MuSings

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Professor Robert Abrams is a serious and successful scholar. He is also an unusually nice and candid fellow, and he presents a workable, efficient, and carefully crafted plan for producing legal scholarship. If you follow his scheme, you will probably get tenure. This is the case even though it is now painfully obvious that the law school boom has gone bust. Nevertheless, I urge you to think about scholarship differently.

My reasons have to do with the connection between passion and production values. My concerns are admittedly somewhat unusual, if not eccentric, in the cool and rational world of legal academia. Moreover, the very notion of giving advice to new law teachers suggests an uncomfortable degree of egocentric holier-than-thouism. So I could easily trash myself and this assignment, but I think I can be somewhat more constructive than that. In fact, it is precisely the chilling effect of our overdeveloped critical faculties which constitutes the present, clear danger I want to address. Without passion, excessive production values may yield security—but in a job you do not want. Abrams's advice does not necessarily exclude passion, and his own scholarship demonstrates his passionate engagement. But Abrams's agenda fails to address what I think is necessary, and what perhaps has to be sufficient, if you are to make sense of your choice of legal scholarship over the lucre, laudatory feedback, and perquisites of law practice.

If you studiously follow Abrams's prescription and place his agenda at the core of your personal project—as today's cliche would have you refer to your work—you may get tenure, but you might also lose sight of why you wanted it in the first place. I do not doubt that getting tenure is preferable to the alternative, nor do I challenge the importance of writing. Moreover, tenure surely is tougher to get now than it was five years ago and it is getting tougher all the time. Certainly the crunch has come to legal academe. This may be because of demographics, a glut on the market for lawyerly labors, scarcer resources, tightening of the tap that since the 1960s provided a pool of previously excluded sources for more diverse student bodies, or possibly other "unknown and perhaps unknowable factors."[1] Still, the coin of the

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I would like to dedicate this essay to Professor Thomas I. Emerson. He has taught me and many others a great deal, not least through his example. He is a law teacher who is able to become passionately engaged without raising his voice; his engagement has in no way diminished his great scholarly achievement.

1. This phrase comes from Justice Stewart's decisive concurring opinion in Milliken v. Bradley, 418 U.S. 717, 756 n.2 (1974), which determined that a federal court could not

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realm remains the production of what we are pleased to call legal scholarship. Getting out scholarship continues to be the way to show the flag and to do what is worth doing.

So I want to discuss writing. First, I urge you to take a romantic leap of faith in yourself. Next, I describe why there may be no safety net as you perform the giddy trapeze act of actually trying to be a legal scholar. Finally, I will try to make a simple, perhaps even simple-minded, point about your chosen profession.

Passion and Production

When you think of a topic to write about, I urge you to choose something you care about deeply. Choose something about which you feel passionately. I am guessing that all new law teachers have passionate beliefs, though this may be despite rather than because of success in the training that helped us land teaching jobs. Even more emphatically, I am asserting that all who, by my lights, should be in teaching decide to teach not because it is a refuge and not because it is easy. Rather, we have sufficient hubris to think that our own thoughts are important enough to undertake the arduous task of trying to communicate them to others.

By urging you to be passionate in your choice of subjects, I do not mean to suggest for a moment that uncontrolled emoting will get you very far. Nor am I hinting that by going eyeball-to-eyeball with the cosmos you will have any more luck than the rest of us in convincing a muse to grace your typewriter or word processor. On the contrary, writing is very hard work. As Ibsen put it,

To live is to battle with trolls
in the vaults of the heart and the brain.
To write: that is to sit
in judgement over one's self.

It is precisely because writing is so gut-wrenchingly difficult that I believe it vital to choose to write about something you care about deeply. Then your commitment to your subject will help to sustain you through this struggle.

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impose interdistrict remedies for school segregation without proof of interdistrict constitutional violations. Despite the State of Michigan's ongoing participation in the schools in Detroit and surrounding towns, neither Chief Justice Burger's majority opinion nor Justice Stewart's concurrence could discern sufficient connections to merit upholding the interdistrict remedy that the district court and court of appeals found necessary to prevent Detroit's schools from becoming virtually all black.

It is not obvious, to put it mildly, why the presence of "unknown and perhaps unknowable factors" should militate against the constitutional claims of minority students rather than against the brokers of the powers that be. Perhaps law schools will not follow the Court in deciding that if there is a basic problem whose causes are not entirely clear, the response should be to do nothing. Cf. Milliken v. Bradley, 433 U.S. 267 (1977) (Milliken II) (upholding expenditure of state funds for remedial education to return victims of unconstitutional action to position they would have enjoyed but for the violation).

2. Henrik Ibsen is quoted in Robertson Davies, The Manticore 73 (New York, 1984).

Law professors may have an even tougher time than most actually getting words on paper because we are so keenly attuned to spotting errors and to countering arguments. We, who learned to squeeze our skepticisms into blue books and out of clerkship memoranda, now find our corrosive intellectual skills turned upon ourselves. Therefore, it becomes crucially important to write about what you genuinely believe rather than to write about what you are told or come to understand from others you ought to address.

Testing one's own passionate beliefs in the process of trying to commit them to paper is a marvelous way to grow. To put passions through this crucible repeatedly gives us hope that we can develop as writers; such testing also nurtures us as teachers, colleagues, and perhaps even as thinkers. If we succeed, we become passionate thinkers. We might even become law professors whose hearts and minds are not divided and whose professions merit attention. Moreover, the struggle to communicate our commitments tends to remind us of what we valued before we undertook to think like lawyers. Continuing to have friends and relations outside law, and to share thoughts, drafts, and passions with them clarifies what matters as they challenge us to communicate plainly and persuasively.

In *The Manticore*, the most introspective if least successful novel in Robertson Davies's marvelous Deptford trilogy, the lawyer who is undergoing Jungian analysis remembers what his old teacher Dunstan Ramsay ("Old Buggerlugs") used to say. Ramsay, who wrote curious books about saints yet preached the Plain Style in writing, insisted, "Be sure you choose what you believe and know why you believe it, because if you don't choose your beliefs, you may be certain that some belief, and probably not a very creditable one, will choose you."[3]

Throughout Davies's wonderful work and, I would bet, at or near the core of whatever you consider to be the best novel you have recently read is the struggle to combine, mediate, or otherwise resolve the relationship between reason and passion. The same is probably true of whatever legal writing you consider the best you know. (While it may not be surprising if you cannot recall a favorite novel or great legal writing, either omission might suggest that you should rethink your career choice.) In both literary forms the trick, the challenge, and what is probably the unattainable goal is the same: to master the minutiae without losing the ability to soar. What makes the task so hard—in fact, so seemingly impossible—is the inevitable gap between what we imagine we can communicate and what emerges, even after struggle, on the page.

Politics and Production Values

All writers must also consider the problem of audience, of course, unless they believe the knowledge that comes from the suffering it takes to create is

3. *Id.* at 230. This theme is central throughout Davies's writing. It seems often to be the key to his explanation of what makes someone great, for example, "flashes of insight, when he pierces through the nonsense of his time, and gets at something that really matters." Robertson Davies, Tempest-Tost 181 (New York, 1985).

itself adequate reward. Hypothetical ascetics satisfied with complete subjectivism may write on their cave walls somewhere, but such rarities are unlikely to have survived the LSATs. Indeed, the problem of audience is an unusually burdensome concern in our somewhat narrow and linear corner of the world. The difficulty is compounded by the fact that many law professors still seek to influence the way lawyers, judges, legislators, bureaucrats, and even the general public think about the law. The cruel reality is that hardly anyone reads law review articles. Nevertheless, we scan tables of contents and resumes and we make judgments about candidates (and colleagues) which are based largely on decisions made by students with two years of legal education about what is fashionable or worthy. Too often, finding out where an article appears is the end of our evaluation of it.

Those of us who actually scan articles become adept at choosing epithets from the Chinese menu of devastating pejoratives that experienced law professors keep near at hand. An article is readily dismissed as "insufficiently normative" if it merely discovers something about the world; it is "overly idealistic" if it involves normative discourse. Similarly, discussion of doctrine can be perceived as typical and too narrow but, if a piece lacks doctrine-crunching, it may be denounced as either too abstract or insufficiently legal.

Many of us seem so determined to impose our own particular values on an indeterminate world that, without reflecting or noticing the reflections, we merrily roll along labeling most articles "totally worthless," and lambasting the scholarship that is left as "second-rate," "a minor contribution," "perhaps a single, but certainly not a home run," or "merely workmanlike." We would not know a "breakthrough" if we tripped over it. Yet law professors seldom confront the issue of what criteria we apply. If we did, we might discover the abyss of uncertainty. We then would be less able to congratulate ourselves on the way we wield power and principle.

Today most Americans apparently seek to return to the gilded age of yesteryear, to the time Douglass Adair aptly described as dominated by "pocket-slapping complacency."[4] Not surprisingly, the news from the law-teaching guild is not terribly different. Our *Zeitgeist* includes a disturbing amount of "looking out for *numero uno,*" combined with a remarkable lack of tolerance for those who have chosen slightly different career paths or other political values. Too many people seem to enter the law-teaching racket not merely because it does not require heavy lifting but because it seems the next logical step on some competitive escalator. It seems that now many find it much easier, much more acceptable, to show willingness as well as ability to destroy anything or anyone who dares try to enter the law school ranks.

Today it is becoming increasingly important to be regarded as someone with standards, sufficiently tough-minded to make principled decisions involving fixed or even shrinking resources. Bluster about the necessity for

4. The statement is from Douglass Adair's essay, "The Tenth Federalist Revisited," reprinted in Trevort Colbourn, ed., Fame and the Founding Fathers 83 (Williamsburg, VA., 1974).

razor-sharp lines is rewarded; quickness in condemning inadequacy is the macho way for both women and men to gain respect and to win promotions. The current paradigm, unlike that of a century ago, may be based more on economics than on geometry and biology, but we are again embarked upon a set of intellectual journeys in which most thinkers seem to "relish a ruthless theory."[5] We are increasingly prone to commit the error once described as mistaking the detachment of the undertaker for the detachment of the surgeon.

Recently, there have been too many poignant incidents in which tenure was denied to scholars whose career paths were out of the ordinary, or whose writing did not fit comfortably within established patterns. For example, within the past few years several leading law schools declared policies of considerable liberality in granting parental leaves. Then, professing regret, these same schools factored lack of production (as it were) into decisions that outstanding publication and teaching records were inadequate to grant tenure to extraordinarily capable women. Additionally, the bitter opposition at some schools to those associated with Critical Legal Studies is now a matter of quite public record. Similar but less open fear and loathing of a wide range of beliefs at many institutions is masked by a process that purports to apply objective criteria.

Risking Toleration

When I urge you to follow your nose in deciding what you want to write about, therefore, I am suggesting that you take a risky course. You may regret it. But I have a hunch that if you play it safe, you will find that even the significant achievement of tenure may turn out to be another Pyrrhic victory in the long line of empty successes our skepticism teaches us to recognize. In academia, as in politics, there may be no ends, just means.

If you choose what you believe for yourself and have the courage to examine and to argue for that belief, you may do great scholarly work. Rather than waiting for the chance to work from within, an approach that is always risky and often fatal for one's ideals, you might actually find that you are strong enough to appear tolerant and brave enough to resist the impulse to apply standard standards. Then, as you gain the respect of the colleagues whose opinions you truly value, you will be asked to judge others. You will find yourself in a position to be both tough and tolerant about scholarship and, most significantly, about your own efforts.

In a sense, of course, I am preaching an old, timeworn, and perhaps threadbare idea. I hope it rises above the level of Frank Sinatra doing it his way. I would prefer to link it to Roger Williams. As portrayed in a brilliant, brief biography by Edmund Morgan,[6] Williams became increasingly

5. This lament about the Gilded Age by Charles Peirce is quoted in an excellent essay about Peirce in R. Jackson Wilson, In Quest of Community: Social Philosophy in the United States, 1860-1920 56 (New York, 1967).

6. See generally, Edmund Morgan, Roger Williams: The Church and the State (New York, 1967).

orthodox until he literally found no one sufficiently pure to worship with except his wife—and he was not so sure about her. It was at that point, convinced that the earth was a dunghill, that this innovative American thinker determined to explore the frontier of religious toleration. Through his courage "to go where the mind leads," Roger Williams achieved limited yet exceptional greatness. At the end of his biography of Williams, Morgan says of Williams, "He dared to think."[7] Those of us who have chosen to be law teachers have the resources and the marvelous opportunity to follow that example: we might even transform skepticism into toleration.

I would like to close with the words of Shakespeare in *The Tempest.* For years, I have used *The Tempest* to begin my American Legal History course for a number of reasons. In fact, I find new reasons each time I teach it. Of particular relevance to the topic at hand, however, is Prospero's closing speech. As you probably recall, Prospero decides at the end of the play to renounce his magic power and to abandon the mystical island he rules. In the Epilogue, undoubtedly seeking applause, Prospero says:

Now my charms are all o'erthrown,
And what strength I have's mine own,
Which is most faint.

Prospero continues with what I take to be a deeper plea:

Now I want
Spirits to enforce, art to enchant;
And my ending is despair,
Unless I be relieved by prayer,
Which pierces so, that it assaults
Mercy itself, and frees all faults.
As you from crimes would pardon'd be,
Let your indulgence set me free.

Prospero and old Shakespeare were seeking more than applause. So should we.

7. *Id.* at 142.