Ruminations about Law Reviews

Bernard D. Meltzer

An independent law review has made an important finding about our faculty. This finding, which may be old hat to you, is that, per capita, the Law School's faculty has published more pages in the twenty leading law reviews than any other law faculty, during a time period that seems to have been the 1980s.

Reactions to that momentous achievement were swift and varied. Dean Stone, with characteristic statesmanship, said something about an imperfect measure, thus preserving his option of emphasizing imperfect or measure, according to his sense of the situation. The International Paper Company was much less guarded. It sent our law school the Forests-into-Footnotes Award. Waste Management Inc. is a joint sponsor. The Sierra Club promptly recommended a countervailing award, one for the faculty that published least, with ties to be broken by drawing straws (biodegradable, of course). The title proposed by the Club was the Leisure of the Theory-Less Class Award. Finally, a centrist proposed a compromise—a prize to the faculty midway between the biggest and smallest tree predator—the Roman Hruska Award. The reactions of those important folks convinced me that I should at least scan a law review or two, notwithstanding the spirit of the Eighth
Amendment. I have time for only an oversimplified report of my romp through the law reviews.

I begin with findings under the caption of Law Reviews and Changing Conceptions of Equality and Equal Opportunity. First, there has been a significant change in the masthead of the Harvard Law Review. In the bad old days, that masthead showed the names of the President and the other officers of that review. Today's masthead avoids such conspicuous elitism. But it would be wrong to conclude that the Harvard Law Review has completely swallowed objections to hierarchy. That review still has a President and other officers. And those titles surface in the resumés that support applications for clerkships, for jobs at our law school, or for jobs at New York law firms whose salary scale confuses a promising associate with a promising big league shortstop.

The second item under the Equality rubric comes from the Columbia Law Review, which recently decided to "set aside five extra places...[for which] preference...[would] be given to gay, handicapped and poor applicants, as well as women and members of minority groups." Who was the Seventh Avenue sage who said that all new fashions end in excess?

I am not sure that the next item belongs under the equality rubric. In fact, I don't know whether it belongs any place. Anyhow, over 800 publications are now listed in the Current Law Index. Most appear at least three times a year, with several lead articles in each issue. Incidentally, my 800 number itself came from an article in a recent issue of the Harvard Law Review entitled "Scholarship Amok: Excesses in the Pursuit of Truth and Tenure."

Obviously, we are talking about a serious number of trees, a serious amount of postage, and a serious number of library shelves. As for reading time, it is said law reviews are supposed to be written, not read. But they do have some readers, including people who check the footnotes to see whether they are cited with a "See" or a "But see"—judges, lawyers desperate for a case or an argument, law students seeking a Rosetta Stone for their professor's observations. Anyhow, we have 800 items, in part because any school that aspires to respectability must have more than one student-edited journal. Harvard has hitched its aspirations to the farthest star; it has ten such journals. Some wily administrator no doubt thought that so many students would be so far behind their publishing schedule that they would not have time for trash buildings.

It is good, I believe, that more students are writing and even better that they are rewriting more. The prospect of publication is, of course, an incentive for student writing; a publication certainly dresses up a résumé. But the question remains whether the proliferation of student publications is the best means for getting law students to write more and to have their writing effectively criticized. What of increasing writing requirements and faculty criticism? Our law school, like others, has done just that and now requires two substantial pieces of writing, in addition to the required first-year writing program.

The trouble with life, as E.B. White said, is that one thing leads to another, and so it is that our faculty's fecundity has led me to scan a few other law reviews including law review articles about law review articles. In addition, I've relied on my impressions of law review articles that I read or tried to read in the last few years. My sample is not representative, my memory about these things is even more unreliable than usual; my comments are not new. If you've gotten this far, maybe you should stop reading now.

I began with Fred Rodell's unhindered attack in 1936 against law reviews. "There are two things wrong with almost all legal writing," he said, "One is its style, the other its content." Rodell's acerbic specifications make H.L. Mencken and B.B. Kurland, even in their dyssyptic moments, seem like apostles of sweetness and light. Rodell inveighed against the narrowness of law reviews and their failure to explore the role of law in dealing, as he put it, with the myriad problems of the world. But even before these sensible criticisms had been printed, some law reviews had confronted the shattering problems of the Great Depression.

What of law reviews today? There is much, I think, to cheer about. But in the law review tradition, I'll accentuate the negatives. I'll mention only three interrelated ones. First, is the frequent failure of law reviews to focus on or even relate to the preeminently practical affairs that make up the agenda of law. Instead, they grope for grand metatheories about something while often ignoring the unruly realities, the grubby particulars, that confront the law.

Such flights from reality remind me of the old story told by Sir Julian Huxley. "I recall," he said, "the story of the philosopher and the theologian. The two had been engaged in dispute, and the theologian used the old quip about a philosopher's resembling a blind man in a dark room looking for a black cat, which wasn't there. 'That may be,' said the philosopher, 'but a theologian would have found it.'" Some law reviews have bridged that gap between philosophy and theology. They've put the black cat in their premises and pulled it out for their conclusions. As Brother Kurland has said, it is easier to get from here to here than from here to there.

The second negative is the impenetrable writing that is often a substitute for communication and perhaps for thought. Such writing surely won't reach even most of the professors or, more important, the lawyers, judges, legislators and their staffs, who, in the end, determine the effects of legal writing on the development of the law. At the risk of sado-masochism, I want you to read the first paragraph of a recent law review article.

In a lecture on post-structuralism, one must inevitably begin with a definition of post-structuralism. Instead I have evoked the figure of the Chiffonner [rag-picker]. I am not well suited for the task of providing us with a working definition because I suspect that there may not be any such thing as post-structuralism. (Of course, my own wariness to identify post-structuralism can itself be understood as part of the phenomenon.) Yet in spite of my reluctance to define post-structuralism, I can at least give a list of authors—Derrida, Foucault, Lyotard, Bataille, Heidegger, and Nietzsche—most of them French, some living, some dead, who have been gathered together under that rubric. And I can also read off a series of catch phrases with which post-structuralism has been associated: the radical indeterminacy of linguistic meaning, and more generally of any semiotic field; the critique of communitarian
aspirations for the replication of the logic of identity; the debunking of the myth of the centered, self-conscious subject transparent to itself; the exposure of the traditional conception of reason as the rationalization of power; the proclamation of the end of metaphysics; and the refusal of the "melancholy science" in the name of "joyful wisdom." Such attempts to identify a wide range of thinkers and philosophical positions as a cohesive movement with amplifying themes, however, often obscure as much as they illuminate.

The third negative is the pretentious piling up of references to esoteric thinkers, often those who lived a long time ago in a foreign country and who wrote in a foreign language, which often stays foreign even after it is translated. Such references are typically a distracting form of name dropping rather than an aid to the reader's understanding or to the writer's argument. I'll resist the temptation to inflict more punishment by quoting an excerpt from another article. But I do want to say something about the citations in a thirty-three-page article in the Yale Law Journal. The author cites himself, of course. His other cites include Horkheimer, Eclipse of Reason; Valens, Cooperative Effects of False Heart Rate Feedback; Frankfurt, Freedom of Will; Kant, The Metaphysical Principles of Virtue; Rawls, of course; Bentham; Hampton, Morality & Pessimism; Plato; Aristotle; Aquinas; Hegel; Mill; Commoner; Bellah, Transcendence in Contemporary Piety; Weber; Marx; Hume; Sartre; Heidegger; Eliade; Wittgenstein; Faulkner; St. Francis of Assisi.

Well, what's to be done and not to be done? First, let's not send the problem to some committee of the organized bar. Its intervention into academic affairs has too often been faddish rather than helpful. But you might do some good if you individually grumbled about opaque or pointless law review articles—grumbled to professors, deans, and administrators. Your gripes might really influence them. On the other hand, you might just egg the obscurantists on. Anyhow, you would comfort professors concerned about the increasing gap between some law reviews and those who administer and shape the legal system.

I am not optimistic about outside intervention. In the end law reviews, like other physicians of the legal system, will have to examine themselves and cure themselves. Will they do it? Rodell, twenty-five years after saying goodbye to law reviews, cheated a little, revisited them and, in a later article, concluded that his most pessimistic predictions had been realized. Believing is, of course, seeing. Anyhow, let's take another look together twenty-five years from now and see how things went from now to then.