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A Significant Symposium

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THE HONORABLE ROGER J. MINER

A Significant Symposium

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The more things change, the more they stay the same. The *New York Law School Law Review* is different in many ways, but still in many ways the same as it was when I was Managing Editor for Volume 1. More than fifty years have now passed, but through the mists of time I can still see the small band of students who worked on that first issue. I well recall the lead article. It was written by that great lion of American law, Roscoe Pound, then Dean Emeritus of Harvard Law School. The article, entitled *The Judicial Process in Action*,¹ came to us in a form all too familiar to law review staffers—all messed up and with much cite and substance work required. *The Judicial Process in Action* . . . I have returned to that article time and time again during the last fifty years; not because it has always remained interesting, informative, and timely; not because it has provided me with valuable insights bearing on my work as a judge; and not because it is a great classic of legal literature. I have returned to that article repeatedly over the course of five decades because I never have understood the damn thing!

The blanks that Pound left in his footnotes required us to look up German and other foreign law texts to fill them in. What he was getting at in the piece still remains obscure. Take this passage: “Theories of judicial decision may be worked out for decision at first instance or for decisions of courts of review (which make precedents) or for both, or may be directed to the law-finding or law-declaring function of appellate courts, or to the judicial process as a whole.”² He then runs on with all kinds of theories applied to various types of judicial actions, analyzing various aspects of Roman law as he goes. He does get in a crack at Cardozo along the way. He was a typical academic, talking to other academics. More about that later. And oh yes, he is the author of this famous phrase: “Law must be stable and yet it cannot stand still.”³ Very profound indeed.

I am sure that the *Law Review* editors today struggle with the same kinds of problems that we struggled with so many years ago. But what I do not understand is why so many issues of the *Law Review*, including those published during the past several years, have been symposium issues. I think that a symposium issue is a very good thing from time to time, but that the traditional law review should be the main concern of those who are entrusted with its publication.

I am told that symposium issues are preferred over submission issues because many authors attempt to “trade up” by getting accepted in this *Law Review* and then trying for publication in what they regard as a more prestigious journal. Such authors should be required to sign an agreement that, if accepted here, they will be published here.

And another thing that I don’t understand in modern times is why the *Law Review* has a publisher. Professor Stracher has a very distinguished background, and the *Law Review* is fortunate to have him as an advisor. We have had a number of professors who have served as advisors over the years and who were very helpful to

1. Roscoe Pound, *The Judicial Process in Action*, 1 N.Y.L.F. 11 (1955).

2. *Id.* at 11.

3. ROSCOE POUND, *INTERPRETATIONS OF LEGAL HISTORY* 1 (P. Smith 1967) (1923).

the editors. The editors should be able to consult with advisors and to have the benefit of their advice, experience, and wisdom. But if the publisher is a person to whom the editor-in-chief reports, then there is something wrong with the operation because then we do not have a student-run journal in the traditional sense. I understand that some editors require a good deal of help, and that is what an advisor is for.

But the concept of a student-run journal must prevail, although I understand that many of those who submit articles, including professors, do not like the idea of having student editors. But that is the tradition, and it should continue. The *Law Review* website says, “The *New York Law School Law Review* is a journal of legal scholarship edited and published by students at New York Law School [. . .]”⁴ But it goes on to say that the executive board and associates and members “work together with a faculty publisher to make all editorial and publication decisions.”⁵ I am not sure whether this is intended to modify the previous phrase.

The symposium presented today illustrates the talents, diversity, and accomplishments of our *Law Review* alumni. Because it does so, I have entitled my remarks, “A Significant Symposium.” I consider this symposium significant for three reasons. First, it announces to the legal community that our graduates with *Law Review* experience are capable of the type of scholarship that leads to appointment as tenured law professors. Here, I interject a long-held hang-up of mine, and that is the absence from the tenured faculty at New York Law School of any New York Law School graduate.

During the years of my service on the board of trustees here, I urged the dean to remedy this serious shortcoming. I was told it was being “looked into.” As far as I am concerned, the faculty is sending this message to the students: “You are capable of being outstanding practicing lawyers, of leading pre-eminent law firms, of serving in the judiciary, of managing and creating successful businesses, of service in high office in city, state, and national government, but you are not worthy to join with us in the enterprise of legal education, except as adjuncts to the tenured faculty.” I suggest to you that this is a disgraceful situation, and I urge the dean and faculty to conduct an immediate and intensive search to identify alumni who are interested in, and capable of, joining this distinguished faculty.

Having served as a trustee, I am fully aware that the faculty is largely a self-perpetuating oligarchy, generally voting to choose those who have an educational background similar to theirs. It is time to open up this closed society of scholars and let in some New York Law School alumni. Maybe they would bring some fresh air to the enterprise. And do not tell me that there is not one of our alumni who is qualified out there.

A participant in this symposium, Carol Bast, class of ‘82, is an Associate Professor of seventeen years standing at the University of Central Florida. She has served as

4. New York Law School: About New York Law School Law Review, http://www.nyls.edu/academics/jd_programs/law_review/about_new_york_law_school_law_review (last visited Aug. 10, 2009).

5. *Id.*

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editor-in-chief of a professional publication and has presented a most scholarly paper for this symposium. Maybe she is not interested, but has she ever been offered a position here? I have no doubt that other scholarly alumni are engaged in teaching law or are interested in doing so. How about reaching out to them? Our students should know that their school is good enough to provide tenured professors who once sat in their seats. It is a matter of pride for all of us.

Second, this symposium is significant for the presentation of scholarly works that are of practical application and convey thoughtful analysis in clear and understandable language. Many articles in many law reviews seem to be written by academics for academics. My colleague on the D.C. Circuit, Harry Edwards, has written of the disconnect between the professoriate and the practicing bar.⁶ Nowhere is this more apparent than in some law reviews, where the writing is unintelligible and what is not unintelligible is boring to the point of stupefaction. I was going to say that if I saw the word “normative” in one more law review article, I would scream. Unfortunately, some of the law review articles prepared for this symposium contain that obnoxious word.

Aside from opaque legal writing, many law academics should be teaching in other graduate programs, since their interests seem to be less in the law than in other academic fields, such as history, psychology, sociology, and philosophy. During my service on the board of trustees, the dean would introduce us to teaching candidates by explaining the “interests” of the applicant. “This is Jane Jones. She is interested in the law of renaissance art, but will teach a course in first year torts.” Such a faculty member naturally gravitates to her field of interest in any course she teaches.

I am advised on good authority that one who taught a first-year course in contracts spent the entire time parsing the provisions of the UN Charter. To give you some idea of the disconnect I am talking about, I give you the titles of three recent law review articles by professors: *The Case of the Missing Discipline: Finding Buddhist Legal Studies*;⁷ *“To Be Human”: A Psychological Perspective on Property Law*;⁸ and *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*.⁹ These articles are not from our law review, of course. I am sure they are all very interesting, but if a law review is to speak to the non-academic segments of the legal profession, those articles don’t do the job. They would better be found in a scholarly journal of some other discipline, not in a traditional law review.

Take the following excerpt from a law review article that was written a while back:

6. Harry T. Edwards, *Another “Postscript” to “The Growing Disjunction Between Legal Education and the Legal Profession,”* 69 WASH. L. REV. 561 (1994).

7. Rebecca R. French, *The Case of the Missing Discipline: Finding Buddhist Legal Studies*, 52 BUFFALO L. REV. 679 (2004).

8. Jeremy A. Blumenthal, *“To Be Human”: A Psychological Perspective on Property Law*, 83 TUL. L. REV. 609 (2009).

9. Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007).

Like most fields of thought, the law has developed its own vocabulary for expressing concepts and promoting values. The language of law is the language of rationality, of the cool and the deliberative. While this insistence upon rationalistic expression has general merit in the elucidation of critical issues, in some instances it obscures more than it reveals. Where, as in criminal punishment, the influence of emotions is too fundamental to ignore or entirely condemn, the law's vocabulary requires expansion to permit emotive discourse.

Bringing emotions into legal discourse has its risk. We must take care that decisionmakers' personal, nonmoral inclinations do not substitute for legal principles in the resolution of controversies. Thus, where we can devise rules sufficiently determinate to minimize emotional influence, we should do so. When we reach the limits of law, when we enter those areas where rules lose their power to direct us toward just results, however, recognition of and struggle with emotional influence becomes necessary. In these mysterious places we need to reconcile thoughts and feelings.

In the seventeenth century Blaise Pascal wrote in his *Pensees*: "La coeur a ses raisons, que la raison ne connait [pas.]" The heart has its reasons, which reason knows not. In our everyday lives we know what is right not only because we think it, but because we feel it. It is our challenge as lawyers to make the law see the sense of that insight.¹⁰

This is how I would sum up the article: The influence of emotion in criminal punishment is good and bad. But how about the last two sentences? "In our every day lives we know what is right not only because we think it, but because we feel it. It is our challenge to make the law see the sense of that insight." I do not understand those two sentences. The author challenges us to make the law see the sense of an insight. I would like to accept the challenge, but I do not know what it is.

The disconnect also manifests itself in the courses given in some law schools, courses that relate very little to the training of lawyers. Not too long ago there was a professor who gave a course in his area of interest—Medieval Icelandic Dispute Resolution. When I spoke to another law professor about this strange course, he replied, "Oh yes, Professor X is in great demand because of his field of expertise." This suggests another area where the law schools are falling short, in my opinion. And that is the dearth of required courses necessary for the training of lawyers. For that is what we are supposed to do here—to train lawyers, that is "persons learned in the law." Some basic training is essential.

It is amazing to me that Wills, Trusts, and Estates, for example, is not a required course. It seems to me that a basic legal education requires some grounding in business organizations, family law, and commercial transactions to name just a few subjects that are now elective and should be required. When I was a student, the first two years were pretty much devoted to required courses, and elective courses were

10. Samuel H. Pillsbury, *Emotional Justice: Moralizing The Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 710 (1989).

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available only in the last year of law study. We also had what were then known as comprehensive examinations in addition to examinations for each course. At the end of the first year, the comprehensive cut across all the subjects studied that year. After the second year, the first two years were covered, and after the third year, a general comprehensive exam was given. This, of course, was much easier to accomplish when the great majority of courses were required. It also proved of great assistance in preparing us for the bar exam.

I dare say that few law graduates today would pass the bar exam without a bar review course covering the subjects that were omitted from their law school experience. The New York Law School of yesteryear was a place that could get you past the bar exam without a bar review course. It seems impossible today. Many students today, without any real knowledge of the world of law outside the academy, elect courses that have no practical application. Many end up with a majority of such courses on their transcript. This does not serve them well. The *Law Review* graduates who have contributed to this Significant Symposium have demonstrated that scholarship is not inconsistent with practical application.

I have been supplied with early drafts of the papers submitted for this symposium, have given them a fast read, and find them most impressive. Steven Allen's article, *Toward a Uniform Theory of Retroactivity* is an important piece of scholarship.¹¹ Whether or not a new decision of the Supreme Court is retroactive is an issue that bedevils us as federal judges. Mr. Allen does an excellent job of examining the problem. His discussion of the application of *Teague v. Lane* in conjunction with structural error brings to the fore some issues that we continue to grapple with.¹² I note that he is a Co-Editor of *Modern Federal Jury Instructions*, a work that saves appellate judges a great deal of headaches if properly followed by the trial courts.¹³

Very impressive indeed is Professor Bast's very detailed article, *Conflict of Law and Surreptitious Taping of Telephone Conversations*.¹⁴ It involves a very thorough exegesis on the laws of various jurisdictions regarding surreptitious wiretapping and the conflict of law problems that arise from the variations in laws. Problems arising from questions as to jurisdiction over defendants and the application of the exclusionary rule are also examined. I find this piece very timely for personal reasons. While sitting with the Ninth Circuit in Pasadena two months ago, I was confronted with a case of a movie director who allegedly hired a private detective to do some wiretapping.¹⁵ The private detective secretly taped his conversations with the director.¹⁶ The case fell within the federal wiretapping statute, and Professor Bast's article pinpoints the issue important to our case—the exception that allows secret

11. *See infra* p. 105.

12. 489 U.S. 288 (1989).

13. MODERN FEDERAL JURY INSTRUCTIONS – CIVIL VOLUMES (John S. Siffert et al. eds., 2007).

14. *See infra* p. 147.

15. *United States v. McTiernan*, 546 F.3d 1160 (9th Cir. 2008).

16. *Id.* at 1163.

taping by a party to the conversation except if the purpose of the taping is to commit a crime or tort. A very useful piece of scholarship.

Victor Suthammanont's article, *Rebalancing the Scales: Restoring the Availability of Disparate Impact Causes of Action in Title VI Cases*, presents an astute examination of the proposed Civil Rights Act of 2008, including an analysis of the conditions that gave rise to it, the possible court challenges it would face, and a fine argument for its adoption.¹⁷ One may disagree with the author's conclusion that the "[Supreme] Court's jurisprudence has reflected a thumb on the scales of justice in favor of the racially discriminating status quo,"¹⁸ but one must concede that the author has made a fair case for his contention that "[the] Civil Rights Act of 2008 is a positive step in rebalancing the scales."¹⁹

I reviewed with great interest the thesis put forth in the draft paper submitted by Lisa Chalidze, *Misinformed Consent: Non-medical Bases for American Birth Recommendations as a Human Rights Issue*.²⁰ The author posits that non-medical considerations provide much of the basis for the advice given by obstetrician-gynecologists on birthing options. This type of advice, according to the author, is not only a disservice to women, but a human rights violation that must be remedied by transparency, and by increasing accountability through litigation—medical malpractice litigation as well as litigation based on constitutional standards pertaining to bodily integrity and autonomy. Particularly interesting to me was the argument against the claims that lawyers have generated the need to practice defensive medicine, are responsible for the malpractice crisis, and are driving OB-GYNs out of business.

Although not slated for publication in this issue, the very scholarly treatment of a most interesting subject is found in the draft of the article by Michele D'Avolio entitled *A New Normative Framework, the Indigenous Representation Model*. Presented here is a novel approach to the recognition of indigenous rights. Of special interest to me was a discussion of the role of the judiciary in the protection of indigenous rights. Although also not slated for publication in this issue, the casenote by Daniel Gershburg, *Wall Street Parking Corp. v. New York Stock Exchange*, speaks to the proper balancing of equities in the granting of preliminary injunctions. This case comment relates to a case in which the appellate court reversed a preliminary injunction preventing security officers of the New York Stock Exchange from searching vehicles entering a parking garage in the aftermath of 9/11.

Paul Bennett Marrow has supplied an abstract for his paper for the afternoon session.²¹ His paper promises to be an excellent one, relating as it does to pre-dispute mandatory arbitration provisions and their desirability. Mr. Marrow seems to be

17. See *infra* p. 27.

18. *Id.* at 29.

19. *Id.* at 57.

20. See *infra* p. 59.

21. See *infra* p. 187.

saying that the consumer is not getting as mistreated as we are led to believe by requirements for mandatory arbitration.

Of great practical value is the topic to be presented by Gregory J. Morse, *Techno-Jury: Techniques in Oral and Visual Persuasion*.²² Especially emphasized in this draft are visual persuasion technologies. Trial lawyers will much appreciate the “do’s” and “don’ts” listed in the article.

In *The Niesig and NLRA Union: A Revised Standard for Identifying High-level Employees for Ex Parte Interviews*, Bran C. Noonan has performed an inestimable service to the bench and bar.²³ This scholarly and well-documented piece examines the problems entailed in identifying those employees who are high enough in the corporate hierarchy to be deemed parties. Ethical rules prohibit an attorney from communicating with a party represented by counsel, and the article reveals how the courts and administrative agencies have grappled with the issue. Emphasized are a New York Court of Appeals case²⁴ and the NLRA Supervision Test. An extensive examination of the ethical standards applicable in ex parte interviews with employees is undertaken in the article.

This brief review of the articles brings me to the third reason why this is “A Significant Symposium.” It is because this scholarship demonstrates how the abilities of our graduates and the training they receive make them eligible for the most prestigious clerkships available. My complaint about John Marshall Harlan, to whom we dedicated the first issue of the *Law Review* in the year that he was elevated to the Supreme Court from the Second Circuit,²⁵ was that he never, to my knowledge, interviewed a New York Law School graduate for a clerkship. He was our most distinguished graduate, and he could have found talent in his alma mater. After all, I was here and available at the time.

During my service as a trial and appellate judge, I have had a graduate of this school as a clerk in my chambers almost every year. This year it is Kohsei Ugumori, class of ‘06, who is here with me today. (I was class of 1956—fifty years between us). Kohsei is an outstanding graduate of this school. He served on the *Law Review* and was active in Moot Court. He was one of a limited number chosen on a competitive basis from law schools throughout the nation for the Attorney General’s Honors Program. He served in the Department of Justice in Washington, D.C. for two years, and has argued in my court as well as in other circuits throughout the country.

Preceding Kohsei was Helena Lynch, class of ‘05, who graduated first in her class here, *summa cum laude*. I often tell people that the lowest grade she had here was “A.” The rest were “A+.” She now receives an unconscionable salary at White & Case. It was a good day when Jim Simon recommended her to me. She was his research assistant as well as a *Law Review* editor. The point I am making is that we

22. See *infra* p. 241.

23. See *infra* p. 261.

24. *Niesig v. Team I*, 76 N.Y.2d 363 (1990).

25. 1 N.Y.L.F. 1 (1955).

have here the cream of the crop, and our top graduates would be a credit to any chambers. Along those lines, I recognize that Mr. Suthammanont served as a clerk to my colleague, Mary Ann Trump Barry on the Third Circuit. I am well acquainted with Judge Barry and admire her excellent opinions. I am sure that our Victor contributed to some of them. And over the years, a number of other students have been chosen for clerkships, but not enough!

My hang-up here is this: Where are the New York Law School applicants? Do the Dean and faculty explore with students the benefits of judicial clerkships? Do they assist students in acquiring those positions? This year, I received hundreds of applications from law students throughout the nation. There is a time in early fall when third year students begin their studies and are allowed to apply for clerkships. Law schools have been sending applications by their students bundled up in glossy paper. They say: "Here are our best. Please hire one for your chambers." Is the law school doing this for our students? In the past, it has been my experience that it is necessary on occasion to actually pry out some recommendations. The law school seems to be sending this message: "Some of us have had clerkships, but our students are not good enough to serve in the chambers of a judge." I know that the occasional professor will hype a student to me and to others, but this should be done on a broader basis. There really should be a faculty committee assisting the Office of Career Services in this task. Students do not know much about clerkships as a career builder.

And in the process they should be told that only the best students, almost always *Law Review* editors, may compete for clerkships. There is a good reason why we seek people with law review editorial experience. I have never hired a law clerk without that experience. Otherwise, I could not keep up on the Bluebook changes. Besides the honing of research, analytical, and writing skills, law review membership brings with it the experience of collegiality—the opportunity to work with others toward a common goal. This is an important experience, valuable to those who would work in a judge's chambers, or in a law firm, or in any other legal environment where teamwork is essential. Not the least important part of the collegiality of a law review is the friendship of your fellow staffers. Some of my colleagues from *Law Review* have been my dearest friends.

The students who work on a law review are actually aiding in the decision-making process even before they become clerks. I can only speak of my own experience in this regard. In my chambers, we always check to see whether there are any law review articles, notes, or comments dealing with the subject of the decisions we are working on. Very often, authors are kind enough to send us reprints of their articles when they see we are considering a case to which their article bears some relevance. As I noted earlier, the law clerks ordinarily are law review alumni, and are in close contact with the law review scene. They recommend others to us to serve as clerks in chambers.

I like to thumb through the major law reviews when I have the opportunity. We often cite to law reviews. But we find them most useful as compendia—exhaustive and comprehensive collections of cases and statutes on particular subjects. I find the

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analysis, conclusions, and suggested directions interesting, but I rely on the reviews much less for those purposes. I find the author's conclusions, very often, off the wall, away from the mainstream, and unpersuasive. This is particularly so when law review authors are reviewing my opinions.

In conclusion, I wish to express my gratitude and congratulations to all who contributed to this Significant Symposium. You have demonstrated the high quality of scholarship for which our *Law Review* must always be known. Despite criticism, law reviews have an important place in the scheme of things. The very best response to the criticism, and the very best statement of the importance of law journals, is found in the excellent article by Professor Stracher entitled *In Praise of Law Reviews*.²⁶ According to our website, our *Law Review* "serves as an academic forum for legal scholarship, and is intended to provide effective research materials for judges, attorneys and students of the law." Over the years, some wonderful, talented, and thoughtful people have been engaged in achieving those purposes. The papers submitted today are very much in that tradition.

26. Cameron Stracher, *Reading, Writing, and Citing: In Praise of Law Reviews*, 52 N.Y.L. SCH. L. REV. 349 (2007/2008).