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## Introduction

David A. Westbrook

*University at Buffalo School of Law*, [dwestbro@buffalo.edu](mailto:dwestbro@buffalo.edu)

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# BUFFALO LAW REVIEW

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## INTRODUCTION

This issue of the *Buffalo Law Review* is the first to be comprised solely by essays. First—and not last, or so it is hoped—the editors and advisors of the *Review* intend to inaugurate an annual tradition of publishing essay collections. This enterprise has certainly begun well; this is a very fine collection of work. There is good, even important, writing here, and the editors of the *Review* have reason to be proud.

In the staid world of law reviews, publishing an essay issue is a fairly drastic departure from the norm. While many journals publish short pieces they call “essays” or “commentaries,” such texts are very rarely essays in any strong sense of the term. As I will suggest, the essay, as form and event, represents a much greater break with law school tradition than one might think—a break not merely of a stylistic variety, but one profoundly in tension with the mission and the status of most legal writing, including most writing published by the *Buffalo Law Review*. Like virtually every other law review, the *Review* usually employs the orthodox format: in each issue, two or three full length articles, most written by professors and often ponderously documented, are supplemented by a couple of commentaries and book reviews, with student notes added as necessary to complete the volume. Ditching this format, even if only temporarily, in order to publish an essay issue thus raises some obvious questions. What was wrong with the orthodox format? And why publish essays, rather than something else? What can the *Review* hope to accomplish?

Obviously, publishing essays is a way for the *Review* to draw attention to itself, simply because this enterprise is

different from what other law journals do. There is no reason to be bashful about this ambition. Publishing, by definition, is about seeking attention. Moreover, inviting well-known scholars to write essays for the *Review* may encourage them to publish here rather than elsewhere (a proposition stoutly supported by the number of eminent authors in this issue), thereby raising the profile of the *Review* in the legal academy. But acknowledging that the essay issue is a sort of marketing ploy, like many efforts at candor, only serves to transpose questions. There are many ways to get attention, but why take a holiday from the standard forms of academic expression in the legal academy—the article, comment, and note?<sup>1</sup> Why turn toward the essay rather than another form of expression? And why is the chance to publish an essay attractive for an established scholar?

Addressing these questions requires more attention to what the *Review* may hope to receive when it solicits essays. The word “essay” has intertwined meanings; let me tease out three. Perhaps the most common meaning of “essay” is simply an opinion piece, in which the author sets forth a judgment on, or a stance towards, a given matter. While essays may marshal facts, may invoke authority (the Constitution, perhaps), and may exhibit fine logic, such texts ultimately work through the reader’s trust in the author’s voice. The reader’s trust in the author—and hence the success of the essay—is often established by the author’s experience or prestige, who the author is, rather than what is written. Successful essays sound right, “ring true”—the judgment offered in the text accords with the reader’s. In this understanding, while essays tend to be normative, even argumentative, and are often written in a personal style, the form works by reassurance, preaching to the converted. It is in this sense that we speak of the “essays” of political pundits.

But there are other ways to think about the essay, in some tension with the idea of a writing expressing personal opinion tending towards daily affirmation. The English word essay comes from the Old French, *essai*, a trying or venturing, and in that sense a trial, and is indissolubly

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1. I have addressed some of these questions in a different context, and at greater length, in David A. Westbrook, *Pierre Schlag and the Temple of Boredom*, 57 U. MIAMI L. REV. 649 (2003).

associated with Montaigne's *Essays*. Montaigne claimed to be attempting—trying—to describe himself through the detailed articulation of his concerns. Montaigne's texts, and indeed all essays, ask, "How do I think?" In this understanding, the person of the author not only underwrites the power of the text, as in the essay considered as an expression of opinion, but the author is also a subject of the text's critique.

"How do I think?" strangely turns out to be an objective question. Musil wrote that "[n]othing is more foreign to [the essay] than the irresponsible and half-baked quality of thought known as subjectivism."<sup>2</sup> Because many of his concerns were fundamental, and because he did such a fine job expressing them, Montaigne ended up producing much more than a collection of personal opinions, even much more than a self-portrait. In writing about his rather particular situation—as a sixteenth century French noble—Montaigne manages to write about Everyman. Taken as a whole, the *Essays* constitute a word mosaic of the human condition.

Therein lies a problem: Montaigne's *Essays* were written and revised over twenty years, polished until they became masterpieces. Such art is rarely if ever achieved without a great deal of work, but in doing such work, Montaigne is not trying to think, he is trying to write. At some point the *Essays* cease to be about Montaigne, and begin to be about the *Essays* themselves. Good writing asserts itself, a phenomenon widely attested to by writers who have the sensation that the writing comes from someplace outside, that they are not writing at all. To compound matters, part of the charm of Montaigne and many other admired essayists (perhaps Joseph Epstein in our day) is that their writing looks effortless. Thus, effort, particularly in the hands of good writers, is first redirected from the ostensible subject of the essay onto the text, and then denied altogether. In this way the essay, a display of effort, tends to be transformed into a writerly *tour de force*, a display of skill, which is in some way the opposite (if also the refinement) of the essayist's intention.

Which brings me to a third meaning of essay: a prose text devoted to the occasion of its own writing, that is, a

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2. DAVID A. WESTBROOK, CITY OF GOLD: AN APOLOGY FOR GLOBAL CAPITALISM IN A TIME OF MISCONTENT x (2004).

text which struggles against its status as a writing. More simply, the essay may be understood as the effort to write a thought truly. This is not as easy as it sounds; it is indeed both impossible and antagonistic to the first two understandings of what writing an essay means. Under the pressure of hard thought, opinions about things—the core of our first understanding of essay—tend to grow complex, contradictory, and worst of all, insufficient. In the same vein, if we are really critical about our language, we realize that the words we have used to express our thoughts have failed to do so adequately, and worse, have imported their own distractions from what we (think we) are trying to say. Representation fails. The first two understandings of essay—as articulation of opinion, and the description of thought—are not wrong, but are preliminary to this third understanding, in which the failure of both opinion and language are conditions for the real work that essays do.

To ask for texts that are uncertain of what they wish to express, skeptical of their powers of representation, and that ultimately struggle to deny their status as texts—much less their status as authoritative texts, is a most un-law school, un-law review, thing to do. In fact, soliciting such texts ought to be prohibited, and if not, the results ought to be widely ignored, and therefore I presume that our school's administration will shut down this enterprise immediately. But to be less flippant, this enterprise cuts against the professional grain. The law, and especially the legal professoriate, discourages doubt in favor of advocacy, places great faith in the representational power ("precision") of its language, and most importantly of all, strives to create texts that are authoritative.

Yet this is a time of widespread if not always explicitly acknowledged doubt. The categories that we use to understand our world are commonly viewed as inapposite, but efforts to establish new categories tend to be viewed with a degree of hostility. Indeed, perhaps the most famous definition of postmodernism—Lyotard's "suspicion of metanarratives"—bespeaks just this consciousness of lacking an adequate vocabulary with which to think and so construct our world, coupled with a belief that, as an intellectual matter, we should resist the imposition of new categories.<sup>3</sup>

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3. See JEAN-FRANÇOIS LYOTARD, *THE POST-MODERN CONDITION: A REPORT ON KNOWLEDGE* xxiv (Geoff Bennington & Brian Massumi trans., 1984) (1979).

When words like war, democracy, the state, and yes, law, lose their coherence, then times may be good for thinkers, but can hardly be called comfortable, and we should be careful of writing that seems too sure of itself.

But while high modern faith may not seem accessible, and at least when speaking we may all seem postmodern now, it is quite difficult to be postmodern, and strangely difficult in the university. An anecdote: I recently wrote a short piece setting forth an idea of mine, without citation or much elaboration, mostly to get the thought down before I lost it. The text was passed around a bit, and ended up being submitted for publication, and hence peer review. The reviewers, no doubt sensible academics, wanted to see discussion of various classic texts, but especially of contemporary scholarship that they deemed pertinent—my reviewers needed a discussion of other texts, a metanarrative. Without such a metanarrative, my text was incomplete, indeed unacceptable. Without relation to the literature, how could one be sure of a text's, or an author's, discipline? And without a discipline, how could an academic text have authority, demand to be read?

I am not being naïve. I know that most writing is performative. Professional writing is done for professional reasons; the text is essentially about the status of the author. Considered in the old fashioned terms of representing an idea, stating something truly, however, the desire for prestige, or even the effort to look respectable, exerts a baleful influence, at the very least a distraction, on the writing. This unavoidable difficulty posed by the ambitions of the writer (recall Samuel Johnson's "No man but a blockhead ever wrote, except for money") is greatly worsened, however, when the writer does not believe in the conventions she is struggling to fulfill, doubts what he is trying to become.<sup>4</sup> The combination of doubt in our categories, and the need to write within the categories, breeds bad writing in the academy, and specifically the law school. (I hope this does not come as a shock.)

It would be too strong to call such writing dishonest, or even in bad faith. Bad faith may well be better than no faith at all. Almost all of being a student, and much of being a professor, is conformity, and it would be foolishly roman-

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4. JAMES BOSWELL, *LIFE OF JOHNSON* 731 (R.W. Chapman ed., Oxford Univ. Press 1965).

tic to think that an altogether bad thing. There is nothing evil in pretending to read everybody, and dropping footnotes accordingly. Too, there is much to be said for disciplines, some more than others. However, while conformity, repetition, habit and the like have merits, they are hardly intellectual virtues, and may be antagonistic to intellectual life. Especially in a time of doubt, the need to conform may inhibit the expression, or even the formation, of thought. Assuming that this is a fair description of the conditions of contemporary intellectual production in the law school, can it be surprising that so much writing for law reviews tends to be awkward, forced, unreal (and deservedly little read)? And if this diagnosis is correct, then the intellectual project embodied by the orthodox law review frays, if perhaps does not unravel altogether. It is silly to talk about being precise when one is not even being candid. And how is one to take such texts seriously, to believe they are vested with any intrinsic authority, that is, authority beyond the merely bureaucratic?

By committing to publishing essays, the *Buffalo Law Review* is creating an opportunity for something refreshingly new and intellectually exciting. The *Review* invited professors with formidable intellectual reputations—almost all tenured, who ought to feel themselves somewhat at ease—to write essays on topics of their choosing. Although the *Review* made no substantive requests, authors were asked to contribute thoughts on a matter that they were currently exploring, to confront questions for which they might not have answers, to take risks. Nor were there any formal rules, beyond a page guideline, but the authors were encouraged to write with aesthetic discipline, searching candor, and a delight in the ambiguity of one's own questions. These authors, in short, have been invited to show us their thinking, which is a difficult and even brave thing to do. We hope that they are flattered to be invited to think in public; we are honored that they have made the effort.

David A. Westbrook†

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† Professor of Law, Buffalo Law School, State University of New York. My thanks to Pierre Schlag for his comments, and especially to Jack Schlegel for the kitchen table where much of this idea was hatched.