WHAT FRANK ALLEN TEACHES

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Frank Allen was dean of the University of Michigan Law School when a junior appointment was offered to me. As dean he spoke for the school; but Frank symbolized more than that for me, something to which I aspired as a legal scholar. I could not clearly identify this at the time, but I knew nonetheless in 1970 when I joined the Michigan faculty that Frank's presence and his example there were compelling attractions for me. Two years later I was fortunate enough to enter into an intensive collaboration with Frank that showed me more clearly what I had glimpsed before.

The occasion for this collaboration was a request from Judge Horace Gilmore, then on the Wayne County Circuit Court, that Frank serve as counsel to a man who had purportedly volunteered for experimental psychosurgery after eighteen years' confinement in the state maximum security mental institution. A taxpayer's suit brought before Judge Gilmore had challenged the propriety of this apparent consent and of the experiment generally; Gilmore preliminarily decided that the man, known then only as John Doe, needed independent counsel and turned to Frank. I was lucky that Frank was both too busy to accept on his own and too intrigued (and responsible) to decline. Frank asked if I would accept the court's appointment with him and I grabbed the chance.

Our joint service as attorneys for Louis Smith (for his real name was ultimately made public, as I will recount) was an engrossing experience for me. Of all the dimensions of that experience, none was more enriching for me than a seemingly incidental aspect: that for more than a month, while the trial proceeded to examine the scientific and social merits of psychosurgery and the adequacy of consent from any involuntarily committed person,[1] Frank and I commuted between Ann Arbor and Detroit. Our two hours together each day were a continuous revelatory education for me.

The central lesson I derived from that course can be described by

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1. The court ultimately decided that adequately voluntary consent could not be obtained for experimental psychosurgery from any involuntarily committed person. Kaimowitz v. Department of Mental Health, 2 Prison Law Rptr. 433 (Cir. Ct. Wayne County, Mich. 1973), *reprinted in* A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 902 (1974).

relating one part of our representation of Louis Smith. Frank and I divided responsibility for this representation. Immediately after Smith agreed that we should serve as his attorneys, I researched the constitutional legitimacy of the basis for his confinement. In 1954, when he was seventeen, Smith had been indicted for murdering a nurse in a state mental institution in Kalamazoo where he had been civilly committed. He was never brought to trial, however, but was instead judged to be a "criminal sexual psychopath"; under the state law then in force, anyone so designated would be indeterminately confined until "fully recovered" but could never be tried for the originally charged offense.[2] The legislature repealed this statute in 1968, noting doubts about its constitutionality under intervening judicial decisions but resolving nonetheless to retain custody over all those previously adjudicated under the statute.[3] By 1972, when the psychosurgery experiment was presented to Smith by Wayne State University researchers, he was one of only twenty-four remaining "criminal sexual psychopaths" in state confinement. My research found that recent United States Supreme Court decisions clearly established the unconstitutionality of the original statute and accordingly of Smith's continued confinement. A three-judge panel of the Wayne County Circuit Court agreed with my argument and Smith was freed.[4]

On the very day of his release, however, the Kalamazoo County Prosecutor announced his intention to prosecute Smith for the 1954 murder. If the Criminal Sexual Psychopath statute were constitutionally invalid, he reasoned, then its bar to prosecution was also invalid and Smith could be tried notwithstanding the lapse of nineteen years and his confinement during this time. A bench warrant was issued for Smith's arrest; Frank took responsibility for arguing against the warrant and renewed prosecution — and we extended our circuit-riding to include a trip between Ann Arbor and Kalamazoo. The presiding circuit judge there was, as it happened, the same judge who had civilly committed Smith eighteen years earlier to the state mental institution where the murder had occurred. He was not persuaded by Frank's argument that the renewed prosecution offended both norms of fundamental fairness, which would require that the state honor its original promise to Smith, and more specific guarantees of the right to a speedy trial.

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2. MICH. COMP. LAWS §§ 780.507-08 (1948) (repealed 1968).

3. MICH. COMP. LAWS § 330.35b (1970); MICHIGAN HOUSE OF REPRESENTATIVES, INTERIM REPORT OF SPECIAL COMMITTEE TO THE 1967 SPECIAL SESSION, 5 MICH. HOUSE J. 115, 119-20 (1967).

4. Kaimowitz v. Department of Mental Health, No. HC73-19434AW (Cir. Ct. Wayne County, Mich. Mar. 23, 1973) (unreported).

We then proceeded to the state intermediate court of appeals. Frank wrote the brief, which was marked by the same clarity, the same taut reasoning, the same eloquence as all of his more widely circulated work. Here are two passages from it:

> The position of the prosecutor is supported neither by good morals, good logic, nor good sense. In this procedure the State of Michigan is seeking to take advantage of the invalidity of its own statute in order to evade its specific undertaking to bar criminal prosecution of appellant, and to proceed on the wholly fictional basis that nothing has happened by reason of the [Criminal Sexual Psychopath] law in this case. Nor can this unattractive posture be justified by appeals to the public interest. The facts charged in the information allegedly occurred almost a generation ago. The prosecution has made no effort to show that appellant is today a danger to the community, nor has any public official invoked the procedures of civil commitment against appellant whereby a determination of present danger could be made. In any event, the civil commitment procedures continue to be available should evidences of danger by reason of mental disorder appear.[5]
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> Here the prosecut[or] proposes to reinstate a prosecution after one of the longest periods of delay in the American judicial literature on the right to speedy trial. The attorney for the state seeks to excuse this delay because of a constitutional deficiency in a statute of the state he is representing. . . . Appellant has sustained over eighteen years of incarceration under some of the most rigorous institutional conditions to be found in this state. He is now asked to defend himself against criminal charges for acts allegedly committed by him nearly a generation ago when he was an adolescent confined in a state mental hospital and suffering from serious mental disorder. If these facts do not make out a case for enforcing the right to speedy trial, one may wonder what its purpose and utility is.[6]

The Kalamazoo Prosecutor's office was stung by this brief, perhaps because of the severity of its criticism, perhaps also because this criticism came from a former dean of the University of Michigan Law School. Whatever the reasons, their underlying resentment was apparent from an unusual letter that the chief of the appellate division in the prosecutor's office, Stephen M. Wheeler, sent to Frank. Wheeler stated that he was "greatly dismayed at the language and implications" of Frank's brief. "When we assumed the positions of Prosecutor and Assistant Prosecuting Attorneys, we left neither our morals, logic, or good sense behind." This was the core of his complaint:

> As I review the briefs of lawyers fresh out of law school, and your brief, I have come to the conclusion that one aspect of the law not taught in law school classes is the proper decorum and respect between attor-

5. Brief on Appeal for Defendant-Appellant at 12, People v. Smith, 57 Mich. App. 556, 226 N.W.2d 673 (1975) (footnote omitted) [hereinafter Brief].

6. *Id.* at 24.

> neys. One of the basic tenants of professionalizm is that while the advocate does his absolute best to represent the cause of his client, he does not do so by attacking the integrity or morality of the attorney representing the opposite party.[7]

Wheeler thus rested his grievance against Frank on the premise that an attorney's personal morality cannot properly be judged by the position he advances on his client's behalf. I would not say that Frank wholly rejected this premise. It plays an important and proper part in establishing that attorneys may, and often must, zealously represent clients whose actions or views are morally abhorrent to them: thus Frank could represent a man who might have brutally murdered a nurse. But I would say, based on my extensive course with Frank, that he was uncomfortable with the premise and that his discomfort arose not so much from abstract ratiocination as from the depths of his character. The premise that an attorney is not personally responsible for the position he advances for his client can imply a kind of moral relativism that is antithetical to Frank's nature — as if the best or even the only route to truth were unconstrained advocacy of any imaginable position in the courtroom or the "marketplace of ideas" in the same way that social welfare is supposedly achieved "invisibly" in an Adam Smithian market by everyone acting on the premise of unrestrained selfish aggrandizement.

Frank was simply incapable — characterologically incapable — of this kind of blinkered, self-referent conduct. The idea that he could be exonerated from personal responsibility for advocacy on a client's behalf could therefore not sit comfortably with Frank. He saw too clearly the comfortable self-deceptions made possible by this kind of moral detachment. This danger was indeed epitomized by the position of the Kalamazoo prosecutors in Louis Smith's case. Whatever the merits of the distinction between attorney and client in the private practice of law, that distinction has much more attenuated relevance in public representation. The Kalamazoo prosecutors could maintain that their personal integrity and morality were irrelevant to their decision to renew Smith's prosecution only by imagining that there was "a client" somewhere — a mythical embodiment of John Q. Public — who directed this action and thereby exempted the prosecutors as merely obedient instruments of the Public Will.

The prosecutors may indeed have deluded themselves into this belief; if so, their lack of integrity, their inability to understand and ac-

7. Letter from Stephen M. Wheeler, Chief of Appellate Division, Office of the Prosecuting Attorney, Kalamazoo County, Michigan, to Francis A. Allen (Jan. 29, 1974) (copy on file at *Michigan Law Review*).

cept personal responsibility for their own actions, was subject even to harsher criticism than Frank aimed at them in his brief. I must say, however, that it is difficult to imagine a more stringent criticism than Frank directed midway in his brief, in explaining why the prosecutor's delay could not be excused by his erroneous reliance on the constitutional validity of the original committing statute: "It is the decision to revive the prosecution, not the long suspension of the proceedings, that shocks the conscience in this case. . . . The prosecutor is not a private litigant and may not be permitted to take advantage of the statute's deficiency . . . ."[8]

The striking characteristic of Frank's brief in this case was precisely what stung the Kalamazoo prosecutors: his willingness to make explicit moral judgments.[9] What I learned from Frank in the course of our collaboration — or, more precisely, what I learned about him, because this was a lesson that he did not so much teach as exemplify — was his basis for this willingness. Frank's moral analysis arose from his character. Not intelligence or ratiocinating rigor — though Frank has these qualities in abundance. Not mastery of formal social science disciplines like psychiatry or economics — though Frank has clear command of the proper, and properly limited, uses of such disciplines for legal scholarship. Law is fundamentally about public morality. The capacity to reach judgment on such questions cannot depend on intelligence or formal analytic training alone. More is required. To say that Frank exemplifies this, and that his warrant for moral judgment resides in his character, is to acknowledge my own inability to define this essential capacity or to explain how it can be taught or learned except in the personal examples afforded by great and gifted teachers.

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8. Brief, *supra* note 5, at 19.

9. The Michigan Supreme Court ultimately, though belatedly, concurred in Frank's judgments. After the court of appeals rejected his position, People v. Smith, 57 Mich. App. 556, 226 N.W.2d 673 (1975), the supreme court initially equivocated; by a four-to-three vote, the court ruled that the trial should proceed and that the objections raised in Frank's brief could be considered on an appeal from any conviction. 396 Mich. 955 (1976). Frank and I then relinquished our representational responsibilities to Richard Ryan Lamb, a Kalamazoo attorney. In 1976, Smith was convicted of having committed first-degree murder (in 1954) and sentenced to life imprisonment. Three years later, the Michigan Supreme Court unanimously reversed Smith's conviction. The court observed:

> [T]he prosecutor relies upon the legal fiction that since the act was a nullity from its inception, the state's assurance to Smith that he would never be tried or sentenced is likewise a nullity. Thus the solemn promise of the sovereign is broken in the name of constitutional construction.
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> We think that comports neither with traditional notions of fundamental fairness in the classic constitutional sense, nor the more elemental and compelling principles of fundamental human justice rooted in the natural law.

People v. Smith, 405 Mich. 418, 435, 275 N.W.2d 466, 471-72 (1979).

In one small way, however, Frank's work on this brief gave me a heartening lesson. Before this enterprise, I had only seen Frank's work in published or near-published form. While writing this brief, Frank showed me his earliest drafts direct from his typewriter. I was astounded that there were more than a few infelicities of expression, even some grammatical errors that I was able to detect in these drafts. When I confronted Frank with several egregiously split infinitives, he was surprised at my surprise. I had imagined because Frank's expressive eloquence flowed so beautifully on the published page that it came easily and quickly to him. I was mistaken. Frank's clarity and grace was an achievement for him; he worked hard at it. The intensity of this effort, the rigor of his self-criticism, were themselves a revelation to me. It gave me some hope that not only Frank's style but his content were more than a natural gift. If this were true, then others had some hope, by emulating his intense self-scrutinizing efforts, of reaching toward if not ultimately attaining his accomplishments.

As Frank Allen leaves the University of Michigan Law School to continue his teaching elsewhere, I would borrow an observation that Oliver Wendell Holmes made regarding Louis Brandeis: "Whenever he left my house I was likely to say to my wife, 'There goes a really good man.' "[10]

10. Holmes, *Introduction* to MR. JUSTICE BRANDEIS at ix (F. Frankfurter ed. 1932).