

Stanford University

From the Selected Works of Robert R.M. Verchick

Winter January, 2019

Tales from the Back Bench

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from

Beyond One L: Stories about Finding Meaning and Making a Difference in Law
(Nancy Levit and Allen Rostron, eds. 2018)

Tales from the Back Bench

ROBERT R.M. VERCHICK

Just beyond the Harvard Law School's campus near the university's music building stands a handsome tree, perhaps elm or maple (I don't inventory such things), its exposed roots elaborately knotted into the lumpy ground. At the base of the trunk is a hollow, so dark that even in full sun you can't see inside. Nailed to the trunk above the hollow, is a hand-painted sign that reads: "Pooh."

That was the scene when I attended Harvard as a 1L. Pooh still lives there. In fact, the bear's now got a small yellow door hinged to the trunk. I suppose that law students passing by wonder, as I did then, who keeps the place up. Undergraduates, most likely. *Maybe* a bored bassoon player avoiding her dissertation. But not law students. They would *never* stoop to such whimsy.

My move to Harvard Law was an exciting, but sometimes frustrating transition. The law school community was large and anonymous, the famous Bauhaus dormitories (designed by Walter Gropius) part Habitrail and part shoebox factory, the eyes of campus administrators a baleful gray. I had come with a bachelor's degree in English (English!) from a west coast university that called itself "the Farm," a campus known for fragrant eucalyptus and a pride of lion-colored hills. Harvard Law was certainly no "Farm," and to my eye it was no "Hundred Acre Wood" either.

Whimsy? Forget it.

At the law school we were all scared. Herded into cavernous classrooms with impressive molding and portraits of dour judges, we sat in swiveling seats each marked with an assigned number. The professors would enter from doors behind the lectern (you wouldn't want them sashaying past students from the rear) and pull out an enormous cardboard seating chart from a special bracket on the wall. "Ms. Johnson . . ." you'd hear one of them say. Thank God, you'd say to yourself. It could have been me.

This went on for weeks, months, with little end in sight. Meeting people was hard, I found, because it was nearly impossible to dig beneath the surface. Students seemed always to be sizing up other students—the schools you'd gone to, your former jobs, the countries you'd visited, your comments in class. Or not. We each had campus mailboxes in the student center into which organizations and departments would stuff urgent flyers about all the stuff you should be doing—hearing a Nobel Laureate, becoming a Big Sister, fighting world hunger, or joining the CIA. All of this would immediately go in the wastebasket as fast as I could shovel it. But on a day in late October I found something else, a single colored sheet formatted like a newspaper. It said:

THE BACK BENCH REPORTER

A publication by, for, and about Section 1

October 24, 1986 – Vol.1, No. 1

It was a newsletter, printed in the unmistakable style of a Macintosh computer with a dot-matrix printer. Like the tracts of Thomas Paine and Alexander Hamilton, authorship was concealed. The title was taken from the practice at the time of allowing unprepared students to sit near the rear of the classroom—on "the back bench," where they could silently listen and perhaps finish a crossword. But, importantly, there was, really, no news. Instead a quiz! ("How many Section members rowed in the 1986 Head of the Charles?" "Ms. Johnson was the first person called on in Prof. Miller's class. Who was the first in Prof. Sargentich's class?") And a ranked list of funny quotations from professors and students overheard and scribbled down in our classes. Who could forget when J.T. said, "You look out the window and you see the Taj Mahal and you say—'Mother of God!'" (What was that all about?) Or Prof. Arthur Miller's creepy smile when

he assured, “Yes, Virginia, we do wash your brains here.” (A number one ranking!)¹²⁴

As leaves fell off the damp trees and dissolved into mush, the *Back Bench Reporter*, or “BBR,” as students called it, hit its stride, and became a necessary diversion to my law student life. Every week the BBR would publish rankings of quotations, light-hearted profiles of students you wish you had met, occasional advice columns and fictional movie reviews, like this one based on *Regina v. Dudley & Stephens*,¹²⁵ you know, the case where three sailors in a lifeboat eat the cabin boy:

JUMPIN’ JACK FLESH [British Title: “Four Men in a Tub”] (PG-13)
Adventure on the high seas as “somebody’s got to be lunch.” Starring
Dudley, Stephens, and Will Parker. “I’m sick; feast upon me!” —J.T.

I loved the 1L profiles. For the most part, they seemed genuine, not showy or posed. They always featured the student’s “facebook” photo, taken in the days of dime store photo booths and inevitably a little goofy looking. You could find out who obsessed over Korean food, who giggled too much in college, who liked Jimmy Stewart movies. Once in a while you found a real hero, like K.L., a doctor who described once “meeting Jimmy Carter while on a trek in Nepal at 14,000 ft. and treating Rosalyn [Carter], who was sick.”

The 1L profiles always featured students’ “ambitions,” some real, some tongue-in-cheek.

C.S.: “To find happiness even if it means being a lawyer”

J.R.: “To practice law on an Indian reservation/To be a village magistrate coordinator in Alaska”

124. Quotations from the *Backbench Reporter* are taken from the publication’s first year in print, available in THE BACK BENCH REPORTER: A PUBLICATION BY, FOR, AND ABOUT SECTION 1, VOLUMES ONE THROUGH THREE: THE WHITE ALBUM 1986-1989 (on file with the author). Many thanks to Doug Ulene, Harvard Law School Class of 1989, for making this work available to me. For the reader’s convenience, I will not cite individually to each publication’s issue. Also, I have taken the occasional liberty of changing punctuation or reformatting text, in the interest of clarity. Finally, I have replaced the names of students with their initials for reasons of privacy; the professors, on the other hand, are on their own.

125. [1884] 14 Q.B.D. 273 (D.C.).

R.H.: “To be a lawyer and a wife and a mother (stable family life is as important as career)”

C.S.: “To be a fat judge”

J.T.: “To emerge from here psychically unscathed”

D.U.: “(Public) Corporate grind; (Private) Author, househusband, entrepreneur, rabbi”

M.M.: “(Pleading in the alternative) (1) To end oppression; (2) To chuck all this for a commune in Vermont . . .”

So sweeping was the *BBR*’s knowledge, so intimate its detail, that people began to suspect there must be spies everywhere. I imagined them as nervous birds scurrying about the wood in search of silver buttons and tangled string. Almost whimsical, I know, but you get the idea.

The quotations poll often captured a moment in class of laughter or at least a smirk. And I came to realize that class really wasn’t all that serious if you remembered the funny bits. Gradually students were crawling out of their shells, and professors seemed to enjoy that.

It happened in Criminal Law:

PROF. DANIEL MELTZER: Give me the difference! Why is this case not like *Katz*? One word—Mr. Albert?

M.A.: Hoffa!

PROF. MELTZER: No, “consent.” “Hoffa” is not bad, though.

And Property:

PROF. LANCE LIEBMAN: You’ve chased a fox? Did you catch it?

D.B.: Yes.

PROFESSOR LIEBMAN: What was it worth?

D.B.: Not nearly as much as the energy you spend chasing it.

And Criminal Law again:

D.G.: It seems to me you can look at sex in one of two ways . . .

PROF. KATHLEEN SULLIVAN: I think there are more.

Sometimes a student would say something he might never live down:

R.N.: I don't know what Camplin was so upset about, just because the guy bugged him.

PROFESSOR CHARLES OGLETREE: If I told you that *bugger* meant "sodomize," would that change your mind?

But then, again, so would professors:

PROF. MELTZER: "You walk through Harvard Square and people ask you if you want to buy drugs . . . Does that happen to anyone besides me?"

How I yearned, back then, to see one of my witty phrases published on that page. I know others did too. Sometimes both students and professors *tried purposely* to get on that page by planning some line and then just letting it fall out. You could tell when people did that.

When it came to skillful sound bites, Professor Miller, our Civil Procedure instructor, was surely in a class of his own. Dressed always in a three-piece suit, a ridiculous watch fob dangling from his vest pocket, he managed to elicit both laughter and horror. There were more rumors about him than anyone else. It was whispered that Miller served as model to Scott Turow's fictional Professor Perini, that Miller once taught *Erie Railroad Co. v. Tompkins*¹²⁶ dressed as a train conductor and once in drag (*Erie* marked a 180-degree reversal—get it?), that he once stormed out of the classroom when a student was unprepared. I have no idea if such claims were true, but they circulated constantly. And say what you want, the guy knew how to make the abstract concrete, like the rules concerning the waiving of objections and the joining of motions:

126. 304 U.S. 64 (1938).

Rule 12(h) is the stiletto—it's the knife coming in; Rule 12(g) is the twist.

Or this explanation of the Full Faith and Credit Clause:

I've got that judgment for \$83 billion, and I can wander around the country with it, can't I? Like Diogenes with a lamp . . . trying to ferret you out. My judgment is a *vacuum cleaner*, and it's in your pockets no matter where your pants are . . .

It's true that class with Miller could get a little rough. At times it seemed as if he had graduated from the Don Rickles School of Education and Pedagogy.

I don't know; the answer isn't on *my face*. It's in the tan pamphlet [containing the Federal Rules of Civil Procedure]. Or haven't you taken the cellophane off yet?

But for the most part, he toyed with the good students, like this graduate from Harvard College.

I mourn the fact that you are the product of an inferior primary, secondary, and undergraduate education. I realize that your world vision is where the best nachos are in San Diego.

And he *did* urge you not to take it personally, as he did once on the return from the hospital:

I hate doctors. I hate needles. I hate clinics. I hate this university. I haven't had any coffee, to which I am addicted. . . . So the only possibility is taking it out on you.

A few students, instant heroes, got sassy right back.

PROF. MILLER: "Why isn't it a *res judicata*/claim preclusion case?
K.S.: Because it's in the Issue Preclusion section [of the book].
PROF. MILLER: "Everyone's a sit-down comedian today."

In winter I liked to walk across the Anderson Memorial Bridge from Cambridge to Allston across the Charles River. The structure's brick and stone evoked a colonial history I was not used to on the west coast. Admirers of *The Sound and the Fury* know that Quentin Compson, William Faulkner's most famous misplaced Southerner, had once been similarly drawn to this bridge—before he threw himself over it. It wouldn't have worked the day I was there, of course, since the water's surface was completely frozen. I stared at the sheet of white ice anchored between the river's shores. Faintly, but unmistakably, I made out a message scratched into the top frosty layer of ice, communicated in simple block-letters about five-feet tall. "Harvard Sucks," it said. Poor Quentin, I thought. But of course, he had nothing to do with it. Yalies? Resentful town kids? Who could know? But again, surely not law students.

I no longer shared that frigid sentiment, but that is not to say I did not have issues. My girlfriend of several years had broken up with me. (In fact, she announced this decision just a few days before my first law school exams.) She was working in New York City at the time, and I was amused and strangely touched that she had asked one of her roommates to call me regularly to make sure I was "O.K."

I guess I was doing all right. The intellectual atmosphere of the classroom was no longer frightening, but instead spiked with creativity, insight, and devilish wit. And I was told by no less than writers for the *BBR* that romance, like many contracts disputes, understandably boiled down to "impossibility and frustration."

Reflecting an almost Jurassic sensibility, the *BBR* early on sponsored a student survey seeking the names of men and women with whom members of the opposite sex would like to be stranded on a South Pacific Island. My favorite published responses (both from women) were "Dudley & Stephens" and "This is insulting—I hope [student] money isn't being spent on this trash." But the *BBR* offered more intelligent insights on law school romance too, noting, for instance, that the heterosexual male student body was *not* so easily divided between men who had "no clue" about women and men who had girlfriends. (There were not many married folk in those days.) It turned out there was a significant number of men who could claim allegiance to *both* camps, a status dubbed "Advertent No Clue," or "Unreasonably Having of Girlfriend." Who knew my life was so easily explained?

In February, the *BBR* published valentines too:

Dear C.,

I'm looking for a short, beer-drinking guy with curly hair who's
man enough to fall asleep in class; I'm looking for you big guy.

The Woman of Your Dreams

And,

To whoever voted for me in the South Sea Island Poll: Get LOST.

Most classmates I knew came to Harvard Law School with an impression of the institution borrowed from popular culture. For some, it was *One L*, for me it was the film *The Paper Chase*, which I must have seen twenty or thirty times. My favorite scene, believe it or not, was the one where James Hart slips away one night with a classmate and sneaks into the library's sprawling stacks. Like the Phantom spelunking Parisian sewers, Hart and friend float through dimly lit corridors, waxing spiritual and casting long shadows. I'm slightly embarrassed to say I did the same thing, or something like it. This was the '80s, of course, so investigating the notes of a conventional scholar like Mr. Kingsfield was not my style. No, I was ensorcelled by the Crits, and the feminists, and the emerging prose poetry that would become Critical Race Theory. I recall combing the music library's jazz collection in search of Billie Holiday's "Body and Soul," because Mari Matsuda had cited it in a draft article.¹²⁷ In the basement of Langdell Library, I would run my fingers down the spines of the *Stanford Law Review* until I came to the absolute fattest one of all—volume 36, the fabled "Crit Symposium" issue, wherein lay the *Finnegan's Wake* of legal scholarship, the Alpha and Omega, Peter Gabel and Duncan Kennedy's shocking and unreadable *Roll Over Beethoven*.¹²⁸ And like a kid reading Kerouac for the first time, I would marvel at the nerve of a top-tier law review that would accept as a scholarly coinage the term *intersubjective zap*.

127. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.—C.L. L. REV. 323, 337 n.62 (1987).

128. Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984).

Heady days, to be sure. But reality killed the buzz. Soon Harvard's faculty was engulfed by a tenure dispute involving a feminist scholar, beloved by some and spurned by others. The affair got ugly fast. Tenure was denied and a wedge was driven through the faculty. Some professors refused to talk to one another after that. Many students also began choosing sides. We 1Ls were somewhat immune, since most of us had little time for ideological battles. But the record, as captured in the *BBR*, will reflect that philosophy and social science did infiltrate our classrooms.

PROF. LIEBMAN: You think moral relativism is scary?

J.T.: If you're just gonna go with the climate of the times, if you're just gonna throw up your hands and say, "Whatever," yeah, I think that's pretty scary.

PROF. LIEBMAN: You've got a problem in the 20th century.

At one point in Contracts, Prof. David Charney suggested a student had "been reading too much Posner." It used to be, he mused, "that in the first year of law school the one thing you were sure to have learned was how to read a case. Now the one thing you are sure to have learned is how to generate cheapest-cost-avoider arguments."

In Torts, our beloved Professor Lewis Sargentich opined on the history of a manufacturer's liability in tort, with a riff that to this day I cannot hope to comprehend. "We have undergone a sea-change," he explained, "a plate-tectonic development: tort was being subducted under contract, but now there is an equal clash of continents."

After the snow melted (in April) and the robins returned, it appeared that we, like that boy in the Hundred Acre Wood had finally outgrown the fantasy. We were focused on jobs now. As even Miller had taught us, "When you get out there, you're not paid to think. You're paid to win." As exams approached, more and more students piled onto the backbench, and Prof. Charney announced that "[n]ext class will be taught from the back of the room so you can all hear me better."

Nonetheless, the *BBR* did continue, published anonymously for three years, although in the end most of us had discovered the small band of classmates behind it. While students *and* professors sometimes ques-

tioned its standards, it must be said that this newsletter is cited not once, but twice, in the annals of the *Harvard Law Review*.¹²⁹

Some of the great personalities I came to associate with Harvard Law School are no longer there. Professors Liebman, Miller, and Sullivan eventually moved to other schools. Professor David Charney, at age forty-four, died unexpectedly from a brief illness in 2000, his life cut way too short.

The students? A runner-up on the infamous South Pacific list went on to become a central player in a wildly successful internet retailer. (I won't mention the name, but it rhymes with "spamazon.") The skinny kid who hadn't opened his "tan pamphlet" is now the Elizabeth K. Dollard Professor of Law at Yale and among the most-cited legal scholars in any field. The young woman who once hoped to end oppression and join a Vermont commune built a career representing municipalities in complex litigation and helping tribes and local governments develop their economies. She is also a Buddhist monk. There are so many people in my first section who have been blessed by rich family lives, satisfying careers, rewarding volunteer work, and adventure of all kinds.

As it turns out, the break-up with my girlfriend didn't last. The next year, we got married and remain so. And on January 16, 1987, a modest plea for help issued by me in Contracts was ranked *first* among the editors' list of favorite quotations for that week's issue.

"I'm not sure exactly where I'm lost . . . but I am."

—R.V.

Back then perhaps. But not anymore.

129. See Note, *Intergovernmental Tax Immunity*, 102 HARV. L. REV. 222, 229 n.49 (1988) (quoting Laurence Tribe: "irony—in and of itself—is not unconstitutional"); Note, *Over-Protective Jurisdiction? A State Sovereignty Theory of Federal Questions*, 102 HARV. L. REV. 1948, 1957 n.79 (1988) (quoting Daniel Meltzer: "*Pullman* is not so much a case as it is a doctrine. The *Pullman* case is, obviously, a prime example of the *Pullman* doctrine.").