Not Just the Deserving

JUDITH MILLER*

Assistant Clinical Professor of Law, Federal Criminal Justice Clinic, University of Chicago Law School

Eugene Haywood, my students' and my clemency client, was sentenced to a mandatory sentence of life in prison when he was convicted, after trial, of being a crack dealer.[1] He was angry when he started doing time, and legitimately so—he had been arrested at 25 and was facing the prospect of dying in prison. It took years before Eugene moved past that anger, but when he did, he threw himself into his own rehabilitation. By the time my students and I met him, he was working three jobs in custody—one for UNICOR prison industries, a second as a suicide watch companion, and a third as a GED tutor. He had learned he was especially talented at math; he was going to correspondence school for his second post-secondary degree, and he'd successfully completed a 4000-hour apprenticeship program.

Eugene was also "lucky." President Obama saw beyond his criminal past and gave him another chance. He's now married, living in Texas, and working in the transportation industry. Since his release, he's been to the White House—his first time on an airplane—and, most importantly, stayed out of any trouble.

But when my students and I first called him in Fall 2014, we didn't know any of that. We knew only that he was a black man sentenced to life in prison for a crack crime. Perhaps even more importantly, we knew that we'd been asked to evaluate him—to determine whether he was one of the deserving saints that President Obama wanted us to try to help or one of the many sinners we were supposed to cast back.

That framework posed a problem from the beginning. Evaluating whether a client *deserves* relief violates the public defender ethos that animates the clinic in which I teach—the Federal Criminal Justice Clinic (FCJC) at the University of Chicago Law School. My colleagues and I are former Assistant Federal Public Defenders, and we continue to serve as private public defenders on the Criminal Justice Act Panel for the Northern District of Illinois.[2] As criminal defense attorneys, we teach our students that our duty of loyalty means "total loyalty is due *each* client in *each* case."[3] As assigned counsel, we emphasize to our students that we don't pick our clients; we zealously advocate for them regardless of whether we think they have a strong or weak case and regardless of what they're accused of having done. And as a public defender clinic, we steadfastly refuse to screen our assigned cases: we sign up for "duty days" where we agree to represent everyone brought to court that day for initial appearances, and we see those cases through their end with dismissal, plea or trial, sentencing, and/or appeal.[4]

This public defender ethos is central to our teaching mission. Our students learn through necessity to advocate as Davids, not Goliaths—a skill that will serve them well regardless of what kind of law they intend to practice. All of our cases start off as long-shots; as a general rule, federal prosecutors don't bring cases unless they have strong evidence on their side. To prepare our students to be zealous advocates in the toughest cases, we teach them the importance of knowing the law, investigating every lead, and fostering a strong relationship with our clients. We role-play initial client interviews where our clients have few reasons to trust us and many not to. We teach our students how to draft—and win—motions by finding elusive threads through years of contrary precedent. And we guide them to develop elaborate social histories that, when coupled with social science, confront the worst facts and counteract the substantial sentences our clients face. We hope to instill in our students a recognition that defending the vulnerable and often despised is not just worthwhile but noble, that the Constitution guarantees every defendant a zealous advocate, and that there is power not only in telling a client's individual story but also in connecting that story to shared principles that even the "undeserving" deserve.

Participating in the clemency initiative presented a challenge for that ethos. As public defenders, we oppose the idea that only the "deserving" merit our help. Yet that was what President Obama's clemency initiative ultimately seemed to ask of us. The problem was far from inevitable. When then-Deputy Attorney General James Cole announced the initiative in 2014, he spoke in sweeping terms of re-examining the sentences of current inmates who "likely would have received a substantially lower sentence if convicted of the same offense(s) today. . . ."[5] He connected the individual cases addressed through the initiative to fairness and promoting "the most fundamental of American ideals—equal justice under law."[6]

As it was implemented, however, the President's initiative didn't evince much care for these principles and instead focused primarily on individual desert. It set out eight factors the President would consider, only one of which was whether the applicant would be given a lower sentence today.[7] The remaining seven factors focused on skimming the cream off the top of the hundreds of thousands of incarcerated inmates: they required that any

Federal Sentencing Reporter, Vol. 29, No. 5, pp. 259–262, ISSN 1053-9867, electronic ISSN 1533-8363.
 DOI: https://doi.org/10.1525/fsr.2017.29.5.259.

commutee be a non-violent, low-level offender, without a significant criminal history, without any significant ties to any large-scale criminal organizations such as gangs, without any history of violence either before or during incarceration, and having demonstrated good conduct in prison.[8] And, as many have criticized, the initiative relied on at least six layers of internal review by federal prosecutors and other government attorneys before a petition even reached the President's desk.[9]

Clemency Project 2014 (CP2014) added a seventh layer to that review—a formally optional endorsement from CP2014 itself.[10] CP2014 received the thousands of survey responses from inmates who had asked for an attorney to help them with the Obama initiative. After minimal screening, the Project assigned those inmates to evaluating attorneys. In turn, the evaluating attorneys would take on limited representation of those inmates "to evaluate whether a client's case meets the criteria for representation for commutation."[11] A CP2014 ethics memorandum stressed that the attorney's evaluation should straightforwardly explain to CP2014 whether a client met the criteria or not, consistent with consent of the client and state ethics requirements.[12] This evaluation could have a material and adverse effect on a client: if CP2014 concluded that he did not meet the criteria, then the Project would "not designate our or any other lawyer to prepare and submit a petition through its process."[13]

This unusual form of representation ran directly counter to the FCJC's approach. Indeed, CP2014 itself was plainly torn about the position in which the administration had put it. On the one hand, it asked for even-handed evaluations and gave its small army of pro bono attorneys a clear path out of a bad case. Given the Obama administration's decision to forsake wholesale reform and CP2014's limited resources, this may well have been the only realistic way to proceed. Yet, on the other hand, the Project's "Overall Instructions for Pro Bono Lawyers" refused to endorse abandoning even those clients whose cases it rejected. In studiously neutral language, the Project emphasized that an attorney could "file a clemency submission directly with the OPA" regardless of whether or not CP2014 decided to back the petition.[14]

Needless to say, one of the very first projects on which my students and I worked was to research whether this new-to-me form of representation was permissible, and if so, what were its requirements and scope. We concluded professional ethics indeed allowed us to play the assigned part in this in this double-skimming, but we decided that we would not do so. How could we build a trusting relationship with our client if he knew we might recommend that he *not* receive clemency? How could we ask our client's friends and family to revisit painful memories about his childhood while at the same time reserving the right to walk away from those memories? Instead, we decided to apply the same public defender ethos to this case that we would to any other, regardless of what the administration wanted. We would treat Eugene like any other public defender client and follow his case through to its ends, regardless of CP2014's verdict.

That choice was probably the most important decision the students and I made. It framed our whole approach. It meant that, as with a regular criminal cases, we started by looking to the end: What investigation and writing should we do at the beginning so that, by the end of the case, we would have a strong executive summary and petition? It meant that FCJC students could do real client interviews, and earlier in the case—they had a chance of getting Eugene to trust us enough to disclose not just the tremendous transformation he'd undergone in custody but also some of the less-than-wonderful details about his life before then. It meant that we could contact family and friends who knew we were on Eugene's side, and not just one more functionary sent to decide his fate. And it meant that we could move more quickly: instead of withholding judgment for the many many months it took to collect all the obscure records we needed to figure out if Eugene truly deserved our help, we could work on the rest of his case right away.

Our strategy worked. Starting at the end meant that, by the time we had all the records we needed, we were in a position to draft a strong Executive Summary and then quickly to pivot to the petition itself. We sent CP2014 a short Executive Summary with nearly 100 pages of attached exhibits, and in short order, they agreed to recommend Eugene for clemency. Because Eugene already had a clemency petition pending, we promptly submitted an even further updated Executive Summary and exhibits to the Pardon Office to supplement that petition, and immediately began working in earnest on a lengthy supplemental petition. And, a few short months later, the President granted Eugene's petition.

The students' evaluation of Factor 7—demonstrated good conduct in custody—illustrates the point. We had learned that Eugene had been disciplined relatively early in his custody for setting a fire. An arson violation was serious business: It's categorized it as a 100-level offense by the Bureau of Prisons (BOP)—the highest level of disciplinary violation.[15] A violation like that could have been a categorical strike against clemency under not just the "good conduct in prison" factor but also the "non-violent . . . offender" factor. Had we been efficient evaluators, our best bet at that point may well have been to wrap up our work and advise CP2014 that he was not a good candidate for the Project's recommendation.

Instead, the students and I dug deeper. It turned out that the ostensible arson was really a work-related accident—one that Eugene himself had reported. And Eugene showed us how the BOP had subsequently treated the incident like the carelessness it was rather than the kind of serious criminal conduct that would preclude clemency.

This follow-up paid off. We could honestly report in the Executive Summary that Eugene had "demonstrated good conduct in prison" and was a non-violent offender. We didn't hide the incident, but we had a concrete and demonstrable explanation for it. At the same time, our in-

depth investigation also enabled us relatively quickly to write up a more expanded version for the Supplemental Petition. Eugene's dated and admittedly careless on-the-job accident paled in comparison to his outstanding in-custody work history and rehabilitation—regardless of the seriousness of the internal disciplinary classification. By approaching the issue as public defenders committed to our client, we successfully neutralized one of the potentially strongest strikes against Eugene, ultimately obtaining both CP2014's recommendation and a presidential commutation.

My students' and my decision to approach clemency through the public defender ethos was not exactly what the clemency initiative seemed to want. But I think ours was the better approach, especially for those who seek sweeping reform of the criminal system, as President Obama purported to.[16]

Despite the soaring rhetoric with which the clemency initiative began, the President's piecemeal project produced far more modest results than the approximately 10,000 grantees that the administration had projected.[17] Jewish tradition would say that saving even one person's life is like saving a world—let alone the 1715 lives of the people who received clemency.[18] Yet the President's initiative failed to connect those individual acts of mercy to a broader criminal justice movement. The President had both legal authority and historical precedent for using the clemency power to enact wholesale retroactive sentencing reform. His decision to stay his hand where he had clear constitutional authority did not succeed in pushing Congress to pass its own reform measures.

That failure was foreordained by the structure of the clemency initiative. Whatever its initial goals, the initiative's focus on individual desert meant de-emphasizing the underlying injustice of sending so many young men to die in prison. Eugene, for example, should never have faced a mandatory life sentence for a non-violent drug crime. His astounding rehabilitation underscored the very real and unfair damage of that sentence. But to focus so heavily on that rehabilitation, as the President's clemency initiative asked, turned attention away from the underlying injustice—and, concomitantly, away from more broadly based arguments for reforming federal sentencing.

My students saw from the outset what Obama's experience as a community organizer should have told him. By approaching Eugene's case as public defenders they could link his individual story with the bigger picture while building a genuine connection with the very people most affected by the problem—Eugene and his family. Approaching the case as evaluators trying to figure out if Eugene deserved our help would have led to the opposite result. Instead of arguing Eugene's case at least in part by connection to the bigger picture, we would have focused solely on the narrow facts of his case. Perhaps we would have missed the research showing that fully half of racial disparities in federal sentencing can be chalked up to prosecutors' decisions about whether or not to charge mandatory minimums.[19] Even worse, we might have failed to connect that point to the sentencing statistics showing that the Central District of Illinois—where Eugene was prosecuted—filed the sentencing enhancements that raised mandatory minimum sentences at the fifth highest rate in the country.[20] And pushing Eugene to prove himself to *us* instead of the other way around may well have led to him concealing information, his family not trusting us, or worse, refusing to work with us on a release plan. It surely would not have helped build support for broad-based federal sentencing reform.

Eugene, my students, and I will forever be grateful to President Obama for saving Eugene's life. Calling Eugene to tell him he would be freed was one of the best moments of my career, and my students will take this victory with them throughout their own careers. But as the President himself acknowledged, freeing only the saints—much less focusing advocates on that project—"cannot fix decades of overly punitive sentencing policies, or make our criminal justice system more fair or more just on the whole."[21] Would that his clemency initiative had been structured accordingly.

Notes

* Thanks to William Baude, Andrew MacKie-Mason, Mark Osler, and Erica Zunkel for helpful comments on this piece.

1 Eugene authorized the disclosure of the privileged and/or confidential information contained in this article.

2 *See* 18 U.S.C. § 3006A(b).

3 American Bar Association, Standards for Criminal Justice Prosecution and Defense Function, § 4-3.5, Commentary at 164 (3d ed. 1993) (emphasis added).

4 *Cf.* Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer's Growing Anxiety about Innocence Projects*, 13 U. Pa. J.L. & Soc. Change 315, 326–27 (2010) (distinguishing clinics that "screen" cases from public defender–style clinics that do not). The clinic also takes on larger-scale projects and other timely cases to promote fairness in the criminal system.

5 *See generally* Clemency Initiative, U.S. Department of Justice (updated Feb. 2, 2017) https://www.justice.gov/pardon/clemency-initiative.

6 Press Release, Office of Public Affairs, Dep't of Justice, Announcing New Clemency Initiative, Deputy Attorney General James M. Cole Details Broad New Criteria for Applicants (Apr. 23, 2014), https://www.justice.gov/opa/pr/announcing-new-clemency-initiative-deputy-attorney-general-james-m-cole-details-broad-new.

7 The Pardon Office characterized the initiative as having six factors. However, the second factor itself had three factors. *See generally* Clemency Initiative, U.S. Department of Justice (updated Feb. 2, 2017), https://www.justice.gov/pardon/clemency-initiative. It is therefore more accurate to say that there were eight factors, and, indeed, many advocates treated the initiative as focusing on eight factors.

8 *Id.*

9 *See, e.g.*, Mark Osler, *Clementia, Obama, and Deborah Leff*, 28 Fed. Sent'G Rep. 309, 309 (2016).

10 In fact, obtaining approval from CP2014 required passing two levels of review, including a Steering Committee where any one representative could veto a case. *Id.* at 310.

11 *Ethical Considerations for Pro Bono Lawyers Participating in Clemency Project 2014* at 4 (undated) (on file with author).

[12] *Id.*

[13] *Id.*

[14] *Overall Instructions for Pro Bono Lawyers* (n.d.), at 4, http://www.law.edu/res/docs/Overall-Instructions-for-Pro-Bono-Lawyers-Final.pdf.

[15] Prohibited Acts and Available Sanctions, 28 C.F.R. § 541.13 (1995).

[16] *See* Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 Harv. L. Rev. 811 (2017).

[17] Then Attorney General Holder predicted that the clemency initiative could release as many as 10,000 federal prisoners. Sari Horwitz, *Struggling to Fix a "Broken" System*, Wash. Post, Dec. 5, 2015, http://www.washingtonpost.com/sf/national/2015/12/05/holderobama/?utm_term=.5c92d5160d9e

[18] *See Mishnah Sanhedrin* 4:5; Clemency Initiative (Apr. 20, 2017) (1,715 commutations granted via clemency initiatives), https://www.justice.gov/pardon/clemency-statistics.

[19] Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. Pol. Econ. 1320, 1323 (2014) ("The initial mandatory minimum charging decision alone is capable of explaining more than half of the black-white sentence disparities not otherwise explained by precharge characteristics.")

[20] United States v. Young, 906 F. Supp. 2d 881, App. A (N.D. Iowa 2013). The United States Sentencing Commission was contacted to request a copy of the data underlying the Young opinion, but the Commission declined to provide it.

[21] A Nation of Second Chances: President Obama's Record on Clemency, https://obamawhitehouse.archives.gov/issues/clemency (Jan. 19, 2017).