Attenuated Subtleties Revisited

Davison M. Douglas

With this issue, the *Green Bag* is beginning to reprint updated versions of articles that first appeared in *The Journal of Attenuated Subtleties* in 1982 and 1983. Readers will be forgiven if they have not heard of this improbably-named periodical, and this republication is a welcome event that guarantees a wider audience for some strange but delightful pieces of legal writing.

The *Journal* was the creation of a group of Yale Law students in the early 1980s who were fascinated with arcane trivialities of law. "The law may not care about trifles, but lawyers certainly do," wrote Editor-in-Chief Robert James in the inaugural issue. "From time out of memory, members of the bar have delighted in advancing the arcane argument, in drawing the strained analogy, and in resuscitating the outmoded doctrine; even today, when 'exalt[ing] form over substance' is reversible error, the fascination with long dead and unimportant detail continues to pervade the legal mind."[1] The *Journal* sought to publish "short scholarly essays, gracefully written, cogently argued, and copiously referenced, which treat subjects long and justifiably neglected in the 'substantial' legal literature – legal topics made obsolete by time or logic."[2] James conceded that not all lawyers "love the subtle and the attenuated," but chided that those who "take no delight in our forays … must find their recreation outside the law, in alcohol or bowling."[3]

The creators of the *Journal* were motivated by more than a mere fascination with legal trivia. They noted two bothersome currents in legal academic writing. The first was the obsession of the legal community with documenting even the most obvious fact.[4] The

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1 *Foreword: Form Over Substance*, 1 J. Atten. Subt. 3, 3 (1982) (quoting *Parker v. Flook*, 437 U.S. 584, 590 (1978), *rev'g In re Flook*, 559 F.2d 21 (C.C.P.A. 1977)) (footnotes deleted). The other editors of *The Journal of Attenuated Subtleties* were David Kirkland, John Little, Manley Roberts, and Benjamin Zuraw.

2 *Foreword*, *supra* note 1, at 3.

3 *Id.* at 4.

4 *See, e.g., County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 579 & n.1 (1989) ("Christmas, we note perhaps needlessly, is the holiday when Christians celebrate the birth of Jesus … .") (citing 8 Encyclopedia of Religion, "Jesus," 15, 18 (1987)).

second was the prodigious effort involved in the editing and publishing of legal scholarship that eventually results in advancing even the most trivial idea.[5] These students saw in this combination of fussiness and microscopy a rich and unexplored vein from which the humor of the parodist could be mined.

Thus was born the *Journal*, generated on a primitive dot-matrix printer and distributed in small, photocopied production runs to Yale students and professors. The *Journal* editors drew its name from Justice Holmes's famous opinion in *Lucas v. Earl*, in which the esteemed jurist noted that a "case is not to be decided by attenuated subtleties."[6] Perhaps not, but as James wrote, "the fancy of the lawyer is surely to be struck by them."[7]

The inaugural reprinting that follows[8] illustrates the trademark *Attenuated Subtleties* formula. While reading materials for his federal jurisdiction class, James spotted an obscure and tangential reference to the possibility of jury trials in the United States Supreme Court. Pulling on this thread, he found that even the tiniest fray in legal fabric could produce an immense amount of material. His discussion of not one but three Supreme Court jury trials is scholarly[9] as well as entertaining. The resulting mental image of nine Justices conducting *voir dire* examinations, ruling on evidentiary objections, and corralling the antics of the modern trial lawyer is fresh and vivid. Reprints of other *Attenuated Subtleties* articles will continue to provide welcome relief from everyday humbug.

All of the *Attenuated Subtleties* writers entered private practice rather than the academy. This was a tremendous benefit to the American economy[10] but a blow to legal education. It is therefore fitting and timely that the *Green Bag* republish these pieces and again give a sorely-needed poke in the ribs of the sacred cow of legal scholarship.[11]

5 It would be unseemly to cite examples. *But see* David P. Currie, *Green Bags*, 1 Green Bag 2d 1, 2 (1997) (referring obliquely to "authors [who] feel constrained to rehearse in hideous detail what every imaginable reader already knows before coming forward with the usual mouse").

6 *Lucas v. Earl*, 281 U.S. 111, 114 (1930).

7 *Foreword*, *supra* note 1, at 3.

8 See Robert A. James, *Instructions in Supreme Court Jury Trials*, 1 Green Bag 2d 377 (1998).

9 Indeed, there has been a contemporary rebirth of interest in the leading Supreme Court jury trial, that reported in *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794). The Chief Justice's jury instruction arguably permitted the jurors to make determinations on matters of law as well as of fact, and modern scholars have used this as authority for "jury nullification." On *Brailsford* and nullification, see generally Alan W. Scheflin, *Jury Nullification: The Right to Say No*, 45 S. Cal. L. Rev. 168, 175 (1972) (citing *Georgia v. Brailsford* as an early American illustration of "the concept of the jury as one of the people's most essential vanguards against political oppression"); John T. Reed, *Penn, Zenger, and O.J.: Jury Nullification – Justice or the "Wacko Fringe's" Attempt to Further Its Anti-Government Agenda?*, 34 Duq. L. Rev. 1125 (1996); *cf. Sparf & Hansen v. United States*, 156 U.S. 51 (1895) (role of jury restricted by Court to resolution of factual matters).

10 At the end of 1983, when the *Journal* editors started their careers in business counseling and litigation, the Dow Jones Industrial Average of blue-chip common stock prices stood at 1259. *See Data Bank: January 1, 1984*, N.Y. Times, Jan. 1, 1984, Sec. 3, at 10. By May 13, 1998, this benchmark index stood at 9212 – a gain of almost *800 percent*. *Dow Adds 50; Sets New High*, Chi. Sun-Times, May 14, 1998, at 54. Factors other than the involvement of these lawyers in our economy may have contributed to this extraordinary result, but the econometric data are sketchy and unreliable.

11 *But cf. Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1887), memorialized in Brainerd Currie, *Rose of Aberlone*, 1 Green Bag 2d 445 (1998), discussing what one could argue is the true sacred cow of the law. *Sherwood v. Walker* is arguably second only to *Moby-Dick* in having the finest opening sentence in all of literature – "Replevin for a cow." 33 N.W. at 919.