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Editing Law Reviews: Some Practical Suggestions and a Moderately Revolutionary Proposal

JAMES C. RAYMOND*

It's been nearly fifty years now since Professor Fred Rodell published what was once a famous article—"Goodbye to Law Reviews"¹—and more than twenty years since the article was revisited by Professor Rodell and reprinted.² On the first page of the original piece, Rodell claims that there are only two things wrong with most legal writing: "One is its style. The other is its content."³ In the pages that follow he makes these charges much more specific, lambasting the law reviews for their "antediluvian or mock-heroic style"⁴ and for footnotes that breed "nothing but sloppy thinking, clumsy writing, and bad eyes."⁵

In examining these charges, it turns out that they are not entirely deserved by the current generation of law reviews. The footnotes are still there, of course, many of them designed to give the page the appearance of scholarship rather than to give the reader any useful information. In general, though, law review articles are neither antediluvian nor mock-heroic in their style. They are simply dull.

The notion that law review articles ought to be stylistically interesting is actually considered subversive by some academic lawyers.

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1. Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 33 (1937).
2. Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279 (1962).
3. Rodell, *supra* note 1, at 38.
4. *Id.*
5. *Id.* at 41.

They will argue, in private at least, that dullness is often a sign of good scholarship and that readers ought to have enough moral fortitude to slug their way through tedious pieces since the authors have exercised considerable stoicism in writing them. In law reviews, articles routinely begin with a presumption of the reader's interest, rather than with an attempt to create it. Instead of starting out with the dramatic situation, the conflict in values and interests among human beings that makes any serious legal issue interesting, law review articles are likely to begin with a dreary rehearsal of a recent decision in which the dramatic event, not to mention the reader's attention, is anesthetized to the brink of coma. Here, for example, is the opening paragraph from what otherwise has the makings of a fascinating article on collective bargaining:

In *NLRB v. Hendrick County Rural Electric Membership Corp.*, the United States Supreme Court held that the "labor nexus" standard employed by the National Labor Relations Board (NLRB or Board) in determining whether employees are excluded from collective bargaining units because they are "confidential" employees has a reasonable basis in the law.⁶

This is a long and uninviting sentence, technical, undramatic, and abstract; and chances are (if you are like most readers of reviews like this one) you didn't bother to read it very carefully. That in itself should be instructive if you happen to be an editor or a potential contributor to a law review.

An unwelcome variation on this ploy is to start out with a series of truisms and platitudes. The following sentences sufficiently illustrate the point:

Almost every type of organized society has some form of marriage with the attendant ritual, ceremony, rules, and mystique. Marriage has always represented the elemental family unit. The biological need of mankind is partially responsible for the universality of marriage.

The topic could not be more timely or more interesting, not only to lawyers but to anyone who is involved in or is close to someone involved in a non-traditional menage (which is to say, virtually everyone alive). Yet the beginning has all the originality of a Freshman sociology paper written shortly before or immediately after a very busy weekend. Only the hardiest of readers will survive the article long enough to discover what happens in the second paragraph.

To a serious writer, nothing is more important than the opening paragraph. That's where readers either get hooked or look for something else to read. If instead of suppressing the human conflict that makes legal distinctions worth fighting about, scholars would dramatize it, their readers might be tempted to go on, not out of sheer duty but out of interest and curiosity. Of the fifty or so articles I ex-

6. All examples of poor writing in this article are taken from actual legal publications. To avoid embarrassment to the writers, the author prefers not to provide precise citations to the illustrative examples.

amined, only one begins with a dramatic situation. The author is Stanford law professor Marion Rice Kirkwood. His topic is "Exposed Nerves: Some Thoughts on Our Changing Legal Culture:"

On the night of August 13, 1906, there was trouble at the Ruby Saloon, in Brownsville, Texas. Shots were fired; a young bartender was killed; a policeman injured. Everybody in Brownsville was sure who must be guilty: the First Battalion, Twenty-Fifth Infantry, black soldiers stationed at Fort Brown, near Brownsville.

The Army conducted an investigation, under orders from the President, Theodore Roosevelt. A few spent cartridges, from Army rifles, were found outside the barracks; otherwise, little evidence turned up. But the weakness of the evidence did not restrain the Inspector General. He concluded that the black soldiers were in fact responsible; and that a "conspiracy of silence" protected the guilty parties.

The soldiers were given an ultimatum: turn in the people responsible or suffer the consequences. No one stepped forward. Accordingly, every one of the soldiers—167 in all—was "dismissed without honor."⁷

Essentially there are two kinds of legal writing: writing that *must* be read, at least by the people it concerns, and writing that can be ignored. Briefs, opinions, statutes, and regulations fall into the first category; law reviews in the second. Each of these two categories can be further subdivided into writing that is intended to be read from beginning to end (like briefs, opinions, and presumably law review articles), and writing that is intended to be consulted as the need arises (like civil codes, form books, and legal dictionaries). Different rules govern each kind of writing. Writing for reference requires a pattern of organization that enables the reader to enter the text at whatever his or her point of interest happens to be, without having to bother with what precedes or follows it. It is generally carved out in logical categories with outlines, headings, indices, or other paraphernalia designed for readers who would never dream of trucking through from beginning to end. The format invites skipping around. The reader's interest can be presumed. People look up tax regs only when they need to know them, and only those they need to know. They don't take copies to the beach for summer reading.

The other sort of writing, writing meant for reading, requires of the author a willingness to create interest if it cannot be presumed, and a pattern or organization that leads readers from one section to the next without giving them much opportunity or inclination to skip around. In the law reviews I examined, there seems to be some ambivalence, if not confusion, about which sort of writing is intended.

7. Kirkwood, *Exposed Nerves: Some Thoughts on Our Changing Legal Culture*, 17 SUFFOLK U.L. REV. 529 (1983).

In addition to presuming rather than creating interest, many clearly cast themselves as reference journals by providing meticulous outlines between the title and the first paragraph and detailed headings thereafter, inviting readers to pick and choose among paragraphs like items on a menu. Outlines of this sort may be useful for students who otherwise have trouble organizing their material. And they are useful in reference documents, documents intended to be consulted rather than read. In a law review article, however, which is ostensibly an essay, an outline preceding the text is tantamount to an editorial admission that anybody who attempts to read the article will need the help of a road map. The in-house defense of this practice is that the complexity of the law requires it. Skeptical outsiders suspect that lawyers don't know how to cut and organize their material so it can be understood without the aid of an outline, and that the complexity of the law is often created by the manner in which it is presented.

The style of legal writing has been a fit subject for parody by humorists from Shakespeare's time to our own. Rodell called it "antediluvian" and "mock-heroic." But things have gone downhill since Rodell's time. The mock-heroic was popular among American legal writers when they still had some notion of the truly heroic, and some inclination to imitate it. Now even the mock-heroic has all but disappeared, except when a modern writer is quoting a writer from an earlier generation. The only example of mock-heroic I found in fifty samples is this virtually unintelligible effort:

That an article copied from the unpatented article could be made in some other way, that the design is "nonfunctional" and not essential to the use of either article, that the configuration of the article copied may have a "secondary meaning" which identifies the maker to the trade, or that there may be "confusion" among purchasers as to which article is which or as to who is the maker, may be relevant evidence in applying a State's law requiring such precautions as labelling; however, and regardless of the copier's motives, neither these facts nor any others can furnish a basis for imposing liability for or prohibiting the actual acts of copying and selling.

This is a bad sentence. But this particular kind of bad sentence implies at least a passing acquaintance with the style of classical oratory, a style characterized by parallelism, balance, anaphora, chiasmus, and grand sentences, sentences that build like snowballs rolling down a mountainside, gathering details and momentum along the way until they finally reach a period. In his first speech against Catiline, Cicero, like the example, uses a series of three parallel "that" clauses ("*ut*" clauses in Latin). But the effect is considerably different:

But that you should be dissuaded from your vices, that you should fear punishment from the laws, that you should yield to the needs of the state, that is

a thing not to be asked.⁸

Without getting into technicalities, the main difference between Cicero's sentence and the illustration is that Cicero's can be understood on the first reading, while the former must be studied. This difference is not a function of brevity as opposed to length; Cicero composed long sentences that are perfectly intelligible:

But because he did not carry with him a sword stained with blood, as he wished, because he departed leaving us still alive, because we wrenched his sword from his hands, because he left the citizens safe and the city still standing, with what grief, pray, do you think he is afflicted and cast down.⁹

Nor is the difference a function of Latin as opposed to English; a good English stylist can craft periodic sentences that Cicero would envy:

In the loveliest town of all, where the houses were white and high and the elm trees were green and higher than the houses, where the front yards were wide and pleasant and the back yards were bushy and worth finding out about, where the streets sloped down to the stream and the stream flowed quietly under the bridge, where the lawns ended in orchards and the orchards ended in fields and the fields ended in pastures and the pastures climbed the hill and disappeared over the top toward the wonderful wide sky, in this loveliest of all towns Stuart stopped to get a drink of sarsaparilla.¹⁰

Nor is it a question of the complexity of the subject matter; other jurists have juggled qualifying or subordinate ideas in less taxing, even elegant prose:

With his popularity, if Eisenhower had said that black children were still being discriminated against long after the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments, that the Supreme Court of the land had now declared it unconstitutional to continue such cruel practices, and that it should be the duty of every good citizen to help rectify more than eighty years of wrongdoing by honoring that decision—if he had said something to this effect, I think we would have been relieved of many of the racial problems which have continued to plague us.¹¹

The difference, simply put, is that Cicero, Earl Warren, and E.B. White put long sentences together in a way that a reader—even a listener, without the advantage of a printed text—could understand.

Of all Rodell's charges, his denunciation of the footnote fetish in legal scholarship is as timely today as it was fifty years ago. A foot-

8. CICERO: THE SPEECHES 36 (L. Lord trans. 1946) (*Sed tu ut vitiiis tuis commovere, ut legum poenas pertimescas, ut temporibus rei publicae cedas non est postulandum*).

9. *Id.* at 48, 50. (*Quod vero non cruentum mucronem, ut voluit, extulit, quod vivis nobis egressus est, quod ei ferrum e manibus extorsimus, quod incolumis civis, quod stantem urbem reliquit, quanto tandem illum maerore esse adflictum et profulgatum putatis?*).

10. E.B. WHITE, *STUART LITTLE* 102 (1945).

11. E. WARREN, *THE MEMOIRS OF EARL WARREN* 291 (1977).

note is, first of all, a distraction. It interrupts the reader's concentration on what is presumably the main line of reasoning in the article. Even if readers stop only long enough to glance at the footnote to determine that they don't need it, still they are distracted, and they experience a brief moment of dislocation as they find their way back to the text and to the thought they were pursuing.

When footnotes are lengthy or when they appear in abundance on a single page, they are also typographically repulsive. For this reason, many editors discourage footnotes. They prefer to see citations made parenthetically in the text rather than at the foot of the page, when this can be done gracefully. They prefer to print bibliographies at the end of an article, under a heading like "Works Cited" or "Works Consulted" or simply "Bibliography," rather than crowd the text with long footnotes intended only for those few readers who intend to do further research on the same subject. They allow discursive footnotes only when they seem likely to be interesting or useful to a reasonable number of their readers, and when putting the information at the bottom of the page serves some purpose that would not be served by working it into the text or appending it to the end of the article.

Footnotes are necessary and useful in scholarly writing. But there is a balance to be achieved, and that balance is disturbed when footnotes begin creeping up from the bottom of the page in a way that threatens the territory normally reserved for the text itself. In one article I found, the actual text on the first page consists of six lines squished between the title and a rising tide of footnotes. On the next page, the tide has risen further, and there are only four lines of text. Another example I found is, one would presume, even more scholarly, since the text makes only six lines of progress over two pages. We can imagine the authors and editors responsible for pages like these, their blood warming with self-congratulation as they come closer and closer to that elusive ideal—the page that has no text at all, just notes.

Authors and editors reveal what they think about their readers by the sort of information they put in footnotes. If they use footnotes to provide information that any educated person ought to know, they insult their readers. If they stuff footnotes with arcane information, they seem pedantic. Somewhere between these two extremes lies a happy balance, a common sense notion that respects the intelligence of the ordinary reader of law reviews and yet satisfies the curiosity of those few readers who would appreciate extra documentation or additional information.

It is hard to imagine, for example, a law review reader who would need help recognizing the names of Yogi Berra, Will Rogers, Felix

Frankfurter, and Oliver Wendell Holmes—all of whom are identified by the editor in one of the law reviews I examined. Footnotes of this sort are symptoms of one of the most pervasive illnesses of legal writing—the inability to distinguish between scholarship and the forms of scholarship. Lawyers and legal academics are almost universally persuaded that other people are impressed by the number and length of their footnotes, even though they admit privately that much of what they put there is pure filler. This delusion was sanctioned in a recent article in which the author actually uses the number of footnotes in law review articles as a measure of scholarly merit.¹² Other scholarly disciplines sometimes gauge the importance of a publication by the number of references subsequent writers make to it. This is not an infallible measure of importance, but it is moderately persuasive. The notion that the number of footnotes in the publication itself determines its importance is what leads to footnotes identifying Yogi Berra and Oliver Wendell Holmes and to pages that consist of more notes than text.

The use of quoted material is another area in which it is easy to mistake the appearance of scholarship for the essence of scholarship. In the law—in brief and opinion writing as well as in law reviews—writers commonly use block quotations that include more information than the reader really needs at that particular point. Here, for example, is a quotation from an article on privacy, the purpose of which is to show “the narrow scope of protection for invasions of privacy afforded by the law of New York”:

The statutory scheme was enacted as a direct response to *Roberson v. Rochester Folding Box Co.* (171 N.Y. 539 (1902)). In this oft-cited case, some 2500 reproductions of a photograph of the infant plaintiff were distributed throughout the country without her knowledge or consent in order to advertise defendant's flour. Most significantly, in sustaining a demurrer to so much of the complaint as was framed in terms of a violation of an alleged right of privacy, the court broadly denied the existence of such a cause of action under New York common law. It is noteworthy, therefore, that, while concern engendered by this decision prompted the Legislature to enact sections 50 and 51, these were drafted narrowly to encompass only the commercial use of an individual's name or likeness and no more. Put another way, the Legislature confined its measured departure from existing case law to circumstances akin to those presented in *Roberson*. In no other respect did it undertake to roll back the court-pronounced refusal to countenance an action for invasion of privacy.

Nor has the Legislature chosen to enlarge the scope of sections 50 and 51 in the fourscore years since *Roberson* was handed down. This despite the court's consistent adherence to its position that, as such, in this State “there exists no so-called common-law right to privacy.”

12. Ellman, *A Comparison of Law Faculty Production in Leading Law Reviews*, 33 J. LEGAL EDUC. 681, 688-89 (1983).

You can gauge the effectiveness of quotations of this sort by observing your own reaction to it. If you read it carefully, you belong to a very small minority of readers. The majority skip long quotations and try to glean their substance from the material that precedes and follows them. In the actual article, this particular quote was further complicated by two footnotes, a brief one identifying the source of the quotation, and another, thirty-two lines long, explaining the phrase "statutory scheme." If you did not read the quote itself, you can easily guess how many readers bothered with the footnotes.

The motive behind quotations of this sort is to provide precedents fully and in context. In effect, however, writers transplant bad writing from one text to another, perpetuating obscurities when they might take the trouble to clarify them and challenging their readers to find the relevant phrase or two buried in a haystack of verbosity.

The alternative to most long quotations is a simple one. The quotation usually includes an important phrase, sometimes identified by the author or editor with italics and the comment "emphasis added." In most cases, "emphasis added" identifies the section of the material that actually deserves to be quoted. The rest should be paraphrased to give the reader enough of the context to make sense of the part that is quoted. When writers can't distinguish the essential phrase or two in a long quotation, chances are it is the meaning of the entire passage that is important, not its peculiar phraseology. In that case, the entire passage should be paraphrased if it is more than three or four lines long. In those rare cases when editors and contributors agree that a particularly long quotation is absolutely indispensable, editors should anticipate the probability that readers will skip it and minimize the damage by preceding and following the quoted material with a paraphrase.

The quality of a law review is not something that can be judged objectively. No one can say what a law review ought to be, and no law review can claim to be the model to be emulated by the others. For the most part, law review editors inherit and perpetuate their traditions without examining them. They do what they do because the people before them did pretty much the same thing. Like judges, however, law review editors occupy extremely powerful positions. They can make changes if they choose to do so. And they might begin by asking themselves what a law review might be, rather than what it has been.

The ideal law review, it seems to me, is one that is designed not only to be referred to, but actually (and here comes the revolutionary proposal) to be read. Its articles are selected not on the basis of the number of footnotes they contain, but on the basis of the timeliness of the topic and the soundness of the scholarship. They may have no

footnotes or dozens of them—all that are necessary to satisfy the curiosity of intelligent readers who are particularly interested in the topic, but no more.

In the ideal review, articles are also selected, or even solicited, at least partly on the basis of how well their authors can write. Ideal editors are prepared to instruct their assistants and even their contributors on the elements of good writing. They refuse to publish anything that they consider dull, and they have the courage to demand a revision of anything they cannot understand. They know from their own reading that the best legal writers are always more than crabbed logicians of the law. They are capable of clarity without any compromise in precision, and, when the occasion warrants, of eloquence no less memorable than Cicero's. Witness this classic and famous passage by Justice Brandeis:

In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.¹³

Editors who dare to accept the revolutionary notion that their law reviews ought to be readable might borrow something of Brandeis' style to write a suitable editorial manifesto:

The law review is the potent, the omnipresent teacher. For good or for ill, it teaches the whole profession by its example. Style is contagious. If the law review becomes stodgy, it breeds contempt for good style; it invites every lawyer to become a pedant; it invites dullness. To declare that in writing about the law, the content justifies obscurity—to declare that lawyers may commit crimes against the language in order to make their ideas seem more weighty than they really are—would make lawyers the laughing stock of literate society. Against that murky tradition each law review should resolutely set its policy.

I suspect Professor Rodell would have subscribed to a manifesto of this sort. And I suspect that the legal profession would be well served if law review editors were to do the same.

13. *Olmstead v. United States*, 277 U.S. 438, 485 (Brandeis, J., dissenting).

