

# THANKS FOR THE THANKS

## AN APPRECIATION OF THE AUTHOR NOTE

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Legal scholars' public expressions of gratitude – those thank-yous that fill law review author notes and law book prefaces – have inspired a good deal of legal scholarly commentary in recent years.<sup>1</sup> Much of that commentary deals with the theory that authors write those thank-yous with an eye more to the future than to the past. This work – “prospective thank-you theory” might be a good name – has numerous variations and complexities, and occasional hilarities. One thread involves the idea that some authors curry favor with great (or at least powerful or rich or famous) legal figures and institutions by thanking as many of them as possible for their support, no matter how slight their connections may be to an author's work. The result, such an author hopes, is that the thanked great ones will think kindly of him or her and bestow favors in the future.<sup>2</sup>

But is it true? Does this aspect of prospective thank-you theory match reality? I suspect that no one really knows, except perhaps the great ones themselves. First, only they know whether they are pleased by any particular expression of gratitude. Second, only they know whether any pleasure they do feel has a causal relationship to any favors they do bestow.

Discovering the truth might be both difficult and uncomfortable. Probing connections between gratitude expressed and help actually

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<sup>1</sup> The leading study is Professor Charles A. Sullivan's *The Under-Theorized Asterisk Footnote\**, 93 GEORGETOWN L.J. 1093 (2005); see also, e.g., Joan Ames Magat, *Bottomheavy: Legal Footnotes*, 60 J. LEGAL EDUC. 65, 77-78 (2010); Ezra Rosser, *On Becoming "Professor": A Semi-Serious Look in the Mirror*, 36 FLA. STATE U. L. REV. 215, 215 (2009); Shane Tintle, *Citing the Elite: The Burden of Authorial Anxiety*, 57 DUKE L.J. 487 (2007); Arthur Austin, *Footnote\* Skulduggery\*\* and Other Bad Habits\*\*\**, 44 U. MIAMI L. REV. 1009, 1021-24 (1990).

<sup>2</sup> Some authors begin with accusations rather than thank-yous. See Sullivan, 93 GEORGETOWN L.J. at 1101-02 n.43 (discussing the phenomenon); see also, e.g., STEPHEN PASTIS, *THE CRASS MENAGERIE* 5 (2008). This approach, and its consequences, might also be worthy of study.

given might be viewed by some as a search for the absence of connections, and such absences (if they existed and were discovered) might be viewed by some as evidence of something other than forthrightness on the part of authors who thanked for help barely (or not) given and great ones who failed to disclaim unearned credit. It all seems so ugly and messy. No one would want to be thanked in the author note of an article based on such research.

There may, however, be a sunnier side to the study of schmoozing via author note. Assume for a moment that author notes are read with the same kind of friendly skepticism that greets most name-dropping – that is, reasonable readers know better than to rely to their detriment on such puffery, and cannot complain (in court, at least) if they do so.<sup>3</sup> So, if no one is harmed by author-note puffery, why not live and let thank? And all the better if the thank-yous do in fact please at least some of the thanked people. It would mean that expansively grateful authors of author notes can make the world a happier place at no cost to anyone other than themselves.

But is it true? Do great legal figures appreciate the appreciation? Standing alone and apart from the question of what work was actually done, it seems like a harmless question that invites harmless answers, not messy or ugly ones. I suspect they would mostly be variations on Yes. And I even have a little bit of antique, but concrete, evidence.

In 1879, Benjamin R. Curtis, Jr. and George T. Curtis collaborated on a biography of former Supreme Court Justice Benjamin R. Curtis. In the preface to the book, Benjamin the younger wrote,

From the Department of State and the Department of Justice, through the kindness of Secretary Evarts and Attorney-General Devens, I have received important information. To the Hon. Henry Stanbery, of Ohio, formerly Attorney-General of the United States, the author of the biography is also peculiarly indebted, as he likewise is to his and my father's friend, D.W. Middleton, Esq., the venerable and urbane Clerk of the Supreme Court of the United States.<sup>4</sup>

Curtis sent a copy of the book to Middleton, who replied by letter:

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<sup>3</sup> See, e.g., *Alpine Bank v. Hubbell*, 555 F.3d 1097, 1106-07 (10th Cir. 2009); *Tietsworth v. Harley-Davidson, Inc.*, 677 N.W.2d 233, 245-46 (Wis. 2004).

<sup>4</sup> BENJAMIN R. CURTIS, 1 A MEMOIR OF BENJAMIN R. CURTIS, LL.D. vi (1879).

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Supreme Court of the United States.  
Washington 9 Oct. 1879  
Benjamin R. Curtis Esq.  
My dear Sir:  
I received yesterday  
Your favor of the 5<sup>th</sup> inst, and  
today a copy of the "Life and  
Letters" of your late Father,  
for which I sincerely thank  
You, and particularly do I  
thank You for your significant  
allusion to me in your preface,  
as your Father's friend, as I  
truly was during the long  
period of our acquaintance  
and our yearly inter-  
course.  
Sincerely & truly yours  
D. W. Middleton

D. W. Middleton to Benjamin R. Curtis, Oct. 9, 1879.  
Collection of the author.

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My dear Sir:

I received yesterday your favor of the 6th inst, and today a copy of the "Life and Letters" of your late Father, for which I sincerely thank you, and particularly do I thank you for your significant allusion to me in your preface, as your Father's friend, as I truly was during the long period of our acquaintance and our yearly intercourse.

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In his day, Middleton was an important legal figure. Clerk of the Court was then, as it is now, a significant post, and his long and distinguished service in it made him "venerable" indeed.<sup>5</sup> When Morrison Waite came to Washington in 1874 to take up the post of Chief Justice, he was fêted at a series of dinners and events hosted by the elite of the Washington establishment. One of those hosts was Middleton.<sup>6</sup> And when Middleton died in 1880, the *Washington Post* reported:

The name Daniel Wesley Middleton has been associated with the United States Supreme court for so many years that his death, which took place Tuesday night, becomes an event of widespread and regretful interest. . . . At the opening of the court yesterday Chief Justice Waite in feeling terms announced the death and adjourned the court out of respect. The justices all visited the house and requested the family to allow the funeral to take place from the court-room.<sup>7</sup>

For the funeral, the honorary pallbearers included Secretary of State William Evarts, Secretary of the Navy Richard Thompson, Solicitor General Samuel Phillips, and Senators David Davis and Matthew Carpenter. Waite later delivered a glowing eulogy at the Court.<sup>8</sup>

So, Middleton was a great legal figure, Curtis's thank-you to him was mere puffery (there being nothing in it about Middleton's help other than "vague generalities that no reasonable person would rely on as assertions of particular facts"<sup>9</sup>), and Middleton's pleasure and gratitude are obvious in his letter to Curtis. May author notes overflow with such kindness, and the hearts of those thanked, with joy!

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<sup>5</sup> CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864-88 PART ONE at 80-83 (1971).

<sup>6</sup> CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864-88 PART TWO at 109-10 (1987).

<sup>7</sup> *Death of Mr. Middleton*, WASH. POST, Apr. 29, 1880, at 4.

<sup>8</sup> *Letter from Washington*, BALT. SUN, May 1, 1880, at 4; *Memorandum*, 100 U.S. ix (1880).

<sup>9</sup> *Alpine Bank*, 555 F.3d at 1106.