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Correspondence

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CORRESPONDENCE

The FORDHAM LAW REVIEW is pleased to publish correspondence which it considers interesting to its readers, but without implication that it accepts or rejects the contentions therein expressed.

May 28, 1940

EDITOR

FORDHAM LAW REVIEW

Dear Sir:

Professor Vold's review of Volume IV of the Restatement of Torts in the May issue of the FORDHAM LAW REVIEW pays particular attention to the division dealing with labor disputes and states at page 308:

"As set forth in this part of the Restatement, secondary boycotts and sympathetic strikes are asserted to be lawful if the actors have a substantial interest in the third person's employment relations. No recognition is accorded the circumstance that the common law materials in this regard were sharply conflicting and that those materials have by many capable reviewers been appraised as preponderating against the legality of such conduct. Apparently Professor Shulman and his advisers are here following what they regard as 'the better view' which ought to be followed. It would have been informative at this point to find more specific exposition of why that is regarded as 'the better view.' Possibly illuminating in this regard is the circumstance that among the advisers to the Reporter are found Mr. J. Warren Madden, the Chairman of the National Labor Relations Board, and Mr. Charles E. Wyzanski, Jr., Assistant to the Attorney General, who appeared as counsel for the National Labor Relations Board in its earlier leading cases before the United States Supreme Court, whereas it does not appear that attorneys representing the other side of the argument in labor disputes were even consulted."

I do not wish to dispute with Professor Vold the interpretation of either the common law materials or the sections of the Restatement to which he refers in his review. That is properly a matter of debate and opinion. But the quoted portion of the review contains implications of fact as to the manner in which the Restatement was prepared which are susceptible of objective verification and which are untrue. In view of the importance of the American Law Institute's publications I think these erroneous implications should be corrected:

1. The fact is that a great many "attorneys representing the other side of the argument in labor disputes" were consulted and their advice resulted in substantial amendment of the proposed drafts. In accordance with the required practice, the draft prepared by the Reporter and the Advisers was submitted to the Council of the Institute and then to the Institute's entire membership for discussion at the Seventeenth Annual Meeting in May, 1939. Surely a very large portion of the lawyers in both these bodies represent the "other side of the argument" in their professional work at least. Because of the controversial character of the subject matter of this part of the Restatement special attention was paid to it. The chapter dealing with labor disputes constitutes about one eighth of the total text of Volume IV but it was the subject of more than half of the discussion of that volume at the Annual Meeting. This eighth was discussed for a whole day while less than a day was

devoted to all the remaining seven eighths. The discussion is recorded in the published Proceedings of the Institute. Reference to these proceedings discloses that attorneys with considerable experience in representation of employers in various States, (as, for example, Mr. Nicholas Kelley, of New York, who has had wide experience in labor relations as counsel for the Chrysler Corporation, and Mr. H. Le Baron Sampson, of Massachusetts) had carefully studied the draft, actively participated in the debate, made acute criticisms, and proposed a number of amendments which were adopted and incorporated into the Restatement as published. Even after this chapter, as amended, was adopted by the members, it was specially referred back to the Council for its further consideration; and many members of the Council then gave it further careful and detailed study.

2. The "other side of the argument" was also ably represented among the Advisers. One of the Advisers was Laurence H. Eldridge, now Professor of Law at the University of Pennsylvania, but then associated with the well-known Philadelphia firm of Montgomery & McCracken. He was a sincere and conscientious worker and represented "the other side" forcefully and effectively not only at the meetings of the advisers but also at the Annual Meeting where, as the Proceedings show, he procured the adoption of a number of amendments. Mr. Wyzanski did, indeed, represent the Government before the Supreme Court in the cases involving the constitutionality of the National Labor Relations Act. He had resigned from his Government office, however, before he became an Adviser. During his entire association with the Restatement he was, and still is, a member of the Boston firm of Ropes, Gray, Boyden & Perkins, a leading New England law firm engaged in corporation and business law. Mr. Wyzanski was personally representing employers before the National Labor Relations Board at the very time that he was advising on the Restatement. I do not know what inference Professor Vold would draw from these additional facts, but I am myself satisfied that all the Advisers were well aware of both sides of the argument and made their decisions with all the objectivity which they could command. (The remaining Advisers were Judges A. N. Hand and L. Hand, Dean Goodrich, and Professors Morgan, Handler and Frey.) And each Adviser had the privilege of insuring specific review by the Council and the Annual Meeting of anything in the Draft which he deemed erroneous or otherwise improper.

3. Conflicts in the "common law materials" on the subject were well recognized and were fully presented to the Advisers, the Council and the Annual Meeting both in Explanatory Notes which accompanied the several drafts and in the discussions. The policy of not stating opposing views or including Explanatory Notes in the final publication has been long fought out, applies to all the Restatements and has no peculiar manifestation in the labor chapter. As stated by Professor Vold, there is more attempt in Volume IV to discuss "the reason for the rule" than in earlier Restatements.

Publication of a Restatement, of course, invites discussion of its accuracy and wisdom. But it is very important that there be no misunderstanding as to the indisputable facts about the way in which the Restatement was prepared. I hope that it is feasible to publish the substance of this letter in your REVIEW—perhaps as a supplemental review in the Book Review section or in the *Obiter-Dicta* division.

Very truly yours

(signed) HARRY SHULMAN
Yale University
School of Law

(The following reply was received from Professor Vold.—EDITOR.)

September 13, 1940

EDITOR

FORDHAM LAW REVIEW

Dear Sir:

Professor Shulman has courteously sent me a copy of his letter in criticism of my review of Volume IV of the Restatement of Torts. If you care to afford space for a rejoinder you may set out the following:

Professor Shulman's letter seems devoted to demolishing supposed untrue implications of fact based on my "possibly." Whether he succeeds therein or not may be a matter of opinion. My own impression is that under American Law Institute procedure ideas or suggestions that do not get a hearing earlier than at the annual meeting come at so late a stage in the development of the text that it is usually extremely difficult then to give them adequate scope and effect in the final draft. As to the advisers mentioned, who participated in the deliberation at its earlier stages, Professor Shulman does not assert, nor does it now directly appear, that any of them, except the aforementioned Mr. Wyzanski, either then were or now are attorneys representing employers in labor disputes.

These personalities aside, however, the main observation upon this part of the Restatement seems to me still to stand unimpeached; that it would have been informative at this point to find more specific exposition of why the position taken in the Restatement is regarded as "the better view."

Very truly yours

(signed) LAWRENCE VOLD
University of Nebraska
College of Law

June 7, 1940

EDITOR

FORDHAM LAW REVIEW

Dear Sir:

May I just briefly comment on the *Obiter Dicta* which appeared in the May, 1940 FORDHAM LAW REVIEW.

It was interesting to learn in your boxed caption that the contents are described as an "individual impertinence, which, whether it be wise or foolish, right or wrong, bindeth none—not even the lips that utter it."

If I may use an alternative meaning of the word "bind", I would like to state my objection to the contents of this article—that the approach and philosophy contained therein, if followed, may well bind many men's mouths and pens, even if not the author of the "individual impertinence."

The article takes pride in the fact "that the legal profession has played no small part in establishing the freedom of the press in the law." But then it continues with the unctuous hypocrisy of those who say, "I like freedom—the kind that I like" when it pleads the philosophy that there is need "of that which will confine it (freedom of the press) to its proper borders." To sustain this philosophy the author pounces upon the first decision that has ever been rendered in any court in the

United States enjoining the publication of a book or pamphlet on the theory that the publication constitutes the unauthorized practice of law because it contains analyses of laws and decisions.

The author of your *Obiter Dicta* emphasizes that "it should not be overlooked, in the midst of all this *trumpeting* (about free press) that the right to practice law, in all its forms, may be a property right." The word "trumpeting" is truly an interesting word to apply to those lawyers and non-lawyers who are zealously guarding the handful of important things which make life under our form of government different from life under the barbarisms now spreading through the world. And if to cling desperately and vigilantly to the concepts which give life in a democracy a dignity and stature they cannot otherwise attain is "trumpeting", then let me add my tin horn to the chorus of brasses.

I wish merely to quote two individuals, the first a trumpeting lawyer, and the second a trumpeting layman. Some of the most stirring language ever used by our Highest Court may be found in an opinion written by the trumpeting lawyer to whom I have referred, Chief Justice Hughes, on the question of the right to print, publish and distribute "literature in its *widest* sense."

"The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish *without* a license what formerly could be published only *with* one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision. See *Patterson v. Colorado*, 205 U. S. 454, 27 S. Ct. 556, 51 L. Ed. 879, 10 Ann. Cas. 689; *Near v. Minnesota*, 283 U. S. 697, 713-716, 51 S. Ct. 625, 630, 75 L. Ed. 1357; *Grosjean v. American Press Co.*, 297 U. S. 233, 245, 56 S. Ct. 444, 447, 80 L. Ed. 660. Legislation of the type of the ordinance in question would restore the system of license and censorship in its baldest form.

"The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated. *Near v. Minnesota*, supra; *Grosjean v. American Press Co.*, supra; *De Jone v. Oregon*, supra.

"The ordinance cannot be saved because it relates to distribution and not to publication. 'Liberty of circulating is as essential to that freedom of liberty of publishing; indeed, without the circulation, the publication would be of little value.' Ex parte *Jackson*, 96 U. S. 727, *Press Co.* supra, was held invalid because of its direct tendency to restrict circulation." (*Lovell v. Griffin*, 303 U. S. 444.)

It is no deceptive analogy in quoting the second player in this symphony of brasses to argue that the appeal by the blind poet and pamphleteer, Milton, for "the liberty of unlicensed printing" applies to the issue now raised as to whether one can, without a license, write of the things which may or may not be done under the laws which govern him and his fellow citizens.

" . . . as good almost kill a man as kill a good book; who kills a man kills a reasonable creature, God's Image, but he . . . who destroys a good book, kills reason itself, kills the Image of God as it were in the eye." [*Areopagitica* (1644)]

I should like to go on indefinitely and exhaust the entire question of the right of free men to discuss, analyze, criticize and write of the laws of their country, of the government of their country and of their way of life. But the chorus of horns is too loud to need further trumpeting from me.

Let me add just one sour note:—The decision in *Shortz v. Yetter*, upon which the entire *Obiter Dicta* was based, was by the Court of Common Pleas in Luzerne County, Pennsylvania. Apparently, the court did not realize that it would be compelled not only to sustain its own decision but also to preserve intact the point of view expressed in your *Obiter Dicta*. Please forgive the court for having just removed the injunction against the publishing of the pamphlet. It may also be interesting for you to learn that the judge who wrote the original decision also wrote the appeal decision for the full court which modified the injunction. Thank God for the trumpets!

Sincerely yours

THE RESEARCH INSTITUTE OF AMERICA, INC.
(signed) LEO M. CHERNE
Executive Secretary

EDITORIAL NOTE:

In accordance with its customary practice, the FORDHAM LAW REVIEW is pleased to extend the privilege of its columns to the Research Institute of America. After reviewing the criticized *Obiter Dicta*, which appeared in the FORDHAM LAW REVIEW for May 1940 under the title "The Lawyer's Best Friend" and after rereading the decision of *Shortz v. Yetter*, which furnished the basis for the above *Obiter Dicta*, the FORDHAM LAW REVIEW regretfully is obliged to observe that the aforesaid letter misconstrues the fundamental legal questions underlying the case of *Shortz v. Yetter* and raised in the modest student contribution.

It is submitted that the above letter of the Research Institute of America discloses three errors which deserve mention:

(1) The criticized *Obiter Dicta* and the decree in *Shortz v. Yetter* did not object to the publication of the pamphlet in question on the theory that the publication constituted the unauthorized practice of law because it contained "analyses of laws and decisions". The pamphlet which the court in *Shortz v. Yetter* enjoined "was published as a part of a plan of defendants and especially Yetter, holding themselves out as qualified legal advisors and ready for consultation with clients concerning wills and decedent's estates and because the pamphlet contained questions and answers which involved legal knowledge and training. . . ." (*Shortz v. Yetter*, unreported.) In other words it was the judgment of the Pennsylvania court that the pamphlet was merely a subterfuge to permit individuals to practice law without license.

(2) The Research Institute of America seemingly is arguing that the constitutional guarantees of freedom of the press and of free speech are unlimited and absolute even to the point of permitting a layman or corporation to practice law without a license. It is submitted that the constitutional guarantees of freedom of the press and of speech are not so unrestricted. As Mr. Justice Holmes, an ardent advocate of individual rights, once asserted: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing panic." *Schenck v. United States*, 249 U. S. 47, 52 (1919). May we not suggest that a false representation of a right to practice law is not constitutionally validated because such illicit practice is conducted in writing or by word of mouth.

(3) One last word regarding the above letter. In the concluding paragraph the writer states: "Let me add just one sour note:—The decision in *Shortz v. Yetter*, upon which the entire *Obiter Dicta* was based, was by the Court of Common Pleas in Luzerne County, Pennsylvania. Apparently, the court did not realize that it would be compelled not only to sustain its own decision but also to preserve intact the point of view expressed in your *Obiter Dicta*. Please forgive the court for having just removed the injunction against the publishing of the pamphlet."

A reading of the final decree of the Court of Common Pleas of Luzerne County (In Banc) leaves the impression that the "sour note" was sounded too soon by our distinguished correspondent. We conclude with a quotation from the final decree which indicates very clearly that permission to print the pamphlet originally enjoined was only granted when the objectionable matter was deleted therefrom: "Now, 10th day of May, 1940, this cause came on to be heard on bill, answer and exceptions to decree nisi; and upon consideration thereof it is ordered, adjudged and decreed:

1. That the defendants, Stanley M. Yetter and Harold A. Clark, and each of them, are hereby restrained and enjoined from printing and publishing questions and answers involving expert or professional legal knowledge in their pamphlet entitled "A Practical Aid for Executors or Administrators of Decedents' Estates", or in any other pamphlet or publication which they may print, publish, circulate or distribute; and from holding themselves, or either of them, out to the public in any such pamphlet or publication as open or ready for consultation for legal services or advice. *With these restrictions they are permitted to print and circulate such pamphlet or publication.*" (Italics inserted).

FORDHAM LAW REVIEW

