From the Production Editor *

"Looking at the data in Table 2, it appears that an attorney who knows the rules of evidence should reexamine his eyewitness testimony." In the midst of preparing Professor Smith's article for publication, I realize that this sentence of his exemplifies every question I confront as production editor for the *Review*. And I begin to suspect that all these questions revolve less around the material production of a journal than around the production of language.

Mindful of my editorial responsibilities, I start exploring my suspicions by considering the question of Professor Smith's grammar. With the obligatory wince, I note his introductory dangling participle. How to remedy it? "The data in Table 2 suggest . . ."? That would soothe whatever irate grammarians make their way into our readership. But have I lost anything of the author's tone or intention? What my revised version lacks, I eventually recognize, is any hint of human agency. It is Professor Smith himself who was "looking at the data in Table 2," and clearly it is he who suggests how attorneys ought to behave. But scholarly etiquette prevents him from completing the tale of his mental adventure with "I came to believe that . . ." (though this may be true and would have made a perfectly grammatical sentence). Now I discover that I have colluded in this impersonalization by forcing the data rather than the researcher to "suggest." Together Professor Smith and I have conspired to convey an impression of scientific objectivity that may belie his passionate convictions in this matter and certainly denies the complex subjectivity out of which his insight grew. Given the conflicting pressures of professional distance and strong personal involvement, it is small wonder the author has deserted his sentence with a participle still dangling.

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* Margaret (Peg) Lourie has served as production editor of the *Review* since I took over the editorship. Every article that has been published bears the mark of her careful reading and editorial skills. Peg came to the *Review* with strong academic interests in several subjects but no prior experience in law and social science. Because I value her ideas and thought her reflections after three years of involvement with the *Law & Society Review* would be of general interest, I invited her to write the editorial introduction to this issue. The descriptions of the articles in this number that follow her introductory remarks are mine. R.O.L.

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Having reluctantly revised Professor Smith's first clause, I find myself perplexed by his "attorney." Does he mean to designate a particular type of attorney who, unlike other attorneys, knows the rules of evidence? Or is he trying to say that any attorney knows the rules of evidence—in which case, he should have inserted commas after "attorney" and "evidence" to indicate a nonrestrictive relative clause? Since the same words can refer to either the whole population of attorneys or only a segment of that population (perhaps the very segment Professor Smith is studying), the distinction is obviously not trivial. In order to settle the question, I find myself turning to surrounding sentences, even looking at Table 2. As I thumb through Smith's pages on my way to his tables, I come to marvel at my power as the arbiter of commas.

After I have conquered this quandry of the commas, my feminist editorial eye falls on the obtrusive generic "his." Will women readers intuit that this supposedly inclusive pronoun subtly excludes them? Or is my own intuition of exclusion simply oversensitive? What if the author's sample included only male attorneys, making this use of "his" accurately specific rather than offensively generic? And can I revise this sentence, avoiding the awkward "his or her," without changing the author's meaning? Finally, my version of Professor Smith's sentence passes all the grammatical tests I can think of: "The data in Table 2 suggest that attorneys, who know the rules of evidence, should reexamine their eyewitness testimony."

Yet now that my nagging editorial doubts about the language of Professor Smith's sentence have been at least tentatively assuaged, other questions arising from my training in literary criticism begin to plague me. It occurs to me to ask whether eyewitness testimony—the topic of Professor Smith's article—is not itself a language system based on certain storytelling conventions. And since Professor Smith quantified his interview data with the help of a computer, I even begin to speculate on the interaction between the language of eyewitness testimony and the language of the computer—both of which structure and thereby determine their respective "output."

At the height of my reverie about language and Professor Smith, I recall what my reading in structuralist and post-structuralist criticism has taught me: that language—because it mediates everything we think and perceive—is our only "reality." This means, among other frustrating things, that since language is all we have, any text—whether historical,

sociological, journalistic, literary—is more significant for what it reveals about linguistic structures than for the light it sheds on the dubious category of "experience" or on the continual search for "truth." Such an orientation has long dominated the criticism of poetic discourse. But we are now also beginning to understand how history texts are structured (and thus determined) by such narrative elements as plot and character. Even Professor Smith seems to encode his article for the *Review* in the language that dominates his discipline: he first surveys the literature on eyewitness testimony, locating within it a contradiction he proposes to resolve, then sets out a research strategy, defines and analyzes his data, finally drawing inferences from his analysis. Might we not, then, ponder whether empirical sociology is actually anything more than the discourse it produces? Or so a literary critic might propose.

This dizzying excursus on the centrality of language returns me to my original project: sprucing up Professor Smith's sentence. I begin to wonder whether the small grammatical changes I make as production editor might not ripple out into circles of unsuspected implication.

But I console myself that, after all, the humanistic enterprise differs from the social scientific one, in which language can still serve as a tool for classifying and explaining that powerful common-sense category we call "experience." More than that, a simple presumption that language and reality are somehow distinct frees the social scientist to exert some influence on the conditions of that reality. Thus, when Professor Smith, however mutedly, urges attorneys to modify their behavior, the humanist entangled in the snares and contradictions of the text may well applaud the sociologist's more activist attempt to intervene in the society he lives in. Even Richard Lempert's warning in his last editorial against drawing premature policy implications from research findings only testifies to the potential impact of social science on important issues of public policy. To a humanist with political instincts this is a heartening potential indeed.

Still, I reflect, adding a parenthesis to one of Professor Smith's references, social science is not a habit of mind I will probably be able to adopt. It would require me to abandon my characteristic use of language to spin out fictions—such as this

of my editorial musings and of Professor Smith's article on eyewitness testimony.

Margaret A. Lourie
June 1985

In This Issue

This issue of the *Review* opens with two articles that deal in different ways with problems of regulatory justice. The first is a fine empirical study by Susan Shapiro entitled "The Road Not Taken: The Elusive Path to Criminal Prosecution for White-Collar Offenders." In her study Shapiro looks at how cases of alleged broker-dealer malfeasance are channeled once they come to the SEC's attention and an investigative file is open. It is not surprising that in most such cases criminal prosecution is the road not taken, but the fact is generally important because it suggests the danger of a substantial selection bias in studies of white-collar crime that catch cases only as they enter the criminal justice system. What is more surprising is the nature of that bias. Many of the features that characterize those cases most likely to end up in criminal prosecutions are also disproportionately associated with SEC decisions to do nothing at all, that is, with the decision to pursue neither criminal, civil, nor administrative remedies. In some cases, such as those in which a crime has been completed and nothing more can be done, the only practical options are to proceed criminally with an eye to retribution and deterrence or to do nothing at all. In other cases, especially those where a crime is ongoing and serious harm can be forestalled, civil or administrative action is sufficient to stem further harm and is more certainly and efficiently administered than criminal sanctions. Thus, Shapiro's study further illustrates a point that has been made by other articles that have appeared in the *Review*. Statistical analyses of the criminal justice system must pay more attention to the organizational characteristics of the domain under study. Often this means that ethnographic approaches are a fruitful supplement to formal modeling.

Gerd Winter's article "Bartering Rationality in Regulation" focuses not on a regulatory agency but on the regulatory state. Winter is concerned with the quality of law that regulation engenders. From this perspective he identifies a mode of legal dealing which he calls "bartering rationality" and argues that it

has come to prominence in the modern regulatory state. Bartering rationality involves trading substantive regulation (especially the potential for full enforcement) for the cooperation of the regulated in the enforcement process (which typically implies partial enforcement). Bartering rationality is not new; Winter provides examples that go back a century and more. What is new is that bartering is emerging from the shadow of the law into the open. Not only are overt bartering and partial enforcement increasingly advocated and often pursued as a means of regulation, but there are those who advocate building barters into the law itself and some such laws have been passed. Focusing on the United States, Great Britain, and West Germany, Winter canvasses the history of bartering rationality, describes different types of barters that occur in legal regulation, and cautions us against the too ready acceptance of bartering as a regulatory ideal. Thus, Winter's wide-ranging essay provides more than the conceptual label "bartering rationality"; it calls our attention to a host of empirical and value questions, the answers to which might well shape modern life.

Herbert Kritzer, William Felstiner, Austin Sarat, and David Trubek in their article "The Impact of Fee Arrangement on Lawyer Effort" present the most sophisticated effort to date to estimate the implications of contingent versus hourly fees for the time civil lawyers put into their cases. What emerges from their study is a somewhat complicated picture that belies received notions about the incentive effects of different fee arrangements. In particular, it appears that contingent fee lawyers do not always put in less time than hourly fee lawyers on comparable cases, and the effects on lawyer time of factors other than fee arrangement appear to vary with the way lawyers are compensated. Both these findings suggest that attempts to model lawyer behavior as largely self-interested and materialistically motivated are, at best, incomplete.

The final two articles in this issue both focus on political aspects of the relationship between law and culture. Sidney Silliman's article entitled "A Political Analysis of the Philippines' Katarungang Pambarangay System of Informal Justice Through Mediation" describes an effort by the Philippine government, similar to the effort that Cuba made with its Popular Tribunals, to spread authority through the institutionalization of village mediation tribunals, a mechanism for informal justice. Unlike Cuba, however, the Philippine tribunals do not attempt to disseminate new norms of

conciliatory justice but instead follow what has long been a traditional village mode of resolving disputes. Silliman is concerned both with the acceptance this system has achieved and with the political implications of this acceptance. He describes a cooptative process in which the national government's influence on rural life is increased, and the lowest level government officials, barangay captains, to some extent displace informal village leaders. But barangay captains often apply informal rather than governmental norms and help create what, for local disputes, is an important political forum.

Stuart Henry's paper "Community Justice, Capitalist Society, and Human Agency: The Dialectics of Collective Law in the Cooperative" is concerned with the interpenetration of political cultures as he examines the relationship between communalistic English cooperatives and the larger capitalist society in which they are embedded. Henry describes a dialectical relation between the collectives he studied and the surrounding society such that communitarian movements and their collective justice systems are continually affected by capitalist norms and requisites for survival. (For example, a housing authority must collect rent from its members, and its survival may be made more likely because in extreme situations it can call on the larger society to evict those who do not pay.) At the same time collective justice systems persist in a variety of institutional components of capitalist society, providing models of socialist legality and pressures for change in this direction. Ultimately, Henry sees in the dialectical interactions between capitalist society and the groups and individuals who make it up the potential for changing the fundamental structure of modern legal systems. Advances toward socialist legality, he tells us, will be partial and if they are to succeed must occur within institutions that do not begin by rejecting capitalism and the capitalist legal order. If Henry is correct, the political implications of informal justice are considerably more complicated than the extant literature suggests.

Richard Lempert
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