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TERRY SANDALOW: MIND AND MAN

*Francis A. Allen**

My first encounter with Terry Sandalow occurred in a classroom at the University of Chicago in the fall of 1956. I had just joined that faculty, and Terry, a third-year student, was a member of my class in constitutional law. Early in the course I called on Terry to state the case that was the subject of the morning's discussion. He replied that he had not been able to read the assignment prior to class. The response did not come as a complete surprise since I was dimly aware that he was a member of the law review staff and very much aware of the malformation of law review culture that dictates a loss of face of any acolyte who reveals that he or she has had time to read a class assignment. The discussion had proceeded for a few minutes without Terry's participation when I observed his hand in the air. Perhaps it was curiosity that led me to admit him to the conversation despite his defalcation. If so, it was well rewarded. Terry made a cogent observation on one of the issues of the case, and from that time became deeply involved in all that was said. By the end of the session he was the leading participant.

This incident (which I have related on prior occasions) I mention not simply to make the point that Terry is a charter member of my private Pantheon of ablest students observed in law school classrooms. He is certainly that, but the story also throws light on his subsequent career. It demonstrates how early in his intellectual development his penetrating analytic intelligence revealed itself, how quickly he was able to identify the critical issues of even unfamiliar problems, and a kind of intellectual verve characteristic of those committed to a life of the mind.

At age twenty-two, Terry, however precocious, was not yet in full command of his powers. What is important about his subsequent development is not so much the honing and enlarging of his talents for rational thought and discourse, although this undoubtedly occurred. What is more important, I think, was the broadening of his knowledge and intellectual concerns. Rational powers can be focused narrowly or broadly. Terry, in his full maturity, has been able to widen the context of his thought and to appreciate the interconnections of circumstances

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and issues often approached by others from a far narrower perspective. The capacity I am describing is apparent in all aspects of his career — teaching, writing, and as Dean of Michigan Law School. It may also be apparent in his decision to devote his retirement in part to the serious study of ancient Greek drama and aspects of art history.

One of the best examples of the thought of the mature Sandalow has not received the wide distribution it deserves. It is his elegant essay given as a lecture at the celebration of the fiftieth anniversary of the Rackham Graduate School in 1988. Terry was asked to discuss professional education. From the outset he widened the scope of his remarks beyond the traditional “professional” schools — law, medicine, engineering — and encompassed the entire university. The problems arising from “professionalizing” academic programs are not confined to the so-called professional schools. The objective of providing students with “useful skills” in undergraduate education has been pursued to the detriment of liberal arts values. The graduate schools are busy turning out professional researchers and future college professors modeled on the pattern of their teachers. “The proper object of graduate education,” he writes, “as of any other education worthy of the name, is to enlarge [the students’] capacity to realize their human potential as that is understood in this culture.”

Terry’s commitments to rational discourse have been made in a time when rationality is under assault, not only in such fields as literature and the arts, but in legal writing as well. He has never insisted that all legal writing follow his own patterns. Legal thought, after all, is a house of many mansions. But his standards are very high, and he does insist that legal theory worthy of respect must possess intellectual integrity and conform to the canons of human reason. Terry, and a good many others, believe that in this “postmodern” era a considerable part of the output of the law reviews fails to meet these requirements and, accordingly, possesses little redeeming value. I believe that after perusing some contemporary publications Terry might ruefully assent to Joseph Stalin’s observation that “paper will put up with anything that is written on it.”

Although I have never heard Terry speak in quite these terms, he recognizes that the pursuit of reason is governed by an underlying morality. The morality in the first instance, of course, requires that reason be followed even when it leads to conclusions that challenge widespread convictions and prejudices. For rational discourse to flourish in the universities, therefore, there must be unrestricted intellectual freedom. Unfortunately, recent years have seen major curtailments of such freedom. The atmosphere on the campuses has made discussion of some of the most important social issues hazardous and has dictated that policies in some vital areas be immune from critical analysis and challenge. Many years ago David Star Jordan, while considering the function and duty of scholarship, observed that society has the right to

expect the scholar to serve as the antidote to the demagogue. This function is being served imperfectly today. As someone recently observed, what is perhaps even more alarming than the losses of intellectual freedom is the failure of most intellectuals to protest the curtailment.

No such charge can be successfully launched against Terry Sandalow. If he has ever taken into account the likely unpopularity of his conclusions before taking a public position, I have not observed it. He was the author of the amicus brief submitted by the Association of American Law Schools in the famous *Bakke* case. His argument supporting the constitutional validity of affirmative action in university admissions remains one of the most persuasive yet offered. In the intervening years, however, Terry has become increasingly skeptical of some of the justifications being advanced for policies of affirmative action in American higher education. Being doubtful, he felt called upon to say so, which he did in a recent essay published in this *Review*.¹ He found himself perhaps in greatest opposition to the currents of opinion prevailing in the American law schools when he appeared before the Senate committee in support the nomination of Robert Bork for membership on the Supreme Court. He argued first that the picture portraying Bork as a "conservative ideologue" could not be sustained. On the contrary, Bork's career both as a scholar and later as a U.S. Circuit judge showed him open to countervailing arguments and, when convinced by them, willing to change his positions on important issues. Terry found Bork's general conception of the judicial function congenial to his own. Recent years, he stated, have seen the federal courts increasingly assuming power to make decisions of policy that the Constitution delegates to the politically accountable agencies. The tendency is inherently erosive of democratic government. Moreover, it renders the Supreme Court vulnerable to criticism and attack. "If judges behave as legislators, it is inevitable that they will come to be regarded as political figures by the public and by those who hold the power of appointment." Should anyone be inclined to dismiss Terry's support of Bork as simply an expression of conservative partisanship, he should take notice of Terry's devastating criticism of the performance of the majority justices in the case of *Bush v. Gore*.

Much of Terry's career, of course, has taken place in the classroom. He tells an interesting story about the development of his teaching style. When he first met classes in his early years at the University of Minnesota, his classroom manner was harsh and confrontational, apparently resembling that of some law teachers of the older

1. Terrance Sandalow, *Minority Preferences Reconsidered*, 97 MICH. L. REV. 1874 (1999) (reviewing WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998)).

generation. In those years he came upon an article on law teaching written by Dr. Andrew Watson, psychiatrist and for many years a part-time member of the Michigan Law School faculty. Although the two men approached intellectual problems from what appeared to be widely different perspectives, Terry recognized the good sense of Dr. Watson's comments and drastically remodeled his classroom methods. While an active member of the Michigan faculty, Terry's teaching was one of the Law School's major strengths. That the quality of his classes was recognized by the students is indicated in part by the flocking of the best students in the school to his course in federal jurisdiction.

When Terry took on the deanship of the school in 1978, I wondered how well he would tolerate the frustrations inevitable in such matters as dealing with the university bureaucracy. Somewhat to my surprise, he appeared to relish these problems, accepting them as challenges to his ingenuity. Shortly after taking office he brought about a reorganization of the internal administration of the school. There were difficulties involved in achieving this goal, but there can be no doubt that the changes served the best interests of the school. Rather than itemizing further the achievements of a productive deanship it may be sufficient to say that the most important gains for the school from his deanship stemmed from his unremitting insistence that the school adhere to the highest intellectual standards. Although Terry left the dean's office a decade and a half ago, the benefits of that insistence are still being felt in the life of the school.

In his private life Terry enjoys the company of a wide and varied group of friends. He and his wife, Ina, both autonomous and highly intelligent people, have forged an impressive partnership. They have cultivated their relationships with their extended families and especially with their children and grandchildren. To some it may prove surprising to learn that Terry is good with small children. Like all wise grandfathers, he understands that when talking with a five-year-old, he must talk seriously, never patronize, and accept the assumptions that underlie the child's thought. If this is done, he will be rewarded with sometimes remarkable insights and a perspective on the world he had long forgotten. A story told of the late Austin W. Scott may illustrate the point. Professor Scott's young grandchild was staying overnight at his grandparents' home. After all in the household had retired the little boy was heard wailing in his bedroom. Professor Scott rose, went to the child and asked why he was crying. The boy answered: "There's a monster in the closet and I'm scared." "Well," said the grandfather, "given your premise, your reaction seems perfectly reasonable." I have no doubt that if the private archives of the Sandalow family were open to public inspection, incidents would be revealed in which Terry is found pursuing the path of reason with his grandchildren in similar fashion.