American Legal History – Russell

FRED RODELL, "Goodbye to Law Reviews," 23 *Virginia Law Review* 38-45 (November 1936).

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 , 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 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 "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. . . .

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. . . .

.[T]he 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 the 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 the 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 of 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 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.

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 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 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. . . .

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," "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 navelgazers. When they are not busy adding to and patching up their lists of cases and their farflung lines of logic, so that some smart practicing 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.

The 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 cozy 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 of 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. . . .

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 clients 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 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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