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Religious Shunning and the Beam in the Lawyer's Eye¹



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Some LRW professors design assignments so that students begin learning fundamental legal skills in the context of issues of particular interest to the professor – what Sue Liemer calls “teaching the law you love.”² Recent articles have explained how this might work when applied to such varying matters as multiculturalism or transactional practice.³ But exposing LRW students to diversity of religious belief does not appear to have found as much traction, at least in the literature. This essay describes one attempt to design a problem that grounds students in just such a larger firmament, while not distracting students (or the professor) from the paramount aim of any LRW course: introducing fundamental skills of legal analysis, communication, and research.

A common piece of advice is to create hypothetical clients with sufficient detail to remind students that their real world clients will not be drawn from a single homogenous culture. This is fine advice as far as it goes; designing realistic assignments is always a worthy goal. I wanted to do more, however, than create a problem that simply included a client who featured religious belief among her personal attributes. Rather, I wanted students to explicitly consider how a given religious belief, and their response to it, could affect the substantive outcome of legal analysis. I also wanted to choose a religious practice that might typically be viewed as “conservative,” but that

didn't trigger “hot button” reactions on the grounds of gender roles, sexual practices, child-rearing, and so on.

The Assignment

I created a closed memo assignment to achieve these goals. The facts were loosely based on a local case.⁴ A parishioner was “slain in the spirit” at a prayer rally, striking her head on the floor when she collapsed. The pastor refused to reimburse her medical expenses, insinuating that she was faking her injuries. Angered, she began telling friends that she might leave the church. The pastor privately confronted her, ordering her to stop “sowing the seeds of discord.” The next Sunday, his sermon emphasized bible verses about the same topic, warning that parishioners who failed to adhere to church discipline risked being shunned. He did not identify her, but she claimed that he constantly looked at her throughout the sermon. Finally, after a heated phone call with the pastor where she told him she was leaving, she discovered that he had sent a letter to all parishioners claiming that she had violated several church precepts, had refused correction, and accordingly should be shunned by all parishioners until she repented. Her friends were apologetic but firm: they could no longer interact with her. Forced to seek out a new church, and upset at losing her spiritual and social community, she sued the church and pastor for intentional infliction of emotional distress.

Substantive Legal Analysis Posed by the Assignment

The assignment asked the students to analyze only whether the conduct was “outrageous,” an IIED requirement. Outrageousness is measured against a malleable standard: Would a reasonable person, hearing of the conduct, exclaim “outrageous!” Put another way, does the conduct go beyond the bounds of decency so that a civilized community would consider it utterly intolerable?⁵

Thus, students needed to determine what a trial judge would likely conclude about how a reasonable person would react to the conduct. Learning how to assess reasonableness is, of course, a challenge for all students learning about tort law. But the inquiry takes on particular salience when the conduct may well seem odd

1 The reference comes from Matthew 7:3 (KJV): “And why beholdest thou the mote that is in thy brother's eye, but considerest not the beam that is in thine own eye?”

2 Susan P. Liemer, *Many Birds, One Stone: Teaching the Law You Love*, in *Legal Writing Class*, 53 J. Legal. Educ. 284 (2003).

3 E.g., Johanna K.P. Dennis, *Ensuring a Multicultural Educational Experience in Legal Education: Start with the Legal Writing Classroom*, 16 Tex. Wesleyan L. Rev. 613 (2010); Wayne Schiess et al., *Teaching Transactional Skills in First-Year Writing Courses*, 10 Tenn. J. Bus. L. 53 (2009).

4 The case eventually made its way to the Michigan Supreme Court. *Dadd v. Mount Hope Church & Int'l Outreach Ministries*, 780 N.W.2d 763 (Mich. 2010).

5 See Restatement (Second) of Torts § 46, cmt. d.

or irrational to students who lack experience with the relevant religious traditions. I wanted students to put aside their initial reactions along the lines of “that sounds crazy!” and explore more deeply whether a religious or cultural practice, no matter how unusual or even offensive it may seem to those who do not share the religion’s beliefs, crosses the line to actionable tortious conduct.

A key issue for interpreting and applying the “outrageousness” rule was whether the applicable community was society-at-large, religious believers in general, members of the particular church (or other churches with beliefs similar to those at issue), or some other grouping. Students could not start formulating answers to this potentially dispositive issue without grappling with what the cases say, or seem to say, about how to measure community reaction. In doing so, students learned the lesson, familiar to all experienced practitioners, that a creative analysis or argument has to be weighed against what the law actually says. Conversely, the lack of authority directly supporting a lawyer’s position does not mean the conclusion is faulty, but does mean that the supervising attorney and client must be fully informed of that absence.

Other helpful class discussions revolved around several outrageousness factors, such as whether the pastor “abused his power” over the plaintiff. This, in turn, raised questions of what power, if any, he actually had over members of his “flock.” Are pastors in general, and this pastor in particular, comparable to the school principals and police officers in Restatement illustrations, or the doctors and insurance adjusters in caselaw? Assuming he both had power (for example, to maintain church discipline) and used it, what if anything made it an *abuse*? Disciplining an errant parishioner cannot by itself be outrageous, any more so than disciplining a misbehaving high school student. Where, if at all, did he cross the line?

A similarly fruitful dialogue arose in the context of “peculiar susceptibility to emotional distress.” Is there anything specific about religious belief that might give rise to viable arguments under this factor? Or do the Restatement and caselaw seem to suggest that this factor is only satisfied by identifiable physical and mental conditions, as opposed to particular beliefs?⁶

⁶ At times, I had to rein in class discussions that took us a bit far afield into constitutional matters like freedom of speech and religion, such as whether judicial oversight of religious

Understanding Client Motivations and Client Counseling

As some surveys suggest, American society is growing more secular. Presumably, law students are not immune from this trend. If so, then problems with explicitly religious backdrops might become increasingly effective vehicles for forcing students to begin thinking about how to recognize, confront, and when necessary, overcome their individual biases when handling legal matters and representing clients.

With this in mind, I was able to use the assignment to introduce students to other aspects of legal practice, such as client counseling. The client has lost something she values highly: her longstanding membership in a supportive religious community. Finding a new church is not the same thing as choosing a new bank or cellular provider; her religious beliefs are a fundamental part of who she is. She does not question the church’s doctrine of shunning, and considers it an essential way to help believers stay on the “right path.” But she also believes the way she was shunned was deeply unfair. The students and I were able to explore how these client-centered concerns might affect the lawyer’s attempts to not simply analyze the law and provide dispassionate advice, but to take on the more fulfilling role of counselor, allowing him to advise the client on matters not limited to purely legal.⁷

Going Forward

I rotate memo problems, and I’ve not yet had the opportunity to re-use this scenario. Reflecting back on the way the problem played out, however, I was impressed by the thoughtfulness of the students’ analysis about how the parties’ religious roles, beliefs, and practices intersected with the controlling legal rules. Moreover, the quality of their written work product met my standard expectations for a closed memo. Inserting a religious component into this assignment did not appear to negatively affect students’ ability to support their analysis with authority or communicate their conclusions in a format that senior attorneys will likely demand. ■

practices might amount to impermissible meddling in internal religious affairs. Should I re-use this problem, it might not be as easy to dodge these sorts of issues given the Supreme Court’s recent decision in *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

⁷ See Model Rule of Professional Conduct 2.1.