

Being a Lawyer, Becoming a Hero

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International Legal Ethics Conference VII

Presentation on Thursday, July 14 11:00 am

Session Title: The Problem of the “Heroic” Model of the Ethical Lawyer

The following are the opening pages of five draft book chapters in Clark D. Cunningham, BEING A LAWYER, BECOMING A HERO (tentative book title, in progress).

Early versions of the Gandhi chapter were presented in India in 2007 at two Regional Workshops on Clinical Teaching Methods organized by Professor N.R. Madhava Menon (National Law Institute, Bhopal; the Symbiosis Law College, Pune) and at the Government Law College, Sikkim, India; in 2012 in New Zealand at New Foundations for Legal Process and Lawyers' Ethics: Australia New Zealand Legal Ethics Colloquium, University of Otago, Dunedin; and in 2015 at the Workshop on Consumer Protection and Public Interest Advocacy sponsored by the National Law School of India University, (held in Mangalore, India) and as the Third Annual Judge Harry J. Wilters, Jr., Lecture in Constitutional Law and Professional Ethics, University of South Alabama, Mobile.

Powerpoint presentation is available at: www.teachinglegalethics.org/becoming-hero

Mohandas Gandhi: “I began to think of my duty.”
or
The Most Important Lawsuit in History: Gandhi and the Abdulla Sheth Case

It is 1982 and many in the audiences watching the movie Gandhi – winner that year of Best Picture and seven other Academy Awards -- are surprised to find that the film begins the story of Gandhi’s life not in India, but in South Africa. Indeed forty minutes – and twenty years of Gandhi’s life – go by before the story shifts to India.

Audiences see a long tracking shot of a train thundering through the night. A caption appears: “Southern Africa 1893.” The shot dissolves to a scene enacted within the cramped confines of a train compartment – a first-class compartment. A very young-looking Gandhi, dressed in the stiff formal attire of a English barrister, is addressed by a ruddy-faced officer of the railroad as “coolie” and told to move to third class. Gandhi retorts in astonishment that he has a first-class ticket, that he always travels first class, and that he is an attorney traveling to Pretoria on a client’s business. The official responds, “there are no colored attorneys in South Africa.” Gandhi proudly recites his credentials – trained at the Inns of Court and called to the bar at the High Court of Chancery in London – leading to the syllogism that “since I am an attorney, and in your eyes colored, there is at least one colored attorney in South Africa.” Infuriated by Gandhi’s refusal to back down, the official tells him to “move your black ass back to third class” or be thrown off at the next station.

It is winter in South Africa, and Gandhi is thrown off the train in Maritzburg, located at a high altitude. The movie only shows him sitting in gloomy silence on a dark train platform. But Gandhi’s autobiography reveals what thoughts are going through his head: “I began to think of my duty. ... Should I ... go back to India, or should I go on to Pretoria ...? It would be cowardice to run back to India without fulfilling my obligation. ... I decided to take the next available train to Pretoria.”

The duty and obligation to which Gandhi refers is his duty as a lawyer to the client on whose behalf he is taking this perilous journey to Pretoria. And as he musters the courage to get back on the next train, surely he is also thinking of his very first client, whom he abandoned in the midst of trial, overwhelmed by panic.

Lt. Commander Charles Swift: Representing Osama bin Laden's Driver

One day toward the end of January 2004, Lieutenant Commander Charles Swift, a Navy lawyer, arrived at the U.S. Naval Base at Guantanamo Bay, Cuba, to meet a new client, who "was shackled hand and foot and chained to a bolt" inside a hut. Security was intense. The military wanted to post a guard inside while Swift talked to his client, and, when he declined, the guards insisted that two massive tables be placed to separate the prisoner from the lawyer and his translator. Swift had also been told to take off his name tag so the prisoner would not know his name. To gain access, Swift made the apparent concession of covering his name with a piece of tape.

Swift asked that the prisoner be unshackled and succeeded in at least getting the chains taken off his client's hands. Once the guards left, Swift quickly changed the dynamics of the meeting. He moved one table out of the way, to be closer to his client. The tape was stripped from his name tag, and Swift gave the prisoner his name and card.

The prisoner initially had no idea why Swift was there. He explained, "I'm a military attorney and I've been appointed to represent you. I can understand if you don't trust me right now. I work for the same people who are holding you here." They met for two-and-a-half hours that day and again the next day. At the end of that second meeting, Swift asked, "Do you believe we're here to help you?" The prisoner replied, "A drowning man will grab onto any hand that's extended to him."

At that moment, Swift and the prisoner, Salim Ahmed Hamdan, embarked on a five year journey together, that ended with Hamdan a free man, reunited with his wife and daughters in his native Yemen. Along that journey was not only the first war-crimes trial since World War II but also a 2006 U.S. Supreme Court decision in a lawsuit that Swift filed on behalf of Hamdan against the Secretary of Defense, Donald Rumsfeld. On the day the decision came down, Duke law professor and former U.S. Solicitor General Walter Dellinger was quoted as saying: "Hamdan is simply the most important decision on presidential power and the rule of law ever. Ever."

Suellyn Scarnecchia and the Baby Jessica Case

The little girl they named Jessica was born February 8, 1991. It was now the last week of July, 1993, and she was almost 2 ½ years old. They were meeting with their lawyer, a young law professor named Suellyn Scarnecchia. They had an incredibly difficult decision to make: whether seven days from now would be the last time they would ever see her.

The preceding paragraph describes a critical moment in what is generally known as the “Baby Jessica Case,” one of the most famous American family law cases of the past 20 years. The clients are a couple who thought they had adopted an infant only to face a court ruling that they must return the child two years later to the biological father, who had not known about the adoption proceedings. The deadline for giving up Jessica is in seven days. Their only hope of ever regaining custody is a long-shot, protracted appeal to the U.S. Supreme Court. Scarnecchia believes that it would be best for them, for Jessica, and for the legal system not to pursue that appeal.

Two months earlier Scarnecchia found herself talking about courage at the Honors Convocation for students graduating from the University of Michigan Law School. For the past six months her personal and professional life had been consumed by work on the Baby Jessica adoption. She and her students in the law school’s Child Advocacy Clinic represented Roberta and Jan DeBoer, who had adopted Jessica a few days after her birth in Iowa only to find out months later that the birth father had never been informed of the adoption proceedings and was attempting to vacate the adoption. After two years of litigation, the Iowa Supreme Court had ruled that the birth father’s parental rights could not be terminated and ordered Jessica to be transferred to birth parents she had never known. Scarnecchia won a reprieve for the DeBoers by obtaining a hearing in Michigan to determine whether such a transfer would be in the child’s best interests. Although she had told the DeBoers at the outset that the chance of winning were extremely low, she had won a surprising victory after an eight-day hearing in the trial court covered by the national media and televised live by Court TV. When she delivered the Honors Convocation address, she was preparing to defend in the next month before the Michigan Supreme Court the trial court’s order that Jessica should remain with the DeBoers.

She told her audience of graduating law students how, after sleepless nights and stressful days, she yielded to her “longstanding addiction to movies” and decided to watch a “Tom Cruise movie” for a “cathartic experience.” She picked out “A Few Good Men,” in which a slacker military attorney played by Cruise is assigned the unwelcome task of defending two marines accused of murder. Cruise is a master at negotiating plea bargains that keep him and his clients out of trial, but his usual strategy runs up against a brick wall when the marines reject the deal he pitches as too good to pass up. As Scarnecchia recounts the scene, Cruise tells his clients they are crazy and one of the marines replies, “You don’t have any courage.”

At this moment of movie watching Scarnecchia was startled. “Why was he talking to his lawyer about courage?” she asked herself. And then she wondered, “why was it so hard for me to relate courage to lawyering?” She reflected on the stories of lawyers who had inspired her to go to law school and realized that it was their courage that drew

her to the profession. “Then, I thought, why was I suddenly, after twelve years of practice, looking for courage now?”

She realized that the Baby Jessica case “was calling for something more from me.” She did not need courage to face the TV cameras and overcome fear of personal failure and humiliation. No, she was calling on her courage more than usual because she knew the chances of losing the case were great and, based on the evidence she had presented, that the resulting trauma of transfer from the only parents she had ever known would be devastating to the helpless two-year old Jessica. “When I realized that my courage was being tested, I accepted the challenge and went on with my work.”

Kapila Hingorani: Creating a Totally New Jurisprudence for the Disempowered

On January 9, 1979 Nirmal Hingorani and Kapila Hingorani, husband and wife, who had been practising law together before the Supreme Court of India for many years, were having morning tea before heading to their law chambers adjacent to the Supreme Court of India.. Kapila Hingorani was one of the first women to appear as an advocate before the Supreme Court, but on that morning she was thinking about quitting law practice to become a social activist because she was feeling deeply discouraged about whether the Indian legal system could really address the urgent needs of most Indian citizens who had no meaningful access to lawyers or the courts.

As she later recorded, "It is a habit with us to read the newspaper after the children leave for school." She said to her husband, "you take so long with the newspaper, we are getting late for court." He quietly passed the newspaper to her and said, "Have you read this"? When she replied "No," Mr. Hingorani said, no doubt in his usual gentle voice, "you always miss the important." She started reading the article he pointed out and literally choked on her tea.

The article, in a national daily newspaper, the Indian Express, was by R. F. Rustamji, a member of the National Police Commission reporting on his visits to the District Jail at Patna and the Central Jail in Muzaffarpur, both in the State of Bihar. According to Rustamji, in December, 1978, the vast majority of inmates in both jails had not been convicted of any crime but were simply being held for trial, described by him as "undertrials." Rustamji gave actual case histories of prisoners who had been in jail awaiting trial for periods longer than if they had been charged, tried, convicted and given maximum punishment.

She read the article and exclaimed out loud, "How can such a situation exist in our country? We must do something about it!" Mr. Hingorani suggested that she file a habeas corpus petition against the State of Bihar seeking their release from illegal imprisonment, "which I said I would do immediately, if I could."

Two days later, on January 11, 1979, Mrs. Hingorani filed a habeas corpus petition drafted by Mr. Hingorani in the Supreme Court of India on behalf of nineteen undertrial prisoners mentioned in the two articles by Rustamji. As pointed out in Mrs. Hingorani's own account of the case, in India (as elsewhere in the common law world): "Normally a Habeas Corpus petition could not be filed without Power of Attorney or an affidavit, typically from a close relation or the "next friend" of the prisoner." Contrary to this usual practice, Mrs. Hingorani did not wait to try and contact any of the prisoners named in Rustamji's article nor to locate their relatives before taking action. Instead she simply filed the habeas corpus petition herself, attaching the newspaper article as the only supporting documentation. To make clear that she was filing the petition as a public spirited citizen, rather than as a lawyer retained by the prisoners, she appeared personally before the Supreme Court without the official robe of an advocate.

The first named petitioner was Hussainara Khatoun, a young woman who had fled with her family from Bangladesh sometime in 1975, a period of civil war and devastating famine during which over 1.5 million people died of starvation. She had been arrested and held in "protective custody" in jail for four years, even though the Indian government had long-since issued instructions that Bangladeshi refugees who were arrested under the Foreigners Act should be released on bond. Another named

petitioner was Itwaria Ahir, who was so mentally disoriented that she could not explain why she was in jail; she apparently was being held as a witness because she had failed to pay a bond to guarantee her appearance to testify in court. A third prisoner, Reena Kumari, was a young woman who had been sent to a “protection home” and then sent to jail when the home closed. Another young woman named Poonam was apparently a kidnaping victim of a prostitution ring; she had been in jail for five years for “protective custody.”

The Registrar’s Office took objection to the filing of the petition it lacked a power of attorney and because its factual allegations were not supported by affidavit but Mrs. Hingorani was not to be deterred and eventually got the petition placed “as an office report” before a three judge panel consisting of Justices P.N. Bhagwati, Justice R.S Pathak, and Justice A.D. Khoshal. The panel set the petition for preliminary hearing on February 5, 1979 and issued notice to the State of Bihar to respond.

Casting aside conventional suggestions to write a letter of protest or form a committee, at that moment, Mrs. Hingorani took personal responsibility to do what she could to end the injustice presented to her shocked eyes. In effect, she strode boldly into the Supreme Court, thrust the newspaper article in front of the judges sitting there, and said, “Do something!” And they did.

Sonia Sotomayor: Being a Hero, Becoming a Lawyer

One day during her senior year at Princeton University, future U.S. Supreme Court Justice Sonia Sotomayor was outraged to read a story in a local New Jersey newspaper about a Hispanic man who had been mistakenly held at the Trenton Psychiatric Hospital simply because he spoke no English. He was an airplane passenger whose flight had been diverted to the Newark airport. Apparently no one on the flight or at the airport spoke enough Spanish to explain to him what had happened, and his resulting frustration and confusion was mistaken for mental illness. Even worse, he was held days at the psychiatric hospital until a Spanish-speaking staff member finally showed up and put him in touch with his family.

Sotomayor grew up in a Spanish speaking family; both her parents had moved from Puerto Rico to New York City during World World II. Her father, who had a third grade education, spoke only Spanish, and it was only after his untimely death when Sotomayor was 9 years old that she herself became fluent in English. During her sophomore year at Princeton she joined and became co-chair of *Acción Puertorriqueña*, a Latino student group that filed a formal complaint with the U.S. Department of Health, Education and Welfare about the absence of any Hispanic employees, not only on the faculty but anywhere in the administrative staff. "It was hard, they said to find qualified scholars, but could they not locate even one Latino janitor? You would never have known that Puerto Ricans made up 12 percent of the population of New Jersey," Sotomayor wrote in her autobiography. In response to the complaint, Princeton promptly hired its first Hispanic administrator, an assistant dean of student affairs whose responsibilities included advocating for Latino students on campus.

Two things about Sotomayor's reaction to reading the newspaper article are telling indicators of her character. First, she felt compelled to respond to the problem exemplified by the unfortunate passenger's plight. Second, instead of trying to pressure the hospital to hire more Spanish-speaking staff -- a goal she considered unrealistic as beyond the influence of *Acción Puertorriqueña* -- she mobilized her own community of Latino students to become volunteer interpreters at the hospital. Reflecting on the reliance on campus protests and confrontational advocacy by *Acción Puertorriqueña*, Sotomayor later wrote that, although she cared passionately about the group's causes, this approach "did not appeal to me." She went on to explain, "Quiet pragmatism, of course, lacks the romance of vocal militancy. But I felt myself more of a mediator than a crusader."

The Trenton Mental Hospital situation became a pivotal moment in her life, evoking a commitment to community building that carried her into her career as a lawyer and judge.

"[I organized] a volunteer program under which our members spent time at the hospital on a continuous rotation so that there was always someone who could interpret for the patients and intercede with the staff if necessary. We also ran bingo nights and sing-alongs, finding that some very uneasy minds were nonetheless able to dredge their memories for the comfort of old songs their parents had sung. And before heading home for Thanksgiving and Christmas, we threw holiday parties ...

In her autobiography, Sottomayor recreates a luminous scene at one of these parties when, in the midst of “a silent winter’s night,” her freshman year roommate, Delores, performs a favorite old Mexican love song.

“Dicien que por las noches
no más se le iba en puro llorar’
[They say that all those nights
All he could do was cry].

“They say he survived the nights on tears alone, unable to eat ... Delores sings ... In the audience, an elderly woman is staring into space, her face as devoid of expression as ever. She is always the unresponsive one, who has not spoken a single word since we’ve been coming to Trenton. Tonight, even she is tapping her foot gently as Delores sings.”

Reflecting back on the volunteer program at the Trenton Psychiatric Hospital, Sotomayor identified it as her “first real experience of direct community service” and the turning point in her life when she “began to think that public service was where I was likely to find the greatest professional satisfaction.”