



THE REBOUND OF THE BASKERVILLES

Robert A. James

IN 2022, I EXCHANGED EMAILS on a point in U.S. Supreme Court history with UC Hastings Professor Rory Little, former clerk to no fewer than five Justices¹ and a law school contemporary. After the correspondence, I visited Rory's online biography and idly clicked on his 1981 student note, published during my second year. The effect was like that of a teacake upon the palate of some French invalid.²

Look carefully and you will see the numeral 1 in the header juxtaposed with a lower-case L in the 1967 date in the text. I realize that some lawyers may shrug and say "so what?" but I and others gasped and exclaimed "*O tempora! O mores!*" Therein lies a tale of a shift change in technology,

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¹ See Rory K. Little, *Clerking for a Retired Supreme Court Justice – My Experience of Being “Shared” Among Five Justices in One Term*, 88 GEO. WASH. L. REV. ARGUENDO 83 (2020), available at repository.uchastings.edu/cgi/viewcontent.cgi?article=2770&context=faculty_scholarship.

² Cf. MARCEL PROUST, *IN SEARCH OF LOST TIME* (1913-27) (pastry triggers narrator's memory of intertwining families and love affairs amid reflections on loss of time and meaning) (belated entry for *Monty Python* S3E5 contest); cf. *aussi* RATATOUILLE (Brad Bird dir., Pixar Animation 2007).

often noted that the right to privacy is fundamental.⁵ In recent years, protection of privacy has come to be viewed as “the principal object of the Fourth Amendment.”⁶ Since its 1967 decision in *Katz v. United States*,⁷ the Supreme Court has maintained that an individual is protected by the Fourth Amendment whenever he or she has a “reasonable expectation of privacy.”⁸ Yet today the Court and scholars alike acknowledge that the constitutional law of search and seizure as it operates to protect privacy is in disarray.⁹ Some lower courts, extrapolating from undeveloped intimations from the Supreme Court, have suggested the existence of a new, undefined exception to the usual Fourth Amendment warrant requirement, one that refuses full Fourth Amendment protection to privacy inter-

Fig. 1. *The Madeleine*, 1981

humans, and the relation between them, played out in the staid confines of a legal publication.

Unlike the *Harvard Law Review*, which in the manner of Coca-Cola has maintained a consistent Old Style 7 typeface and page layout for over a century, the *Yale Law Journal* in the manner of Pepsi has seen many design changes through the decades.³ Rory and I entered law school during the reign of a grand style (*circa* 1967-1980), with a Bodoni display face and a Baskerville text face floating with broad margins across the expanse of the page. Is it not a thing of beauty bare? Note well the thick and thin widths of the letters in both fonts, and gaze ye upon the delicately rounded features of the distinct italic face.

³ The *Yale Law Journal* design changes are evident in the published mastheads at yalelawjournal.org/masthead. There is absolutely no need for a *Harvard Law Review* variorum. A sensitive review of legal publication designs (and a philippic against the Times New Roman typeface) is James Grimmelmann, *Times Out* (Jan. 4, 2015), available at 2d.laboratorium.net/post/107177930945/times-out. See also Ambrogino Giusti, *The Typography of Law Reviews*, a 2016 University of Washington Information School law librarianship paper, available at depts.washington.edu/uwlawlib/wordpress/wp-content/uploads/2018/01/Giusti2016.pdf.

The Yale Law Journal

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Grant Gilmore

Harry H. Wellington†

On the inside of the red, white, and blue dust jacket that encloses his Storrs Lectures,¹ the feast within is described truly: "Written in the eloquent style of the classics of American legal scholarship, Grant Gilmore's reflections on the American approach to law since the eighteenth century are wide in their range of subject matter, provocative in their discussion of large ideas, and bold in their assessments of influential legal scholars and judges of the past." Consider the descriptive words. They capture more than *The Ages of American Law*. They describe the man's *oeuvre*: "eloquent style," "wide in their range," "provocative," "bold." Nor is there any discontinuity between the man and his writings. As teacher and colleague, Grant is eloquent, wide-ranging, provocative, and bold.

To celebrate Grant on his retirement from Yale is to celebrate a survivor—one of the luminaries of a generation of academic lawyers who were schooled in the cynicism of the realist movement. Grant found his way out of that swamp, better surely for having been dropped into it. He rejected cynicism for the firmer ground of skepticism. With

Fig. 2. Bodoni over Baskerville Roman and Italic, Spread Out in Space, 1970s

My understanding is that the *Journal* editors of the day would mail hard copies of their edited texts to the Fred B. Rothman publishing company. Rothman would newly enter the characters into its presses to generate the intended result in galley proofs and final production runs.

Two changes occurred around the turn of the eighties decade. First, production was shifted from Rothman to the Darby Printing Company in

Atlanta. Second, the *Journal* acquired at least two “word processing machines” that allowed the direct entry of text and footnotes in the New Haven offices themselves. These were not compact personal computers, mind you, because personal computers had not been marketed yet. They were only a step removed from steampunk – keyboards tethered to cathode-ray tubes displaying raw and garishly greenish text. What you saw was most assuredly not what you got. The memory was preserved in large collections of magnetized-mylar floppy disks, each eight inches square.

Control over one’s own text must have been exhilarating, after years of having to correct proofs sent back through the post office. I imagine tables and mathematical formulae must have been especially painful to edit from afar. But the transfer of technology and change of printing management came at a price, really two prices.

First, everyone who had been taught to type in the sixties and seventies learned on typewriters. These contraptions, especially the manual versions, had to address the possibility of key shafts colliding with one another. There is a persistent though likely unfounded theory that the QWERTY key layout was designed to slow down the typist,⁴ but, relevant to this study, models unquestionably did not have all the basic symbols and numerals we enjoy today.

An exclamation point was made by typing an apostrophe, back-spacing, and typing a period. Some older typewriters lacked a zero (0) and one made do with an upper-case or lower-case O. And almost universally, they lacked a numeral one (1) and one learned to type a lower-case L (l). So law students and secretaries (titled word processors these days) reflexively typed Ls instead of 1s. We were so used to using Ls for 1s in our work that instances like “1967” in Rory’s note frequently made it into print – especially when we were the editors of our own typing. Examples pepper the 1981 and 1982 volume issues.

Second, the dawn of computerized printing was associated with a coarse simplification of typefaces. At Darby, the Bodoni was not used, and a simply larger and bolder Baskerville font served for the titles and other display uses. It was Baskerville here, Baskerville there, Baskerville, Baskerville everywhere.

⁴ For more on this urban legend, see Koichi Yasuoka & Motoko Yasuoka, *On the Prehistory of QWERTY*, 42 ZINBUN 161, 162 (2011).

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1. See note 37 *infra* (discussing influence of exploitation theory on tort law). See generally Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554 (1961) (history of theory of enterprise liability).

Fig. 3. More "Ells" in "1961" for George L. Priest, 1982

The distinction between thick and thin elements of each letterform more or less coagulated into a thick stroke, set with less space between lines and narrower margins. And instead of the graceful Chancery notes of the 1970s style, the italic of the early 1980s can be described as "queasy Roman" — the same plain font, Baskerville yet again, just with all the letters leaning to the right as if steadying themselves against a lamp-post.

As previously mentioned,⁵ I approached the Managing Editor of Volume 92, Bob Cooper (later Attorney General and Reporter of Tennessee), and suggested that since I was going to find those Ls after printing, I might as well spot them ahead of printing. Bob, and Editor-in-Chief Ricky Revesz (later NYU Law School dean and American Law Institute executive director), welcomed the set of extra eyes provided by me and our late friend David Kirkland. Dave and I formed "a shadowy quasi-military grammar-police organization" named ÆSTHETIC CENTRAL COMMAND, and we did our best throughout Volume 92 to root out the Ls, as well as double spaces between sentences, Bluebook lapses, and infelicities of style and substance.

Over time, Yale adjusted to both changes. New students and word processing employees, weaned on computers, arrived who knew enough to type the numeral 1 instead of the lower-case L. Even if they faltered, new editors came into office attuned to spotting outliers. With increases in system capabilities, true *italics* thankfully returned to the *Journal* as soon as

⁵ Robert A. James, Benjamin C. Zuraw, Manley W. Roberts & John J. Little, *Attenuated Memories*, 9 J.L.: PERIODICAL LABORATORY OF LEGAL SCHOLARSHIP 67 (2019).

The Right, the All Right, and the Good

The Rejection of Consequentialism: A Philosophical Investigation of the Considerations Underlying Rival Moral Conceptions. By Samuel Scheffler. Oxford: Clarendon Press, 1982. Pp. viii, 129. \$12.95.

Judith Lichtenberg†

Some days, I think I am a consequentialist; some days, I am sure I am not. Is it simply that I cannot make up my mind? Or is it that the meaning of consequentialism refuses to stay still? One thing seems sure: An approach to ethics that seems by turns as if it must be right, as if it cannot be right, and as if it misconceives the crucial questions shows all the signs of striking a deep philosophical chord.

Fig. 4. *All Thick Baskerville, with Queasy Roman, 1981-83*

Volume 93 in 1984. After “an unfortunate run of Times [New Roman],”⁶ the current publication is beautifully designed, set in the University’s custom typefaces crafted by Matthew Carter. It is replete with thick and thin elements, contrasting fonts, and attractive, chiseled faces. But my personal recollection, triggered in 2022 by wincing at Rory’s note, is that the issues of the early 1980s were a typographic mess.

The larger lesson here is that there are times when control over a technology passes to a user base that does not know how to properly employ it. The democratization of publishing, which began with the personal computer and now extends to social media applications on smartphones, has made all of us printers, graphic designers, photographers, and meme aphorists – even though only a few of us possess all of those skills at the moment of transition. As a system devolves to a new group, it is incumbent on those who come afterwards to learn and practice, and then to

⁶ James Grimmelmann, *supra* note 3.

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modify for their own purposes, the tools, the techniques, and the tricks of the craftspeople who came before.⁷



⁷ Cf. T.S. ELIOT, *THE WASTE LAND* (1922) (dedication to Ezra Pound as *il miglior fabbro*, Dante's "better craftsman"); Henry Wadsworth Longfellow, "The Builders" (1850) ("In the elder days of Art,/Builders wrought with greatest care/Each minute and unseen part;/For the Gods see everywhere").