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### Recommended Citation

Ronald B. Lansing, *The Creative Bridge Between Authors and Editors*, 45 Md. L. Rev. 241 (1986)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol45/iss1/12>

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# Essay

## THE CREATIVE BRIDGE BETWEEN AUTHORS AND EDITORS

RONALD B. LANSING\*

There is a love affair between author and audience. Authors court their readers. In that romance, editors may be matchmakers or interlopers. In either case, editors stand on the bridge to bar passage until proper papers are produced, papers that might begin like this:

The *donatio mortis causa* is one of those perpelexed topics in the law which are at once the despair of judges and the delight of law schools.

At this conference of editors, this author has been given the opportunity to joust with you on the bridge. The temptation is for me to brandish axioms and maxims, decrees and edicts, do's and don't's. How-to-do-it and self-help stuff. Pithy succor.

I could be old soldier and give you tattered advice: Be professional, courteous, and other such horse sense. I could render stern admonitions: Never flush or set fire to an author's footnote! Or: Always respond to your deadlines within a time period commensurate with what is left of this century!

On the other hand, I could yield and grant certain exceptions to these rules. For example, if a footnote exceeds the length of the textual point for which it stands as support, you may substitute, in rare situations, the footnote for the text and the text for the footnote.

I could tell you that, as editors, you have a right to expect that at least every fifth word in the manuscript be only one syllable long. For instance, an author's sentence may read: "The enormity of perquisites provides scenarios within which consideration of polysemous perambulance interface beyond mere situational annoyance." In such a sentence, you have a god-given right to exchange every fifth word with a word from the planet we live on—words such

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as “hard ball,” “slam dunk,” “oatmeal,” “spinach,” or some other life form.

Of course, if I were to give this kind of counsel, I would dress it up to make it more befitting the dignity of law review style. I would do this by removing from it the crass humor, by multiplying syllables, by doubling adjectives in front of nouns, by de-energizing the verbs, by making one sentence where two or three had existed, and by stamping the whole of it with a formality the consistency of thick starch.

But law review editors don't need to be told to walk cautiously. Caution has been in all of your learning. Deans, alumni, faculty, the practicing bar are always admonishing. We are all great admonishers. Indeed our discipline—the law—is one cautious admonition after another. Furthermore, your status as brand new editors is a breeding place genetically stuck to the dominant tried-and-true. You're a new kid on the block, and you walk upon eggshells. You turn over once a year. You barely have time to learn the ropes, let alone new knot-tying. You have all you can do to learn how it has been done, without troubling yourself with visions of how it might be done. Caution is always there to tell you, just as it told your predecessors, that if you walk softly, you will not foul the footprints you follow.

And so I begin with the assumption that you are already shored up by restraints. My contribution, therefore, is to equilibrium. My counsel deals with innovation. Good word, “innovation”. *Novate*: something new; *in-novate*: to *instill* newness into something.

As I say, you are not in the best position to innovate. All the cards are stacked against you. Good advice to new guys on the block is to listen, not to activate. Don't deign to be different until you have sampled the territory.

But you should understand that your reluctance to innovate affects lead article authors. It affects not only *what* they write and *how* they write, but *whether* they write.

What is it that might prompt an author to write?:

The *donatio mortis causa* is one of those perplexed topics in law which are at once the despair of judges and the delight of law schools.

Is there something in the substance, the style, and the existence of this kind of writing that is prompted by conformity to an editorial matrix?

In choosing whether or not to write for typical student-run law

reviews, authors are struck by the prospects of drowning. “My article has lungs,” the author says. “It wishes to breathe; but I fear that before it can do so, it will inhale the sea of monotony that engulfs it. Its body will be made to wash up on distant shores—forgotten before it was gotten.”

Historically, the drowning began with this sentence:

The *donatio mortis causa* is one of those perplexed topics in the law which are at once the despair of judges and the delight of law schools.

Go back in time to the mid-nineteenth century. Civil war is threatening the nation. Abolitionists are trying to do something about slavery. Slave owners resent it. The Chief Justice has flexed the Supreme Court’s muscles and has elbowed a space for the Court in our constitutional line of government. But the President has said that the Chief Justice “has made his decision, now let him enforce it.” A young Illinois lawyer is talked about as a possible counter to a strong states’ sovereignty movement which threatens the Union. Chief Seattle of the Suquamish Indians in the Northwest Territory is forced to sell his tribe’s ancestral lands to pioneering intruders.

It’s 1852, and the new American common law is burgeoning. The judges of thirty-one states and the territories are cranking out so many opinions that it is no longer humanly possible for lawyers to take into the mind all that is transmitted from the minds of judges.

Two men in November 1852—Asa Fish and Henry Wharton—take a look at the expanding case law condition and say, like Busby Berkley, “Let’s have a Review!” And so they edit the *American Law Registry*, the first law review to be published in the United States. It would later become the *University of Pennsylvania Law Review*.

The first article published in that first law review was entitled *Gifts in View of Death*, and it attacked that doctrine as outmoded. The article was eleven pages long and had thirty-seven footnotes. And what was the opening sentence—the first sentence ever published in an American law review?:

The *donatio mortis causa* is one of those perplexed topics in the law which are at once the despair of judges and the delight of law schools.

Well, we still have gifts *causa mortis*, and we still have law reviews. And maybe that tells us something.

The *student-run* law review did not catch on until Harvard moved into the field in 1886. By 1928—42 years later—the number of law

reviews had grown to thirty-three. Fourteen years later, while the United States was on the brink of World War II, there were fifty-five law reviews. Another 14 years saw the birth of twenty-three more law reviews so that in 1955, a little bit before you were born, there were seventy-eight law reviews. During your lifetime, the number of law reviews has exploded. There are now over 185. It took over a century to make the first eighty-five law reviews; it took the last 25 years to make 100 more.

The concerned author is then troubled by the fact that these 185 law reviews are spuming out more than 160,000 print pages each year. Put that in perspective: If 400 print pages in a stack equals one inch in thickness, then 160,000 print pages equals 400 inches or 33 feet of shelf space—which means one library book case per year.

Another way of looking at it is this: Take those 160,000 pages and lay them out end to end like a scroll along a freeway; they would extend over twenty miles.

Here's still another way of looking at it: An average reader of legal prose, assuming that she will read one page in two minutes and that she will read continuously for ten hours a day, six days a week, will take almost 90 weeks to read the production of law review material cranked out in one year.

Please note, then, that sometime, probably during the 1970s, a momentous happening occurred. No one probably noticed it because we were all concerned with Watergate or hostages or the Burger Court or the rising number of lawyers or other "News at Eleven." No one noticed that the quantum of law review material passed a point of no return—a point where it was no longer humanly possible for a single reader to return to the mind all that was transmitted from the minds of reviewers, a situation like that confronting Wharton and Fish in 1852. Those that would "view-the-law-again" now publish in 52 weeks what it takes a reader 90 weeks to consume. Before the reader has feasted, another year of review begins and another meal of 160,000 pages is served. The single reader is stuffed with 33 feet of shelf space, over 20 miles of scroll, 90 weeks of reading.

The author says, "That is the stuff of which drowning is made."

"But," say the editors, "not to worry. Authors, your concern is misplaced; your worry is a misunderstanding of the purpose of law reviews. Law reviews *review*; they do not envision. Law reviews synthesize, capsulate, rehash in digest form what is said elsewhere. Law reviews say *again*—in new clarity and analysis. Reviews are to that

extent a shortcut. To be sure, they are stored, and meant to be stored, for the savings will one day provide thrift. Law reviews were never intended to be fireside, cover-to-cover reading; they are reference tools. They are to be warehoused until need arises. They are read selectively. They do not court general interest; they cater to special need. Law reviews are valets—attendants who patiently await naked necessity.”

“But that is troubling,” says the author. “What if I don’t wish to write an article like you describe? What if I want to write an article that will pique intellectual curiosity, that will stimulate reader interest, that will make for the reader new vistas, new insights, new knowledge? What if I seek to cross the bridge and not wait for the reader to do so? What if I wish to court and not to be courted? What if I don’t like the idea that my work will simply be hauled out one day when the need arises, that it will be stored like so much luggage until use claims it? What if I want to reach an audience and persuade them of something? Where is it that I can do this? What assurances do I have that this work of mine will not be a mortuary tag upon the toe of shelf knowledge?”

If we look carefully at the author’s complaint, we see that it is not a complaint that there are too many law reviews. Rather, it is a complaint that with so many law reviews there is yet only a limited access to the reader. Thus, it is not the explosion of law reviews that concerns authors; the concern is rather the implosion of style. Law review writing, like all academic writing, has become a suffocating art form. There are two ways to gag an idea: One way is to censor it, and the other is to dress it in uniform and march it in column with look-alikes.

Is your law review an incestuous, in-house affair? Is the make-up of your readership so special, so in-bred, that authorizing a law review lead article is merely a limited correspondence with intellectual acquaintances? Is it written by professors for other professors?

If I don’t want to wait for selective need but rather I want to build interest, then is your law review a place for me to publish? Is it a fix-it, skill manual? Does your law review have a reputation for being food for thought or thought for food? Is it written by mechanics for other mechanics?

To be sure, there are some simple maneuvers of business management that can help solve some of these author concerns. For example, a thorough, accurate index to subject matter in your law

review may put more researchers onto an author's words. Increasing the breadth of circulation will obviously do that. Timely publication of timely articles helps. Promotion attempts could be more imaginative; for example, why not assure authors that the law review will distribute 100 reprints of an excellent lead article to key persons throughout the nation?

But these are touch-ups that put off the overhauling. What can editors do with the form and content of the product to allay the author's concern about reaching an audience or, more importantly, to allay the reader's concern about not receiving the widest spectrum of authorship?

One approach begins with a look at the science of records study and their interpretation. Systems tend to be closed. They become hermeneutic circles, and the difficulty is finding the way in. We have all experienced this when we stood at the threshold of learning a new discipline. Certainly our entry into law school is a good example. We can't see the whole of law until we see its parts, but we can't see the parts until we see the whole.

To overcome this paradox of learning, one must *view* and then *re-view* within the discipline. The first read may gain a perspective on the whole—now better to understand the parts on a second read. And having better understood the parts, the whole becomes clearer on still another read. Read and re-read. View and review. A repetition. An encircling—until you have taken the doctrine in. Therein is the danger: It is an indoctrination so gradual that it is difficult to separate where one has taken in and where one has been taken in. And so the system tends to explain itself. By setting up its own jargons and linguistic patterns, the system argues with words and premises that are explainable only within the whole of its understanding.

Once a system gets caught up in such a circle, it turns inward and implodes upon itself. We have all seen how difficult it is to break the circle of theological fundamentalism: How do we prove the existence of the Biblical god? Simple. The Bible tells us so; see chapter and verse. How do we prove the validity of a law? Simple. Other laws tell us so; see case and statutory authority.

It is not possible to reason from outside of a system that is hermeneutically sealed. It is one thing to have standards of excellence which inspire us to reach outward. It is quite another thing to have patterns of uniformity which turn us inward and backward.

Law reviews that follow circular traditions help close the doors of a system. To publish in a law review means that the author must

be prepared to accept certain manners, phraseologies, nomenclatures, idioms, and tongues. And once the author arms himself with the jargonese of a discipline, it is extremely difficult to ferret him out as a nincompoop.

Law reviews can become monastic writings, scrolled parchment to be preserved, stored, warehoused for archaeological digs at the rate of one full bookcase per year. All of this helps to explain the common complaint that law seems to be traveling farther away from the understanding of its constituents.

Isn't it about time that law reviews began to write to a broader audience? Is there not a challenge to editors and authors alike to begin to explain this legal system to its citizenry? With so many reviews would there not be a service to the whole society if some of those publications reached outward instead of inward?

Do not misunderstand my rhetoric. There is nothing wrong with speaking our language nobly. But the imaginative author must feel free to experiment—not only with ideas, but also with language and style. When all law reviews have precisely the same templets of speech, our oracles become one, coded entry.

Academic language must be made to compete. If ideas are to be given free and timely vent, then the academic grove must descend to the marketplace. It is good that there are many law reviews. Free speech thrives in a multitude of tongues, but this happens only when those voices are not in chorus, only when they challenge each other for better ways and are not afraid to fail.

Let me illustrate. Here is a substantive idea expressed in four different styles: conversational, scholarly, slang, and literary:

In the *conversational* or informal style, the idea might be stated in this way: "Laws make us think twice about whether we do something or not. Most of the time, we'll follow along with the way the law wants us to go because we know what'll happen if we don't. But sometimes we just have to do what we think is best."

The *scholarly* way of putting that same idea, might go like this: "It is axiomatic that laws act as deterrents. Behind deterrents lie sanctions which operate as and manifest themselves in coercive power. In spite of such sanctions, history proves the existence of occasional rebellion and civil disobedience."

In street *slang*, the idea might come out like this: "The Fuzz has the arm. The Man can collar some sucker and throw his ass in the slammer. But sometimes the dude just don't give a damn."

Finally, Kahlil Gibran captured a similar thought in *literary* style:

“You can muffle the drum and loosen the strings of the lyre; but who shall command the skylark not to sing?”

The point to note here is not just that there are four different ways to say the same idea, but rather to note that style does affect substance. Content is affected by the degree to which the author puts feeling to words. A different perspective on the same object gives us a different object. The scholarly approach is detached, reserved, analytical. It lacks the warmth, directness, force, and humanity of the others.

The reader is enriched by the truths in each of those perspectives. But the enrichment does not end there. The reader is also enriched by the differences.

Would you publish these words?:

The *donatio mortis causa* is one of those perplexed topics in the law which are at once the despair of judges and the delight of law schools.

Certainly you would, and certainly you should. It's not a bad sentence. It's good grammar, and it speaks well of despair and delight.

On the other hand, would you have published this opening line for the same article?: “I say nuts to the doctrine of gifts in view of death.” For one thing, the word “nuts” is too much slang. For another, writing in the first person is frowned upon. And third, there is a humorous and emotional injection that is not befitting the serious work of scholarship.

Yet it was that type of language which Professor Fred Rodell used in his irreverent castigation of law review scholarship in a 1936 *Virginia Law Review*. In a 1962 “revisit” to that article Rodell finished this way: “Well, fellows, there it is in a nice, neat nutshell. All I can add is: — Ah, scholarship; ah, nuts.”

Not many realize that Rodell's 1936 work was part of a multi-authored symposium of articles about law reviews. Only Rodell's article has withstood the test of time. Not an article written today, nor a speech given about law reviews can escape considering citation to his work. And, I submit, the reason for that is because the author and his editors were bold enough to set aside the mold.

No speech critical of law review style can be concluded without taking a jab or two at the law review penchant for interminable footnotes (I call them “footprints”), the cover-your-rear-at-every-corner syndrome. Footnotes can be “subterpagan” weed roots — pods that suck life from the text.

Take the nursery rhyme Humpty Dumpty. A law review recitation of that ditty might go something like this: Humpty<sup>1</sup> Dumpty<sup>2</sup> sat on a wall.<sup>3</sup> Humpty<sup>4</sup> Dumpty<sup>5</sup> had a big fall.<sup>6</sup> All the King's horses and all the King's men<sup>7</sup> couldn't put Humpty<sup>8</sup> Dumpty<sup>9</sup> together again.<sup>10</sup>

1. Has reference to an egg. See M. GOOSE, NURSERY RHYMES at 44 (Grimm's ed. 1850).

2. *Id.* at 45.

3. For discussion of walls, see Jericho (tumbling down), Jerusalem (wailing), China (length), and Berlin (swift construction).

4. *Supra* note 1.

5. *Id.*

6. Here the term "fall" has reference to gravitational pull and is not to be confused with autumn, as if to say Mr. Dumpty's "big fall" was truly a reference to his *magificent autumn*. For a general discussion of autumn, see, e.g., Robert Frost.

7. It follows, of course, that if the opposing thumbs of the King's *men* could not reassemble an egg, then the hooves of horses would be doubly inept.

8. *Supra* note 1.

9. *Id.*

10. The legal implications of the failure to reassemble Humpty (*supra* note 1) Dumpty (*id.*) are disturbing because while there might be a moral duty to rescue, there is no legal obligation to do so. See generally, PROSSER ON TORTS, Sec. suchnsuch at suchnsuch page (suchnsuch ed. 19 hundred and suchnsuch.)

To be sure, footnotes serve a purpose, but it is a purpose that serves only one style of article. Even within that style, footnotes become appendages that wag the dog. They are abused when they fall into *id.-itis* and *supra-itis* — those interminable cross-referencings so symptomatic of a "textenereal" disease spread by overexposure to the Internal Revenue Code.

In a footnote the author is implicitly saying this: "Dear reader, I just said something profound. If you don't believe me, here is someone else who said the same thing, or said something like it, or said something sort of like it, or said something close to it, or said something that almost said it, or said nothing in particular about it but did discourse in the same general area. In other words, dear reader, I feel obliged to tell you that what I said is not altogether original, not totally creative."

Now, there's not a damn thing wrong with that kind of candor. But to the extent that it is required by a manual of procedure, it steers the scholar away from imaginative thought. It breeds the scholar who prides herself on and measures the value of her law review article on the number of footprints she can follow.

A random and typical law review article, which came across my desk last week, had 266 footnotes in thirty-five pages of print. That's an average of seven and one-half footnotes per page. Almost one half of the footnotes were "id. 's," "supras," or "infras." Oddly enough, four percent of the footnotes included citations to the author's own previous work. There has to be something amiss in a system that fosters a restraint in an author who must seek the security of his own authority in order to confess the non-originality of his own thought.

Footnotes also wag the text in that they interrupt the flow of sentences. Visually, they form little annoying punctuation marks at every phrase or clause — momentary disengagements. I confess that I am one of those whose attention crashes to the bottom at every calling to go there. Scotty, for godsake, beam me up! Something would have been lost if Shakespeare would have nodded our heads with these halts and descendings: "To be (*see generally* Aristotle's *Metaphysica*) or not be be (*see generally* Nietzsche's *Nihilism*); that is the question (for examples of questions, see LSAT or Multi-State Bar Exam)."

Again, I say there is nothing wrong with good scholarship engaging in the research necessary to shore up its argument by joining forces with precedent, history, and authority, or in advising the reader that more can be found in other places. But I do urge that editors should be aware that footnoting is part of a stylistic form, which (like all form) affects content, which may not be right for all law review articles, and which in any law review article is a matter of author choice.

I like the occasional article that shows instead of tells. I like articles that give us the story. The story may be fiction, history, or biography. It may be the facts of a case — not the cold legal facts, but the real human facts. Frankfurter's *Sacco-Vanzetti Trial* piece is a good example. Prosser's *Lighthouse Him No Good* article and Fuller's *Case of the Speluncean Explorers* are also examples of the injection of storytelling into the hardened arteries of law.

I like the conversational style — articles that carry on a dialogue. People talking, arguing, sharing. Plato knew its value when he wrote the Socratic dialogues. The *Stanford Law Review* did it in a

recent issue on Critical Legal Studies. The *Lewis and Clark Environmental Law Review* was kind enough to publish a dialogue which I had the joy to write. The dual advocacy of trials and appellate war between majority and dissent are good vehicles for dialogue. There are many examples. Dialogue means conflict, and conflict holds our interest.

I like articles that are a vent of emotion, a throwing down of the gauntlet, a hyperbolic release of human spirit. Not everything in the law is cold logic and cynical acid. Rodell's irreverent attack on law reviews is not a masterpiece of rationality; but when he wrote *Goodbye to Law Reviews* and said, "There are two things wrong with almost all legal writings: One is its style, the other its content," he warmed our heart with his honest indignation instead of encircling our minds with dialectics and polemics. To be sure, such indignations do not win the day, but they do set the battlefield. They are just as much a part of legal training as is the laboratory analysis of *donatio mortis causa*.

I like articles that create pictures, make metaphors. They appeal to both halves of our brains. Pictures allow us to visualize and not just to travel in bits and bytes along linear sentences. Metaphors give us a glimpse through the window of separation and allow us to see similarity. In bright moments they illuminate universals. Tunnels and compartments of the law, we see, are not so separate after all. Oliver Wendell Holmes, Jr., made this picture: "A word is the skin of a thought." An editor who would change that picture to read, "A word is a symbolic allusion to an underlying perception or conception," has drastically missed not just form but substance. A typical legal writer might write, "The risks of endangerment include the reasonably foreseeable prospect of perilous lifesaving attempts." But it took a Cardozo to say, "Danger invites rescue." In that simple picture, the reader sees, senses, and remembers. Stories, dialogue, emotion, pictures are cool winds on the parched, law review scene because law is a humanity—not just a science.

There are enough of you now that you can afford to innovate. Every law review should have room for one article per issue that defies the usual mold. How about a section in your law review—right there alongside of articles, notes, comments, and book reviews—called essays or editorials or stories? And where is it written that *Law Review* has to be the name tag? Instead of *Law Review*, how about *Law Impressions* or *Law Imprints* or *Law Perspective*?

If you do pick up the gauntlet I lay down and begin to let the

creative authors know that your law review is amenable to innovation, then no doubt you will make a few errors. Creative writing is not easy, and there is a lot of junk perpetrated in its name. But if we gain anything from the fact that there are more than 185 law reviews spuming 160,000 pages of print annually, we ought to gain the courage to know that a little failure along with the experiment is no real sacrifice.

Editors, be receptive to the new, the different, the original. Realize, of course, that you have a job to do, realize that radical departure, just for the sake of departure, is never reason enough. But at the same time remember that thought is the reason for your existence and that you are not there simply for review and revision. You are there to view and envision.

By all means, maintain. Maintain good standards; maintain the good article that synthesizes and clarifies a complex area of law, that surveys the parts to see the whole, that helps the practitioner implement abstractions. I'm simply urging you to save room for the imaginative, not to be too convinced of the age-old separation of method and substance, not to lose sight of the fact that stories become the law and the law, in turn, becomes a story.

Let it be known that your publication welcomes manuscripts that are fresh and provocative; that you wish to excite your readers; that you have a mind for literature, essays, inspiration, humor, pathos, creation, and any skin of a thought that would lower the yashmak veil that curtains the face of law, that would strip from the law its stoney facade of pontification, erudition, pedantry, and turgidity.

To the task of taking the starch from your pages, I commend you.

To your success, whatever road you steer, I wish you well.