

# ALCALDE

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**DOES THE LAW SCHOOL LEAN TO THE LEFT?**



In December of 1967 a University of Texas law professor placed a telephone call which alienated thousands of Texans. For a time his call extinguished the lighted windows which formed a cross on the side of the Austin Federal Service Building, but it also lit the fires of dismay in many merry Christian gentlemen. In the spring of 1968 another Texas law professor drafted a fair housing ordinance which provoked hundreds into signing petitions and caused a searing racial confrontation at the polls. Still later in the spring yet another Texas law professor led a noisy and disillusioned faction of University students in a bitter fight for Eugene McCarthy.

Norman Hackerman, the president of The University, condones such faculty activities in a January *ALCALDE* interview: "The purpose of academic freedom is really simple. It says that by virtue of becoming a faculty member, you do not give up your first class citizenship—that's all. You have the right to make statements on your own within the law and preferably in good taste . . ."

Such a benign view on the personal activities of faculty members is not shared by everyone. Take this excerpt from a letter recently mailed to Page Keeton, Dean of the Law School: "I was serious in pointing out that the UT Law School is rapidly losing prestige because of a group of radical teachers who obviously use their positions to foment problems and to bring out a group of future lawyers more interested in trouble than peace."

This unhappiness with radicals is

not isolated, nor is it limited to the Law School. Anyone who has occasion to publicly represent The University of Texas must deal with the distrust that a radical image engenders. Perhaps this distrust has best been described by a young applicant who wrote the Admissions Office last summer to explain why his parents would not allow him to attend school in Austin. His parents felt that "The faculty of The University of Texas is filled with atheists and communists, that Austin is a city of immorality and sin, and that most of the students are hippies or political radicals. My parents are somewhat right wing."

Whether you view the world through right-wing spectacles, left-wing glasses or with no help at all, it cannot be denied that many Texans see radical spots marring the burnt orange of The University. And nowhere are the spots more annoying than in the School of Law. No matter that Dean Keeton has put together a faculty, a plant, and a library which has achieved national prominence; as long as some of the faculty members bear nicknames like "The Red Rascal," there is something rotten in the state of legal education.

True or not, this sentiment exists; and because it exists the editors of the *ALCALDE* have sought the cooperation of the School of Law in the preparation of an article about some of the faculty "radicals" who have received publicity in recent months. The cooperation came mostly in the person of Byron Fullerton, BS in Phys. Ed. '46, LLB '56, the affable Assistant Dean of the School of Law. Although

Mr. Fullerton scheduled the interviews with great good will, he claimed that they were superfluous. "I'm the only radical in the school," he said. "I'm the only one to publicly support Nixon." Obviously one of the faculty members knows right from wrong, but what about the others? Perhaps the mere fact that Mr. Fullerton's statement was intended as humor gave some hint about the composition of the law faculty.

The hint died aborning with the appearance of Roy Mersky, the first of the red-hot radicals to be interviewed. Mr. Mersky does little for the image of the slovenly, bearded anarchist busily manufacturing explosives in some cluttered cellar. Instead, he looks like a man with bankers for relatives. He is the chief librarian of the Law School and his office lies at the end of a rather tortuous routing through the library stacks. The office itself is large, bright, and incredibly neat. On the walls hang pictures of his family; and in a place of honor next to his desk there is a picture of Tom Clark, the former United States Supreme Court Justice. The photograph is signed and it bears a particularly friendly note from the Justice. Mr. Mersky was equally friendly, but he appeared a trifle unwilling to reopen the half-forgotten Christmas present of another season. It was he who had complained to the General Services Administration about the Christian cross which had been formed by the lighted windows in the Federal Building.

At the time of the incident a rumor drifted about the School of Law to

the effect that Mr. Mersky was in an automobile with a now retired Justice of the U.S. Supreme Court when he first saw the lighted cross. Supposedly a discussion had ensued and the Justice concurred with Mr. Mersky's position that the Christian symbol violated the first amendment of the Constitution. (*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .*) Mersky did not choose to deny or confirm the Justice's position on the constitutional question, but he was willing to confirm the gentleman's presence when the cross was first noticed.

Mr. Mersky quickly pointed out, however, that he alone initiated the action as both a concerned citizen and as a student of constitutional law. He felt the lighted cross on federal property was a clear violation of the doctrine of separation of church and state. For this reason he called the local head of the General Services Administration and so explained. He was politely referred to the United States attorney in San Antonio. The attorney was neither antagonistic nor was he hostile, but he said that he needed to do some further checking with the Justice Department. Shortly thereafter the lights were turned out. At this point Mersky was out of it; he had seen what he considered to be an injustice, and he had registered his protest as a citizen.

At least he thought he was out of it. He wasn't. The incident was made

public and Mersky was the target of hundreds of vile, anti-Semitic hate letters, presumably written on behalf of the Prince of Peace by those with tender, Christian sensibilities. Talk around Austin inferred that a local Congressman had overruled the Justice Department, for the lights went back on and they remained on. Soon other less polite phone calls began to come in, these threatening bodily harm to Mersky's family and destruction to their home. Finally, he was forced to ask for police protection.

Even after a year has passed, Mersky still seems a little surprised at the reaction to his complaint. He does not consider himself anti-Christian nor anti-religious. He did what he did as a "gesture to *strengthen* the Constitution as it is interpreted by the United States Supreme Court." He felt that "Religious people should be offended by the crass commercialism of the lights." Born a Jew, Mersky identifies with the Jewish culture but does not practice or follow the Jewish faith. His children attend a Unitarian Sunday school and have summered twice at a Quaker camp in Vermont. His oldest daughter last year celebrated communion every morning of the week at the local Episcopal prep school she attended.

Perhaps the most gratifying aspect of the experience was the support that came from clergymen. Mersky has copies of letters from Methodist, Episcopal, Presbyterian, and Unitarian ministers all supporting his doctrine

of separation. It is quite apparent that Mr. Mersky sincerely believes in the credo himself.

The question that must be faced in the Mersky case has to do with seriousness. Was it all that important? Did the lighted windows which consummated the tenuous marriage of church and state provide any real danger? Mersky himself says that it was "not a very significant or important issue and that there are other more crass violations."

One of the crasser violations that now concerns Mr. Mersky has to do with the school prayer issue. He feels that any teacher that leads her class in prayer is actually doing no less than encouraging disrespect for the law.

His position on this point has some legal precedent, but when he was questioned on another related matter the clear waters of religious freedom became muddied. A number of Jewish professors in the Law School are in the habit of either giving their classes walks or simply absenting themselves on Jewish religious holidays. Mr. Mersky does not celebrate the holidays and thus does not follow this practice, but he stated that he approved of it and felt that it was perfectly legal as long as the professors made up the classes at a later date. The legality of their act was based on the same first amendment which guarantees religious freedom.

For the layman this is difficult reasoning to follow. Is it illegal for a

teacher to spend a minute and a half on a prayer which the students may or may not listen to as they see fit? At the same time is it legal for a teacher (paid by the state) never to meet his regularly scheduled class at all because of a purely religious holiday? Even if the class is made up, the inconvenience to the student surely infringes upon his rights much more than does the infringement of a short prayer. Only a lawyer could sort this one out; and if you don't happen to be a lawyer, it is hard to identify exactly who is teaching disrespect for the law.

Although Mr. Mersky's logic on religious freedom may be exceedingly lawyer-like, it is quite clear that we must look elsewhere for our radicals. His action on the lighted cross incident was taken after consultation with a Supreme Court Justice; it was the product of sincere motives; and it was intended to strengthen rather than destroy religious beliefs. Finally, his position was correct, both legally and theologically. After all, the cross is a symbol of Easter rather than Christmas. Probably the strongest criticism that can be made of his action is that it was unwise to create an issue from a relatively innocuous incident. But to be unwise is to be human and that particular condition does not merit the vilification Mr. Mersky received.

The definition of Christianity and humanity greatly concerns the second of the Law School "radicals," Parker



JAMES W. BANDY

ROY MERSKY . . . *They say he doesn't believe in Santa Claus . . .*



JAMES W. BANDY

*PARKER FIELDER... Austin realtors disagreed with his ideas on "putting the principles of Christian life in practice." ...*

Fielder, LLB '48. Mr. Fielder is a lithe fifty and if appearances mean anything, casting him as a radical would be like having Little Orphan Annie play the part of Lolita. He, of all things, wears his hair in a crewcut and that in itself should make him a dues paying member of the establishment. He is, as a matter of fact, a Life Member of The Ex-Students' Association. For eight years, from 1953 to 1961, he practiced as a tax lawyer in Midland; and he retired from the Army Reserve with the rank of Colonel just last June. His appearance, his background, and his attitude all belie the radical label. "I by no means want to overthrow the system," he says. But he does want to improve it.

Parker Fielder has gained notoriety by working for improvement in the area of human relations. He got actively involved in the spring of 1967 when, as Chairman of the Board of Austin's Central Christian Church, he was asked to see if his church would endorse a resolution prepared by the Austin City Council which urged a voluntary breakdown of segregation in housing. Mr. Fielder presented the resolution to his Board believing that it would pass easily since it was no more than a statement of principle. Instead, the issue became a small Donnybrook and the resolution was finally passed by the narrowest of margins.

Disillusioned by the reluctance of his church to take a stand and disheartened by the assassination of Martin Luther King, Fielder then of-

ferred his services to the Austin Human Relations Committee. The Committee put him to work by having him prepare a local fair housing ordinance. He followed the language of Title Eight of the Civil Rights Act of 1968 as far as prohibited housing activities were concerned. Fielder felt there was good reason for a local law even though it did little more than reiterate the federal law of the land. "The local enforcement would be more effective and faster to go into effect, and in the hands of local authority it would show local responsibility." The Austin Board of Realtors didn't see it that way, and they circulated petitions calling for a referendum as soon as the City Council passed the ordinance. They obtained three times as many signatures on the petitions as they needed. The issue simmered through the summer; the ordinance was revised by Fielder to meet some of the objections; and finally a referendum was held on October 19, 1968. The ordinance was defeated by some three thousand votes and the issue was dropped by the City Council. So much for the doctrine of States Rights and for those who would like to keep federal bureaucracy out of local matters.

Fielder was saddened by the defeat, but he is not a man to give up because things don't go his way. Even a casual visitor quickly senses the man's strength and genuineness; he impresses as one who would be a bulwark of comfort at the stressful moments in life. Fielder remains as a

board member of his church and he continues to be interested in civil rights. He feels that it is important to work inside the church and that there is "still a great deal of work to be done to put the principles of Christian life in practice." Surely a statement with which few men can disagree.

By this time it should become apparent that the Law School radicals are extremely illusive. One candidate has been pretty well protected by the umbrella of the United States Constitution, and the other is a retired Colonel who is chairman of a church board. If just a little investigation shows this kind of conservative coloration, why is it that the Law School is so easily and obviously tarred with the radical brush? Perhaps the reason lies in human nature; people are disposed to believe what they want to believe. Allen E. Smith is a case in point.

Without question Al Smith is a remarkable person; he is a kind of latter day Jack Armstrong who grew up. Only thirty-six, he probably lives as active a life as any member of the Law School faculty. He is on the general faculty council of The University and chairman of four or five faculty committees; an outside law practice occupies some of his time each day and he teaches a full load of courses. Last year he wrote several articles, co-authored two books, served as Secretary of the Texas Civil Judicial Council, Secretary of the Austin Memorial and Burial Society, and sponsor of a

Law School honor society. He also was a judge of the Moot Court program, supervised some of the student writing for the Texas Law Review, and he is a member of an arm-long list of professional organizations. He has received offers of guest professorships at three prominent American law schools, and is in fact this semester serving as a guest professor at Cornell.

Perhaps because he does so much, he finds it necessary to be a physical culture faddist. He works out regularly and he attends Stan Burnham's exercise class at the UT gym three times a week where he can out push-up and out run anybody in the place. In fact the man is so much the All-American boy who made good, it tends to infuriate those of us who must jog along behind.

How Al Smith traveled down his royal road to intellectual and physical fulfillment is in itself an interesting story. He barely managed to graduate from high school and as a wise-guy kid joined the Marine Corps with every intention of making it his career. The level of maturity he displayed at this point in his life is graphically apparent in the scar tissue still showing on his right upper arm where he was only partially successful in having a tattoo removed. While in the Marines he took a college extension course in English, and he was fortunate to have a perceptive teacher skillful enough to show him his own potential. After several years in the service, he raced through a bachelor's



ALLEN SMITH... *Why did the Chairman of the Board of Regents call him a bomb thrower?...*

program at The University of Texas, graduating a Phi Beta Kappa with highest honors. Like Parker Fielder, he attended the Texas Law School and he received his LL.B. with honors on August 26, 1961 at the age of twenty-eight.

The story of how Al Smith became a radical is equally interesting. It came about mostly because he lives near the School of Law in a political precinct comprised largely of students. Shortly before the precinct conventions last year a group of his students came to him and asked that he lead them in a fight for Eugene McCarthy. Smith says he felt an obligation when they came to him. "If there is anything I've tried to teach," he says, "it's that political change ought to take place from within the system. When they came to me and asked that I put up or shut up, I had no choice."

Al Smith and his students managed to put up enough to win the precinct convention. They knew they could do little more than make some noise at the county convention, but Smith went about that task well within the rules of correct political behavior. He spent a long amicable afternoon with Texas Ex Robert Sneed and U. T. Regent Joe Kilgore, the Travis County democratic dignitaries who were planning the convention, and they hammered out the format. Among other things, Smith was scheduled to lead off the political speeches on the night of the convention.

While he was making his speech, Smith's role changed from that of a

teacher providing a lesson in the responsible approach to political activity to that of a radical as quickly as you might say, "Chairman of the Board of Regents." According to an Associated Press news release which came out days after the convention, a reporter leaned toward Frank Erwin and said, "Frank, isn't that one of your boys?"

"Yes," Erwin answered. "He's one of the bomb throwers we've got over at the law school."

Now Al Smith doesn't know Frank Erwin. Why Smith was called a "bomb thrower" is a mystery to him. He does feel that he might get to know Erwin a little better, however. With a big grin Smith indicated that he had half-seriously considered taking legal action against Erwin. "Bomb throwers don't make responsible lawyers, and if I ever go into full-time private practice that statement may have done me some financial damage."

Rather than being an explosive radical, Smith is simply a good lawyer. He has committed the sin of representing the SDS in legal proceedings, but he has undone that sin by also representing The University against the SDS. Like all good lawyers, he defends clients, no matter how unpopular the cause; he doesn't judge them. He also has something of the old Roman politician and writer, Cato, within him. Cato, in his later years, used to close every speech with the words, "Carthago delenda est"—"Carthage must be de-

stroyed." Oddly enough, Smith's recurring theme is sidewalks. He believes that the quality of modern life could be considerably enhanced if new sub-divisions had sidewalks. In the evenings people could take leisurely strolls, visit their neighbors and meet the new neighbors; without sidewalks social intercourse is cut off unless you are brave enough to venture onto the streets and do battle with Buicks. Smith somehow manages to introduce this theme in all his local speeches, and he has asked the City Council to pass a housing ordinance to require developers to provide sidewalks. All in all he behaves very strangely for a bomb thrower.

If the Law School's three prime candidates for radical of the month are all complete busts, are we to conclude that the Forty Acres is fresh out of boat rockers? No, we can't; and any such conclusion would be nothing short of a whitewash job. For a moment let's leave the mild-mannered legal professors and look at the self-proclaimed radicals. For instance, this statement of Larry Caroline's as reported in the March 17, 1968, *Austin-American-Statesman* surely qualifies him for the supreme accolade: "This country needs a revolution. Socialism of some kind will play a necessary role. I think we can change our society with a bloodless revolution only if the people who now hold power are willing to give up gracefully."

Once a radical professor has been identified both by his own proclamation and by his statements, what is to

be done? Should the administration exorcise him like some diseased devil? No. Not if you agree with President Hackerman's statement about first class citizenship and not if you believe in freedom itself. Any man in this country, even if he is a professor at The University of Texas, has the right to be wrong as well as to be right. To see radicalism at The University as some sort of cancer is to overreact. If the disease were communicable, why did the UT students elect Nixon in a strawvote? This puts them somewhat to the right of the citizens of the state of Texas, a strange stance for those infected with radicalism.

It is hoped that the problem of radicalism at The University of Texas may be laid to rest. There is no question but that radicals do exist on this campus, but many a rock must be turned before one can be found. And when found, his appearance is deceptive. As often as not The University of Texas "radical" would rather build sidewalks than destroy Carthage. We could all do with a few more sidewalks. □