

1-1-1994

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Recommended Citation

Leo P. Martinez, *Of Michelangelo and Roscoe Barrow*, 16 HASTINGS COMM. & ENT. L.J. 426 (1994).
Available at: https://repository.uchastings.edu/hastings_comm_ent_law_journal/vol16/iss3/1

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Of Michelangelo and Roscoe Barrow*

by

LEO P. MARTINEZ¹

Before beginning a focused introduction of this year's recipient of the Roscoe Barrow award, I'd like to indulge in recounting two seemingly unrelated experiences.

The first relates to a time some years ago, when I was in private practice with a well known San Francisco law firm. I was at the office late at night reviewing a client's file. The client, then about age 70, was the grandchild of an entrepreneur who had founded a spectacularly successful venture in the early part of this century. As I flipped through the file, I came across one of the early and important documents associated with the venture. The document caught my eye owing to both its brittle and yellowed appearance as well as to the fact that it was typed on a manual typewriter without error in the days before either correction fluid or word processing. It so happens that the document was, according to the attached cover letter, prepared by one of the lawyers for the venture. This in turn was of some note to me because the lawyer practiced in a small town in my native state of New Mexico. If I mentioned the town's name I am confident few people, even native New Mexicans, would recognize it.

Having been thus distracted, I took the time to review the letter and the document in detail. It quickly became apparent to me that the letter and the document were, even by sophisticated San Francisco law firm standards, remarkable pieces of work. The document anticipated, correctly as it turns out, potential areas of concern. It dealt with the potential concerns in a dispassionate way calculated to reduce the possibility of litigation and to encourage harmony in the venture. It was, in short, the kind of document I would have been proud to have crafted. The letter, which explained the operation of the document to the then unsophisticated client, was direct, it was clear in thought and focus, it was complete without being patronizing, and it was the obvious result of a lot of effort. My vivid memory of that

* This commentary is substantially the presentation given by the author on the occasion of the Hastings COMM/ENT Law Journal annual Roscoe Barrow Award presented to Rachelle Chong on April 5, 1994.

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night long past is that I was filled admiration and respect for the work of this long dead lawyer whose work still remained vital.

The second experience relates to a talk given by Oliver Wendell Holmes, Jr. entitled "The Profession of the Law" given by him to Harvard College students in an effort to persuade them to attend law school.² The talk is memorable to most because it is a staple of law graduation commencement speeches. It is memorable to me in particular for one passage. Holmes said "Of course the law is not the place for the artist or the poet."³ The line to me has always been remarkable because it directly contradicts what I believe to be true and it contradicts the man whose memory we honor.

Roscoe Barrow, a long time teacher of Contract Law and Communications Law at Hastings, was famous for his lecture on the case of *Peevyhouse v. Garland Coal and Mining Co.*⁴ The lecture always attracted an overflow crowd and at its conclusion many were observed in tears.⁵ The case involves the appropriate remedy for a mining company's breach of a promise to restore Willie and Lucille Peevyhouse's land to its original state. The court, after consideration of relevant cases ultimately decides that a diminution in value measure (effectively nothing) is the preferred remedy because the cost of restoration is so relatively great. The suggestion is powerful that more imaginative lawyering on the part of Willie and Lucille Peevyhouse's lawyer would have led to a better result for the Peevyhouses. Roscoe Barrow used the case to teach a principle which transcends contract law. He urged his students to practice with legal imagination. In his world judges and lawyers were classified either as stonecutters whose imagination was lacking or as "Michelangelos" whose creative thinking allowed relief instead of injustice. Unlike Holmes, Professor Barrow's important lesson was that the practice of law required imagination, creativity, and art. He urged his students to become Michelangelos of the law so that it could be said that the law was also for Peevyhouses and the unfortunate of the world.

And so Roscoe Barrow's legacy lives on. It lives on in the spirit of the New Mexico lawyer whose clever and creative work remains

2. Nadine Stossen, *Pro Bono Legal Work: For the Good of not only the Public but also the Lawyer and the Legal Profession*, 91 Mich. L. Rev. 2122, 2149 (1993) citing Oliver W. Holmes, *The Profession of the Law: Conclusion of a Lecture Delivered to Undergraduates of Harvard University on February 17, 1886*, in *Collected Legal Papers* 29, 30 (1920).

3. *Id.* The succeeding sentence reads, "The law is the calling of thinkers." I don't quarrel with it.

4. 382 P.2d 109 (Okla. 1962), cert. denied, 375 U.S. 906 (1963).

5. This journal has reported on the Professor Barrow's lecture in depth. See *COMM/ENT* L.J. 277.