Law Faculties as Prophets

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The mission of a prophet is that of a moral witness to (and usually within) an institution. From a Jewish-Christian point of view this witness is through institutions for people.¹ My argument here is that American law faculties are to the American legal profession what the Old Testament prophets were to Israel. I propose to make the argument with a New Testament story.

The last chapter of the Acts of the Apostles (Chapter 28) is the account of St. Paul's arrival in Rome. It is an account of three institutions, of their moral impact, and of a prophet within them.

Here is the Pharisee, Saul of Tarsus, arriving a privileged prisoner of the Romans. His letter to Roman Christians has preceded him. He comes himself to be a religious leader for as long as the Roman bureaucracy can bear having Christians around. The Roman Christians come out of the city to meet him. The first meeting he has inside Rome is with the leaders of the Jewish community.

When it is convenient for the state to blame its failures on him and his followers, it will do so. Paul has two years of pastoral work ahead of him in Rome, five or six years altogether.² After that he will go to his death at the behest of a mad dictator, as his Jewish brothers and sisters went to similar deaths, in similar circumstances, twenty centuries later.

I am interested in the three institutions Paul served—the Roman state, the nation of Israel, and the congregation of Christians

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¹ I attempt to develop the prophetic idea in a modern setting, with citations to scholars who know more about prophets than I do, in Advocacy as Moral Discourse, 57 N.C.L. REV. 648 (1979).

² DANIEL-ROPS, SAINT PAUL 153-163 (J. Martin trans. 1953). St. Paul's last few years, and his death, are not reported in the New Testament; the traditional story is that he left home after the period described in the Acts of the Apostles, but later returned and was a victim of Nero's persecution of Christians, probably in 67 A.D.
in Rome. He had and used the advantages of membership in each of these three institutions; he owed fealty to each of them, and gave it. He was, in each of them, a prophet.

Law faculties live, as St. Paul did, in a civil society, in a heritage of valued traditions, and in colleagueship with those who do as we do in pursuit of what might be described as a common belief. (Belief is probably a metaphor here, but anyone who has grown to love his colleagues will see the point, even if it is only a metaphor.)

St. Paul was a Roman citizen. He made claims upon and was a victim of the powers of this world. He was in Rome because of his privileged civil status; he had appealed to Caesar. And before his appeal he had demanded the protection of the Roman army. But for this citizen status one or the other of the three factions which made up the Sanhedrin in Jerusalem would have disposed of him, as they had disposed of Jesus, and of St. Stephen. Saul of Tarsus had been one of the persecutors of Stephen, on behalf of the religious authorities from which Paul, the convert, had appealed to Rome.

Paul lived in this Roman civil society as a stranger, as each of we law teachers live in a society of strangers. Such common bonds of theology as we Americans might once have had are common no longer. For example, it would not have been unusual for me to write in a legal journal about the Acts of the Apostles a hundred years ago, but I suspect it is strange to do so now. There is literally no purely moral claim we Americans can make upon one another. All we have in common is the law, and the law is a matter of procedure, as, for Paul, Roman law was a matter of procedure. It was procedure that had caused him to be committed to the lenient charge of a Roman officer, procedure which brought him to Rome. The substance of Roman law, which was the defense of the Roman state through fear, did Paul no good, except the ironic benefit, finally, of martyrdom.

The substance of the Roman law, which was the maintenance of an empire through fear, had no interest in Paul and he had no interest in it. He had appealed to power and to power only, and power had protected him in Jerusalem, and Caesarea, as it would protect him and then kill him in Rome. Being a Roman had no

5. See supra note 2.
significance; it did not stand for anything except law. St. Paul would have understood what Solzhenitsyn said last June about a moral community built on law: “Whenever the issue of life is woven of legalistic relationships, this creates an atmosphere of spiritual mediocrity that paralyzes man’s noblest impulses.” Paul appealed to law for safety—as Solzhenitsyn did—and then only for a while. He did not appeal to law for meaning. And we had better not do that either.

Our first institution, then, is the state. It is the most prominent institutional setting for moral witness by lawyers, but it is no help in deciding what the witness should be. It is as important as anything, for example, not to confuse justice with force. Force comes from the government, but justice does not come from the government. Justice is the gift we give one another as we go about living under the law, and as we go about making the law fit our lives. Our truthfulness in doing this is from where justice comes.

Justice is not the result of power. It is not the result of force. The idea that governments provide goodness—that power provides justice—is where tyranny begins. We lawyers should be sober and watchful about the horrors of what people have done to one another in the name of the law. These horrors occur when people begin to believe that good can be achieved with power. The holocaust is one example. The crucifixion is another.

St. Paul was also a Jew. The first thing he did in Rome was to address the leaders of the Jewish community in Rome. He made a claim on the heritage he shared with those leaders. He caused them to argue about his claim, and particularly about his further claim that the person of Jesus was the fulfillment of the Jewish heritage. "They went on from dawn to dusk. Some were won over by his arguments; others remained sceptical." (Acts 28:24).

This claim was not a legal claim in the sense that Paul’s claim on Rome was a legal claim. It was not legal, really, at all; it was prophetic, in the Old Testament sense of that word. His moral claim on the Jews in Rome was a claim on their deepest beliefs and the consequences of those beliefs. “He spoke urgently of the kingdom of God and sought to convince them about Jesus by appealing to the Law of Moses and the prophets.” (Acts 28:23).

7. This paragraph and the next two also appeared in the article cited in note 1 supra and in Justice in Everyday Life, 22 Res Gestae 394 (1978).
Paul’s relation to the Jews in Rome suggests to me an analogy between the modern American law teacher and the legal profession. Our moral claim on the profession is like the claim Paul made on Israel. We are at our best morally when we speak to the profession prophetically, but from within the tradition which the profession claims. Our calling as part of this second institution, the profession, is to provide reminders of the consequences of its pretensions.

The profession is tragic, as all institutions are. It tends to the acquisitive protection of its own. It tends to the exclusion from membership of those who are different. It tends, as all guilds do, to define social welfare in terms best suited to the profit of its own membership. Even at its best it will not admit the tragedy of its own prerogative; we can speak to it as Paul spoke to the meeting in Rome: “You may hear and hear, but you will never understand; you may look and look, but you will never see. For this people’s mind has become gross; their ears are dulled, and their eyes are closed.” (Acts 28:26-27).

We law school lawyers are somewhat less than three percent of the legal profession. This prophetic claim we make on it is the claim of a small unrealistic minority. Listen, for example, to the recent attack on adversary ethics of one of the greatest of our prophets—Professor Harry Jones:8

If unbridled partnership, single-minded and ... no-holds-barred, is unacceptable in the other affairs of life, is it acceptable in the context of the lawyer’s professional functioning?

If the ABA Code of Professional Responsibility is to retain the idea of partisanship as the measure of the counselor’s obligation, it should be for some far better reason than that the all-out partisan model enables lawyers to participate as advisers in morally-dubious enterprises without being criticized for it and without feeling uneasy about it themselves. Somehow it must be made plain that the lawyer's moral judgment is not for hire, that there are occasions when the lawyer as counselor is under a duty to act as a person of independent ethical concern with obligations not only

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to his client's interest but also to fairness and justice in the management of affairs.

What Jones is doing, it seems to me, is insisting that the profession step outside itself, criticize its own rules, and amend its traditions.9

Finally, St. Paul came to the church in Rome, and we come to our own most organic institution, the law school, our colleagues. This is the place where we are most likely to be deluded. The more vigorous our prophecy to the profession, the more insistent our moral witness in the society, the more likely are we to become smug about the corruption and tragedy of the academy.

My life among my own is an organic life. It is hard to be prophetic in it because I am always one of those who is addressed. My colleagues are partners in my prophecy; they are not the objects of it. My relationships within the law faculty are based on faithfulness more than on rules. When Paul wrote ahead to the Christians in Rome he delivered a polemic against rules. "Law intruded," he said, "to multiply law-breaking" (Romans 5:20). And yet each of the little churches Paul tended in his ministry—Ephesus, Corinth, Phillipi, Rome, Galatia, and the others—fell into contention and error as soon as he turned his back.

Each of the churches, hit upon some way to certify its superiority over other people and to exclude the heathen. Each of them did what institutions always do—it started drawing lines, casting out deviants, and building pedestals. Each of them forgot its purpose. Paul railed against this tendency when he railed against the law—meaning the system of rules which the Jewish Christians inherited. When Karl Barth came to translate Paul's word "law," and to give it meaning for Christians in the 20th century, he translated the word "law" as "church."10

The Christians were arguing, for example, over the issue of eating meat which had been sacrificed to idols. The vegetarians were well on their way to casting out the meat eaters. Paul said to them: "No one of us lives, and equally no one of us dies, for himself alone. If we live, we live for the Lord; and if we die, we die for the Lord. Whether therefore we live or die, we belong to the Lord. . . . Let us therefore cease judging one another, but rather make this simple judgment: that no obstacle or stumbling block be

9. This image is borrowed from Professor Larry Churchill, a teacher of medical ethics. It is developed more fully in the article cited in note 1 supra.

placed in a brother's way.” (Romans 14:7-8, 13).

The central problems in a brotherhood are that the brothers no longer see what they're doing, and forget how they come to be brothers in the first place. What we law teachers tend to do is to sanctify ideas of exclusive fraternity which are at worst wrong and at best tragic. And what we forget is that the way we treat one another is the number one moral model for our students of how lawyers should treat one another. The way we treat our students is the number one moral model of how lawyers should treat their clients. We are, collectively, prophets—false prophets sometimes.

Our ideas of rank, scholarship, academic freedom, tenure, effective teaching, community service, and faculty governance, are all ideas which have tended to protect an insular white male oligarchy. They tend to do that. At worst they do it. At best they tend to do it. It is impossible to stand for anything without standing against something. It is impossible to recognize those who exemplify what we stand for without excluding those who exemplify something else. At best it is impossible to stand for anything without that sort of exclusivity, and that is what I mean when I say that at best our institution is tragic. The moral consequence is that we tell the truth about what we are doing, and find out thereby if we want to do it—if we should do it.

The great opportunities of our lives in this third institution are the opportunities of ministry in a community. Here we can deal with one another in the ethics of fidelity, because we can see a possibility of being faithful. That possibility has been lost in the broader civil society; we live there, as Paul lived within Roman civil society, according to law. The ethics of fidelity are also unlikely in the broad professional society we have, with other lawyers, because we who inhabit university law schools have chosen to separate ourselves into the academy. Teachers of medicine, by contrast, have not separated themselves into the academy, so that their moral witness has no prophetic character about it—they cannot be prophets. The result is that they hire philosophers and theologians to teach ethics in medical school. Morals are a specialty in medicine. Morals are a specialty in law school, too, and we

12. The ethics of fidelity in professional associations is analyzed in W. May, Notes on the Ethics of Doctors and Lawyers (Poynter Center 1977).
are the specialists. We are prophets by our own choice—false prophets sometimes.

Here we can still try to tell the truth to one another. Two truths that occur to me are that we are professional models for our students—moral models—and that our fraternity, in its exclusivity, is at worst corrupt and at best tragic. Here we are still able to search for and revive the roots and consequences of a morality which has more to it than the suffocation of the law or the inane pretensions of professional ethics. We can, in other words, see our immediate community as the most significant place for institutional moral witness.