

# ARIZONA LAW REVIEW

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VOLUME 33

1991

NUMBER 2

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## Essays

### LAW REVIEW AND THE MODERN MIND

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Dean Sullivan telephoned me a while ago and asked me whether I believe in free speech. That is like asking someone whether he believes in democracy, or apple pie. I responded, "Of course I believe in free speech." "Good," he replied. "We want you to come and give one." He also told me, "Keep it short. Don't try to be funny; don't try to be witty; don't try to be engaging. Just be yourself."

I would like to read a short passage from a well known American novel:

Saturday morning was come, and all the summer world was bright and fresh, and brimming with life. There was a song in every heart; and if the heart was young the music issued at the lips. There was cheer in every face and a spring in every step. The locust trees were in bloom and the fragrance of the blossoms filled the air. Cardiff Hill, beyond the village and above it, was green with vegetation, and it lay just far enough away to seem a Delectable Land, dreamy, reposeful, and inviting.

Tom appeared on the sidewalk with a bucket of whitewash and a long-handled brush. He surveyed the fence, and all gladness left him and a deep melancholy settled down upon his spirit. Thirty yards of board fence nine feet high. Life to him seemed hollow, and existence but a burden. Sighing he dipped his brush and passed it along the topmost plank; repeated the operation; did

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it again; compared the insignificant whitewashed streak with the far-reaching continent of unwhitewashed fence, and sat down on a tree-box, discouraged.<sup>1</sup>

You know the story. Through a brilliant use of reverse psychology, Tom Sawyer was able to hoodwink his gullible friends into thinking that it was actually a *privilege* to whitewash the fence. They did all the work for nothing; in fact, they even paid him for the privilege.

The modern analogue to Tom's whitewash is, of course, law review. Law schools want to have law reviews. However, hiring people to write, edit, and citecheck is expensive. Under standard university wage scales, buying one hundred hours of this kind of skilled labor can cost nearly one hundred dollars. So law schools get students to do it for free, and they even get some of the best students to do it. All they have to do is *limit* the opportunity to the best students, and busy law students line up like Tom Sawyer's friends, begging for the opportunity to spend countless grueling unpaid hours working on the law review.

Law students, however, are not the only ones hoodwinked: law professors across the country spend much of their professional lives slaving away on articles that they will publish *for free*. "It's an honor," their deans tell them. "A privilege. You're lucky that the law reviews don't charge *you* money for publishing your articles." Then the deans secretly call each other on the telephone and laugh until tears stream down their faces.

Law school deans also have other ways to encourage faculties to publish. They badger the professors incessantly: "Write this. Publish that. Wake up." They also adopt the rule of "publish or perish." This rule is the reason that law professors' "office hours" for student consultation have been reduced to "office nanoseconds." It is also why law schools have professors whose classroom performance consists entirely of mumbling inaudibly and soaking the front of their clothes with drool. They add to the prestige of the school by writing articles with titles like *The Law of Insect Matrimony*, and *Livery of Seisin and Similar Laws Governing Clods*. Law schools claim that their promotion and tenure criteria also include citizenship and teaching ability, but this is purely a ruse. "Good citizenship" means "no indictments." At some schools, it means "no convictions." "Good teaching ability" means that the teacher can explain how to sign the seating chart. One professor left the dean's office and puzzled, "Did the dean say that I am noted for my humorous delivery, or humored for my notorious delivery?"

The law review experience begins with the selection process. Membership is generally restricted to the top ten percent of the class. These students are given this special honor so that employers will not overlook them simply because they are at the top of their class. A few students are given permission to write-on to law review, in a grudging admission that writing ability might possibly somehow someday have some tangential relevance to editing. So write-on students spend all their waking hours for weeks or months writing and editing an article in order to have the privilege of doing

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1. M. TWAIN, THE ADVENTURES OF TOM SAWYER 26-27 (1876).

more writing and editing. Write-on competitions have therefore been compared to a pie eating contest in which the first prize is another pie.

The faculty, however, generally believes that the best measure of student intelligence is the ability to spot issues on a torts exam that begins innocently enough with two parties having silly names like "Dan Quaylude" and "Rosanne Barndoor" and ends up in a nuclear explosion stretching halfway across the solar system. The exam asks students to address such realistic issues as whether the Eggshell Skull People who inhabit the planet Pluto are foreseeable plaintiffs.

In any event, law review membership develops extremely valuable legal skills. For example, students become intimately familiar with the Bluebook. This is a definite benefit, assuming that you consider it a benefit to have an intimate familiarity with mass psychosis. The Bluebook is based on the premise that anything worth doing is worth overdoing. The Bluebook began as a good idea to add a little regularity to the hodgepodge of legal citation. However, if regularity were the objective, oat bran would have been a better solution.

According to the Bluebook, sometimes you give authors' first initials and sometimes you don't. Sometimes you give parallel citations and sometimes you don't. You must give pinpoint cites in three separate reporters for every California case, even though nobody has ever confirmed that any lawyer actually owns a copy of the California Reporter. The introductory signals have been attacked as

an ultra vires imposition of a full-blown theory of stare decisis.... Use *no signal* when you've got the guts. Use *e.g.*, when there are other examples you are too lazy to find or are skeptical of unearthing. Use *accord* when one court has cribbed from the other's opinion. Use *see* when the case is on all three's. Use *cf.* when you've wasted your time reading the case. Insert *but* in front of these last two when a frown instead of a smile is indicated.<sup>2</sup>

A huge portion of the Bluebook is devoted to foreign materials, even though nobody has ever cited a Soviet case for persuasive effect in the entire history of American law. The way I see it, if Americans were meant to learn a foreign language, how come the Bible was written in English?

Law review editors, by definition, also edit. The major problem with editing is that law reviews are not content with standard American English. They each use a different style manual, with its own peculiar rituals and orthodoxy. I can understand why the U.S. government needs a style manual<sup>3</sup> to preserve bureaucratic language. "It has been suggested that we minimize the utilization of excess illumination" sounds more official than "turn out the

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2. Lushing, *Book Review*, 67 COLUM. L. REV. 599, 601 (1967) (reviewing A UNIFORM SYSTEM OF CITATION (11th ed. 1967)). Apparently responding to criticism that they are too rigid and dogmatic, the Bluebook's authors have granted each writer the freedom to decide whether a citation to a book review will even identify the book being reviewed. A UNIFORM SYSTEM OF CITATION Rule 16.1.3 (14th ed. 1986). This opportunity for creative expression can produce an exhilaration beyond description.

3. UNITED STATES GOVERNMENT PRINTING OFFICE STYLE MANUAL (1984).

lights."<sup>4</sup> But do California and Texas really need their own style manuals? Why does the University of Chicago merit one,<sup>5</sup> but other universities do not? And why do Strunk and White get a style manual of their very own?<sup>6</sup> For once, I would like to object to an editing change by saying, "But the *Gordon Official Style Manual* requires all infinitives to deliberately be split, preferably by several paragraphs."

But not all of the law review experience is Bluebooking and editing. Law review members are also expected to write notes and comments. These pieces typically have strict page limitations, mostly because there are limits on how big of a fool one can make of oneself in fifteen pages. However, some people seem to have a special talent for overcoming even this obstacle. This is the reason that notes and comments used to be anonymous. Anonymity of authorship could be an advantage for professors, too, as the Robert Bork hearings showed. However, professors insist on putting their names on their articles, fearing a disease called "reverse amnesia," a condition in which nobody can remember who you are.

Law review editors also get to evaluate articles written by law professors. Of course, these articles are not about the LAW. Nowadays law professors consider articles about legal doctrine to be pedestrian.<sup>7</sup> An article like that might actually make a real difference in someone's life, and law professors have no time for pursuits as mundane as that. They are too busy writing articles about meta-law: the philosophical, political, sociological, and linguistic aspects of law.

Some articles deal with law and economics, which rests on the premise that material wealth is the ultimate human value. According to some of these articles, wealth is to justice as a fine restaurant is to the beef jerky counter at Seven-Eleven.<sup>8</sup>

Critics assert that law and economics rests on dubious assumptions. For example, an economics professor was walking across campus with a student. "Look," said the student, pointing at the ground, "a five-dollar bill." "It can't be," responded the economics professor. "If it were there, somebody would have picked it up by now."<sup>9</sup> Ultimately, law review editors discover that law and economics is really not that much fun. Economists like to quote Thomas Carlyle's statement that economics is "the dismal science." Like much of what economists say, this statement is half true: it is dismal.<sup>10</sup>

Another current topic in legal scholarship is Critical Legal Studies. "Crits" believe that all law is politics, and they spend their time "trashing" or

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4. G. BLOCK, *EFFECTIVE LEGAL WRITING* 34 (2d ed. 1983). The bureaucratic version of this sentence is attributed to a White House aide, and the translation to President Franklin D. Roosevelt. *Id.*

5. THE CHICAGO MANUAL OF STYLE (13th ed. 1982).

6. W. STRUNK, JR. & E. WHITE, *THE ELEMENTS OF STYLE* (3d ed. 1979).

7. Or possibly, if the articles are about horses, equestrian.

8. Richard Posner's book, *Economic Analysis of Law* (1973), has been described as "four hundred pages of tunnel vision." Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 VA. L. REV. 451, 452 (1974).

9. J. JONES & W. WILSON, *AN INCOMPLETE EDUCATION* 125 (1987).

10. *Id.* at 120.

"unmasking" the law to reveal its underlying value preferences. The revelation that the law actually protects real human values has been so shocking as to produce a crisis of confidence in the law as an institution. Previously, everyone thought that the law simply existed for its own sake, much like the vice presidency. I do not mean to say, however, that the Crits are attacking the biggest straw man in history. That honor is reserved to the Republican Party, who in 1988 won a landslide victory over the Democratic presidential candidate, Willie Horton. Crits argue that the law is hypocritical, and they deconstruct it to expose the hidden values it refuses to acknowledge. Then, after taking us into the wilderness and leaving us there, they zoom off in their BMWs and Jaguars to continue their class struggle against hierarchy and privilege.

Crits could try harder to make their writing clearer, or at least preface their articles with a Rosetta Stone so that people who merely speak English could interpret their hieroglyphics. On the other hand, some people have suggested that clarity would be suicidal for the Crits. Charles Fried has observed that some arguments are so flawed that the only way to present them is to wrap them up in fuzz and throw them over the wall when no one is looking.<sup>11</sup>

Other law review articles deal with law and social science. These articles are based on sociological studies that show, for example, that business people usually do not pay the slightest attention to contract law,<sup>12</sup> and that the only people in the entire world who have any idea of contract law are first-year law students. Another study shows that medical malpractice reforms have made no measurable difference in liability insurance costs.<sup>13</sup> Naturally, people who have devoted their entire lives to these subjects find these studies distressing, to say the least. So unless you like having enemies, it is better not to burst their theoretical bubbles by revealing the law's (lack of) impact in the real world. After all, "[f]riends may come and go, but enemies accumulate."<sup>14</sup>

Another current trend in legal scholarship is the law and literature movement, which applies methods of literary analysis to legal texts and examines the treatment of legal issues in literature. I have some difficulty with this area, since frankly I don't understand literature very well. I think that a literary work can usually be reduced to a single sentence that captures its essence. A few examples come to mind. *The Odyssey*: Never underestimate the value of a good travel agent. *War and Peace*: Russian winters are darn cold. *Richard III*: Never vote for anybody named Richard. *King Lear*: How sharper than a thankful child, to have a toothless serpent (or something like that). *Metamorphosis*: Being a bug is a drag. Also, I like to see modern actors play classic roles, like Sylvester Stallone playing Hamlet: "To be, or what?"

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11. Address by Charles Fried, Brigham Young University Law School Graduation (April 22, 1988).

12. MacAuley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

13. Sloan, *State Responses to the Malpractice Insurance "Crisis" of the 1970s: An Empirical Assessment*, 9 J. HEALTH POL., POL'Y & L. 629 (1985).

14. Thomas Jones, *quoted in* R. BYRNE, *THE OTHER 637 BEST THINGS ANYBODY EVER SAID* no. 563 (1984).

If law review makes you work your brain to the bone, one should expect the camaraderie and friendship on law review to make up for it. Unfortunately, the only positive thing one can say about being with other law review members is that it is more fun than being with the faculty. Of course, lots of things meet that standard, including going down to the gas station and jumping on the ding hose. However, the prospect of being part of a close community of bright and dedicated young scholars does have some romantic utopian appeal. Regrettably, when you get on the law review you learn that it is about as communitarian as the United States Marine Corps. The only reason that some law reviews have dispensed with cattle prods and flogging is that state law schools are subject to the cruel and unusual punishment clause of the eighth amendment. However, the Federalist Society is working on that problem.

I would like to say some good things about law review.<sup>15</sup> In my judgment, law review enhances your educational experience.<sup>16</sup> It improves your writing and editing skills, and superior writing skills are essential to being a superior lawyer. It also enhances analytical skills. You strengthen your analytical skills when you write a note or comment analyzing a case or topic, when you evaluate articles to make publication decisions, and when you edit pieces for publication. Law review also exposes you to a wide range of thinking about various issues; it makes you a participant in the world of legal scholarship. It perfects your citation skills, which helps you to be a more efficient and accurate writer. It also provides an opportunity to develop professionalism — to work with a team, to perform your own responsibility in a conscientious and professional manner, and to see challenging and important legal projects through to completion. Perhaps most significantly, law review brings scholarship to bear on critical legal issues and makes important contributions to difficult problems that very much need solving.

We should be under no delusion that we have earned law review membership entirely on our own. No one can justifiably take personal pride in inborn abilities that he or she received free of charge. Also, our educational opportunities often have much more to do with where and when we were born than with meritocracy. Behind my desk sits a photograph of my grandfather standing in front of the horse-drawn Wells Fargo wagon that he drove. He was about fifteen years old in the picture; he was only able to finish the eighth grade before he had to go to work. You do not have to go back very far in your family to find people who simply did not have the same educational opportunities that you have. Those people are proud of you; they are glad that you have these opportunities. You owe them much more than you might imagine.

We cannot measure our self-worth by the fact that we are well educated or on law review. In the ultimate calculus, virtue matters more than

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15. This part of the Essay hopefully saves it from being utterly without redeeming social importance. Cf. *Roth v. United States*, 354 U.S. 476 (1957).

16. A survey of past and present members of one law review asked how they rated the value of the law review experience to their career objectives. Seventy-one percent rated it very valuable and 26% valuable. Only 3.1% rated it not valuable. Riggs, *The Law Review Experience: The Participant View*, 31 J. LEGAL EDUC. 646, 650 (1981).

worldly achievements. But if that is true, what of our efforts toward competence, and even excellence, in the study and practice of law? I believe that we have a duty to develop our talents and to use them to serve others. Striving for excellence is not incompatible with that goal. Increasing one's abilities increases one's abilities to serve.

In Chaim Potok's novel, *The Chosen*,<sup>17</sup> Reb Saunders had a brilliant son, Danny. Danny had "a mind like a jewel,"<sup>18</sup> "like a pearl, like a sun."<sup>19</sup> Reb Saunders explained,

[W]hen my Daniel was four years old, I saw him reading a story from a book. And I was frightened. He did not read the story, he swallowed it, as one swallows food or water.... It was a story in a Yiddish book about a poor Jew and his struggles.... Ah, how that man suffered! And my Daniel *enjoyed* the story, he *enjoyed* the last terrible page, because when he finished it he realized for the first time what a memory he had. He looked at me proudly and told me back the story from memory, and I cried inside my heart.... "A mind like this I need for a son? A *heart* I need for a son, a *soul* I need for a son, *compassion* I want from my son, righteousness, mercy, strength to suffer and carry pain, *that* I want from my son, not a mind without a soul!"<sup>20</sup>

Reb Saunders feared that Danny would have a cold mind, a cruel mind — proud, haughty, impatient with less brilliant minds, unable to understand pain, indifferent to suffering.<sup>21</sup> Therefore, he imposed upon his son a regimen of silence, so that Danny could learn of pain and understand the pain of others. In this manner, Reb Saunders hoped to teach Danny to suffer for his people, to take their pain from them, and to carry it on his own shoulders.<sup>22</sup>

Good lawyers must have the skills required for professional competence. But this is not enough. They must know how to carry the burdens of other people on their shoulders. They must know of pain, and how to help heal it. Lawyers can be healers. Like physicians, ministers, and other healers, lawyers are persons to whom people open up their innermost secrets when they have suffered or are threatened with serious injury.<sup>23</sup> People go to them to be healed, to be made whole, and to regain control over their lives.<sup>24</sup> These are large and important tasks, and they require all that we have to offer. They require both good minds and good hearts — not only mental acuity and professional skill, but also compassion, righteousness, mercy, and strength to suffer and carry pain. That is what it takes to be a truly good lawyer. And the world desperately needs truly good lawyers.

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17. C. POTOK, *THE CHOSEN* (1967). I am indebted to John S. Tanner for identifying this passage. See Tanner, *Not a Mind Without a Soul*, 45 *BYU TODAY* 26, 44 (Mar. 1991).

18. *Id.* at 276.

19. *Id.*

20. *Id.* at 276-77.

21. *Id.* at 276.

22. *Id.* at 279.

23. B. Hafen, *To Beginning Law Students on "Professionalism"* 5 (unpublished manuscript) (copy on file with the author).

24. *Id.*

