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Academic Research and Advocacy Research

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ACADEMIC RESEARCH AND ADVOCACY RESEARCH

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Research is something we all do, whether for buying a new car, choosing a favorite wine, or agreeing to marry an attractive lover. Some research is a necessary evil, some a delightful passage, some unmitigated drudgery. Our general concern this evening is to hone the concept of legal research, at least as it is manifested by law professors and lawyers. More specifically, how does academic research and advocacy research differ in the world of law and what unique obligations might such differences suggest for the law professoriate?

The general issue is the difference, perhaps conflict, between research aimed primarily at discovering truth and expanding knowledge versus research aimed primarily at mounting an argument to achieve victory for a client or some law reform goal. Academic research permits the researcher to define the topic and the important points to be studied, and encourages the researcher to report everything found of any value to the field. Advocacy research typically begins with a narrowly drawn topic and issue, and the researcher is encouraged to report only the findings which bolster the advocate's primary argument, either greatly discounting or remaining conveniently silent about conflicting evidence.

I. PERSONAL EXPERIENCE

Let me provide fair warning about my personal goals in this inquiry. I have thought about this issue for most of my seventeen years as a professor, occasionally defending the adversarial tone of my scholarly writing, often admiring the attempts at value-neutral writing by other

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scholars, and condescendingly ridiculing the thinly-veiled adversarial goals of most law review articles.

During the past two years I have had to face this issue more directly in my own work. For over a decade, beginning in 1976, my professorial research and writing largely concerned the issue of the death penalty for juvenile offenders. I began with the goal of discovering everything about its history and current practice as well as the relevant law and policy issues. As I carefully documented this phenomenon, I fought against my inclination to roundly condemn it as barbaric, unamerican, and otherwise outrageous. I continued to remind myself that my obligation was to report everything—the good, the bad and the ugly.

A year and one half ago I was finishing the final edit of my book[1] on this subject. As I painstakingly checked and double checked each footnote, each statistic, I also reworded any text that revealed too baldly my true feelings about the need to end this practice. I did allow my adversarial side relatively free rein in the final chapter[2] but otherwise tried to hew the work to the idealistic model of the detached, uninvolved academic researcher.

A few weeks after finishing the final edit of the book I was invited to become involved as co-counsel for a juvenile actually on death row.[3] I had repeatedly refused such requests in the past, fearing that the role of advocate with my client's very life on the line would render even more difficult my efforts to live up to the value-neutral model of the academic researcher. But the academic research and writing was over, the case was a particularly good one for appellate review, and I thought the experience would be a good refresher for me on the real world of lawyering.

As many of you know, I did agree to serve as co-counsel. I worked for several weeks on the petition for certiorari and then worked for several months on the briefs. The case was argued before the United States Supreme Court on November 9, 1987, and the decision may be handed down any day now.[4] My six months of intensive advocacy research and writing on that case made clear to me the real world differences between advocacy research and academic research and the schizophrenia such differences induce in the lawyer/law professor who attempts both.

Before continuing with the tale of my personal saga down this treacherous path, let me return to some fundamental principles and guideposts for these two quite different endeavors.

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[1] V. Streib, Death Penalty for Juveniles (1987).

[2] *Id.* at 184-89.

[3] Thompson v. Oklahoma, 56 U.S.L.W. 4892 (U.S. June 29, 1988), *vacating and remanding* 724 P.2d 780 (Okla. Crim. App. 1986).

[4] Editor's note: The case was decided on June 29, 1988. *See* Thompson v. Oklahoma, 108 S. Ct. 2687 (1988).

II. Academic Research by Law Professors

We are law professors and lawyers. While trained primarily, and in my case solely, to be attorneys at law pursuing the interests of clients in various adversarial or quasi-adversarial settings, we find ourselves in the role of university professors whose subject happens to be law. University professors in other disciplines typically are not only well-trained in their fields, but are socialized in their graduate programs to fulfill the research and writing expectations of university professors. By and large, law professors do not have that experience. We are trained advocates functioning in an academic world that values non-adversarial exposition and inquiry.

Law professors' professional lives are continually drawn in a variety of directions. First, they are expected to teach beginning and advanced law students the rudiments of law in the particular areas of expertise claimed by the professors. Effective, indeed acceptable, law teaching requires research to develop new courses, improve current courses, prepare teaching materials and textbooks, and more generally just to stay abreast of new statutes, cases, and ideas in the subject matter of the courses we teach.

Another expectation of law professors is that they regularly provide a range of services to the law college, the university, the profession, the legal system, and the society-at-large. The various specific service obligations may be in academic governance, law reform, or continuing legal education. Many of these service areas may require specialized research just to understand the issues involved and the appropriate alternative solutions to be considered.

The third obligation of the law professor is the focus of this paper. This is the expectation of scholarship, typically manifested in written papers, articles, monographs and books, either expanding the frontiers of knowledge or providing particularly insightful analyses of existing knowledge. It is in this function that the professor, law or otherwise, has an almost unique role to play.

At least in theory, the law professor is afforded a generous portion of the work week, perhaps twenty to thirty percent, with no narrowly defined job tasks and no target billable hours. The law professor is simply admonished to "seek truth" and "to go where no mind has gone before." And, as all of us in this business soon discover, our success in this academic research, particularly as manifested by research publications, is the primary determinant of our success as law professors.

So we write. We use our legal training and experience, as well as the advocacy mindset issued to us as law students and lawyers, to do the research upon which this scholarly writing must be based. We can hardly be blamed for falling back on our previous research and writing efforts to provide a model for our continuing work. For almost all of us, that previous research and writing experience comes from our writing of briefs

and papers in law school and the writing of motions, briefs, and similar documents as practicing lawyers. Therein lies the problem, and the target of our inquiry this evening.

III. Advocacy Research by Lawyers

Practicing lawyers function in a world quite different from the university, certainly in the context of the individual case. The case comes to the lawyer as an undifferentiated jumble of contested facts, arguable law, and often intense emotions. The lawyer's role is fairly clear—to achieve the best results for your client. For a criminal defense attorney, for example, those results typically are (1) to minimize the chances of conviction and, failing that, (2) to obtain the least severe sentence.

The research limitations on the lawyer advocate are often severe, particularly for the criminal defense attorney. Little time, less assistance, and even less encouragement often lead the advocate to what can only be described as a "quick and dirty" foray into the primary law sources. Beckoning sidetrips must be shunned, and background reading of law review articles is an extravagant luxury. Trial judges, and even appellate courts, give little encouragement for the Brandeis Brief or even exposition of the argument beyond the primary statutes and case holdings.

But the most serious problem stems from the role of the lawyer as advocate. No motivation exists to expand knowledge or produce insightful critiques of existing knowledge unless this would serve to gain the desired results for the client. Since cases primarily require diligent uncovering of the facts and presentation of those facts in the most persuasive manner possible, the knowledge expanded and being critiqued is simply what happened on the night in question. While this may be crucial to the client's case, it is seldom of interest beyond the confines of that case.

So the advocate is often in a mad rush from tree to tree, forced to grab at facts and law that help the client but with no time, and perhaps no inclination, to wander and enjoy the forest. A steady diet of such advocacy research may well lead the participants to believe that this is what research is all about and to be skeptical toward and unappreciative of less goal-oriented, real world, practical research. Perversely, it can appeal to the characteristic cynicism of lawyers and bolster their belief that no one does or should pursue research unless there is something in it for the advocate's cause.

IV. Implications for Law Professors

If the general sense of these positions can be accepted at least in part, what are the implications for law professors' research and writing?

Should we follow our natural inclination to pursue advocacy goals, arguing for some law reform measure or for some new direction? I say no, or at least not always.

Two primary reasons lead me to this conclusion. First, expansive, exhaustive, unrestricted, far-reaching explorations of important topics in law are of undeniable value to the legal profession. Few issues have only two sides; more commonly, issues impact a wide variety of people and principles, most of which are unrepresented in advocacy settings. If we are simply to understand where we have been, where we are, where we are going, and where we might go if things were different, we must be furnished with information and analyses which cover the waterfront and which are as objective and value-neutral as humanly possible.

Second, law professors are the only ones who can or will perform this service. Practicing attorneys lack the mindset, the resources, and the ethical latitude, certainly as far as such an unrestricted inquiry might not further their clients' interests. Appellate judges are restricted in their opinions to the advocacy briefs of the parties, their own limited research and that of their clerks, and the issues presented in the case before them. Legislators considering legal reform may attempt a broader inquiry but are not immune to the efforts of political action groups or the wishes of their constituents, and in any event they do not enjoy the protections of academic tenure. University professors in fields other than law, no matter how closely allied with law, seldom have the depth of legal analytical ability to satisfy this need, at least by themselves.

So it is up to law professors. Indeed, it is part of their contract with the university, the profession, and society. They are paid a reasonable full-time salary to work a full work week and are assigned only a few teaching hours and a few service commitments. The rest of their work week is left open for precisely the kind of endeavor described above. They have almost no restrictions, even no guidelines, as to the appropriate topics to be explored, research questions to be addressed, conclusions to be drawn, or values to be served. Ignoring for the moment the predilections of student law review editors to whom our finished products are submitted, law professors don't even have to be relevant.

Certainly in comparison to practicing lawyers and judges, law professors have almost no firm deadlines or page limits. For the advocate, the brief is due on Monday regardless of the condition of the draft. Academic professionals can, and most do, put the still uncooked piece on the shelf for a while until we work through the parts that trouble us, that still need more research, or that we can't seem to get quite right. Yes, we may face approaching tenure or promotion decisions but even then the restraints are quite loose.

Many issues will never be researched in any scholarly manner if not by law professors. These include issues that can not, or at least have not for centuries, found their way into justiciable cases. They have not been and

will not be addressed by legislative committees. Either they are not particularly relevant to the law of today, they are not at all ripe for presentation to adjudicative bodies, or they are based upon unproven and currently unprovable facts. Only the curious law professor will have the time, freedom, and inclination to follow that thread wherever it may lead.

V. So How Are We Doing?

If there is at least some obligation for the law professoriate to fill this niche, how well have we done? How many law review articles, for example, simply explore all of the nooks and crannies of a legal issue and avoid any strongly worded moral at the end of the story? How easy is it to distinguish between the law professor's article and the lawyer's brief in any measure other than format? How often do law professors use their freedom to research and their access to law reviews simply to launch yet another manifesto to further their own pet cause? Shouldn't they feel some obligation to provide a neutral, objective exploration and presentation of all the issues and let the readers decide for themselves what conclusions should be drawn? Finally, might this not tone down the too common shrill pettifoggery language of so much legal scholarship?

VI. Epilogue: Confessions of a Sinner

Having roundly chastised the law professoriate for researching and writing advocacy pieces rather than academic pieces, let me now turn the spotlight on my own efforts. Was I able to follow the righteous path in writing about the juvenile death penalty, or do my published pieces read like advocates' briefs? *Mea culpa, mea culpa.*

I tried from the beginning to do the right thing, but the human side of me, long repressed but with a faint pulse still discernible, occasionally overtook the legal scholar side of me. As I examined the facts about executed child after executed child, describing them in a detail unattained since my ninth grade laboratory report on the dissection of a frog, I could not suppress the outrage boiling within me.

I confess. The part of the brief I contributed for the Supreme Court case was a thinly disguised reprint of my law review article[5] and book chapter[6] finished the year before. Even before I was officially an advocate for a juvenile on death row, I was writing advocacy pieces and unflinchingly sending them off to law review editors. I tried to tell the whole

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[5] Streib, *The Eighth Amendment and Capital Punishment of Juveniles*, 34 Clev. St. L. Rev. 363 (1986).

[6] V. Streib, *supra* note 1, at 21-40.

story, the good, the bad, and the ugly. But even a friendly reading cannot avoid picking up on my point of view.

I promise to do better. I promise to think about the things I have said in this little talk and to try to walk the better path. Won't you join me?