SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 58 | Issue 2

2007

Peter Junger: Scholar and Stylist

Jonathan L. Entin

PETER JUNGER: SCHOLAR AND STYLIST

Jonathan L. Entin[†]

Peter Junger once described himself as a little fox.[1] This was not, as those who knew him will attest, a reference to his physical size, nor was it his way of identifying with the animal at the center of *Pierson v. Post*,[2] the great Property case that he taught for so many years, although Peter almost certainly had more sympathy for that creature than he did for either of the parties. Instead, the reference was intellectual: to the breadth of vulpine knowledge (as in Isaiah Berlin's notion that foxes "pursue many ends, often unrelated and even contradictory"[3]). And it was surely accurate, because Peter knew a lot about many things.

I first heard of Peter Junger while working on my law review Note, several years before I had any contact with the Case Western Reserve University School of Law.[4] I was writing about the federal government's effort to suppress the publication of a magazine article about the hydrogen bomb. This came less than a decade after the Pentagon Papers case,[5] in which the government sought to suppress the publication of newspaper articles about a classified study of American involvement in the Vietnam War, and Peter had published a provocative article on that case.[6] It was one of the first law review

---

† Associate Dean for Academic Affairs and Professor of Law and Political Science, Case Western Reserve University.

1 Peter Junger, *A Fox Interprets the Hedgehog*, IN BRIEF, Jan. 1987, at 5.

2 3 Cai. 175 (N.Y. Sup. Ct. 1805).

3 ISAIAH BERLIN, THE HEDGEHOG AND THE FOX 1 (1953), *quoted in* Junger, *supra* note 1, at 5.

4 Jonathan L. Entin, Note, United States v. Progressive, Inc.: *The Faustian Bargain and the First Amendment*, 75 NW. U. L. REV. 538 (1980).

5 New York Times Co. v. United States, 403 U.S. 713 (1971).

6 Peter D. Junger, *Down Memory Lane: The Case of the Pentagon Papers*, 23 CASE W. RES. L. REV. 3 (1971).

articles analyzing the decision, and it is still attracting attention.[7] Because there was very little jurisprudence about national security and the First Amendment, I had to pay attention to what Peter had to say. As usual, he had his own distinctive take on this high-profile case, and he made his point in a distinctive way that reflected his extraordinary knowledge and his remarkable flair for the English language. Here is how Peter began *Down Memory Lane: The Case of the Pentagon Papers:*

> It is a thing of memories, the case. Not necessarily real memories; they could just as well be ersatz recollections of some penny-dreadful smoked out of the collective unconscious of sixty years ago. It is not really our sort of case, or not predominately, and it hardly belongs in these pages. It is another sort, the case of the Pentagon Papers.
>
> The decision of the Supreme Court in *New York Times Co. v. United States* is surplusage, an epilogue inserted in the saga solely for verisimilitude, or to give it a medicinal touch of redeeming social interest. At least that was my first impression although, of course, it alludes to many half-forgotten things of perhaps more substance than *The Four Just Men* or *The Purloined Letter*. Undoubtedly because of this allusiveness, as well as the hysterical publicity which the press applies to its own affairs, one can foresee a plethora of articles discussing the implications of the case.
>
> But let me, by way of prologue, make one thing clear. Mr. Justice Harlan, in dissent, prefaced his opinion with these words of Mr. Justice Holmes: "Great cases like hard cases make bad law." I trust that it is not presumptuous for me to point out a fact of which I am sure Mr. Justice Harlan was well aware and in which he found much consolation: the case of the Pentagon Papers is not, in any lawyer's sense, a great case and it did not make any law at all, good or bad. The Republic has stood for 180 years since the adoption of the first amendment without a judicial determination of the power of the Federal Government to impose prior restraints upon newspapers, and with luck it will still stand in 2151 without such a determination. Some precedents are

[7] *See* STEVEN H. SHIFFRIN & JESSE H. CHOPER, THE FIRST AMENDMENT: CASES—COMMENTS—QUESTIONS 318 (4th ed. 2006).

> unnecessary, however much writers in law reviews might yearn for them.[8]

About fifteen pages later, Peter provided the following epigram that elegantly captured his view of the case: "[I]f *Shelley v. Kraemer* is properly called the 'Finnegan's Wake of Constitutional Law,' *New York Times Co. v. United States* may well be its Rorschach blot."[9] For him, the Pentagon Papers case did not really turn on the First Amendment, but rather on separation of powers. As he put it in searching for a "neutral principle" to explain the result: "The doctrine of the separation of powers denies the Executive the constitutional power to take action on his own authority if that action is one which would be of doubtful constitutionality had it been authorized by Congress."[10]

Like most constitutional scholars, I am inclined to believe that one can extract a clearer First Amendment principle from the *seriatim* opinions in the case than Peter did. Still, as I pointed out in my Note, the district court in the H-bomb case emphasized that Congress had in fact authorized injunctions under the Atomic Energy Act to prevent the dissemination of sensitive nuclear information and that a plausible, although to my mind ultimately unpersuasive, argument could be made that this statutory provision resolved the separation of powers concerns that Peter had identified in his article.[11] We will never know who was correct, because the H-bomb litigation ultimately fell apart when much of the same information appeared independently in an underground newspaper that was handed out on the steps of the federal courthouse where the case was initially heard.[12] In the end, though, Peter's iconoclasm and his stylistic elegance made a profound impression on me.

Those qualities are abundantly reflected in his almost legendary critique of the law-and-economics approach to water pollution. He began this way:

> In the twelfth regnal year of King Richard II, Parliament declared:
>
> > For that so much Dung and Filth of the Garbage and Intrails as well of beasts killed, as of other

---

[8] Junger, *supra* note 6, at 3-4 (footnotes omitted).

[9] *Id.* at 18 (footnote omitted).

[10] *Id.* at 38 (emphasis omitted).

[11] Entin, *supra* note 4, at 544, 563-65.

[12] *Id.* at 541 n.11.

> Corruptions, be cast and put in Ditches, Rivers, and other Waters, and also within many other Places, within, about, and nigh unto divers Cities, Boroughs, and Towns of the Realm, and the Suburbs of them, that the Air there is greatly corrupt and infect, and many Maladies and other intolerable Diseases do daily happen. . . . [And therefore decreed] that all they which do cast and lay all such Annoyances, Dung, Garbages, Intrails, and other Ordure in Ditches, Rivers, Waters, and other Places aforesaid, shall cause utterly to be removed, avoided, and carried away betwixt this and the Feast of St. Michael next ensuing after the End of this present Parliament, every one upon Pain to lose and to forfeit to our Lord the King [£20].

To ensure that the waters of England would remain pure, the statute further provided that no one thereafter should throw or cast any such annoyances into the waters, and anyone who did was to be "punished after the Discretion of the Chancellor."

It was a nice try, but nothing came of it. King Richard got involved in the War of the Roses and finally, in the reign of Queen Victoria, the statute was repealed along with a number of others which had ceased to be in force. Despite various legislative attempts and judicial inventions, the United States has never had, at least until the passage of the Federal Water Pollution Control Act Amendments of 1972, any body of federal law that was more effective in controlling water pollution than the Statute of Richard II. It is not clear even now that we have an effective pollution control law, but at least we have the legislative scaffolding upon which such a law can be built.[13]

More than 330 pages later, he concluded:

> It may be difficult to take into account in a mathematical analysis that "[n]o man is an Iland, intire of itselfe," but we know it to be true. If we deny our natures in pursuit of a

[13] Peter D. Junger, *A Recipe for Bad Water: Welfare Economics and Nuisance Law Mixed Well*, 27 CASE W. RES. L. REV. 3, 3-5 (1976) (footnotes omitted) (quoting 12 Rich. II c. 13 (1388) (brackets in original)).

> Pareto optimum, we shall pay a grievous price. Everyone may even be worse off. And as to the waters:
>
> > "By the rivers of Babylon there we sat down, yea, we wept."[14]

Peter's skepticism about the economic analysis of law made him the perfect foil to Judge Richard Posner, the great proponent of that approach, who gave the Sumner Canary lecture in 1986.[15] At the dean's request, Peter wrote a response to Judge Posner. That was the piece in which he described himself as a fox, in contrast to "the Great Hedgehog," Posner, who knew "the [one] Great Thing."[16] In the end, Peter reported himself "delighted that the greatest of our hedgehogs does see that interpretation can be a problem—and a necessity—for a judge, that the life of the law is more than mathematics."[17]

As the excerpts I have shared with you suggest, Peter had a remarkable intellectual curiosity and a memorable prose style. Unfortunately, some of his best stuff never made it into print. Take his wonderful piece, "The Original Plain Meaning of the Right to Bear Arms," written several years before the recent revival of academic interest in the Second Amendment.[18] Anticipating Sanford Levinson, Peter described that ambiguous provision as an "embarrassment," [19] although he came up with a more concrete meaning for it than Levinson has ever done. Rejecting the interpretive approaches of such leading theorists as Ronald Dworkin, Richard Epstein, and Laurence Tribe, Peter traced the Second Amendment right to bear arms to the English Court of Chivalry and concluded that "the 'right to bear arms' is the same as the right to display armorial bearings, and that the original plain meaning of the Second Amendment is that the government shall not infringe upon one's right to be a lady or a gentleman."[20] Indeed, he inferred, this disputed provision "so skillfully avoids the use of sexist language . . . that,

---

[14] *Id.* at 335 (quoting John Donne, *Devotions Upon Emergent Occasions XVII, quoted in* Sierra Club v. Morton, 405 U.S. 727, 760 n.2 (1972) (Blackmun, J., dissenting) (brackets in original); and *Psalms* 137 (King James)).

[15] *See* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1986-87).

[16] Junger, *supra* note 1, at 5.

[17] *Id.* at 8.

[18] Working Paper 08-01, Case Research Paper Series in Legal Studies, *available at* http://ssrn.com/abstract=1082417.

[19] *Id.* at 1, 4, 5. *Cf.* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989) (probably the first chapter in the modern flood of Second Amendment legal scholarship).

Id. at 5-6 (footnote omitted).

rather than a barbarous anachronism, it is one of the most principled provisions of the pre-Civil War Constitution."[21] In short, "since a well regulated militia requires officers, and officers must be gentlemen, the framers intended to preserve the gentry from the leveling tendencies of the masses."[22] If only the Supreme Court had access to this analysis amid the torrent of briefs in its recent gun-control case, *District of Columbia v. Heller*.[23]

One reason that Peter never published this Second Amendment piece might be that by then he had gotten deeply involved with computers, both as a programmer and as a lawyer. He later explained that some of his fascination was stimulated by a Robert Heinlein novel that he read in law school. In Heinlein's world the laws of physics had given way to the laws of magic, but law practice was unaffected: "It turns out that we had been practicing magic all the time."[24] Years later, as a senior professor, Peter mused that "[t]he newly ubiquitous computer is only the latest example of technology that can assist us in our magical practice, in our manipulation of texts and information, and that can also disenable us." The point was clear: "If we are going to rely on magic, we really ought to understand it."[25] He even mused about some intellectual property issues relating to computers and before his death had posted on his website a substantial manuscript arguing that "Patenting Software Is Wrong."[26]

Peter's interest in computers and the law led him to return to some of the issues raised by the Pentagon Papers, showing that what goes around comes around. He taught a course that was designed to teach law students about computers, which in turn led him into conflict with the federal government and ultimately into court. Few law professors ever become litigants, and Peter was remarkable even in that narrow domain. But it is not for me to tell that story. The person who really knows those details is Peter's friend and lawyer, Gino Scarselli.[27]

---

[21] *Id.* at 6.

[22] *Id.* (footnotes omitted).

[23] No. 07-290 (U.S. argued Mar. 18, 2008).

[24] Peter D. Junger, *The View from Nowhere*, IN BRIEF, Jan. 1995, at 4, 4.

[25] *Id.* at 5.

[26] Peter D. Junger, *You Can't Patent Software: Patenting Software Is Wrong*, 58 CASE W. RES. L. REV. 333 (2007).

[27] Gino J. Scarselli, *Tribute To Professor Peter Junger*, 58 CASE W. RES. L. REV. 325 (2007).