

The Goring of the Judiciary's Oxen: Foreword to the Second Circuit 1971 Term

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THE GORING OF THE JUDICIARY'S OXEN

FOREWORD TO THE SECOND CIRCUIT 1971 TERM

It is an honor to be invited to write a foreword to this second annual review of the opinions of the United States Court of Appeals, Second Circuit. Last year this Review published its first such survey and I am sure that this provided ample reason to invite the Chief Judge, Henry J. Friendly, to initiate the series with his usual pertinent and scholarly comments. Among those was his suggestion that the Review need not consider that it had made a commitment to do this critique *in perpetuo* if the venture proved disappointing. Apparently in the eyes of the Editors of the Review at any rate, it was successful enough to warrant another round. Having decided to go ahead, I suppose the principle of *stare decisis* mandated another foreword by another Judge of the Court. If this practice continues, either the series will end quite soon or we will have to increase the number of judges. Since none of my opinions was discussed last year, not having been on the Bench long enough to contribute much to the 1970 term, I imagine I was considered to be a safe choice this year. My problem is that I don't quite understand my present assignment especially since the series has already been blessed and launched under such distinguished judicial auspices. I cannot reasonably be expected to comment on last year's review nor can I anticipate this year's material.

I suppose therefore it might be somewhat appropriate and pertinent, to make some observations about the practice of student criticism of judicial opinions in law review comments. I had no compunction as a student editor of the Fordham Law Review in chastising the Court of Appeals or any other Court that came my way. This is the American way and was as normal to me as booing Babe Ruth if he failed to hit a home run. Moreover, law students listen daily in class to law professors many of whom have passed a bar exam and some of whom have even practiced law, as they regularly castigate appellate courts for opinions with which they differ. Not only did I participate in this as a student but I freely admit that in twenty-five years of teaching, the best part of a casebook to any virile professor are those opinions which he finds

manifestly illogical and unsound. I even confess that for a decade I wrote an annual review of the New York Insurance Law for the New York University Law Review and later the Syracuse Law Review in which I did not hesitate to criticize opinions which did not fit within my concept of what the law should be. The question can now be properly asked, I suppose, now that you have been duly ordained and appropriately parked on the woolsack or, as we say in the law, now that the shoe is on the other foot, do you think that such student goring of the judiciary's oxen is humane or should it be curbed by some appropriate agency such as the A.S.P.C.A.

I frankly never thought of the problem until about five years ago when a distinguished New York appellate judge wrote a rather warm note to me as Dean of the Law School protesting a student comment which criticized an Appellate Division decision which was later reversed by the Court of Appeals. He suggested, in fact insisted, that this was a sport not to be continued since it was not consistent with fair play or acceptable practice. It was flattering indeed to find a judge who read the law reviews but a quick study convinced us, and I am pleased to say eventually him, that all law reviews positively leapt at the chance to dissect inept decisions assuming, of course, that the issues were of some substance and the court of some repute. In fact, if the autopsy report could be published before an appellate court had a chance to repair the damage, so much more the elation of the student contributor and presumably his peers. I can say in all honesty that I do believe that the student comment and criticism of student notes, is healthy, desirable and should be supported. In fact, I wouldn't have the courage to take any other view. I would draw the line at libel or any personal attack that might lead to a breach of the peace or create a public nuisance although I am sure that there are those who might disagree.

My reasons for this position are manifold and some may even be material. To those who say that students are not yet fully trained in the law and have not yet taken the courses embraced in some of the opinions they may criticize and that therefore while the experience of writing notes may be helpful to their personal professional growth, they hardly merit publication by a University as responsible contributions to legal literature, I reply — balderdash! Law students are now considered mature enough to select the law school curriculum, to grade the performance of law school professors and to publish the marks. Moreover, they pay the tuition which supports the Review, so why shouldn't they have the right to write for it, assuming their spelling and grammar are reasonably accurate. After all, we do have a First

Amendment and there is no mention at all in the document or in the cases construing it of any Law Review exception.

I also subscribe to this view because I have not been on the Bench long enough to have had any decision criticized by anyone in print. In fact, the only comment that I know of about one of my cases was somewhat favorable and I reserve my only footnote to pay it proper respect.*

Actually, of course, the hides of the judiciary's oxen are much more elephantine than I ever imagined before I joined the herd. Our court sits normally in panels of three and if one of our brothers dissents, his comments are usually more pointed and scathing than anything written by a student or teacher in law school. Moreover, even when the panel is unanimous, one should not imagine that the author's first draft was clasped to the bosom of his colleagues. His own law clerks have probably corrected his grammar and attacked his authorities. What they have missed, his learned brothers and their learned clerks have also torn asunder. Perhaps most devastating of all is the colleague who simply concurs in the result. Freely translated this means you have somehow reached the right result but I don't agree with your reasoning and I won't tell you why. There is, of course, the Supreme Court in the wings to eventually pass upon your work product. In brief, there is very little pride of authorship left in the Circuit Judge of the Second Circuit by the time this Review or any other uncovers his weaknesses.

While some of this has been written with considerable tongue in cheek, I can honestly say that all of this attention is to the good. Our opinions do warrant the close scrutiny of young legal minds and whether this results in approval or criticism is not really important. Whether either is merited cannot be determined with accuracy anyway on this planet as any District Court Judge will freely testify. *Bon appetit!*

WILLIAM HUGHES MULLIGAN
Circuit Judge, Second Circuit

* The Second Circuit Review — 1970 Term, 38 BROOKLYN L. REV. 909, 914 (1972).