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COMMENTARY

Juggling Scholarship and Social Commitment: Service to the Community Through Representation of Indigent Criminal Defendants*

HENRY GABRIEL**

You can tell by the title that I am going to address a struggle, a conflict; which, of course, is going to be resolved in favor of a fervid social commitment. You can tell this by the words that I use, and because you know that the representation of indigent defendants is noble. Therefore, you may safely assume that academic lawyers who do *pro bono* work for indigents likely have settled this conflict by the awareness that we are achieving good. This may be a safe assumption, but one that I would like to examine.

I have been handling federal appeals for the last six years. These cases are all appeals in the federal court of appeals and the United States Supreme Court, and I receive them through court appointments and through the Louisiana Death Penalty Resource Center. My clients are all indigent and marginalized. I do this in addition to teaching a full academic course load. The university does not provide me with extra compensation for this work.

Therefore, the question confronts me head on: why should I commit to *pro bono* work for indigent defendants? More broadly stated, why should we academicians agree to such work?¹ This, of course, presupposes an even more elementary question: should lawyers in academe be practicing law?

I do not adhere to any fixed model of what a law professor should be. There are those who joined the academy for the precise purpose of avoiding the practice of law. This does not appear to me to reflect negatively on the teaching profession or those who profess it. Teaching and traditional scholarship are both virtuous callings, and when properly combined, as is done by the finest in our profession, present enough honor, distinction and importance to fulfill the best of professional lives. But

* This commentary is based on a speech given by the author to the Minority Law Teachers Conference held in New Orleans on September 27, 1991.

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1. "We" being the classroom teaching faculty. The clinicians get to do this work all of the time.

your interests, as do mine, may be in the active participation in the legal process. If that is true, there is an abundance of reasons to use your time and talents for this work.

First, the expertise of law professors is useful to the courts as well as the clients who desperately need access to the courts. This expertise is badly needed. If there is any doubt in your mind about this, you need only let the courts know that you are willing to assist in some cases and you will be answering the telephone soon, and often.

Second, you will be setting a proper example for your students. This is what I call the "talk is cheap" version of legal education. I do not think law professors are obligated to do any *pro bono* work, but if you do not, and you tell your students that they should, they are entitled to ignore you.²

Pro bono work also allows unique insight into the legal process. This is one area of the law where the system shows its most enigmatic and significant warts: where the system is the slowest, breaks down the most, and is the most challenging to the participants. I have also found that some judges, who have not impressed me by my cold study of their opinions, have appeared quite bright and perceptive when they are on the bench grilling me during an oral argument.

This can all be fruitfully brought into the classroom. What my recent work has shown me is the vast dissimilarity between the law in the books and the law as reflected by the reality of indigent prisoners.

As an example, I recently won what I believed to be a significant victory in the United States Court of Appeals. In this case, the court accepted our argument for a major revision and expansion of the application of the rule of *Brady v. Maryland*³ which resulted in an extension that significantly increases the rights of criminal defendants against the government. After I received a copy of the court's opinion, I wrote my client a self-congratulatory letter explaining the importance of our victory: I told him "we won." Straightaway he responded: "How can you say we won? I'm still in jail after 17 years for a crime I didn't commit." Of course he is correct. The levels of additional hearings at both the state and federal level before he will be released, if ever, will take several years, and will require much additional free legal counsel (if he can get it). Students need to know that the poor do not have any easy avenues for redress in the criminal justice system, and they must usually rely on the many overworked public defenders, if they are able to get access to them.

Students are led to believe, because of the cases they read, that there

2. I am not referring only to preaching about social activism and hypocritically doing nothing, but also simply meeting the basic professional demands that we expect from any practicing attorney.

3. 373 U.S. 83 (1963).

was a "golden age" during the sixties and early seventies when the accused had strong and vigorous rights against the state that had exercised its powers against the individual defendant. Unless we experience, and continue to experience, for ourselves the frustration of the system in real cases, the frustration of time and of resources, of poverty and ignorance, we too lose sight of the fact that, for the individual indigent defendant, the present (or past) temperament and spirit of the makers of our constitutional law is of no moment or consequence. When this occurs, our own lack of focus will be brought into the classroom to perpetuate further this veil which masks the truth about the relationship between the indigent accused and the state.

There is, of course, one final reason to represent indigent criminal defendants. (Version one: the joke) Because the pay is superb. (Version two: the truth) Because it feels good.⁴

But all I have said thus far is too easy: too pat. It borders on clichés and platitudes. What I would really like to examine here are the reasons for not undertaking this type of work.

First, I would like to consider one of the strongest and most encrusted myths in legal education, the stated standards for faculty evaluation. The myth is easily stated. A faculty member will be evaluated for retention, promotion and tenure on three specific criteria: teaching, scholarship and community service. This triad has been set out as the established basis of evaluation for so long that we have become numb to our own rhetoric. We have begun to believe it because we say it.⁵ But it is a myth, and, as with all myths, it is not true.

The reality of legal academia presents us with two models of professional survival. The first model is excellence in scholarship and something less than a disaster in the classroom. The second model is excellence in teaching and having put something in print.⁶ With either paradigm, community service, whether university and law school com-

4. And because of all of the potential clients you may have, the indigent criminal defendant simply needs you more than anyone else does.

5. New faculty members who are at institutions without strong informal mentoring systems run the risk of being advised by well meaning senior colleagues that community service, and particularly *pro bono* work, will be looked upon favorably come promotion time. These senior colleagues mean no harm, but they are apt to fall back on "standards" and point out the lack of publication on the part of the young professor whose promotion they vote against. And in this negative vote, they mean no harm.

6. The first model applies to the "top ten" schools and the next ten schools that claim to be in the top ten. The reason these schools can emphasize scholarship over teaching is because the faculty at these schools actually publish. See, e.g., Ira Mark Ellman, *A Comparison of Law Faculty Production in Leading Law Reviews*, 33 J. LEGAL EDUC. 681 (1983); The Executive Board, *Chicago-Kent Review Faculty Scholarship Survey*, 65 CHI. KENT. L. REV. 195 (1989). The second model applies to all other law schools. The reason this model applies to those schools is because the faculty on those schools would rather talk about writing than write, and therefore teaching is the only basis by which evaluation can be made.

mittee work, working with professional organizations, or other activities, such as *pro bono* representation of indigents, counts very little.

Therefore, it would appear that those without tenure and those who may be considering the possibility of moving to another school should measure carefully the costs of *pro bono* work. That time might otherwise be used for traditional legal scholarship which will, ideally, advance an academic career or, at the least, simply allow the continuation of an academic career.⁷

Not only is it possible that engaging in *pro bono* work may passively operate against you by drawing too heavily on the limited resource of time, it may also have a pernicious and direct detrimental effect on an academic career. For new members of the academy, it is always important to watch whose toes you may be stepping on. I think three potential problem areas have to be considered.

First, there are the members of the clinical faculty who may resent what they perceive as an infringement on their own inviolable ground. This is understandable. They will be only returning in kind the treatment they have received from the regular classroom faculty.⁸

Then, there are the members of the law school faculty who believe that all law professors should be barefoot and in the classroom. They are disturbed by anything they perceive as diluting the central teaching mission of the law school. The more insecure they are about the relation between what goes on in the law school classroom and what is in fact necessary for the formation of future members of the legal profession, the more likely they are to attack anything in the law school that occurs outside the classroom.

The third group of faculty who may be disturbed by your engaging in *pro bono* work are those basic back biters who do not like it when anyone does anything. You must simply know that they exist, so you may decide how best to work around them.

There are other legitimate reasons for not spending your professional energy on *pro bono* representation of the poor. For example, a law school is not a law firm, and you cannot expect the support and services from a law school that you would legitimately expect in the practice of law. If you forget this fact, the secretaries, the print shop, and the mail room

7. A recent study in the *Journal of Legal Education* suggests that professional activities other than teaching and traditional scholarship, to the extent that the alternative activities draw away energy from teaching and scholarship, may have a detrimental effect on those who are already tenured. William G. Hollingsworth, *Controlling Post-Tenure Scholarship: A Brave New World Beckons?* 41 J. LEGAL EDUC. 141 (1991).

8. For faculty who are at schools that have sharply defined lines between the clinical and classroom faculty, with different cultures for each, and with each having its own standards of evaluation, it is possible to not only engender resentment on the part of the clinicians, but simultaneously have the classroom faculty brand you a "clinician" and therefore question whether you are proper classroom faculty "material".

will remind you in ways that will make a most profound impression on you.

A final reason for avoiding this type of work is that you will get little recognition for it. I point this out for one reason. All academic lawyers know that excellence and hard work in law teaching is a thankless task. We also know that most of our scholarship, no matter how insightful or useful, goes unnoticed. How much more work are you willing to take on that goes unrecognized?

Yet, for many of us, involvement in *pro bono* cases becomes part of our professional addiction. It takes up about one-third of my work time, and at times, exceeds this. Because of this, I have developed some buffers that have allowed me to keep this work under control so it does not interfere with my primary professional activity as a full-time law professor.

First, I keep in mind that I cannot save the world. Although I believe the work I do is important, it cannot even begin to make a dent in the vast need for legal assistance. Thus, I regularly check the status of my workload to ensure that I have not committed to more than I can handle.

Second, I rely heavily on student assistance. I have never found any shortage of highly talented and motivated students willing to assist in the research and brief writing of an appellate case, and sometimes, giving the oral argument.⁹

I do not perform trial work and strongly recommend against it. There is not enough time to be a trial attorney and a full-time law professor. Although I do know faculty members at various law schools who do undertake a substantial amount of trial work, I do not know of anyone doing this who maintains regular office hours at the law school, keeps up with his courses, and maintains a reasonable schedule of scholarly research and writing. Doing any less than that is being less than a full-time productive member of a law faculty.

I also think it is important to limit yourself to cases of some importance. The time and talents of a full-time law professor are too precious to do otherwise.¹⁰ This can be used as a base for some of your scholarly activity as well. A case which sets important precedent can always be spun into a serious article. It is not important that it necessarily becomes

9. This obviously is a tremendous benefit to me, as it allows me to be much more efficient and productive, and therefore allows me to handle more cases. From the standpoint of legal education, it may be even more beneficial to the students. At Loyola, the students can receive credit for this work in the class on Federal Appellate Practice. In addition to the actual experience of research and brief writing, this is often the first time the students are exposed to the pressure and time constraints of practice. Many students have told me this is an invaluable lesson in professionalism, and possibly the most important lesson gained from the experience.

10. Thus far, I have concentrated on the professional concerns of doing *pro bono* work. We have our lives, our families, our other reasons for guarding our time and energy. The toll this type of work takes on an otherwise full time law professor is substantial.

a lead article in a major law review. There are many avenues of publication, such as bar journals and practice guides. All help to develop a publishing record that will allow you to be taken seriously.

But thus far, I have spoken as if scholarship and *pro bono* practice are separate and unrelated activities. They need not be. Legal scholarship comes in a variety of molds, and scholarship which reflects the struggles of real people as it works through the intricacies of the law is much less dry than that scholarship that does not. The writing of appellate briefs and the preparation of oral arguments forces you to approach legal problems with the intensity that you would give your legal writing. This hard thinking about the law keeps us from getting too soft in the way we talk about the law in the classroom and write about the law in our scholarship.

I am, of course, referring to real scholarship. Scholarship that does not rigorously analyze the law will be taken as soft scholarship, and this may be held against you.¹¹

In this balancing of priorities in your professional life, you have to ask whether this work is needed. I think it is. Last spring we did a study of the resources for post-conviction relief available to indigent inmates at the state penitentiaries in Louisiana and Mississippi. We discovered, as will be no surprise to anyone, that most of the poor indigent inmates in our prisons do not have any practical access to legal assistance, and they have inadequate legal resources.¹² Many of these prisoners have claims that will never be addressed. But some of these claims do make it to the system as *habeas* petitions. It is at this point that the judges are able to cull out the meritorious claims, and in particular, those that would merit the type of attention that we in the academy can bring to bear.

Does this work matter? In my experience, yes. Most of the appellate work that my students and I handle successfully, either on direct appeal or in post conviction proceedings, is the follow up of other lawyers who were working under less than ideal conditions. These lawyers were often inexperienced, and they were always overworked. Many appeals simply need the sustained concentration and effort that law professors are in a position to deliver. For example, I was recently asked to undertake a direct appeal to the United States Supreme Court in a death penalty case. In this case we challenged the constitutionality of the jury instructions on

11. For example, simply writing about doing *pro bono* work, as I am doing here, will not be taken as serious scholarship. Nor should it be. For those just embarking on an academic career, the four to six years to tenure will go by fast enough, and just mastering the assigned courses, developing a strong and natural teaching style, and beginning to cultivate a record of publication will take up as much time as any profession has a right to demand.

12. We also found, contrary to popular opinion, that the prisons actually allocate a fair amount of their limited resources to the law libraries and the institutional writ writers, and the priority scheme for allocating these resources to the prisoners is quite fair.

reasonable doubt. These instructions had been challenged before. But my students and I were able to do something with the petition that the prior lawyers did not have the luxury of doing. We were able to fully research the law and related social science literature, then write, rewrite, reresearch, edit, polish, think it out again, then go back to step one and start over and write the damn thing correctly.

And we won.

