

PREFACE

[parallel citation: 2015 Green Bag Alm. 3]

This is the tenth *Green Bag Almanac & Reader*. For a reminder of the reasons why the world is a better place with it than without it, read the “Preface” to the 2006 edition. It is available on our website (www.greenbag.org).

OUR DILIGENT BOARD

Our selection process for “Exemplary Legal Writing of 2014” was, like past years’, not your typical invitation to competitive self-promotion by authors and their publishers and friends. We did not solicit (or accept) entries from contestants, charge them entry fees, or hand out blue, red, and white ribbons. Rather, we merely sought to:

- (a) organize a moderately vigilant watch for good legal writing, conducted by people (our Board of Advisers) who know it when they see it and bring it to our attention;
- (b) coordinate the winnowing of advisers’ favorites over the course of the selection season, with an eye to harvesting a crop of good legal writing consisting of those works for which there was the most substantial support (our “Recommended Reading” list);
- (c) poll our advisers to identify the cream of that already creamy crop; and then
- (d) present the results to you in a useful and entertaining format — this book.

The nitty-gritty of our process for selecting exemplars was a simple but burdensome series of exercises:

Step 1: Our advisers read legal writing as they always have, keeping an eye out for short works and excerpts of longer works that belonged in a collection of good legal writing. When they found worthy morsels, they sent them to the *Green Bag*. “Good legal writing” was read broadly for our purposes. “Good” meant whatever the advisers and the lead editor thought it did. As one experienced scholar and public servant on our

board put it, “there is good writing in the sense of what is being said and also in the sense of how it is being said.” Our advisers were looking for works that had something of each. “Legal” meant anything written about law — opinions, briefs, articles, orders, statutes, books, motions, letters, emails, contracts, regulations, reports, speeches, and so on. “Writing” meant ink-on-paper or characters-on-screen.

Step 2: The *Green Bag* organized the advisers’ favorites into categories, and sent a complete set to every adviser, along with a ballot. Advisers’ names were not attached to the works they nominated. In other words, everything was anonymized. Advisers voted without knowing who nominated a piece.

Advisers’ votes were secret too. No one but the lead editor ever saw individual advisers’ completed ballots or knew who voted in which categories. And the editor will destroy all individualized records once this *Almanac* is in print.

Advisers were free to vote in as many categories — or as few — as they desired. Most advisers voted in all categories.

Step 3: The lead editor tallied the votes and compiled the “Reader” portion of the *Almanac* based on those tallies, without adding to or subtracting from the list of works in each category that received the most adviser votes. All nominated works are listed in the “Recommended Reading” section.

Despite the substantial work involved in this project, most of our advisers seemed to enjoy it. The rest seemed to view it as a professional duty. Either way, we’re glad to have had them. But these are people with jobs, other commitments, and sleep requirements. So not everyone has pitched in every year — and quite reasonably and understandably so. Being listed as an adviser on an *Almanac* implies that a body has done some advising, however, and it doesn’t seem right to burden people with a slice of the collective responsibility (or credit, if there is any) for a project in which they did not participate this time around. So, the list of board members in this *Almanac* is different from last year’s. The fact that people have moved on and off the list does not necessarily indicate anything about their commitment to the *Almanac*, nor does it affect our gratitude for the efforts of every one. And we are indeed very grateful for what is, with the completion of this *Almanac*, a decade of work.

TURNING THE PAGE:
A NEW SELECTION SYSTEM FOR 2015 AND BEYOND

It has been a good run, these past ten years, but now we are done with our original system for selecting exemplary legal writing. Starting with the eleventh *Almanac* (that's the next one, to be published in 2016, recognizing works published in 2015 and 1965), we are using a new system. But before we get to that, permit me, on behalf of everyone at the *Green Bag*, to once again thank all of our advisers for their generous contributions of their time, thought, good taste, and reputation-by-association. It has been, I would like to think, worth the trouble. Thank you very much, advisers.

Now, about the present and the future.

A. The New System

It is like the old system, with four exceptions:

- there is some division of labor at the nominations stage;
- only nominators get to vote — and all of them get to vote in all categories;
- the categories have changed a bit — we are starting small and hoping to manage things fairly well on a small scale early on, work out any kinks, and expand in the future; and
- the nominations cycle was Halloween-to-Halloween (cute but confusing); now it is the calendar year (dull but not so confusing).

B. Categories and Nominators

We're starting out in 2015 with four categories, each with its own nominators, and all with the same deadline: January 1, 2016.

- Category #1: Judicial Opinions •

Who can nominate? Any judge who issued a signed opinion in 2014 that is available in WestlawNext's "Cases" database.

What can they nominate? One or two signed judicial opinions issued in 2015 that are available in WestlawNext's "Cases" database. (If someone nominates more than two it won't be a problem — we will simply ask them at the end of the year to pick their two favorites from all their nominees.)

• Category #2: U.S. Supreme Court Briefs •

Who can nominate? Any member of the Supreme Court bar whose name is on the cover of a merits-stage brief — filed on behalf of a party or an amicus curiae — in a case decided by the Court on the merits in 2014. Also, any member of the Court's press corps.

What can they nominate? One or two briefs in cases decided by the Court on the merits in 2015. (Once we have a handle on this we will probably add other practice-related categories.)

• Category #3: Law Review Articles •

Who can nominate? Anyone who (a) authored a work with a 2014 publication date that is available in WestlawNext's "Law Reviews & Journals" database, and (b) was not a law student at the time.

What can they nominate? One work with a 1965 publication date in any law review at a U.S. law school. This is a test of durability and timeliness: What legal scholarship published 50 years ago is the most readable and worth reading today? (We will probably add other times in the future — 10, 25, and 100 years seem like good candidates — but for now we're starting simple.)

• Category #4: Books •

Who can nominate? Each year, starting this year, we will enlist a few respectable authorities to give us lists of their five favorite new law books (with short explanations, which we will publish with the listers' bylines in the *Almanac*). Those will be our nominees in the "Books" category. (We will probably treat other types of writing this way in the future — news reporting, scripts, and poetry seem like good candidates — but, again, for now we're starting simple.)

What can they nominate? This time around, any books about law with 2015 publication dates.

C. Winnowing and Voting

Voting will be conducted in January 2016.

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Who can vote? Anyone who (a) sends a valid nomination in any category to rdavies@greenbag.org, and (b) provides their snailmail address with the nomination (so we can send them a ballot) gets to vote in all categories.

What will they actually vote on? A ballot of finalists winnowed from the pools of nominees. The winnowing will be mostly a popularity-and-persuasion contest — opinions, briefs, and articles receiving the most nominations will make the ballot, as will those whose nominations are accompanied by the most persuasive explanations of their sterling qualities. The “Books” category will be an exception: it will be a merged list of the “five favorites” lists described above. We will probably divide the “Judicial Opinions” nominees into two categories — “Opinions for the Court” and “Dissents, Concurrences, Etc.” — when it comes time to vote.

D. Confidentiality

This is one area where there will be no change: Confidentiality of nominator-nominee and voter-nominee connections will be complete, as it always has been. The names of all nominators and voters will appear only in a long, plain, simple list with no indication of what anyone nominated or voted for. No titles or other honorifics, no precedence, no categories — just alphabetical order by last name as it has been on our website and in the *Almanac* since day one back in 2006.

I suppose the people making the “five favorites” lists of books are exceptions of a sort — everyone will know what their five favorites are because we are going to publish their short explanations with bylines. But that is all. Even for the book people, no one will know what they vote for in any category.

E. Publication

The old routine holds here as well. Every year we will publish as many of the top vote-getters as we can (or, for books, excerpts) in the *Almanac*.

F. Why Are We Doing This?

There are many reasons, big and small. Here are short versions of a few of the biggest:

First, we are trying to expand and diversify the pool of nominated works — by expanding and diversifying the community of participants in the selection process.

Second, we are trying, at the same time, to maintain (or perhaps even improve) the credibility of our results. (We think they have always been credible, due to the quality of our board of advisers.) To that end, we've created for each category a pool of nominators consisting of obviously qualified and interested experts (people who are sufficiently competent and committed to publish in the relevant category, and sufficiently active to have done so quite recently), and an overall pool of voters that is sufficiently large and diverse to offset any parochial tendencies among specialists in any one category.

Third, we are also trying to structure the whole process so that it is less burdensome and more enjoyable for all participants.

So, for example, focusing on judges to make the initial nominations of opinions and then inviting a wider range of people to vote — that “wider range” being all nominators in all categories, all of whom are experts on legal writing of some sort and have demonstrated their interest in the subject of writing excellence generally by nominating in their own categories — seems like a good thing to try. Nobody else has, to the best of our knowledge. Dealing with practitioners' writing and scholarship in pretty much the same way seems equally worthwhile: focusing on practitioners to make the initial selection of briefs and then letting a wider range of experts vote, and focusing on scholarly writers to make the initial selection of law-review writing and then letting a wider range of experts vote.

I expect that in the next few years we will enlarge (and perhaps also refine) our nominating pools for current categories, add new categories (legal journalism? student writing?), add new vintages for scholarly writing, and so on.

Suggestions are most welcome. Please send them to editors@greenbag.org. And please spread the word.

G. And Yes, We Are Paying a Steep Price

While we are optimistic about this new system, we are also unhappy with one feature of it. We will lose, temporarily, several superb (as in superbly knowledgeable, collegial, and sage) *Almanac* advisers who do not fit in any of the new categories of nominator-voters. But we hope to be able to invite them back soon, as this new system grows and evolves.

PREFACE

SHERLOCKIANA IN GENERAL
AND THE EXTRAORDINARY JULIAN WOLFF, M.D.
IN PARTICULAR

The theme of this year's *Almanac* is, as should be obvious from the cover, the world of Sherlock Holmes and, in particular, "The Adventure of the Norwood Builder," a Holmes story set in London in 1894 and first published in 1903. You will find here, among many other interesting and entertaining items, several versions of the "Norwood Builder" story, including a lawyerly annotated edition with contributions by several leading Holmes scholars (and an introduction by Andrew Jay Peck), a rare 1911 pamphlet edition from the David M. Rubenstein Rare Book & Manuscript Library at Duke University, and a couple of pages of the original manuscript from the Berg Collection at the New York Public Library (with an introduction by Jon Lellenberg).

In addition, as should be obvious from pages 1 and 2 of this *Almanac*, the *Green Bag* believes that full appreciation of a Sherlock Holmes story involves knowing the lay of the land. For that sort of thing there is no substitute for a map. We've done our best (*see* pages 1 and 2 above). But we probably have not lived up to the standard set by the late Julian Wolff, M.D., the Ptolemy of Sherlockian cartographers.¹ As a salute to his work — and for the benefit of our readers — we are reprinting (with the kind permission of his family) all 13 maps from his famous but hard-to-find *Sherlockian Atlas*.² Plate I ("London") is reproduced on pages 12 and 13 below. Plates II through XIII appear (sometimes accompanied by details) in sequence as the opening images of each month in this *Almanac*. But first, here are Wolff's foreword to his atlas, and the table of contents with its charming illustration:

¹ See, e.g., Jon Lellenberg, *Cartographer Royal of the BSI*, FRIENDS OF THE SHERLOCK HOLMES COLLECTIONS, Dec. 2002, at 1; Peter B. Flint, *Dr. Julian Wolff*, 85; *Led a Club for Fans Of Sherlock Holmes*, N.Y. TIMES, Feb. 16, 1990.

² JULIAN WOLFF, *THE SHERLOCKIAN ATLAS* (1952) (privately printed limited edition; "Approximately ~~one~~ 3 hundred copies of this small brochure have been printed for friends of Sherlock Holmes & Dr. Watson [signed] Julian Wolff").

FOREWORD

Flattering requests which have been from many quarters received indicate that some demand for these maps still exists and it seems appropriate to make the entire collection available for the one hundredth birthday of Dr. Watson, that old soldier who will never fade away. Therefore this parvum opus is now offered to a world which may not yet be prepared and to experts who will probably agree that it is not the last word on the subject.

Included in this irregular atlas are the five maps which originally appeared in Edgar Smith's Baker Street and Beyond: THE WORLD, EUROPE, ENGLAND, LONDON and UNITED STATES. IT IS FULL OF OLD HOUSES, HIS LAST BOW WINDOW, OPERATION REICHENBACH and DARTMOOR were previously published in the old Baker Street Journal, notorious for its missing three quarters. The sketch on the contents page is by the old master, Frederic Dorr Steele, and this is its first appearance in print.

J.W.

33 Riverside Drive
New York 23, N.Y.

Foreword, in JULIAN WOLFF, THE SHERLOCKIAN ATLAS (1952)

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(The Hound of the Baskervilles.)

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Contents, in JULIAN WOLFF, THE SHERLOCKIAN ATLAS (1952)



Plate I: England, in JULIAN WOLFF, THE SHERLOCKIAN ATLAS (1952) (left side)

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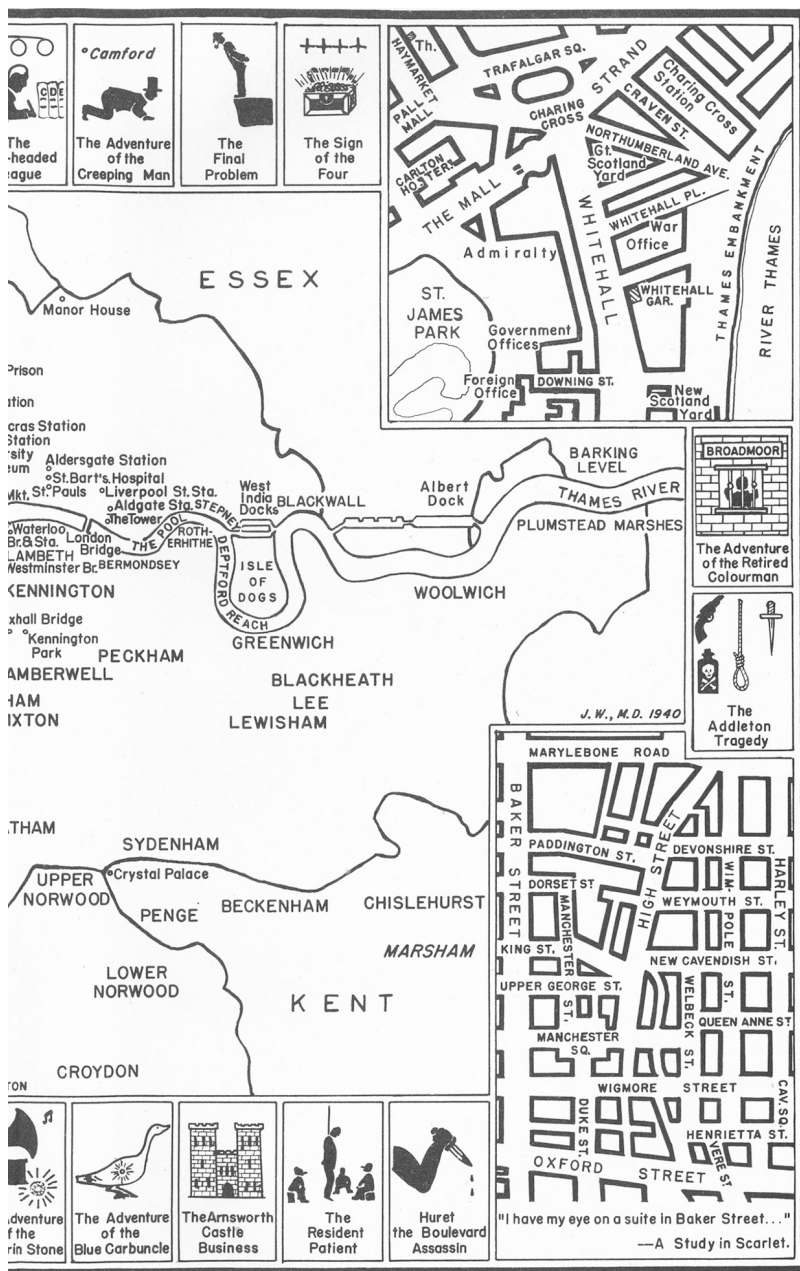


Plate I: England, in JULIAN WOLFF, THE SHERLOCKIAN ATLAS (1952) (right side)

HOMER KEEPS NODDING . . .

We continue to struggle, and fail, to produce a flawless big fat book in a hurry. Here is the only error we are sure we made — there are others, no doubt — in the 2014 *Almanac*:

Page 137: There should be a closed parenthesis after “1986” at the bottom of the page.

Blessed as we are with intelligent and attentive readers, we are confident that all our errors will eventually be brought to our attention. Consider, for example, this useful catch by Christopher G. Bradley of Austin, Texas:

Almanac & Reader 2012, pages 285 & 294: As I made my way (belatedly) through your varied and engaging *Almanac & Reader 2012*, I noticed an error. In Rex Stout’s “The Last Drive,” you include a “Synopsis of Preceding Chapters” on page 285, just before Chapter IV. But the Synopsis in fact includes events from Chapter IV itself and not just the preceding chapters, and therefore I believe it should have been placed instead at the beginning of Chapter V, which begins on page 294. (While the Synopsis acted as a “spoiler” of Chapter IV, I will add I found the story to be a great read nonetheless.) You may well have corrected this error already. On the off-chance you have not, I knew you would be zealous to do so.

“The Last Drive” is included (with the above-noted error corrected) in a new book — *The Last Drive and Other Stories* (Mysterious Press/Open Road, May 2015) (Ira Brad Matetsky, editor). The volume also includes ten other early Rex Stout stories that have never been reprinted since their magazine publications a century ago.

IN OTHER BUSINESS

Our goals remain the same: to present a fine, even inspiring, year’s worth of exemplary legal writing — and to accompany that fine work with a useful and entertaining potpourri of distracting oddments. Like the law itself, the 2014 exemplars in this volume are wide-ranging in subject, form, and style. With any luck we’ll deliver some reading pleasure, a few role models, and some reassurance that the nasty things some people say about legal writing are not entirely accurate.

PREFACE



Finally, the *Green Bag* thanks you, our readers. Your continuing kind remarks about the *Almanac* are inspiring. The *Green Bag* also thanks our Board of Advisers for nominating and selecting the works recognized here; O'Melveny & Myers LLP (especially Nadine Bynum, Marjorie Inparaj, and Greg Jacob) and the George Mason University School of Law for generous support; and the many members of the Sherlockian community generally and the Baker Street Irregulars particularly who pitched in to make this *Almanac* much better than it might have been. And thanks especially to Peter Blau, whose byline appears nowhere in this book, but whose generous, humorous, literate, and encyclopedic influence pervades it, and whom we salute, elliptically, on the cover.

Ross E. Davies
January 29, 2015



Medical life is full of dangers and pitfalls, and luck must always play its part in a man's career. . . .

I made £154 the first year [1882], and £250 the second, rising slowly to £300, which in eight years I never passed, so far as the medical practice went. In the first year the Income Tax paper arrived and I filled it up to show that I was not liable. They returned the paper with "Most unsatisfactory" scrawled across it. I wrote "I entirely agree" under the words, and returned it once more. For this little bit of cheek I was had up before the assessors, and duly appeared with my ledger under my arm. They could make nothing, however, out of me or my ledger, and we parted with mutual laughter and compliments.

Sir Arthur Conan Doyle,
MEMORIES AND ADVENTURES 70 (1924);
cf., e.g., Preface, in 2013 GREEN BAG ALM. 1, 3;
Preface, in 2014 GREEN BAG ALM. 1, 3

JL

RECOMMENDED READING

[parallel citation: 2015 Green Bag Alm. 16]

We have tallied the ballots and printed the top vote-getters in this book. They are the ones listed in the Table of Contents above and marked in the list below by a little ★. There were plenty of other good works on the ballot. We list them here. Congratulations to all.

• • • •

OPINIONS FOR THE COURT

Samuel A. Alito, Jr., *Burt v. Titlow*, 134 S.Ct. 10 (2013)

Fortunato P. Benavides, *Silva-Trevino v. Holder*, 742 F.3d 197 (5th Cir. 2014)

★ Frank H. Easterbrook, *National Organization for Women, Inc. v. Scheidler*, 750 F.3d 696 (7th Cir. 2014)

★ Neil M. Gorsuch, *Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir. 2014)

Patrick E. Higginbotham, *Fisher v. University of Texas at Austin*, 758 F.3d 633 (5th Cir. 2014)

Sandra Segal Ikuta, *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014)

Alex Kozinski, *Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014)

Michael J. McShane, *Geiger v. Kitzhaber*, 994 F.Supp.2d 1128 (D. Or. 2014)

J. Paul Oetken, *Duffey v. Twentieth Century Fox Film Corp.*, 14 F.Supp.3d 120 (S.D.N.Y 2014)

★ Richard A. Posner, *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014)

Richard A. Posner, *Klinger v. Conan Doyle Estate, Ltd.*, 755 F.3d 496 (7th Cir. 2014)

Richard A. Posner, *Medlock v. Trustees of Indiana University*, 738 F.3d 867 (7th Cir. 2013)

★ John G. Roberts, Jr., *Riley v. California*, 134 S.Ct. 2473 (2014)

Robin S. Rosenbaum, *Berry v. Leslie*, 767 F.3d 1144 (11th Cir. 2014)

Kevin G. Ross, *State v. Schmid*, 840 N.W.2d 843 (Minn. Ct. App. 2013)

David S. Tatel, *Amer v. Obama*, 742 F.3d 1023 (D.C. Cir. 2014)

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- Sidney R. Thomas, *Hawkins v. Franchise Tax Board of California*, 769 F.3d 662 (9th Cir. 2014)
- ★ Diane P. Wood, *Empress Casino Joliet Corp. v. Johnston*, 763 F.3d 723 (7th Cir. 2014)

CONCURRENCES, DISSENTS, ETC.

- Harry T. Edwards, *Gilardi v. U.S. Dept. of Health and Human Services*, 733 F.3d 1208 (D.C. Cir. 2013)
- ★ Emilio M. Garza, *Fisher v. University of Texas at Austin*, 758 F.3d 633 (5th Cir. 2014)
- Ruth Bader Ginsburg, *Veasey v. Perry*, 135 S.Ct. 9 (2014)
- Richard A. Posner, *Frank v. Walker*, 2014 WL 5326463 (7th Cir. 2014)
- ★ Richard C. Tallman, *Henry v. Ryan*, 766 F.3d 1059 (9th Cir. 2014)
- ★ Don R. Willett, *El-Ali v. State*, 428 S.W.3d 824 (Tex. 2014)

BOOKS

- Bruce Ackerman, *We the People, Volume 3: The Civil Rights Revolution* (Harvard University Press 2014)
- ★ Joan Biskupic, *Breaking In: The Rise of Sonia Sotomayor and the Politics of Justice* (Sarah Crichton Books/Farrar, Straus and Giroux 2014)
- Ward Farnsworth, *Restitution: Civil Liability for Unjust Enrichment* (University of Chicago Press 2014)
- Damian Fowler, *Falling Through Clouds: A Story of Survival, Love, and Liability* (St. Martin's Press 2014)
- ★ Bryan A. Garner, *Black's Law Dictionary* (Thomson Reuters 2014) (10th edition)
- Morris B. Hoffman, *The Punisher's Brain: The Evolution of Judge and Jury* (Cambridge University Press 2014)
- David Lat, *Supreme Ambitions: A Novel* (American Bar Association 2014)
- Richard A. Posner, *Reflections on Judging* (Harvard University Press 2013)
- Leslie H. Southwick, *The Nominee: A Political and Spiritual Journey* (University Press of Mississippi 2013)
- ★ Laurence Tribe and Joshua Matz, *Uncertain Justice: The Roberts Court and the Constitution* (Henry Holt and Co. 2014)
- Lea VanderVelde, *Redemption Songs: Suing for Freedom Before Dred Scott* (Oxford University Press 2014)

RECOMMENDED READING

LONG ARTICLES

- Nicholas S. Brod, *Rethinking a Reinvigorated Right to Assemble*, 63 Duke Law Journal 155 (2013)
- H.L.A. Hart, *Discretion*, 127 Harvard Law Review 652 (2013)
- ★ Toby J. Heytens, *Reassignment*, 66 Stanford Law Review 1 (2014)
- Alfred S. Konefsky and Barry Sullivan, *In This, the Winter of Our Discontent: Legal Practice, Legal Education, and the Culture of Distrust*, 62 Buffalo Law Review 659 (2014)
- ★ Andrew Norris, *A Maelstrom of International Law and Intrigue: The Remarkable Voyage of the S.S. City of Flint*, 54 American Journal of Legal History 73 (2014)
- Ilya Shapiro, *Fear and Loathing at One First Street*, 18 Texas Review of Law & Politics 358 (2014)
- Geoffrey C. Shaw, *H.L.A. Hart's Lost Essay: Discretion and the Legal Process School*, 127 Harvard Law Review 666 (2013)
- J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 Vanderbilt Law Review 1099 (2014)

NEWS & EDITORIAL

- ★ David Cole, *Can Privacy Be Saved?*, New York Review of Books (March 6, 2014)
- John Elwood and Conor McEvily, *Relist Watch*, SCOTUSblog, www.scotusblog.com (October 9, 2014)
- Jennifer Gonnerman, *Before the Law*, The New Yorker (October 6, 2014)
- Scott H. Greenfield, *Horse-Trading Constitutional Rights*, Simple Justice, blog.simplejustice.us (October 25, 2014)
- ★ Linda Greenhouse, *With All Due Deference*, New York Times (July 23, 2014)
- Jeff Hadden, *The limits of judicial immunity*, Detroit News (August 22, 2014)
- ★ Adam Liptak, *The Polarized Court*, New York Times (May 10, 2014)
- Tony Mauro, *On Second Thought . . .*, National Law Journal (November 4, 2013)
- Jeffrey Toobin, *The Solace of Oblivion*, The New Yorker (September 29, 2014)

MISCELLANY

- John D. Bates, *Letter to Honorable Patrick J. Leahy* (August 5, 2014)
- Stephen B. Burbank, *Re: Jimmy Graham Franchise Player Tender, NFLPA v. NFL* (July 2, 2014)

RECOMMENDED READING

Tristan L. Duncan et al., *Appellant's Brief, Petrella v. Brownback*, Nos. 13-3334 & 14-3023 (10th Cir. March 31, 2014)

★ Drew Justice, *Response to Government's Motion in Limine Two, State v. Powell* (Cir. Ct. Williamson County, Tenn. [2013]) (No. I-CR-086639-B)

★ Jon R. Muth and Patrick M. Jaicomo, *Amicus Curiae Brief of the Students of Father Gabriel Richard High School, Ann Arbor, Michigan, People v. Carp*, 852 N.W.2d 801 (Mich. 2014), 2014 WL 814722

Barbara B. Rollins, *The Lawyers, in Lawyer Poets and That World We Call Law* 190 (Pleasure Boat Studio 2013)

★ Ilya Shapiro, *Brief of Amici Curiae Cato Institute and P.J. O'Rourke in Support of Petitioners, Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334 (2014), 2014 WL 880942

Donald B. Verrilli, Jr., *Memorandum for Respondents in Opposition, Little Sisters of the Poor v. Sebelius* (U.S. January 2014)



I went to Holmes' grave yesterday and I laid a big wreath on it — not as from myself, but from "The Authors Society." In one beautiful graveyard lie Holmes, Lowell, Longfellow, Channing, Brooks, Agassiz, Parkman & ever so many more.

A. Conan Doyle,

Letter to Mary Doyle, Nov. 2, 1894, in

JON LELLENBERG ET AL., ARTHUR CONAN DOYLE:

A LIFE IN LETTERS 340 (2007)