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The Revolving Door Part I: A Federal Prosecutor Returns to School

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7:45 AM. I hop off the bicycle and amble toward the faculty wing, a slightly rumped figure in denim shirt, tastelessly loud tie, and chinos. I pause to savor the Virginia mountain air and the scene of light mist shrouding the buildings and fields of one of America's great small universities. Ah, the academy! Peace. Tranquility. Quiet contemplation.

Into the office. Class at 9:00. Let's see what the old casebook has in store today. Hmm... *Director of Public Prosecutions v. Morgan*. Rape case on appeal to the English House of Lords. I'll just skim through the opinion, jot a few notes, and dazzle the youngsters with a little Socratic legerdemain. After all, I've been practicing criminal law on one side or the other for 15 years. Cake.

8:00 AM. Let's see if "I've got this now - there are five different opinions rendered in *Morgan* by various law lords, plus the opinion of Bridge J., of the Court of Appeals. Lord Hailsham says that "the prohibited act in rape is non-

consensual sexual intercourse, and the guilty state of mind is an intention to commit it." But does that mean that the defendant must intend merely to have intercourse, or must intend that it be non-consensual? Lord Edmund Davies (or was it Lord Fraser of Tullybelton?) seems to think that an intention to have intercourse is enough under the precedent of *R. v. Tolson*. And Lord Simon of Glaisdale appears to be plugging for a kind of negligence standard for the defendant's knowledge of the victim's state of mind. Oh dear...

8:30 AM. But Bridge J., of the Court of Appeals says that a defendant's claim of ignorance of the victim's state of mind is, in American parlance, an affirmative defense. These kids have been in law school less than 3 weeks. Do any of them have the faintest idea what that means? Can I explain it in about 2 minutes?

8:45 AM. Keep calm, Frank. Now, *Morgan* is in the section of the casebook headed "Mistake of Fact." What is the English rule on that? Can it be gleaned from *D.P.P. v. Morgan*? Is there some difference between English and American law? And what about Professor Estrich's article



THE REVOLVING DOOR PART I

A Federal Prosecutor Returns to School

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urging adoption of a negligence standard in sexual assault cases and suggesting that the standard of reasonable belief is different for men and women? And how am I ever going to talk about all this without seeming either hopelessly politically correct or a sexist, fascist beast? Oh dear, dear, dear. . .

8:56 AM. Push the PRINT button. Pray the printer works. Stuff the notes in a folder. Scurry for class.

9:00 AM. Dozens of upturned faces. Dozens of enquiring minds. Deep breath. "Good morning class."

10:00 AM. I survive, by a gnat's eyelash, maintaining (I hope) for another day the illusion among my students that I know what the heck I'm talking about. I wonder what the casebook holds for tomorrow. Perhaps I ought to go look...

Scott Sundby, my opposite number in the swap which took me from the U.S. Attorney's Office in Miami to Washington & Lee University Law School in 1994-95, loved to tell

my friends in Miami this true story: Some weeks after we agreed to exchange both jobs and houses, but before my wife and I made the move to Lexington, Virginia, a large package was delivered to Scott's house addressed to me. In the box was a huge hammock (my birthday present from my wife). Scott liked to say that the hammock was a pretty good indication of my expectations about life as a law professor. Whatever my expectations, I can say with utter candor that I spent precious little time in that hammock during my year at W&L.

Law teaching is hard work. To my trial lawyer friends who expressed envy at the easy life I must be enjoying, I often said they should imagine having to prepare and present five or six oral arguments a week, every week, for months on end. To the novice teacher presenting several courses for the first time, the task often feels just that daunting. As practicing lawyers, we flatter ourselves that we are "experts" in our fields, and thus that it would be a simple matter to step over to the local law school and, with minimal preparation, unburden ourselves of our accumulated wisdom to eager pupils. In truth, the legal

knowledge most of us gather in a life of practice is rather like a watery stew – uneven, containing (depending on our talent and diligence) varying numbers of meaty, nutritious nuggets, but overall rather thin, jumbled, and formless. What I found on sitting down to teach others about my own practice area is that I knew a great deal about some things, very little about others, and that I had never before tried to figure out how it all fit together. I came away from my year as a law professor with a heightened respect for the difficulty of the job, a respect that extends not merely to new teachers who must master and lend coherence to masses of legal material for the first time, but even more particularly to experienced teachers who bring excitement and a sense of discovery to courses they have taught for years (a category in which Washington & Lee is singularly blessed).

By the same token, I left Washington & Lee reconfirmed in the belief I have held since my own law school days that substantial experience in the practice of law is a nearly indispensable qualification for at least some areas of law teaching, albeit a qualification persistently undervalued by many law faculties. I do not insist that every law professor must once have been a long-time practitioner. Nor does my belief necessarily rest on the general observation that those training aspirants to a profession whose business is tending society's system of behavioral rules ought to have some personal experience helping actual human beings interact with the system. I refer here merely to the conviction that, regardless of one's native intelligence, diligence, or pedagogical genius, it is inconceivable to me that subjects like evidence, or civil and criminal procedure can be taught with the same degree of subtlety, understanding, and practical wisdom by someone who has never set foot in a courtroom as by an experienced practitioner of the litigator's art.

The challenge of becoming and remaining a dynamic classroom teacher is, of course, only one of the aspects of being a successful law professor. Within the law teaching profession, the coin of the realm is not teaching, but scholarship. I say this, not because good teachers are not appreciated by their students and within their own institutions, but because the activity that is most visibly rewarded in the law school universe is the production of books and journal articles. When I came to W&L, I confess I was disposed to think that the emphasis on scholarship has a markedly distorting deleterious effect on the legal academy. Along with many other practicing lawyers, I suspected that law professors devoted to Wittgenstein and periodic deconstruction and reconstruction of the latest "law and [insert the flavor of the day]" intellectual fad, were ill suited to training young practitioners who will have little time or use for such fripperies. Some of my skepticism on this head has been, if anything, enhanced by a look under the hood of the academic machine. Nonetheless, while it may be that I have "gone native" (to employ a probably politically incorrect 19th Century expression), the highly visible success of W&L in combining high scholarly output with high student satisfaction has gone some distance in convincing me of the academic orthodoxy that good scholarship enriches one's teaching and one's potential for service to the larger community.

At Washington & Lee, the faculty member who consistently wins the "best teacher" award from the upper division students to whom he teaches, of all things,

corporate law, is a former big firm lawyer who is also a specialist in English legal history and a prolific author of, among other things, articles about the philosophy of law so dense that I can barely understand them, much less imagine having written them. Similarly, the supervisor of the prison law clinic is a multi-lingual ex-Marine who joyfully terrorizes generation after generation of W&L first-years in criminal law and procedure, and who is also probably the world's leading authority on 12th Century English juries of presentment.

The lesson Washington & Lee teaches is that it just may be possible to do it all – teach, write, and serve the legal profession. Of course, W&L enjoys the mutually reinforcing advantages of long tradition, small size, beautiful setting, and a large endowment. It can afford to recruit unusual teachers and give them relatively few students. Other law schools are not so blessed. Indeed, as the number of law school applicants shrinks, many law schools will increasingly feel pressed to do more with less.

Nonetheless, there may be a paradoxical boon for tomorrow's law students in the very oversupply of lawyers and general disillusionment with daily practice that has caused the decrease in aspiring attorneys. Law schools are becoming, inevitably, and already perceptibly, more "consumer oriented" in their efforts to secure desirable students from a dwindling applicant pool. They are yielding to the dual pressure from students and their prospective employers for an education richer in skills training and more attuned to the realities of life in the law. In such a time, the demand by law schools for teachers who know something of a lawyer's life is, I think, creeping upward. At the same time, a generation of extremely capable practicing lawyers is extruding a cadre of aspiring teachers who have practiced successfully, but who yearn for a more contemplative existence, and who defy the canard of legal academic purists that those who bear the taint of the world cannot or will not do serious scholarship.

Put plainly, the legal teaching market is unbelievably tight and law schools across America wise enough to do so can mine the talent pool of seasoned lawyers for a new generation of law teachers who can bring to the classroom, to law journals, and to our collective professional conversation the leaven of meaningful practical experience.

Even for those who make law teaching only an occasional foray out of the frenzy of earning a living at the bar, such expeditions are likely to yield great benefits. The urgent necessity of organizing one's ideas before trying to teach someone else about them has, in my experience at least, often been the occasion for leaps in my own understanding. When I teach, I make connections I had not made before, and I am required to re-examine my own prejudices and encrusted certitudes. I have always found that, after teaching, I am a better lawyer than I was before. At a minimum, those who sojourn in the legal academy often return with new and surprising ammunition to be fired in courthouse wars.

I must close with a confession: I am not the best possible advertisement for merely dabbling in the law professor racket. Despite the fact that it is hard work (honest), it's a great life, and I am going back to it. When I left Washington & Lee last summer, I returned to the Justice Department; however, I recently accepted a position on the faculty of Gonzaga University in Spokane, Washington. And maybe someday I'll get to use that hammock. ☞