacement.

The verb “teach” is defined as:

1. “to show or help (a person) to learn (how) to do something: to teach a child (how) to swim
2. to give lessons to (a student, pupil, or class); guide the studies of; instruct
3. ...
4. a. to provide (a person) with knowledge, insight …
   b. to attempt to cause someone to understand or accept (a precept or philosophy) …”

We in the academy categorize our work by three different roles: teaching, scholarship, and service to the public. We use these categories for promotion, tenure, and evaluation of professors. These categories are useful for identifying the different audiences of law professors. The audience of each leg of the “three-legged stool” varies. The “teaching” leg focuses on the law professor’s responsibility to, and interaction with, students. The “scholarship” leg focuses on the law professor’s responsibility to advance the understanding of the law—with an audience of the legal academy, courts, students, and lawyers. Finally, the “service” leg of the law professor’s professional duty focuses specifically on interaction with members of the bar. Ultimately, all three legs involve teaching. Each seeks to explain, convince, or show something to the audience, which is the ultimate purpose of teaching, regardless of the venue.

Socrates reputedly believed that “there is no such thing as teaching.” With this idea, Socrates sought to emphasize that learning is a recollection of morality. This statement strikes me with force. Like a Zen koan, this assertion presents a puzzle and, additionally, insights into the possibility of changing the way we teach and the way students learn. It involves much more than the old saying about leading a horse to water or the modern admonition to attend to “outcomes” rather than “inputs.” This statement offers a changed focus, emphasizing that the goal of teaching is learning. Teaching can be good, bad, or in between, but it is instrumental to the goal of student learning. As such, the test
of good teaching is good learning; that is, the students successfully learn or, as we often say today, “master” the lessons. The Socratic message is not that there is no distinction between good or bad teaching, but rather that the measure of success is the learning. Certainly, the saying does not justify teachers relaxing or recasting the role of teacher as a passive “resource” or “facilitator” if that means doing less or failing to confront the work of engaging students. Like any endeavor, there is a range of success for a given teacher, and, as any teacher who reads his or her evaluations from students knows, the reception to a teacher can vary from class to class and even from student to student. (“Too theoretical.” “Not theoretical enough.”) Again, it is a mistake for teachers to allow this variety of responses to take them “off the hook” of fulfilling the responsibility of engaging students and providing an atmosphere that promotes learning. In large part, the lesson Socrates offers is a challenge to commit to learning.24

Accepting the general principle that teaching is instrumental does not mean, of course, that teaching is not significant: a real thing with challenges and triumphs. Teachers see the smile of reason as a student understands the rationale for a rule or masters the interaction of factors in a court’s analysis. They experience the electric moment when a student “gets” a concept, marking a connection. This connection bridges a space between the teacher and the student and between not knowing and knowing. That is some kind of something. It takes effort and planning. It can help students gain the knowledge, skills, and competence to solve legal problems and, additionally, to serve society in the role of problem solver.

Good teaching appears in a myriad of approaches, and teachers bring different views and even disagreement on everything from methods to legal doctrine to societal goals. However, the threads that make up the fabric and culture of society are stronger than such disagreement. The inclusion of “seriously” in the title of this essay includes seriousness of purpose. Most students drawn to law school are interested in ideas and ideals. They expect serious consideration of ideas and have high hopes to make a difference. Too often they find in law school that the impact of law on society appears to be less than they imagined, and they realize legal principles are often indeterminate, as well as unclear. For many law students, the classroom experience may seem like mental gymnastics or a desultory game of “hiding the ball” of analysis.

The primary takeaway from some law classes and continuing legal education presentations seems to be the law is merely a matter of opinion. Judges or disciplinary boards may find a violation in the case before them, while another judge or disciplinary board would conclude the opposite. It seems undeniable that there is indeterminacy in the law. Yet, while indeterminacy is real, we do a disservice to students if we leave the impression that the law is merely opinion. Concluding that a defendant in a tort action was negligent or was not negligent arguably should make actors more, rather than less, cautious. The common law is “not a compendium of mechanical rules written in fixed and

indelible characters." General concepts of rights and obligations found in the common law encourage reasonable conduct. The modern commentator might say it incentivizes care and disincentivizes negligence. Indeed, the indeterminacy of law can be seen as a way of incentivizing care. For example, tort law seeks to encourage non-negligent conduct. The risk that a court might find particular conduct negligent makes it less likely that actors in the real world will engage in that conduct. As such, an “unclear line” gives a wider margin of safety than a “bright line” and incentivizes greater care. Although clear rules have great appeal for actors, especially for regulated communities, the law often relies on flexible principles rather than hard-edged rules, opting for intentional ambiguity over clarity. In other words, the law embraces indeterminate standards to insure flexibility in future cases. General standards such as “reasonableness” and “negligence” benefit society because ambiguity increases the likelihood of reasonable and non-negligent conduct. The Supreme Court often uses ad hoc, factual inquiries instead of bright line rules and acknowledges the flexibility of the common law.

The reality of indeterminacy does not, however, mean the law is simply a matter of opinion or that all views are equal. It does not turn teachers into sophists, focusing on mere rhetoric. Reasonable minds can differ, and factual issues are subject to differing conclusions. This point should not, however, serve to reduce legal study to the impact of the law or liberate the lawyer from serious deliberation of the rules. Indeed, recognition that decisions of courts or other decision makers vary should heighten the caution lawyers bring to counseling clients and scrutinizing their own action. Knowing a legal judgment can turn on the opinion of the application of a rule to a factual setting does not, of course, mean the tribunal considering the action will adopt the lawyer’s view of the facts. The tribunal, in its calm contemplation, may have a different view. In fact, we refer to judicial decisions as “opinions” of the court. This does not mean the opinion of the individual whose conduct is at issue will ultimately be honored. This reality should make lawyers, as well as law professors, more cautious.

Lawyers are the glue that holds society together. They help solve problems of individual clients. Moreover, they serve society by settling disputes by peaceful means and by producing societal benefits in the form of economic transactions. The Preamble to the American Bar Association Model Rules of Professional Conduct states that lawyers, including legal educators, have a


special responsibility for improving the legal system and access to the legal system.28  “Lawyers are the mechanics of the legal system. They drive and help fine-tune the engine, knowing that if it is not in working condition, it will not reach its destination. Lawyers are specially trained in the legal system’s goals and have the greatest expertise about its operation.”29

The Association of American Law Schools (“AALS”) Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities (“AALS Statement of Good Practices”) presents the role of the professor as an aspirational endeavor. According to the AALS, “Law professors should aspire to excellence in teaching and to mastery of the doctrines and theories of their subjects. They should prepare conscientiously for class and employ teaching methods appropriate for the subject matters and objectives of their courses.”30 Additionally, the professor’s role requires more than transmitting knowledge to students or even the skills to use that transmitted knowledge. Professors should “assist students to recognize the responsibility of lawyers to advance individual and social justice.”31 The Preamble to the ABA Model Rules of Professional Conduct embodies a sense of the high calling lawyers and law professors should pursue.32 Likewise, the AALS Statement of Good Practices provides guidance and insight into the role of lawyers, who are also teachers, specifically noting, “Members of the law teaching profession should have a strong sense of the special obligations that attach to their calling. They should recognize their responsibility to serve others and not be limited to pursuit of self interest.”33

Professor Susan Martyn presents a model for law school professors and others in education. Her dedicated focus on the learner and the learning shows the importance of the law teacher to the development of law students and to our legal system. Taking both teaching and learning seriously, Professor Martyn helps students prepare to become reasonable advocates and to fulfill their important roles as public citizens in a complex and contentious world.