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Goodbye to Law Reviews

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GOODBYE TO LAW REVIEWS

IT IS doubtless of no concern to anyone that this is probably my last law review article. As a matter of fact, this makes one more article than I had originally planned to write. It was something in the nature of a New Year's resolution. Yet the request to do a piece about law reviews seemed a golden opportunity to make my future absence from the "Leading Articles, Authors" lists a bit more pointed than would the business of merely sitting in a corner, sucking my thumb, and muttering Boo. Keeping well in line with two traditions—a course which lawyers will readily understand—I decided to break the resolution and not wait for opportunity's second knock. This, then, is by way of explaining why I do not care to contribute further to the qualitatively moribund while quantitatively mushroom-like literature of the law.

There are two things wrong with almost all legal writing. One is its style. The other is its content. That, I think, about covers the ground. And though it is in the law reviews that the most highly regarded legal literature—and I by no means except those fancy rationalizations of legal action called judicial opinions—is regularly embalmed, it is in the law reviews that a pennyworth of content is most frequently concealed beneath a pound of so-called style. The average law review writer is peculiarly able to say nothing with an air of great importance. When I used to read law reviews, I used constantly to be reminded of an elephant trying to swat a fly.

Now the antediluvian or mock-heroic style in which most law review material is written has, as I am well aware, been panned before. That panning has had no effect, just as this panning will have no effect. Remember that it is by request that I am bleating my private bleat about legal literature.

To go into the question of style then, it seems to be a cardinal principle of law review writing and editing that nothing may be said forcefully and nothing may be said amusingly. This, I

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take it, is in the interest of something called dignity. It does not matter that most people—and even lawyers come into this category—read either to be convinced or to be entertained. It does not matter that even in the comparatively rare instances when people read to be informed, they like a dash of pepper or a dash of salt along with their information. They won't get any seasoning if the law reviews can help it. The law reviews would rather be dignified and ignored.

Suppose a law review writer wants to criticize a court decision. Does he say "Justice Fussbudget, in a long-winded and vacuous opinion, managed to twist his logic and mangle his history so as to reach a result which is not only reactionary but ridiculous"? He may think exactly that but he does not say it. He does not even say "It was a thoroughly stupid decision." What he says is—"It would seem that a contrary conclusion might perhaps have been better justified." "It would seem—," the matriarch of mollycoddle phrases, still revered by the law reviews in the dull name of dignity.

One of the style quirks that inevitably detracts from the forcefulness and clarity of law review writing is the taboo on pronouns of the first person. An "I" or a "me" is regarded as a rather shocking form of disrobing in print. To avoid nudity, the back-handed passive is almost obligatory:—"It is suggested—," "It is proposed—," "It would seem—." Whether the writers really suppose that such constructions clothe them in anonymity so that people can not guess who is suggesting and who is proposing, I do not know. I do know that such forms frequently lead to the kind of sentence that looks as though it had been translated from the German by someone with a rather meager knowledge of English.

Long sentences, awkward constructions, and fuzzy-wuzzy words that seem to apologize for daring to venture an opinion are part of the price the law reviews pay for their precious dignity. And circumlocution does not make for strong writing. I grant that a rapier in capable hands can be just as effective as a bludgeon. But the average law review writer, scorning the common bludgeon and reaching into his style for a rapier, finds himself trying to wield a barn door.

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Moreover, the explosive touch of humor is considered just as bad taste as the hard sock of condemnation. I know no field of learning so vulnerable to burlesque, satire, or occasional pokes in the ribs as the bombastic pomposity of legal dialectic. Perhaps that is the very reason why there are no jesters or gag men in legal literature and why law review editors knit their brows overtime to purge their publications of every crack that might produce a real laugh. The law is a fat man walking down the street in a high hat. And far be it from the law reviews to be any party to the chucking of a snowball or the judicious placing of a banana-peel.

Occasionally, very occasionally, a bit of heavy humor does get into print. But it must be the sort of humor that tends to produce, at best, a cracked smile rather than a guffaw. And most law review writers, trying to produce a cracked smile, come out with one of those pedantic wheezes that get an uncomfortably forced response when professors use them in a classroom. The best way to get a laugh out of a law review is to take a couple of drinks and then read an article, any article, aloud. That can be really funny.

Then there is this business of footnotes, the flaunted Phi Beta Kappa keys of legal writing, and the pet peeve of everyone who has ever read a law review piece for any other reason than that he was too lazy to look up his own cases. So far as I can make out, there are two distinct types of footnote. There is the explanatory or if-you-didn't-understand-what-I-said-in-the-text-this-may-help-you type. And there is the probative or if-you're-from-Missouri-just-take-a-look-at-all-this type.

The explanatory footnote is an excuse to let the law review writer be obscure and befuddled in the body of his article and then say the same thing at the bottom of the page the way he should have said it in the first place. But talking around the bush is not an easy habit to get rid of and so occasionally a reader has to use reverse English and hop back to the text to try to find out what the footnote means. It is true, however, that a wee bit more of informality is permitted in small type. Thus "It is suggested" in the body of an article might carry an explanatory footnote to the effect that "This is the author's own suggestion."

It is the probative footnote that is so often made up of nothing

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but a long list of names of cases that the writer has had some stooge look up and throw together for him. These huge chunks of small type, so welcome to the student who turns the page and finds only two or three lines of text above them, are what make a legal article very, very learned. They also show the suspicious twist of the legal mind. The idea seems to be that a man can not be trusted to make a straight statement unless he takes his readers by the paw and leads them to chapter and verse. Every legal writer is presumed to be a liar until he proves himself otherwise with a flock of footnotes.

In any case, the footnote foible breeds nothing but sloppy thinking, clumsy writing, and bad eyes. Any article that has to be explained or proved by being cluttered up with little numbers until it looks like the Acrosses and Downs of a cross-word puzzle has no business being written. And if a writer does not really need footnotes and tacks them on just because they look pretty or because it is the thing to do, then he ought to be tried for wilful murder of his reader's (all three of them) eyesight and patience.

Exceptions to the traditions of dumpy dignity and fake learnedness in law review writing are as rare as they are beautiful. Once in a while a Thomas Reed Powell gets away with an imaginary judicial opinion that gives a real twist to the lion's tail. Once in a while a Thurman Arnold forgets his footnotes as though to say that if people do not believe or understand him that is their worry and not his. But even such mild breaches of etiquette as these are tolerated gingerly and seldom, and are likely to be looked at a little askance by the writers' more pious brethren.

In the main, the strait-jacket of law review style has killed what might have been a lively literature. It has maimed even those few pieces of legal writing that actually have something to say. I am the last one to suppose that a piece about the law could be made to read like a juicy sex novel or a detective story, but I can not see why it has to resemble a cross between a nineteenth century sermon and a treatise on higher mathematics. A man who writes a law review article should be able to attract for it a slightly larger audience than a few of his colleagues who skim through it out of courtesy and a few of his students who sweat through it because he has assigned it.

Of course, the conventional cellophane in which most legal

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writing is wrapped is not entirely unconnected with the product itself. I am fully aware that content helps to determine style. I am also aware that one of the best ways to palm off inferior goods is to wrap them up in a respectable-looking package. And though law reviews and law writers deserve a round of ripe tomatoes for their devotion to what they solemnly suppose is the best legal style, it is the stuff concealed beneath that style, the content of legal writing, that makes the literature of the law a dud and a disgrace.

Harold Laski is fond of saying that in every revolution the lawyers are liquidated first. That may sound as if I had jumped the track but it seems to me to be terribly relevant. The reason the lawyers lead the line to the guillotine or the firing squad is that, while law is supposed to be a device to serve society, a civilized way of helping the wheels go round without too much friction, it is pretty hard to find a group less concerned with serving society and more concerned with serving themselves than the lawyers. The reason all this is relevant is that if any among the lawyers might reasonably be expected to carry a torch or shoot a flashlight in the right direction, it is the lawyers who write about the law.

I confess that "serving society" is a slightly mealy phrase with a Sunday school smack to it. There are doubtless better and longer ways of expressing the same idea but it should still convey some vague notion of what I mean. I mean that law, as an institution or a science or a high-class mumbo-jumbo, has a job to do in the world. And that job is neither the writing of successful briefs for successful clients nor the wide-eyed leafing over and sorting out of what appellate court judges put into print when, for all sorts of reasons, some obvious and some hidden in the underbrush, they affirm or reverse lower court decisions.

Yet it would be hard to guess, from most of the stuff that is published in the law reviews, that law and the lawyers had any other job on their hands than the slinging together of neat (but certainly not gaudy) legalistic arguments and the building up, rebuilding, and sporadic knocking down of pretty houses of theory foundationed in sand and false assumptions. It would be hard to guess from the mass of articles dedicated to such worthy inquiries as "The Rule Against Perpetuities in Saskatchewan,"

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"Some New Uses of the Trust Device to Avoid Taxation," or "An Answer to a Reply to a Comment on a Criticism of the Restatement of the Law of Conflicts of Laws."

Law review writers seem to rank among our most adept navel-gazers. When they are not busy adding to and patching up their lists of cases and their farflung lines of logic, so that some smart practising lawyer can come along and grab the cases and the logic without so much as a by-your-leave, they are sure to be found squabbling earnestly among themselves over the meaning or content of some obscure principle that nine judges out of ten would not even recognize if it hopped up and slugged them in the face.

This centripetal absorption in the home-made mysteries and sleight-of-hand of the law would be a perfectly harmless occupation if it did not consume so much time and energy that might better be spent otherwise. And if it did not, incidentally, consume so much space in the law libraries. It seems never to have occurred to most of the studious gents who diddle around in the law reviews with the intricacies of contributory negligence, consideration, or covenants running with the land that neither life nor law can be confined within the forty-four corners of some cosy concept. It seems never to have occurred to them that they might be diddling while Rome burned.

I do not wish to labor the point but perhaps it had best be stated once in dead earnest. With law as the only alternative to force as a means of solving the myriad problems of the world, it seems to me that the articulate among the clan of lawyers might, in their writings, be more pointedly aware of those problems, might recognize that the use of law to help toward their solution is the only excuse for the law's existence, instead of blithely continuing to make mountain after mountain out of tiresome technical molehills.

In what I have said about the stuffy style and fluffy filling of law review articles, I have not been referring exclusively to those elegant effusions in the front of the book known as "leading articles." The shorter fillers called "notes," "comments," "recent cases," and similar apologetic terms come in for the same kicks in the pants as they pass in review. Usually written by students —and then rewritten by the editors—their subjects are likely to be just as superficial and their style even more assiduously stilted.

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I see no difference except that the top dogs among the law review authors, in return for seeing their stuff spread out in slightly larger type, are forced to confess authorship in public, whereas the small fry are spared the embarrassment of signing their names.

If any section gets a partial reprieve from all this slapping around it is the book review section. When it comes to the book reviews, company manners are not so strictly enforced and it is occasionally possible to talk out loud or crack a joke. As a result, the book reviews are stuck away in the back like country cousins and anyone who wants to take off his shoes and feel at home in a law review will do well to come in by way of the kitchen.

All of this raises another question about which I am curious. I wonder why all the law reviews, so far as lay-out and general geography are concerned, are as like as a row of stiffs in a morgue. Why do they all start out with a fanfare of three or four leading articles and then dribble back diminuendo through variations on the same sort of theme until they reach the book reviews at the end?

The answer, I suspect although I have no means of proving it, is that they have all been sucked into a polite little game of follow-the-leader with the Harvard Law Review setting the pace. That might also account for the universally dignified tone of law review writing. I have nothing in particular against the Harvard Law Review and I have nothing against the New York Times either, but it seems to me that if all the newspapers in the country had stepped all over themselves in an effort to imitate the stately mien of the Times, the daily press might well be as badly in need of a hypodermic as are the law reviews. Even at the cost of breeding a Hearst in their midst, the law reviews could stand a few special features, a few fighting editorials, a cartoon or two, and maybe even a Walter Winchell.

When it comes right down to laying the cards on the table, it is not surprising that the law reviews are as bad as they are. The leading articles, and the book reviews too, are for the most part written by professors and would-be professors of law whose chief interest is in getting something published so they can wave it in the faces of their deans when they ask for a raise, because the accepted way of getting ahead in law teaching is to break constantly into print in a dignified way. The students who write

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for the law reviews are egged on by the comforting thought that they will be pretty sure to get jobs when they graduate in return for their slavery, and the super-students who do the editorial or dirty work are egged on even harder by the knowledge that they will get even better jobs.

Moreover, the only consumers of law reviews outside the academic circle are the law offices, which never actually read them but stick them away on a shelf for future reference. The law offices consider the law reviews much as a plumber might consider a piece of lead pipe. They are not very worried about the literary or social service possibilities of the law, but they are tickled pink to have somebody else look up cases and think up new arguments for them to use in their business, because it means that they are getting something for practically nothing.

Thus everybody connected with the law review has some sort of bread to butter, in a nice way of course, and all of them—professors, students, and practicing lawyers—are quite content to go on buttering their own and each other's bread. It is a pretty little family picture and anyone who comes along with the wild idea that the folks might step outside for a spell and take a breath of fresh air is likely to have his head bitten off. It is much too warm and comfortable and safe indoors.

And so I suspect that the law reviews will keep right on turning out stuff that is not fit to read, on subjects that are not worth the bother of writing about them. Yet I like to hope that I am wrong.

Maybe one of these days the law reviews, or some of them, will have the nerve to shoot for higher stakes. Maybe they will get tired of pitching pennies, and of dolling themselves up in tailcoats to do it so that they feel a sense of importance and pride as they toss copper after copper against the same old wall. Maybe they will come to realize that the English language is most useful when it is used normally and naturally, and that the law is nothing more than a means to a social end and should never, for all the law schools and law firms in the world, be treated as an end in itself. In short, maybe one of these days the law reviews will catch on. Meanwhile I say they're spinach. * * *

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