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William O. Douglas

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WILLIAM O. DOUGLAS*

I have a special affection for law reviews, as I was an editor at Columbia (1924-1925), and I have drawn heavily from them for ideas and guidance as practitioner, as teacher, and as judge. In my time there has been a shift in authorship of law review articles from practitioners and judges to law professors, which Mr. Justice Cardozo described as follows:

> Judges and advocates may not relish the admission, but the sobering truth is that leadership in the march of legal thought has been passing in our day from the benches of the courts to the chairs of the universities.
>
> This change of leadership has stimulated a willingness to cite the law review essays in briefs and in opinions in order to buttress a conclusion. More and more, the law reviews are becoming the organs of university life in the field of law and jurisprudence. The advance in prestige of the universities has been accompanied, as might be expected, with a corresponding advance in the prestige of their organs.[1]

The first distinctively legal periodical was published in England from 1761 to 1762 and was known as the *Lawyers' Magazine*. The first American legal periodical was the *American Law Journal*, started in 1808 and continued until 1817 The first Irish one appeared from 1827 to 1838. The first Scotch one—*Reports of Proceedings in the Edinburgh Police Court*—was published for part of 1829 India came up with the *Calcutta Legal Observer* in 1839 which continued until mid-1840.[2]

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* Associate Justice, Supreme Court of the United States.

[1] SELECTED READINGS ON THE LAW OF CONTRACTS at IX (Ass'n Am. L. Schools ed. 1931). And see Mueller & Skolnick, *Bar Reactions to Legal Periodicals*, 11 J. LEGAL ED. 197 (1958), Friedman, *A Comment on "Bar Reactions to Legal Periodicals,"* 11 J. LEGAL ED. 384 (1959), Newland, *Legal Periodicals and the United States Supreme Court*, 7 KAN. L. REV. 477 (1959).

[2] See HICKS, MATERIALS AND METHODS OF LEGAL RESEARCH 197-98 (3d ed. 1942).

The oldest continuously published American law journal today is the *University of Pennsylvania Law Review*.[3] As we entered the 1960's we had about 207 law reviews and journals, both general and specialized; and the business schools had as their counterparts in the neighborhood of six.

Some law journals may be so biased as to present only one side of controversial issues.[4] Yet most have a more cosmopolitan complexion. Law journals and business journals—freed from any undisclosed partisan bias—furnish helpful guides to the profession. They can be provocative and stimulating by showing the dimensions of a problem. They often reveal complexities and dangers where the frame of reference of a single controversy makes the case seem simple. The economic and business aspects of problems can be so presented as to help the lawyer or the judge understand the facts and realities of a relevant segment of life. They can do what the Brandeis brief did in *Muller v. Oregon*.[5]

The fashioning of a rule of law by Congress and its construction by courts involves choices. For Congress the choice is among different policies for varying fact situations. Value judgments are involved in court decisions, even though judges operate only interstitially. Those value judgments vary among individuals. Objectivity is the goal; but none can be dead sure of all the components in a particular decision, for the subconscious plays a role along with the other faculties of rational man. From the time judges began to preside over hearings and trials they have brought value judgments to bear on their decisions. Where only moral issues are involved, there is apt to be less complexity than where social and economic forces are at play. Who alive can draw from his environment the wisdom to decide the far reaching issues that judges are often called upon to settle? Where is he to get his insight into factory and market conditions to resolve an ambiguity in a statute? How can he judge wisely on mergers or on labor arbitration? He needs constant education and renewal. It is there that law reviews and business journals can be illuminating. But what if the views presented are those of special pleaders who fail to disclose that they are not scholars

[3] *University of Pennsylvania Law Review*, now in its 113th volume, started out as the *American Law Register* in 1852. In 1898 it was taken over by the Department of Law of the University of Pennsylvania (vol. 46), but continued to be called the *American Law Register* until 1908, when the name was changed to the *University of Pennsylvania Law Review and American Law Register* (vol. 56). It now carries the title *University of Pennsylvania Law Review*, with a notation on the title page that it was formerly the *American Law Register*.

[4] See Frankel, *The Alabama Lawyer, 1954-1964*, 64 COLUM. L. REV. 1243 (1964).

[5] 208 U.S. 412 (1908).

but rather people with axes to grind? I fear that law journals have been more seriously corrupted by non-disclosure than we imagine.

The self-interest of the pleader is one of the most powerful of all forces. A lawyer whose livelihood is wholly dependent on retainers from one client has aptly been dubbed by one of my judicial friends as a "stall-fed lawyer." The interests of that client are bound to affect his views on most professional matters. Likewise, if he is a plaintiff's lawyer in antitrust suits he will have one leaning; while if he is a defendant's lawyer in that kind of litigation, he will have another and different leaning. It was, therefore, surprising that when the *Report of the Attorney General's National Committee to Study the Antitrust Laws* was submitted in 1955 none of the affiliations of the committee members was disclosed—no indication was made as to whose professional interests were on one side of the issues, whose on the other. A House Report[6] commenting on that study said that "some of the recommendations made by the committee would, if accepted by the courts, decide" pending litigation; but that while the plaintiff company in that litigation was not represented on the Committee, five lawyers representing the defendants were committee members. The House Report stated:

> This must not be misinterpreted in any sense as a reflection on the integrity of these men, nor on the public-spirited nature of their participation in the report. It may well be true, but it would be entirely irrelevant, that these men first developed their attitudes and beliefs, and then acquired their clients. Whatever causes or extenuating circumstances may have contributed to their thinking, nevertheless these men have a vested interest in the interpretations they are offering to the courts. These interests in and of themselves are wholly lawful and ethical interests.
>
> But when these partisan, one-sided attitudes are presented as impartial, fully rounded conclusions reached by disinterested experts, then questions are presented whether an element of misrepresentation exists which has the effect of discrediting much of the fine work that went into a report that could have been outstanding.[7]

Normally all points of view should be represented so that reports are not one-sided; hence the interests of the authors should be plain for all to see. A plaintiff's lawyer has predilections that a defendant's lawyer does not share, and *vice versa*. Each sees the same problem—whether antitrust or negligence—through glasses of a different tint. The reader

[6] H. R. REP. No. 2966, 84th Cong., 2d Sess. 48 (1956).
[7] *Id.* at 48-49.

should know through what spectacles his adviser is viewing the problem.[8]

Congressman Wright Patman has rendered a fine public service in pursuing this problem relentlessly in the antitrust field. In his Report[9] he has disclosed instance after instance of authors whose articles purported to be objective but who were in fact receiving an undisclosed fee from a special interest on one side or the other of a controversial subject.[10] One such instance given prominence in the Report was the appearance in one law journal of an article analyzing issues arising under the Robinson-Patman Act and adopting an unfavorable point of view toward the Act. The Patman Report—which title I use here to disclose Congressman Patman's own interest in the occurrence—observed: "That article adroitly failed to disclose that the author is affiliated with a law firm presently opposing the Government in a pending case arising under the Robinson-Patman Act."[11]

Another instance of non-disclosure involved a law review article on the concept of "effective" or "workable" competition. The article did disclose that it was a revision of a report submitted by the author to the Business Advisory Council. But it did not disclose that the author had received more than $13,000 from the Council for this report and other work; nor did it disclose that the Council's special antitrust study fund (from which this author was presumably paid) was obtained from contributors of whom a majority were past or present defendants in important antitrust suits.[12]

The Report, multiplying instances of this sort from economic and legal writings, seeks to demonstrate that the whole literature of "effective competition" was created by hireling professors financed by "the

[8] The total membership of the Attorney General's Committee was 61. *Id.* at 40. "Of the 46 lawyers on the committee, it was established that at least 39 were attorneys for defendants (past or pending) before the Federal Trade Commission or the Department of Justice. . . . None of the lawyers on the committee is known to be a so-called plaintiff's attorney, regularly representing the interests of plaintiffs in triple-damage suits under the antitrust laws." *Id.* at 46.

[9] H. R. REP. No. 2966, *supra* note 6. And see Newland, *The Supreme Court and Legal Writing: Learned Journals as Vehicles of an Anti-Antitrust Lobby?* 48 GEO. L.J. 105 (1959); Latham, *The Politics of Basing Point Legislation,* 15 LAW & CONTEMP. PROB. 272 (1950).

[10] See 103 CONG. REC. 16159-69 (1957) for documentation of the extent to which "hired professors" have been active in the antitrust field without disclosure that they were retained to advocate a particular point of view.

[11] H. R. REP. No. 2966, *supra* note 6, at 227.

[12] *Id.* at 34. STAFF OF SUBCOMM. No. 5, HOUSE COMM. ON THE JUDICIARY, 84TH CONG., 1ST SESS., INTERIM REPORT ON THE BUSINESS ADVISORY COUNCIL FOR THE DEPARTMENT OF COMMERCE 20-22 (COMM. PRINT 1956); Newland, *supra* note 9, at 120-21, 124-25.

defenders of price discrimination, basing-point pricing practices, and other monopolistic practices."[13] One commentator, who feels that the evidence adduced by the Patman Committee has been somewhat exaggerated in this regard, nonetheless draws the following conclusion:

> At the least, the Select Committee on Small Business showed that proponents of revision of the antitrust laws have actively engaged in constructing an impressive body of literature favorable to their own interests; that a few prominent economists have at times been retained by big business interests for that purpose; that articles favorable to antitrust defendants have been published in law reviews and learned journals over a period of several years; that at one time or another some elements of the drive for revision of the antitrust laws have fitted into a consciously organized but largely undisclosed lobby to revise the antitrust laws; and that the Attorney General's Committee and its report favored big business interests which had sought revision of the antitrust laws.[14]

The law journals have not been the only media abused by non-disclosure. The late Senator Estes Kefauver developed in his Hearings on the Drug Industry that there were many undisclosed pay-offs behind speeches, endorsements, and articles promoting special drugs for the pharmaceutical business.

The 1962 Kefauver Committee Hearings showed how symposia, presumably the product of learned men or learned societies, have been arranged by advertising agencies on behalf of pharmaceutical companies to promote a new drug, the doctors or psychiatrists who participate being paid undisclosed honoraria to promote a commercial product.[15] Advertising agencies prepared editorials for newspapers.[16] They also prepared syndicated feature columns in the form of mats and had them mailed to newspapers without disclosure that they were prepared for pharmaceutical companies.[17] They prepared articles on new drugs and

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[13] H. R. REP. No. 2966, *supra* note 6, at 31; see *id.* at 31-38.

[14] Newland, *supra* note 9, at 125.

[15] *Hearings on S. 1552 Before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee*, 87th Cong., 2d Sess. 3181-209 (1952).

[16] *Id.* at 3204-08. See also *id.* at 3208, where Senator Kefauver said: "Well, sir, I think that medicines are so important—the doctor should be the referee of the medicine. And the second thing is that medicines, I think, have to be treated differently from anything else I know of, because we are dealing with the health of people. It is important to know, first, that the doctor prescribe the medicine, and second, that its effectiveness be correctly stated, and third, that the side effects be correctly stated, and fourth, the reader ought to know where it comes from, whether it is an expression of independent judgment.

It would seem to me that getting an editor to publish something that an advertising agency has prepared violates all of these four requirements in connection with safe and proper drugs."

[17] *Id.* at 3221-51.

solicited doctors for their by-line.[18] Senator Kefauver stated the issue of disclosure or nondisclosure as follows:

> We are not accusing anybody of being dishonest. What we are trying to find out is whether public relations people ought to be in the business of writing articles which seem to be plugging the particular drugs or trying to sell them or create demand for them and whether there ought to be identification of the fact that there is some interest on the part of the writer and people who have something to do about it to the magazine to which they submit it.[19]

This is a complex society in which we live. The special interests are not easy to identify. There was a time when the "trusts," "management," "Wall Street" and the like had a fairly clear and very special connotation. With specialization has come a proliferation of interests —not only stock exchanges and underwriters but over-the-counter dealers, those who turn out warehouse receipts, chain banks, pension funds, and many others. There was a time when the line between "management" and "labor" was clear-cut. But we now have a professional class in between those groups. They are the arbiters who sit on ever-widening issues and render a unique public service. Those arbiters are the experts in the field, and their advice and wisdom are sorely needed. Yet when the Landrum-Griffin Act[20] was before the Congress their voices were seldom heard. They have retired to the sidelines, as judges do, leaving the contest to others. Their withdrawal robs the current debate of perspective and wisdom. That, however, is another aspect of the problem which I pass by. I propose here only that when a special pleader enters the list he show his colors.

I do not propose a law. Rather I propose an editorial policy that puts in footnote number one the relevant affiliations of the author. If the article is paid for, I would not necessarily require the disclosure of the amount of the fee; the fact that there was a fee would be sufficient. If there were no fee but a client's interest was reflected in the article, I would want disclosure of that client's identity. If the author was a freelancer in a particular field, I would want a general statement that his professional interest lay in the direction of certain types of litigation.

That kind of editorial policy would put the law reviews on a high, respected plane, and would give them new prestige and vigor and re-

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[18] *Id.* at 3236.
[19] *Id.* at 3268.
[20] 73 Stat. 519 (1959), 29 U.S.C. § 153 (1962).

store them to what Chief Justice Hughes once called the " 'fourth estate' of the law."[21]

For five years I was associated with the Securities and Exchange Commission, whose first law[22] was premised on full disclosure. Perhaps that is why I am partial to full disclosure. Since this talk is scheduled for a law review, it would perhaps be desirable to put into the first footnote the following: "The author was once a Member and Chairman of the Securities and Exchange Commission."

[21] Hughes, *Foreword*, 50 YALE L.J. 737 (1941).
[22] Securities Act of 1933, 48 Stat. 74, 15 U.S.C. § 77 (1958).