

TEACHING MORALITY

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Several years ago in Connecticut, during a criminal trial, the judge looked down from the bench and saw the defendant standing there alone. The judge asked, "Do you have counsel?" The defendant looked up at the judge and said, "Allah is my counsel," to which the judge responded, "I mean local counsel." Those of you who know me will say "he will do anything for a cheap joke," which is true. But this joke is a lot like legal education. In trying to teach law students, we law faculty are much like the defendant. We have our religion and our religion is the Rule of Law. Our religion has substantive rules and the ultimately mystical part of our religion we call "teaching people to think like a lawyer." As we and the students go through this process we lose much along the way as we try to disassociate law students from the real world.

One day last January, my six year old daughter came home and said to me, "Hey Dad, I learned a song today the teacher said you might know." I said, "Oh, that's great. What's the song?" She started singing "We Shall Overcome." This was on Martin Luther King Day. I said, "That is a great song. Let's sing it together." We sang it and she said, "Do you know about Mrs. Parks?" I said, "Yes, what did you learn about Mrs. Parks?" She told me the story in substantial detail. I felt like my heart was going to explode from emotion. What affected me the most was that in her telling of the story, Mrs. Parks was right, segregation was wrong, the bus driver was mean, it was wonderful that Dr. King came to help somebody who was right, and Dr. King and Mrs. Parks were very, very brave.

My first reaction after the emotion passed was to think "what a wonderful school you go to. There is no amount of money that can buy that kind of education." My next thought was, "I wonder when that education stops?" I was already convinced from my own experience that the kind of education my daughter was receiving stops, if it has not already stopped, on the day a first-year student walks into a law school in the United States.

I have one more story before developing my views on what students come to law school with. I sat down with a first year law student I did not know. We just happened to sit next to each other in the dining hall. We introduced ourselves and I said, "Hi, how do you like law school?" She said, "It is horrible. It is horrible because I came here with the understanding that Yale was a place where policy was important. I came from California and I spent the last year working in an AIDS clinic. I am very concerned with issues of gender and race and class and none of those are discussed here. In fact they are discouraged if we bring them up. So my only question is whether I should drop out of law school or whether there is another law school which might be better than this

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one." I was like, "Oh Gee. Lunch looks good." But we proceeded to talk about the clinic and what that meant and about different clinics she might be interested in. She did have an interest in AIDS and we were doing a fair amount of AIDS work in our prison clinic. We talked about her enjoying law school more in the prison clinic. Of course, when it became time for that to happen, given the lottery we have and the fact it is roughly a 2 to 1 resource allocation problem, she was not selected to be in that program and would have been in no clinic during her entire first year. She became a recipient of what became known as the "Trinity Rule" which I will get to in a minute. My point is that students do come to law school filled with passion, with morality, with a sense of justice, and *we* spend, the generic *we*, the law school itself, spends three years doing our best to crush them under the weight of the rule of law instead of helping them to integrate their ideas and values with the law. To the extent students are looking at clinics, they are not only looking at them as a means of touching reality. They are looking at clinics as a furlough from prison. For some students, a clinical program is like work release.

In this conference we are talking about our goal as being that of trying to teach justice. I would be ecstatic if law schools made the changes needed to stop impeding students in their own quest for justice, if we could only look at law school in terms of identifying the obstacles and removing them from the students' way. This would allow the students to proceed in their quest for justice and would allow us to direct them in the kind of cases and the kind of law they want to do. Part of this would be to help them integrate their natural feelings with the law and to stop telling them that morality is separate from rule of law. We should not tell our students that "this case does not involve justice." We should not tell our students that we are more concerned with rational thinking than with passion.

If we do this properly, students will be able to get a long way on their own. I have four very discrete suggestions or plans to try to help law schools move in that direction. The first point involves another story. In 1986 we started at Yale what we think was the first homelessness clinic to do outreach into the community. We were trying to keep it very narrow because it was an experiment. We did not know what to expect. None of us knew what we were doing, so we decided we would only take two experienced students and four inexperienced students and no one else. A fifth person came to us and this fifth person really wanted to take the clinic. He told us this is why he came to law school, you all know this plea because you have all heard something similar from students. We said no, no, no. Finally, I said to Steve Wizner "Someone with this much passion, let's take him." That became the Trinity Rule, named after the student, Frank Trinity.

Every year someone came to the clinic who seemed to fulfill the rule. We warned these people when we let them into the clinic under this rule that it had a specific history, that they had to perform to an exemplary level and that, if they did not measure up, the rule would never again be followed. The class that year, and I was a first year teacher, was supposed be 20 students. I ended up taking 36 students. I did not understand that we did not have the resources to allow everyone to do clinical work. The limit exists to allow us to supervise adequately. I understand after supervising 36 students in one semester. For

those of you old enough to remember the Legal Aid divorce caseload-approach of 250 per lawyer, of which 35 are going to trial "this morning," it was like that.

The following year the same student came and said, "Let's do outreach at welfare hotels." I said, "Why do you want to do that?" He had all kinds of reasons. I thought the idea was the craziest idea I had ever heard. There are fifty reasons why you cannot do outreach at welfare hotels. We did not know which people were renting rooms in welfare motels as opposed to non-paying clients. There were many questions: "How would we get in touch with them? How long would they stay? Where would they go? What kind of problems did they have?"

For every question I had and every point I raised against the proposal, Frank Trinity had an answer. Other students also wanted to do this and I thought, "he has thought this proposal through much better than me. The worst that could happen is it will not work. No great disaster, for even if it fails, we will all learn something and I will be able to say 'I was right.' Moreover, he will have gone into the community to try to look for a new way to provide services for a segment of the community that did not receive those services. What else was more important than that?"

To make it short, this was the most successful thing we have ever done. To this day it is still the most successful thing we have done. Our work helped close those welfare motels. My point is obvious. Students must be given the opportunity to help plan things, and not only innovative legal work. They need to help plan innovative service systems, innovative ways to get into the community. Students sometimes have seemingly crazy ideas that may be worth a try. At least in the homelessness clinic they usually get the opportunity to try.

So point number one is that clinics are a very scarce resource allocation that cannot be allowed to continue that way if justice is to become a realistic part of law school. We must expand clinics in two ways so that 1) we allow an open admission system to provide room for all law students, and 2) the content of the clinics must be student driven.

There has been some discussion here of transactional courses. We need to move in the direction where students with different interests are able to do public interest work and get into clinics. We had one example in our transactional clinic at Yale. A workshop was started under the sponsorship of Bob Cover and Michael Graetz, who were both tenured professors. After Bob Cover died, Michael went ahead with it. He and I co-taught the program. I do not think it would have happened if it were me alone. I do not think Yale would have backed it up the way it did. But fortunately at Yale, once you are tenured you have total anarchy to do whatever you want as to curriculum. That was a huge advantage. Those of you who are in equivalent positions and able to co-teach and have permission to experiment must do it. It is very important.

The story that I remember best was in the second or third year of the transactional clinic program, when a transfer student came to us. He had been at Harvard one year and at Yale a second year. He was a tax student and was very shy. He cared about poor people but he dreaded the thought of going out to a shelter or a prison. He came very meekly and said, "I am really very interested in tax. Someone told me that this is the kind of place I can use tax to help poor people." My reaction, frankly, was to try not to drool on him. I was so excited, "Wow, a tax student. You are going to learn more about the low

income housing tax credit than you ever wanted to know. This is great." Not only did he have a sense that he could do it, but that he was an important cog in what we were going to do. He had something to offer. He learned the low income housing tax credit, and the following year he drafted testimony to Congress on the technical amendments. As far as I could tell he effectively dropped out of law school that year to just do this kind of work and expanded into other activities. He became less shy along the way. At least it seemed to me within the class he did. But certainly he had a sense that he was doing valuable work. He had never had that sense before.

My third point is that, in 1974, when I was a new lawyer, I went to a Legal Services training conference and heard an hour and a half from people who had tried cases in the Supreme Court talk about federal causes of action. If anyone here remembers the old Legal Services training, that was it—federal causes of action. After an hour and a half of this, it was all done. Someone saw Florence Roisman from the National Housing Law Project sitting there. She had not said a word. People are nervous if Florence does not say anything. So they asked, "Florence, what do you think?" She answered, "Causes of action. If it offends your sense of justice there is a cause of action." That stayed with me for all these years as a pretty good precept, although it sometimes backfires. Last week, for example, I told a student there was no case. He says, "What do you mean? It offends my sense of justice. Of course there is a case."

We generally follow that idea and we follow it as a way of saying to students, "Do not look at law mechanistically. How do you move from A to Z to reach a solution? Let's see how to get there." That is what Roisman's phrase means to me. There is usually a way to get there. Students must be involved from day one in working toward solutions. One thing we tell students in both our transactional course and the homelessness course is, "if you are not willing to make these decisions, if you do not treat yourself as a valued member of this law firm, take another course, because we expect you to take responsibility."

I am an advocate of students doing social security cases, administrative cases, landlord-tenant cases. I also want every student to have the opportunity to look at a difficult and complex problem. We treat problem solving as the methodology of looking for innovative ways to get where you have decided you need to go in order to achieve a desired solution. In *Savage v. Aronson*,² a right to shelter case for AFDC families, our law students did all these things along the way, and continued to do so after we won at the trial level. I saw Barbara Sard at a conference and she said, "who is going to argue the case on appeal?" I told her a student who had done a great deal of work would argue. Barbara said, "You are not going to let a student argue this important case before a state Supreme Court?" I answered, "that's what we do." The student had, at his own request, eleven moots in preparation for the argument. This was not our recommendation. He kept scheduling them and ultimately gave what I think was a brilliant argument. We lost 6 to 1. But the loss certainly was not

²571 A.2d 696 (Conn. 1990).

because of the quality of his argument or the nature of the work involved. There was enormous pride felt by his classmates that he was standing up before the state Supreme Court representing all their work. Eighteen students worked either on the trial level or on the appeal of that case.

Finally, I want to talk briefly about morality. Students come to school with a sense of morality but are afraid to enforce or assert it because we keep throwing rules at them. We keep telling students that they represent a client and they have to do it zealously and their morality does not come into it at all. I know I used to be told things like that. But I am shocked in the last few years at how uncomfortable law students are at giving personal opinions to a client. We teach students what to tell clients. We teach students the law so that they can advise clients as best as possible. We fail to teach students that they are allowed to say to a client, "You should not do that. Although you are allowed legally to do that I think it is wrong!" We experienced this phenomenon this summer in two very dramatic ways. Normally, when a student became very upset over a conflict with one of our clients, I would have said, "Well, it is very hard. If it is repugnant to you, you are allowed to get out of the case. You have to make that decision based on whether you can provide zealous representation to the client." But on this particular occasion, I said something very different, something that I think I will continue to say. I told the student: "It is OK that you are upset. Everyone else in this place is trying to take away your humanity so you will not have to be upset and will not have to think about these things. What we have to do together, is find a way to take your being upset and turn it into a path that is part of your representation of the client."

We came to the resolution that she would talk to the client about why she thought the client was acting wrongly, albeit not illegally. She would provide the full legal remedy to the client but say why she thought it was bad practice and in the long term not good for the client. Experienced lawyers do this all the time. I used to complain as a Legal Services lawyer about government lawyers. They never seemed to tell their clients that what the client was doing was stupid. They only told them whether the judge would sustain it. It was insane. It cost the government millions of dollars. We would get what we wanted and we would say over and over again, "Do AGs have a brain? Do they ever talk to their clients?" Now I understand they do not and that we in law schools are training people to think the same way.

