Monroe Freedman – Heart and Mind

By Abbe Smith

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Monroe was my mentor, co-author, intellectual life partner, and member of my family. There is no one like him; he is irreplaceable.

Monroe’s irreplaceability is deeply personal for me. When he died, I lost one of my best friends. But he was also unlike anyone else in the legal profession. I want to write about both things.

As a practicing lawyer, scholar, teacher, and activist, Monroe had a unique role in the profession. He was an unusual law professor—especially in today’s academy—whose work spoke to both theory and practice, sharpening and challenging the way we think about lawyers’ ethics and what it means to undertake the representation of another human being. His impact was wide and deep, as revealed by the reams of email I’ve received since his death. Legal academics, former students, and members of the criminal defense and capital defense bars have described him as “a giant,” “a legend,” “a towering figure,” “a hero,” “a mensch,” “a sword and shield for all criminal defense lawyers,” “a true original,” “a champion for liberty,” and “a fearless example to us all.”

One member of the American Board of Criminal Lawyers—an organization to which he was especially proud to belong—called him “The Lion of the Bar.” Another referred to his exemplary “strength of character and personal courage.” Another said “the phrase ‘a gentleman and a scholar’ was coined for him.” As Monroe’s Hofstra colleague Eric Freedman wrote: “If any capital defense lawyer anywhere in the country ever faced an ethics issue, Monroe had only one question: ‘How can I help?’”

Although I knew that Monroe would one day leave this world, I was never going to be ready for it. Around 10 years ago, Monroe called to ask a favor. He wanted me to be the executor of his living will. I told him I was honored to be asked, but wanted to know exactly what this entailed. He said he had a low tolerance for pain. I said, “Like dental pain?” Then he said he didn’t want to be a burden to his family. I responded that it might not be a burden, but an opportunity for those who love him to show him how they feel. He said it sounds like you’re not the right person for the job.

I couldn’t have been more wrong for it. The mere thought of ever losing him was hard enough. As University of Calgary law professor Alice Woolley later wrote, “Part of life is our resolute inability to imagine the passing of those we love.”
Monroe knew a lot about loss. He had more than his share, with the deaths of his son Caleb, wife Audrey, and recently, daughter Sarah. I often wondered how he was still standing, and still going strong.

Several lawyers and academics who reached out to me in the aftermath of Monroe’s death noted his boundless passion for law and social justice and his extraordinary staying power. He did not simply tackle a few issues, obtain tenure and a deanship, achieve fame, and call it a day. In the last few months before his death, he published an op-ed in the *National Law Journal* on the need for independent prosecutors in police shootings of unarmed African Americans like teenager Michael Brown in Ferguson, Missouri, consulted with a national juvenile defense organization on ethical issues posed by certain practices in juvenile court, provided guidance on a controversy relating to a public defender office’s participation in a hip-hop video on police violence, organized a course at Hofstra on “Lawyers and Social Change” (for which he recruited a virtual “who’s who” of the progressive bar as guest speakers), and finished an article on lawyers’ ethics for the *Hofstra Law Review*.

He, Alice Woolley and I had also just finished co-editing a book called *Lawyers’ Ethics* for Ashgate Press in the UK. (In Monroe’s characteristically generous way, he insisted that the authors be listed alphabetically by first name. Alice and I have since changed that so that there is one more book in the world with his name first.)

Part of Monroe’s resilience—and continuing relevance—was his amazing capacity for collaboration and friendship. He was making new, dear friends—Georgetown law professor Paul Butler, University the District of Columbia law dean Shelley Broderick, Hofstra law professors Susan Fortney and Jennifer Gundlach—and deepening old ones until the very end. Cardozo law professor Ellen Yaroshefsky has a word for Monroe’s friends and admirers. She calls us Monroevians.

Monroe would be the first to admit that he wasn’t perfect.

He had a temper. He called me up one day in the early 1990s and said we were going on “The Phil Donahue Show.” I said, no I wasn’t. He said your ticket has been booked and a limo will be waiting at LaGuardia to take you to NBC Studios. We were to appear on a show with Judge Harold Rothwax and the President of the National District Attorneys Association about Rothwax’s 1996 right-wing, anti-criminal defense screed *Guilty: The Collapse of Criminal Justice*.

I swear I thought that he and Harold Rothwax were going to have a heart attack on the show. They were at each other’s throats. (In fact, Harold Rothwax died of a heart attack later that year.)

Monroe could be very fierce about his views and principles, and occasionally brusque. Some people were afraid of him. They were right to be. As NYU law professor Stephen Gillers wrote, “The thing I remember about Monroe was, if you got into a debate with him, he was relentless in making his point and dismembering your arguments word by word, with citations, and then he’d quote inconsistent things you said five years earlier and forgot, and you now had to explain.”
He could also be gracious in the face of an attack. One admirer called him the “proverbial iron fist in a velvet glove.” When Gillers wrote a paper called, “Monroe Freedman’s Solution to the Criminal Defense Lawyer’s Trilemma Is Wrong As a Matter of Policy and Constitutional Law,” he assigned it as recommended reading to his students.

Monroe had the humility to admit when he was wrong and change his mind. But he had an annoying habit of being right the vast majority of the time—and would not give an inch to wrongheaded detractors. As one admirer remarked, “He was flexible, but...intractable when he knew he was right.”

Monroe was also fiercely loyal to friends, family, and colleagues. There was nothing better than having Monroe on your side.

He and I occasionally disagreed: about whether Atticus Finch was a hero (I am an Atticus admirer), whether Judy Clarke and Quin Denvir were right to fight for the life of Unabomber Ted Kaczynski against his wishes (I side with these capital defenders), and whether you could do more good as a prosecutor or defender (Monroe maintained that a conscientious prosecutor could do more good than a zealous defender; I disagree).

He was a harsh grader. He and I nearly came to blows when we taught legal ethics together at Georgetown. He maintained that he didn’t want to send lawyers out into the world to hurt clients. I told him I needed more data to be convinced that a three-hour in-class exam had any relationship to actual lawyering.

But he also treated students with an abiding respect and generosity. Whenever a student caught a mistake he made or offered a new way of looking at things he hadn’t considered, he would give them an engraved pen that read “Excellent job. Monroe H. Freedman.” Because I taught with him I had to have my own pens made that read “Excellent job. Abbe Smith.” I now have other engraved pens for my clinic students as well. They read: “Not Guilty! My two favorite words. Abbe Smith”

I recently attended a public defender reunion in Philadelphia (I am a proud alum of The Defender Association of Philadelphia). A career defender I’ve always admired named Stuart (Stu) Schuman approached me to say that he had only recently learned of my association with Monroe. He said he had been a student of Monroe’s at George Washington University shortly after Monroe joined the faculty. He had Monroe for first-year contracts, a subject in which he had little interest. But he knew he was in the presence of greatness: Monroe was brilliant, eloquent, and the most principled teacher he ever had. A core principle was that lawyers have a duty to pursue racial and social justice—a principle Stu took to heart. And Monroe so looked the part of a law professor in that three-piece suit he always wore. Stu did not do well in contracts, but he made a point of taking every other course Monroe taught.

My partner Sally Greenberg took Professional Responsibility at Catholic University from a professor named Lou Barracato in the late 1970s. She remembers two things from the course: her professor began every class by writing on the blackboard “DON’T COMMINGLE FUNDS,” and his constant refrain to students was, “What would Monroe Freedman say?”
In addition to his prowess in the classroom, Monroe was a prolific scholar who wrote on a wide range of issues in law and ethics. He was not someone who wrote only because this was required of him as an academic. He wrote because he had something to say. And he said it simply and forcefully, unlike much current legal scholarship. He was gifted at coming up with pithy and provocative titles. Some of my favorites were: “In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct;” “The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases;” “The Public Defender and Triage: Gideon’s Trumpet Becomes Gideon’s Strumpet;” and a review of Daniel Markovits’ 2008 book, *A Modern Legal Ethics*, entitled “Misunderstanding Lawyers’ Ethics” (co-written with me).

Among Monroe’s many delightful personal qualities, he was the world’s best dinner companion (he was a great conversationalist and a “foodie” long before that term became popular). He was also a terrific traveling companion; he even made law conferences fun. He was funny, quirky, and incredibly generous.

He was a founding member of the Flat Earth Society. When asked whether he really believed the earth was flat, he would reply, “I know it is. Just look.” He always wore a watch chain with his three piece suit. He would tell students that the watch chain had great sentimental value because his grandfather sold it to him on his death bed.

When my son Joe was Bar Mitzvah’d he wrote Monroe a thank you note: “Dear Monroe: Thank you for coming to my Bar Mitzvah and for the generous check. I will use it wisely and in moderation.” Monroe is the only person I know who ever replied to a thank you note. “Dear Joe,” he wrote. “I don’t want you to use it wisely and in moderation. I want you to waste it on beer and women.”

Alice Woolley has a son with autism who loves drumming, and particularly loves drumming with surgical gloves. Alice happened to share this with Monroe. A couple of months later a special package came for her son John with some surgical gloves Monroe had found (with help from one of his granddaughters) and a note for John “from your friend Monroe.”

He hated clichés, but was very sentimental (especially about his family). He loved the most obscure New Yorker cartoons—this was another thing we disagreed on, we never laughed at the same New Yorker cartoons. He was a consumer of both high-brow and low-brow culture: from Shakespeare to airport detective novels. He had an amazing ability to be occasionally bawdy without being crude.

Monroe was an extraordinarily progressive thinker on a wide range of issues—especially for a man of his generation. He annoyed my partner Sally when he first met her by declaring that he was a feminist before she was born. He was one of the least homophobic people I’ve ever met and represented the Mattachine Society, one of the oldest gay organization in the country. He had a deep and genuine appreciation for the struggles of the poor. He was a passionate, tireless fighter for real access to justice—not just words on a courthouse. As Eric Freedman said, “Monroe always thought there was more he could do to bring justice to the world.”
I want to end with one of my favorite speeches that Monroe used to make to students:

As you contemplate the practice of law you should understand that you may be called upon to represent people who, out of sheer greed, will hurt and even kill other innocent people. And if you can’t handle that then you should not go into the practice of corporate law.

Monroe Freedman had a profound impact on so many. I feel lucky to have had him in my life and in my heart. I couldn’t be prounder of my association with him. He will always be the wise, brave voice in my head.

Endnotes