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The Judge and the Academic Community

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Judges on Judging

The Judge and the Academic Community

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I. THE SPECIAL DIGNITY OF THE ACADEMIC LAWYER

In the inaugural essay of this series, Judge Coffin described this unique effort of the editors of the *Ohio State Law Journal* as an opportunity for judges to engage in "reflective self-examination" in a time of "remorselessly increasing pressures" on the judicial way of life as it has existed since the founding of the Republic.[1] When any institution—public or private—is experiencing great stress and, consequently, is in danger of undergoing cataclysmic change, the quality of its relationships with the other institutions with which it regularly interacts can determine its ability to deal effectively with the pressures. If those other institutions are supportive, stress can be eased; change can be more orderly and, most importantly, the essential traditions of the besieged institution can remain intact.

As my contribution to this effort at "reflective self-examination," I shall explore, at least in schematic fashion, the judiciary's relationship with an institution in which I once enjoyed full membership—the legal academic community. The relationship of the academic community to the judiciary is a multifaceted and long-standing one. However, like many long-lasting relationships, it is often taken for granted. Consequently, its potential for good is overlooked, and superficial misunderstandings as to the nature of the relationship often threaten its continuance.

In the United States, the judiciary has long regarded itself as having a special relationship with the legal academic community. The uniqueness of this relationship crystallized for me in 1980 when I had the opportunity to participate in the 1980 Anglo-American Judicial Exchange. This experience in comparative criminal law involved both study and "hands-on experience." Each country traded a "team" of about a dozen judges and lawyers to study, observe, and evaluate the other country's approach in the hope that such an experience would lead to a more critical evaluation of one's own system. The different attitudes of the two teams toward academic "input" was remarkable. The American team included a law dean and two law professors. Academic contribution to the team's discussions and evaluations was an integral part of the project. By contrast, our British hosts found it somewhat difficult to accept the presence of academics in what they regarded as essentially "professional" activity. For instance, at one social gathering, a very distinguished member of the Judicial Committee of the House of Lords came up to me and remarked: "You know, professor, we believe there is very little room for philosopher kings in our legal system." For him, the academician was simply not a part of the legal profes-

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1. Coffin, *Grace Under Pressure: A Call for Judicial Self-Help*, 50 OHIO ST. L.J. 399, 399, 400 (1989).

sion. Changes in the law and in legal procedure were to be hammered out in the experience of day-to-day litigation. There was no perceived need for a theoretical overview of the justice system. The different attitudes of the two teams toward the participation of members of the academy in the affairs of the profession took on a particularly graphic form at the more formal occasions when protocol entered the picture. The British "pecking order" was: 1) All judges according to seniority; 2) all lawyers by date of admission to practice. No distinction was made between members of the practicing bar and members of the academic bar. The Americans distinguished between the academic and practicing bar. Members of the academic bar preceded their colleagues from the practice.

My observation of the contrasting British and American judicial attitudes toward the academic lawyer prompted me to give more thought to the reasons for the high esteem accorded the professor by the American judiciary. In the following paragraphs, I shall explore what appear to me to be the key features of the relationship between the bench and the academic community. I shall also identify several areas where, in my view, misunderstandings need to be laid to rest, pitfalls avoided, and, more importantly, the potential for improvement enhanced.

II. Scholarship and the Judiciary

A. *The Objective "Amicus Curiae"*

Judicial respect for the scholarship of the academic community is, in one sense, no different from the respect of other professionals for the work of the scholar. We are an open society that is generally unafraid to meet its problems head on, and the work of the scholar in analyzing those problems and finding solutions does not go unrecognized. As a nation, we have come to respect those who, through their research and writing, devote their energies to the identification and resolution of the problems confronted by our legal system. The Anglo-American Exchange again provided a good example in the context of judicial administration. Throughout the sessions, I was repeatedly struck by the willingness on the part of the Americans to admit openly the problems we faced and the need for improvement. For instance, there was a good deal of discussion about the necessity to ensure a venire free from latent prejudice—especially racially-based prejudice. Most of the Americans frankly admitted the existence of the problem and focused on how to structure a meaningful inquiry that would cull out such prejudice without making the voir dire a trial within a trial.

Beyond the relatively confined world of judicial administration, no one can doubt the academic bar's direct and substantial intellectual contribution to the process of judicial lawmaking through the common law system of adjudication. It is the academic bar that has traditionally provided the intellectual "jump spark" necessary for the law's rational growth. The scholarship of the academic lawyer identifies for both the bench and the practicing bar the policy concerns that animate our law. It attempts to reconcile conflicting policies and suggests rational growth of existing legal principles to solve new problems.

The bench and practicing bar accord this special deference and respect to the academic bar because its scholarly work product is an objective and dispassionate analysis. It can be relied upon for its thoroughness and objectivity. This expectation places a significant burden on the academic lawyer to preserve that objectivity and independence. For instance, often the academic lawyer also participates in the litigation process as counsel. In such a situation, scholarship dealing with issues involved in the litigation ought to disclose this non-academic interest. An article in a scholarly publication ought not bear undisclosed striking similarities in its analysis to a brief—even a brief amicus—submitted by the same author in pending litigation. This problem can also arise when a member of the practicing bar engages in scholarly writing. Scholarship by members of the practicing bar is a venerable tradition in the United States. One only needs to have a casual acquaintance with the work product of the American Law Institute to be convinced of the value of the rare individual who can combine the scholarly and the practical. However, here too, full disclosure of those associations that may influence what is held out to be the work product of an objective scholar seems appropriate.

B. *The Objective Critic*

Another function of academic scholarship—critique of the judicial work product—casts the academic bar in a somewhat different relationship to the judiciary from the one that exists with respect to the other functions of legal scholarship. While, in one sense, constructive criticism is supportive of the judicial function, it is also distinctly adversarial. This is a most important role. If law is to remain different from politics, it must be governed by principle and, consequently, judges must adhere to principle in deciding cases.

Indeed, at least in a very broad sense of the word, academic critique of the judicial work product is a function of constitutional dignity and worthy of the special respect we accord such a function. The separation of powers scheme in our constitutional order establishes much more than a series of "checks and balances." It also establishes a framework for a constant dialogue about the values at the core of our legal system. It creates a constitutional order open to self-evaluation, self-critique, and, fortunately, self-correction. The most obvious participants in the ongoing dialogue are, of course, the three branches of government. These entities are not, however, the only participants in this dialogue. Indeed, the constitution itself acknowledges the existence of other participants. For instance, in his famous address at Rutgers University, Justice Brennan noted:

> [T]here exists a fundamental and necessary interdependence of the Court and the press. The press needs the Court, if only for the simple reason that the Court is the ultimate guardian of the constitutional rights that support the press. And the Court has a concomitant need for the press, because through the press the Court receives the tacit and accumulated experience of the Nation, and—because the judgments of the Court ought also to instruct and to inspire—the Court needs the medium of the press to fulfill this task.[2]

2. Brennan, *Address of William J. Brennan, Jr.*, 32 RUTGERS L. REV. 173, 174 (1979).

If it can be said that the press facilitates the furtherance of first amendment values by ensuring that the communication protected and contemplated by the first amendment is informed communication, I suggest that we can also conclude that the academic bar has a special role in the national dialogue. Once the press informs the public about nonlegal public policy matters, the polity, we presume, is quite capable of evaluating the information through the process of political dialogue. However, most members of the political community do not have the training necessary to monitor the judicial function. They must depend on the academic bar.

This role of judicial critic is especially difficult in the area of constitutional interpretation. Here, the fundamental values of our political order are at stake. Yet, given the raging debate on how the Constitution ought to be interpreted, the appropriate role of the scholar-critic is an especially delicate one. Indeed, one's view on the appropriate role of the scholar is at least partially determined by one's view on the proper role of the judge. Nevertheless, most would agree that the role of critic in constitutional matters requires, at least as a starting point, a good deal of attention to doctrinal analysis. Nevertheless, there has been an unfortunate trend in recent years to deprecate such doctrinal scholarship as "sterile" and "unimaginative." This decline in attention to doctrinal scholarship is a very serious phenomenon in the intellectual life of the profession. The question of whether such scholarship serves a particularly useful function when it stands alone is one upon which reasonable persons can differ. However, there can be, I respectfully suggest, little question that the rigor of its analysis is a necessary component in any intellectual endeavor involving the search for principle. That search is the lifeblood of the judicial process.

Fulfillment of this role of judicial critic requires, I also suggest, certain special commitments by those members of the academic bar who undertake it and by the law schools and universities that support such research. For the academic legal scholar, the performance of this constitutionally significant function requires a great deal more than the observance of the usual norms of scholarly ethics. Most importantly, it requires, I suggest, a special kind of "full disclosure." It requires a candid statement of one's views on the nature of the judicial function, especially when the critique involves the judicial review of constitutional issues. If the scholar differs with the judge on the role that the judge ought to perform, that difference ought to be disclosed. If a judge has played by the rules of one perspective of constitutional interpretation, while the scholar adheres to another, that disagreement will most certainly color the critique of the judge's methodology. Also, there ought to be full disclosure of ideological perspective. If a member of the academic bar is ideologically committed to the achievement of certain goals for our society through the judicial process, those goals ought to be stated frankly.

Universities also have a very special responsibility to scholars who perform this role of judicial critic. They must foster an atmosphere of academic independence that recognizes not only the scholar's interest in personal intellectual freedom, but also the public's interest in a robust and uninhibited critique of the judicial work product by the academic lawyer. An essential step in the creation of that atmosphere is the explicit acceptance by university administrations of the many modes of academic

scholarship within the legal academic community—including both doctrinal and interdisciplinary work. Doctrinal scholarship has suffered appreciably because of tenure pressure within the university. While doctrinal scholarship is essential to the dialogue between the judiciary and the academic lawyer, that value is hardly appreciated beyond the walls of the law school, where most decisions on a law professor's professional future are made. The doctrinal scholar and the interdisciplinary scholar both have a great deal to contribute to the growth of the law and our understanding of judicial work product. Their work must be equally recognized, equally regarded—and equally protected.

C. *Judicial Scholarship: The Need for "Breathing Space"*

This role of the academic bar as "intellectual watchdog" of the judiciary requires great sensitivity on the part of both judges and the academic community when judges engage in scholarly endeavors. There can be no doubt that scholarly undertakings by judges are permissible and salutary. Indeed, they have been an integral part of the judicial way of life since at least the day of Justice Story.[3] In writing about the relationship among the three branches of government, Chief Justice Burger cautioned that they did not coexist in hermetically sealed containers.[4] Certainly, the same caution—perhaps with even more emphasis—is appropriate with respect to the relationship between the academic bar and the judiciary. Dialogue requires communication and interaction. Yet, the different role of each must be respected. The jurist can make a great contribution to doctrinal scholarship (as the many judge-authored treatises demonstrate). Certainly, the judge can make unique contributions to our appreciation of the processes of government, especially judicial decisionmaking. He can explore the historical and philosophical roots of our legal heritage, and no one can doubt that he has a special role—and responsibility—in the maintenance of ethical and moral standards for the bench and bar. Judicial efforts in interdisciplinary areas such as law and literature and law and religion are especially important because they enrich, in a special way, both reader and writer.

Judicial intellectual enrichment through scholarship must not be underestimated. Daily judicial duties provide little opportunity to integrate one's learning or to engage in rigorous intellectual self-criticism. Scholarly endeavors put the jurist in touch with a broader world of ideas and provide an important source of intellectual nourishment.

While the academic lawyer and the jurist have much to share in the world of scholarship, the differences in their roles will necessarily produce some stress points that require prudent attention. First, the special concern for academic freedom necessary if the academic bar is to fulfill its role as critic of the judicial work product requires that the judge, if a faculty member, be especially careful about participating in matters of academic governance that involve an assessment of the scholarly mission of the law school or of particular members of the faculty. It also requires, I suggest, great circumspection in participating in the editorial decisions of scholarly

3. *See, e.g.*, J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833).

4. INS v. Chadha, 462 U.S. 919, 951 (1983) (citing Buckley v. Valeo, 424 U.S. 1, 121 (1976) (*per curiam*)).

journals, the principal source of academic criticism of the judicial work product. On the other hand, the law school—and its parent institution—must be careful to avoid endangering, even obliquely, judicial independence. The appointments process, especially for part-time faculty, including judges in many cases, requires frequent reappointment and therefore presents frequent opportunity to express displeasure over the judge's views on the bench.

III. The Judge and the Classroom

A. *The Judge-Professor*

The synergistic effect of classroom teaching on both judge and law student is widely understood and appreciated within the legal profession. However, if the recent debates over the ethics reform legislation are any indication, it is largely misunderstood by others. As noted in the preceding section, the daily duties of judging afford the judge little opportunity or time to integrate his experience or to engage in intellectual self-criticism. The classroom provides an opportunity for both. The preparation and presentation of a law course requires a significant intellectual effort that is indeed refreshing. The inquiries of students challenging the conventional wisdom require the professor-judge to rethink the "givens," to assess more critically the present state of the law, and to contemplate more comprehensively the future growth of the law. Current case loads leave the judge with little free time. However, time spent teaching is hardly time wasted from the judicial task. As case loads mount, intellectual battle fatigue becomes more of a danger. To the degree that we permit case load statistics to cut the judge off from the mainstream of the profession's intellectual life, we compound the effect of that battle fatigue. An hour's sparring over the United States Supreme Court's latest pronouncement with bright, eager students hardly dulls one's approach to the daily grind of record review and opinion writing. Faculty associations also provide the judge with mature professional companionship with relatively little danger of professional impropriety.

Teaching also provides the judge with an opportunity to fulfill effectively another obligation of judicial office—moral leadership within the profession. All law schools have classes in basic professional responsibility and ethics, but this minimum requirement hardly affords the new member of the profession an adequate opportunity to appreciate fully the responsibilities and traditions of the profession. In an era of growing incivility in the courtroom and increasing materialism in the practice, the judge has a responsibility to remind the profession of its better self. The classroom is the perfect environment for suggesting to those who will soon enter into full membership in our profession that they ought to evaluate critically the vectors of professional life that have become the "givens" for those who have preceded them. If incivility in the courtroom is to cease, if being a lawyer is once again to mean the acceptance of a special responsibility for the course of public affairs, the change must take place in the classroom and continue into the courtroom. The judge-professor can bridge that gap.

B. *The Judge as Student*

"Continuing legal education" for the bench or bar conjures up the image of crowded rooms of notetakers at one- or two-day-long programs designed to "update" the participants on recent developments in bar review fashion. These programs no doubt play an important role in keeping the bench and bar current, and the academic lawyer's contribution to these sessions is enormous. However, there is a growing realization that this approach to judicial education only partially fulfills the need for intellectual refreshment. Consequently, the judiciary has begun to call upon the university to play a greater role in judicial education. The Master of Laws program at the University of Virginia under Professor Daniel Meador is probably the most ambitious of these programs. Other developments, however, will probably have a wider impact. The Federal Judicial Center has begun to integrate more theoretical presentations into its continuing legal education programs. It is also developing, in conjunction with law schools, more extensive programs designed to submerge the judge into the life of the scholarly community, albeit for a brief time, and to strengthen the judge's ties of intellectual kinship with the academic community and its work. These intellectual "retreats," even if they are of relatively short duration, can provide significant intellectual respite for the judge with several hundred cases on the docket and no relief in sight. Moreover, it gives the academic bar the opportunity to remind the judge of his better self.

IV. Conclusion

The academic lawyer and the judge play different roles in the intellectual life of the profession—roles that require, paradoxically, both collaboration and a certain amount of "breathing space." However, the ultimate responsibility is a shared one. We must keep alive and nurture a professional tradition of scholarship transformed into service to the commonwealth—and to the dignity of the individual person.