Ohio Northern University Law Review

Volume 38 | Issue 2 Article 5

A Tribute to Victor Streib

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Recently, law schools have come under attack for being too theoretical, emphasizing scholarship over teaching and theory over practice.[1] Law faculties, it is claimed, have little or no real practice experience, and offer esoteric courses that cannot possibly inform future lawyers.[2] Moreover, law professors are rewarded for deeply theoretical scholarship but less for teaching or community service.[3] From within this critique, it is claimed that law schools are divorced from the realities of law practice, churning out graduates lacking basic lawyering skills.[4] Although new lawyers often receive on-the-job training (the costs of which could be passed on to clients), economic pressures have made this approach seem less feasible.[5]

The divide between theory and practice is an old one. Many attribute the split to Christopher Langdell, who was appointed Dean of the Harvard Law School in 1870.[6] Responding to criticisms that law was a mere trade and not a graduate-school worthy area of study, Langdell sought to establish the underlying theoretical approaches to the study of law.[7] Legal reasoning, case analysis, and logic became central to law teaching, with little to no emphasis on the other skills necessary to good lawyering. Those skills, such as client counseling or trial practice, were deemed too practical by the legal academy to warrant inclusion. Although law schools more recently have added new courses designed to teach these important "practical" skills, they remain isolated from the traditional curriculum in important ways—taught by adjuncts or faculty without tenure, and not part of the required curriculum, for example.[8]

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1. *See* David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1.
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*
6. *See* David Segal, *supra* note 1.
7. *See id.*
8. *See id.*

The notion that theory can do without practice—or the converse—is deeply flawed. Despite the academy's claims to intellectual bona fides, the reality is that most law graduates will practice, not teach, law. Moreover, the distinction between legal reasoning, logic, and case analysis on the one hand and "practical skills" on the other is largely specious, for the former is a set of skills essential to the practice of law, as is the latter. On the other hand, the disdain for the academy is—at its worst—anti-intellectual. The best attorneys know that the practice of law is not simply a matter of screwing pipes together to make liquid flow; one must know certain fundamental principles governing gravity and mechanics to make the water flow in the direction and manner desired.

The reality is that theory informs practice and practice informs theory. The best lawyers and academics know this and find ways to learn from one another to accomplish change, innovation, reform. Nevertheless there are certain institutional disincentives: woe to the untenured professor who writes a "merely descriptive" article or a treatise for the bar. And the practitioner who wants to delve into the theory of the law finds little time, encouragement, or financial incentive to do so, for what client wants to pay for time spent reading academic work?

But as I have said, I believe excellent practitioners and academics understand the value of thinking deeply about the law in order to implement or effectuate change. From an academic perspective, using law as a tool for social reform is not only appealing but possible; the security of tenure enables one to take positions that may be unpopular or politically infeasible. There nevertheless is a certain exhilaration in articulating a new theory or arguing for societal change while simultaneously exploring these ideas with young (and often quite insightful) law students. Such an approach provides purpose to a career, can rescue one from becoming an intellectual dilettante, and exposes young lawyers to the value of intellectual exploration. In short, intellectual pursuits could—and do—change the way the world is understood.

Professor Victor Streib in many ways is the epitome of the academic who understands this important connection between theory and practice. Although a prolific scholar, his intellectual pursuits had a deeper purpose: to reform the law. The work that most influenced me (and with which I am most familiar) is his work on the juvenile death penalty. His scholarship, including his book, *Death Penalty for Juveniles*, showed us the realities—and injustices—of executing juveniles, and educated all of us on the need to see beyond stereotypes.[9] He also challenged the way the law was

9. VICTOR L. STREIB, DEATH PENALTY FOR JUVENILES (1987).

constructed around the death penalty and children, and argued that the constitutional framework should—and must—accommodate juveniles.[10]

Professor Streib, however, also walked the walk of the practitioner. He served as co-counsel in a number of cases involving juveniles sentenced to death,[11] including that of Wayne Thompson, a fifteen-year-old Oklahoma youth sentenced to death for his crimes.[12] In *Thompson v. Oklahoma*,[13] Justice Stevens, writing for a plurality of the Supreme Court of the United States, held the imposition of a death sentence on a juvenile who was fifteen at the time of his crimes violated the Cruel and Unusual Punishment Clause of the Eighth Amendment.[14] Noting that evolving standards of decency determined the boundaries of the Cruel and Unusual Punishment Clause, the Court looked to statutes and jury determinations as reflections of those evolving and contemporary standards.[15] The plurality cited Professor Streib's book, *Death Penalty for Juveniles*, as evidence that the execution of juveniles was both rare and now "abhorrent to the conscience of the community."[16] Even the dissent cited Professor Streib's work.[17]

In retrospect, the *Thompson* case was the breach in the dike, although it did not seem so at the time. Less than a year later, the Supreme Court upheld the imposition of the death penalty on sixteen- and seventeen-year-old offenders in *Stanford v. Kentucky*.[18] Justice Scalia, who had written the dissenting opinion in *Thompson*,[19] now authored the Court's plurality opinion.[20] The plurality concluded that the "majority of . . . [s]tates that permit capital punishment authorize it" against minors who are at least sixteen at the time of the offense.[21] Petitioners' arguments that the death penalty violated evolving standards of decency thus were without merit because petitioners had failed to establish a national consensus against the death penalty.[22] Rejecting the claim that society viewed capital punishment of juvenile offenders as inappropriate, Justice Scalia again cited Professor

10. *See id.*

11. *See, e.g.*, Allen v. Florida, 636 So. 2d 494 (Fla. 1994) (Co-counsel for appellant in a death penalty case involving a fifteen-year-old boy); Cooper v. Indiana, 540 N.E.2d 1216 (Ind. 1989) (Co-counsel for petitioner in a death penalty case for a fifteen-year-old girl).

12. *See* Thompson v. Oklahoma, 487 U.S. 815 (1988).

13. 487 U.S. 815 (1988).

14. *Id.* at 838.

15. *See id.* at 826-32.

16. *Id.* at 832.

17. *Id.* at 869-70 (Scalia, J., dissenting) (arguing that statistical evidence does not support claim of changing attitude toward execution of juveniles).

18. 492 U.S. 361, 380 (1989).

19. *Thompson*, 487 U.S. at 859.

20. *Stanford*, 492 U.S. 361.

21. *Id.* at 371.

22. *Id.* at 377.

Streib's book, arguing evidence that such sentences were rare did not support the contention that they should never be imposed.[23]

Professor Streib nevertheless continued to influence the debate about the execution of juveniles. He continued to write and practice, serving as co-counsel for other juveniles sentenced to death and testifying as an expert witness on the juvenile death penalty.[24] In 2005, the Supreme Court returned to the issue of the execution of juvenile offenders in *Roper v. Simmons*.[25] This time, a majority of the Court found that the imposition of a death sentence on a criminal defendant for crimes committed as a juvenile violated the Eighth Amendment.[26] The Court once again cited Professor Streib's work as evidence of a national consensus opposing the death penalty for juveniles.[27]

Professor Streib's work on the juvenile death penalty may be seen as part of a broader agenda examining the sentencing and punishment of juveniles. Some of his early scholarship raised legitimate questions about the efficacy of severe sanctioning in juvenile law.[28] For example, he raised issues about the imposition of a sentence of life without the possibility of parole for juveniles convicted of criminal offenses.[29] Moreover, his work on the capital punishment of juveniles reflects a broader interest in the death penalty. He has examined issues surrounding the death penalty for female offenders and written several articles and books on the subject.[30] Professor Streib also has written more broadly about death penalty law as well as considered ethical issues in the representation of death row inmates.[31]

Professor Streib has made numerous other contributions to our understanding of law, and I do not mean to disparage those contributions by not focusing on them here. I simply want to emphasize that his work has helped to change the face of juvenile justice in the United States for the better. He has served as a model for those who see the importance of

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23. *Id.* at 373-74.

24. Victor L. Streib, Biography, OHIO NORTHERN UNIVERSITY, http://www.law.onu.edu/faculty_staff/faculty_profiles/victorstreib.html (last visited Feb. 20, 2012).

25. 543 U.S. 551 (2005).

26. *Id.* at 578-79.

27. *See id.* at 564-65; *see id.* at 595-96 (O'Connor, J., dissenting).

28. *See, e.g.*, Victor L. Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 OKLA. L. REV. 613 (1983).

29. *See* Victor L. Streib, *Moratorium on the Death Penalty for Juveniles*, 61 LAW & CONTEMP. PROBS. 55, 73-74 (1998).

30. *See, e.g.*, Victor L. Streib, *Rare and Inconsistent: The Death Penalty for Women*, 33 FORDHAM URB. L.J. 609 (2006); *see also* VICTOR L. STREIB, THE FAIRER DEATH: EXECUTING WOMEN IN OHIO (2006).

31. *See, e.g.*, VICTOR L. STREIB, DEATH PENALTY IN A NUTSHELL (3d ed. 2008); *see* Victor L. Streib, *Would You Lie To Save Your Client's Life? Ethics and Effectiveness in Defending Against Death*, 42 BRANDEIS L.J. 405 (2004).

bridging the artificial gap between theory and practice and has no doubt inspired others to do the same. While I might hope that he continues to exhort all of us to do more, I also wish him the best in this, the next stage of his life. We will miss him.