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Recommended Citation

John H. Schlegel, *Better Than No Teeth at All?*, 50 Md. L. Rev. 231 (1991)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol50/iss2/4>

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BETTER THAN NO TEETH AT ALL?

JOHN HENRY SCHLEGEL*

It feels more than a bit peculiar to be asked to write something for the fiftieth anniversary of this or any law review. True, I have twice before discussed the subject of law reviews.¹ But the first time, I defended student run law reviews on the twin grounds that it was a waste of faculty time to edit such journals and that fancy law firms would never let them die because the existence of the law review credential reduced the cost of recruiting (and maybe of training) new associates. The second time I explained the awful boring sameness of the law reviews as a reflection of the awful boring sameness of law school courses, which I ascribed to the failure of the law professoriat to develop a professional identity different from that served up by Christopher Columbus Landgell over one hundred years ago. These are hardly encomia of the kind that qualify one for the performance of the celebratory offerings usually expected on an occasion such as this, at least unless, "Well, they're better than no teeth at all," is an encomium for false teeth. But this journal's editor, for whatever reason, managed to flatter the guerrilla/gorilla in me and so I hereby offer my unorthodox congratulations to the *Maryland Law Review* on its fiftieth anniversary:

Hope the next fifty are better than the last.

Now do not misunderstand my peculiar greeting. I would surely offer some version of it to any law review in the United States, so this journal is not being singled out for adverse comment. Indeed, Robert Maynard Hutchins, boy dean of the Yale Law School, once told me that in fifty years as a reader of both the Columbia and Yale journals he could notice no change in the one and only an occasional, extremely modest change in the other. The school magazine, as a friend euphemistically calls it, is a durable format.

* Associate Dean and Professor of Law, State University of New York, Buffalo. B.A., Northwestern University, 1964; J.D., University of Chicago, 1967. This piece is for Fred Rodell, whom I never knew, but who got it right, more often than not. In his memory I have followed, as best I can, his strictures on style and form. Footnotes have been inserted by dutiful editors. They believe that someone might find them useful; I do not.

1. Schlegel, *Revenge on Moon (Over) Your Law School*, 40 J. LEGAL EDUC. 467 (1990); Schlegel, *An Endangered Species?*, 36 J. LEGAL EDUC. 18 (1986).

At the same time, a modest amount of individual censure ought to be noted, for in a very technical sense the *Maryland Law Review* has been reckless in proceeding down well worn paths. At the outset—volume 1, number 1—the *Law Review* was presented with a solid critique of that well worn path, adverted to it (the essence of recklessness) and proceeded forward anyway. By recounting this behavior I mean to note that in the year of the publication of the first issue came also the publication of Fred Rodell's scathing critique of the institution, "Good-bye to Law Reviews."² That publication was duly noted and editorially commented on in the first issue of this law review.³ Rodell's was not the first criticism of the institution; one might find in Karl Llewellyn's ground breaking criticism of the American law school, "On What Is Wrong with So-Called Legal Education,"⁴ an earlier trenchant criticism of the institution in his comment that he was publishing a speech given at the Harvard Law School in the *Columbia Law Review* because "as on other occasions . . . [the *Harvard Law Review's*] canons of taste and policy did not jibe with mine."⁵ But Rodell said it noisier and classier than Llewellyn and only a year later, so it is his criticism that merited attention.

And what was that criticism? In declining to contribute further to "the qualitatively moribund while quantitatively mushroom-like literature of the law," Rodell observed: "There are two things wrong with almost all legal writing. One is its style. The other is its content."⁶ Although that about covers the waterfront, he nevertheless added: "The average law review writer is peculiarly able to say nothing with an air of great importance."⁷

Rodell's complaints about style might be grouped as objections to the mock dignity of a prose form that makes it difficult to offer a forthright opinion in the first person or to treat pompous behavior with the real humor that it deserves, and to the pointless nature of the footnote tradition. The result, said Rodell, was that "the strait-jacket of law review style has killed what might have been a lively literature 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

2. Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936).

3. See Editorial, *A Symposium on Law Reviews in a Neighboring Journal*, 1 MD. L. REV. 59 (1936).

4. Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651 (1935).

5. *Id.* at n.*.

6. Rodell, *supra* note 2, at 38.

7. *Id.*

sweat through it because he has assigned it.”⁸

Rodell's complaint about substance was simply that since “law . . . [was] the only alternative to force as a means of solving the myriad problems of the world,”⁹ the lawyers might focus their writing on those problems rather than on “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.”¹⁰ This travesty called scholarship—which avoids realizing that “law is supposed to be a device for serving society”¹¹—Rodell explained by the observation that the professors who write the articles get professional advancement from the effort, the students get fancy jobs, and the law firms free research.¹²

It is hard to fault Rodell's analysis, though it could be strengthened by noting that the canons of law review style promote a false objectivity associated with the rule of law seen as the law of rules; that law review substance discusses legal rules, the stuff of this understanding of the rule of law, not problems or devices for serving society; and that the law professors have a professional identity rooted in this understanding that is made problematical when attempts are made to move the form beyond the discussion of legal rules. But the more interesting thing is the response of the editor of this journal in 1936 to Rodell's arguments. Passing off the question of style as simply a matter of good manners in debate and a reflection of the dignity of the law school named on the mast head, the editor avoided the question of substance entirely but instead focused on Rodell's objection to providing free research for law firms. He defended this practical effect with the rhetorical nonsequitur that a firm's use of a review writer's research itself justified the existence of that review.¹³ So, zero for three, the *Maryland Law Review* marched into the future.

A more revealing set of responses would be hard to find. Unable to deal with crucial questions of substance, the editor chose to treat the question of form as one of pure form, or “good manners” (and thus, in addition, to ignore Rodell's recognition that “content

8. *Id.* at 41.

9. *Id.* at 43.

10. *Id.* at 42.

11. *Id.*

12. *Id.* at 44-45.

13. See Editorial, *supra* note 3, at 61-62.

helps to determine style"¹⁴) and to treat the claim of meretricious behavior on the part of all concerned by standing it on its head. In so indulging in pure pleader's trickery he (for the writer was surely John S. Strahorn, Jr., the faculty editor) silently affirmed the traditional content of the law review and the underlying ideological centrality of that content, for it is our most deeply held assumptions, those things that could not be otherwise, that we find most difficult to defend. Thus, it is not surprising that this first volume should contain such gems as "Latent Equities in Maryland" and "Revocation of a Will by Birth of a Child." Even more enlightening is an article with the sexy title "Jurisdiction Over Non-Resident Motorists for Suits Arising from Local Accidents." This article actually identifies a real social problem—exactly as Rodell would wish—then spends most of its effort treating constitutional law as rules to be applied, rather than attempting to understand why it was that such a simple and obvious problem had become such a big deal—a classic example of forest and trees.

Was Robert Hutchins' observation correct? How much better have law reviews become in fifty years? To answer that question I grabbed the last bound volume of the *Maryland Law Review* on my library's shelves—volume 48. If change is to count as better, some changes can be seen quite quickly. For example, the discussion of Maryland law, the "essentially local" topic that the editor of volume 1, number 1 thought should be the "subject matter" of the *Law Review*, has now been consigned to the student's notes and comments. "Matters of general law," which were to be "handled only because of their local interest," are now the quarterly grist of the articles section and are slipping into the comments section, if not the notes. Book reviews have somewhat bewilderingly disappeared, a sad state of affairs since, as Rodell recognized, they were in 1936, and are now, the liveliest and most uninhibited of the law review art forms. But what of style and substance and the social conditions of use?

As to style, little has changed, much less for the better. Footnoting has clearly gotten worse as big piles of text in eight point type now litter a quarter to a third of most pages where fifty years ago such excess was relatively uncommon. And although Avi Soifer is permitted to use "I," at least in a transcribed speech, most other work seems to be the result of automatic writing by "this article," which is possessed of "The Law." Even the exception, the committee that is allowed an impersonal "should"—not "we believe," but a

14. Rodell, *supra* note 4, at '42.

“should”—is interesting; perhaps it is a matter of strength in numbers or the security of an inter-disciplinary perspective that makes the difference. And of course “manners” still dictate that all prose written specifically for a review be as interesting as watching paint dry. Here, whatever the wine, there are no new bottles.

As for substance there has been one highly significant change—a shift from private to public law as the central focus of law review scholarship, a shift that can even be seen in the section labeled “Developments in Maryland Law, 1987-88.” It would seem that Rodell’s criticism is being followed as we set our collective sights on AIDS, capital punishment, and capital redeployment. But even a cursory reading of materials on these topics would demonstrate that it is not new wine in the old bottles either. In the face of a massive epidemic with devastating effects on one of our most vulnerable communities and enormous continuing costs for treatment, the *Law Review* chooses to discuss whether there is a duty to warn patients that their health care provider is HIV positive and conversely whether such providers have a duty to warn individuals in varying relationships with HIV positive patients that they may be potentially at risk. Talk about straightening the pictures while the Titanic goes down. Similarly, it is hard to deny that defendants in capital cases need counsel in post-conviction proceedings. But to discuss this question without centering on the great social forces that are attempting to re-institute capital punishment in the United States and the way that legal doctrine is being used to retard that attempt, perhaps even to the point of increasing antagonism towards the procedural safeguards that make up this body of doctrine, is to assume law’s imperviousness to such forces, a position that should have been *passé*, at least after Lord Bryce. And the notion that race and age discrimination law are likely to be potent or even significant forces in retarding corporate decisions to redeploy capital is to have spent too much time thinking about the little Dutch boy with his finger in the dike.

Now, what is going on here? No one would deny that these three problems are among the more significant in our society. But look at the law review writer’s response to each. It’s like the high school geek who thinks that the right shoes, the right shirt, and the perfect shades make cool. Association with important social problems may bring a kind of indirectly reflected glory, but it is no substitute for cool, and cool in this context is scholarship that tries to help us understand how law—not rules but law, a complex inter-

play of rules, institutions, social givenness and power—is being, or might be used with respect to each problem.

Try these understandings, for example. Our response to the AIDS epidemic is deeply bound up in our fear and loathing of homosexual sexual practices and drug users—that is, what abstinence versus condoms, and “just say no” versus free, clean needles means. The law wanders blithely on and lets treatment costs escalate in the name of patent protection, that is to say property rights, in ways that would never have been allowed had Jonas Salk tried to price his polio vaccine at six hundred dollars per dose. This use of law merits discussion.

Capital punishment is about the fear, perhaps justified, of the middle class that the lower class, particularly the black lower class, is without sufficient informal mechanisms of social control. This is why the relatively easiest issue (even in New York, a moderately anti-capital punishment state) is about killing cops and guards; they are the tenuous front line of our official, that is, our in-default, mechanism for social control. Whether it is sensible to ignore that fear, indeed to use law without regard to the existence of that fear, raises profound questions about whether the law as rule can in fact undercut the rule of law. That issue merits discussion.

Capital redeployment is an ongoing problem in any society where technological innovation is rapid and becomes even more serious when improvements in global transportation and in local education make rapid industrialization of the third world a viable economic step. And such redeployment is most likely to affect racial and aging minorities because they get the most economically marginal employment—the employment most liable to suffer the adverse effects of such redeployment. The use of concepts of property and privateness to externalize the costs of redeployment on employees rather than to recognize them as a cost of government industrial policy is a fascinating re-enactment of the nineteenth century industrial revolution, which was similarly paid for, in part, by (different) minority employees. This too merits discussion as did the development of an economy of intangibles and the transformation of social relationships attendant to the widespread availability of cheap, personal transportation in 1936.¹⁵

But the important thing to notice is that in the 1980s as in the

15. I can see no great issue underlying discussion of the revocation of a will by the later birth of a child, a topic that surely invokes only the timeless struggle between greedy, disaffected relatives. The law has always been bewildered in the face of such disputes. Latent equities are life's revenge on the tidy world of the conveyancer.

1930s this Review does not discuss the important questions but stands, geek-like, hoping that being seen close to Patrick Swayze will be enough to hide the fact that it is not Jennifer Gray but Plain Jane Gray on its arm. I suggest that consulting the library withdrawal records for any bound law review volume will quickly disclose the date's true identity.

Now let me say again that I do not mean to single out the *Maryland Law Review* or its contributors for excoriation. The law reviews at the "fancy" schools are just as derelict and even more pompous and self-important. The authors whose work I have commented on are all competent, occasionally inspired legal technicians. But that is the problem. A friend who recruits for a large Washington law firm puts it bluntly when he says, "I don't want associates who can think like a lawyer; I want associates who can think like a client!" Similarly we do not need technical articles exploring more doctrinal crochets or turning policy analysis into technical economics or just more doctrine. We need articles that help us understand how and why law is being used. We need the discussions I have asked for, not more of the discussions I have read.

And why don't we get them? Well, the social conditions of the law review have not changed since Rodell wrote. The law professors still want advancement, the law students still want better jobs, and the law firms still want a little bit of free research—thinking like a lawyer is *really* dispensable if you can go to a ready source of arguments. I have explained why this is so elsewhere and by now benumbingly. It is the ideology of the rule of law as the law of rules that keeps law professors at their boring tasks, that reproduces those tasks for law students, and that provides the public face for practitioners, who of all people know better. And so my unorthodox congratulations, for while there is every reason to believe that there will be fifty more volumes of the *Maryland Law Review* there is no particularly good reason to believe that the next fifty will be any better than the past.

Still, I started my congratulations with a peculiar word—"hope." Several years ago, when I composed the first of my series of jeremiads about legal education, a faculty member at the school where I delivered it commented that it seemed as if I were preparing to leave law teaching. I was appalled at such a misunderstanding. One can only get this angry about something one cares passionately about. So I bring you my congratulations with hope. So long as law professors will listen, so long as student editors will hear, there is hope—hope that law reviews will one day be full of articles about

law and not articles about legal rules. And, yes, the *Maryland Law Review* can start on its own. It does not need to wait for Harvard or Yale or Stanford. History teaches that revolutions break out in the strangest places. Remember what Fred Rodell had to say and do not make the same reckless error twice. Take one little step. Instead of candles put copies of *A Uniform System of Citation* on your birthday cake. Then burn them all. No teeth may in fact be better than false ones.