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Introduction

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I was present ten years ago when the annual Review of Third Circuit decisions was born. In my introduction to that issue, I stated that the challenge to those responsible for the annual review was to undertake critical analysis with perspective and understanding. How well that challenge has been met I leave to more objective critics, although my impression is that the Review has been faithful to that charge.

However successful the Review has been in meeting the task it set for itself ten years ago, the end of a decade is an appropriate time for re-evaluation and for setting new goals for the future. For a healthy law review, this means looking anew at the purposes that good legal writing should achieve and recommitting itself to the discipline necessary to achieving those purposes. A good law review will apply that discipline vigorously to every aspect of its editorial process, from the selection of the topics or opinions it will explore to the legal analysis it offers its readers.

A preliminary point can be made on the selection process that is perhaps indigenous in law review writing. I have the impression from my own law review days, confirmed by my reading of law reviews over the years, that cases are selected for comment largely because they lend themselves to negative criticism.

Because it is more exciting to take issue with an opinion than merely to endorse its soundness, this practice is understandable and perhaps legitimate. However, selecting primarily those opinions that are considered "fair game" by the Review poses a special challenge if quality criticism is the goal. The challenge is the ability of the writer to tacitly convince the reader that he or she has dispassionately isolated the controlling legal principles and has fairly presented the facts. Anything less results in suspect writing that defeats the salutary objective of law review analysis.

A good law review will impose the same discipline on the presentation of its topic as it does on the selection process. I cannot overem-

phasize the importance in the editorial process of presenting the facts fairly. Every writer is on occasion faced with the temptation to emphasize certain facts and ignore others so that he may present his thesis in a better light. That temptation must be resisted. It is intellectually dishonest, and nothing is more likely to alienate the reader.

Given an accurate portrayal of the facts, the real challenge to quality legal writing is to provide sound and probing legal analysis. Hindsight analysis requires that the writer keep in mind that the judge's function is to decide the case on the basis of the legal positions asserted by the parties. In our adversary system, the rules of the game are important. It is the parties and not the judge who must make the arguments. The court must take the adversary positions under consideration and from them determine and apply the correct legal precepts. Thus, objective law review criticism should differentiate between the legal positions presented to the court and those the writer believes should have been presented.

It is equally important that the reviewer, in dissecting the legal principles invoked by the judge, make certain that he or she differentiates among apparent misrepresentations of the law, misapplications of the law to the controlling facts, and undesirable results. These distinctions are important because they assist the reader in reaching a conclusion as to the legitimacy of the criticism. Only by clearly identifying the problems in the opinion under scrutiny does the writer accept the full responsibility of legal analysis and allow the reader to evaluate its worth.

There is perhaps an even more compelling reason why the writer should clearly identify the problems in the opinion under analysis. Only when the source of the problem is clearly identified will it become apparent whether the judge has improperly invoked or applied legal precepts, or whether proper application of the appropriate legal precepts has, in this case, led to a result that the writer believes is undesirable for policy reasons.

Identification of the first problem is at the heart of constructive legal criticism. The second problem presents issues of policy that are frequently within the province of another branch of government. Both problems are the proper object of scholarly criticism. But such criticism is constructive only when it is directed to the appropriate source.

As the Villanova Law Review enters the second decade of its Third Circuit Review, I would charge it to continue to forego mere surface analysis and concentrate in depth on the factors which are

critical to probing analysis. In this way the Review will continue to be a valuable tool for the legal profession and the judiciary.