



2003

Obscure but Interesting: Remembering Volume 1, Number 2

Vic Fleming

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Recommended Citation

Vic Fleming, *Obscure but Interesting: Remembering Volume 1, Number 2*, 25 U. ARK. LITTLE ROCK L. REV. 245 (2003).

Available at: <https://lawrepository.ualr.edu/lawreview/vol25/iss2/6>

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*Vic Fleming**

When I moved to Arkansas from North Carolina in 1975 to attend law school, I was not thinking about law review.¹ I was thinking about passing. Having taken a B.A. in English from Davidson College in 1973, I was twenty-three years old and had spent two years in Chapel Hill, where my wife was in graduate school. Working various jobs to bring in a little money—cook, waiter, mail-room clerk—I was also laboring mightily on the side, trying to write the Great American Something.

My plan had been to publish articles, on obscure but interesting topics, for a year, raking in freelance fees from leading magazines. Then I would enter graduate school, cruise to a Ph.D., and teach Shakespeare on a rural hillside to intellectual upperclassmen at a private college. In my spare time, I would write best-selling books, on obscure but interesting topics, raking in royalties.

As my stack of rejection slips grew, I spoke with recent graduates of the program I had planned to enter. The top students were grateful, I learned, to find jobs teaching composition to under-motivated freshmen at urban universities. Many were unemployed. None, as I recall, had a book deal in the works.

Bailing out before matriculation, I decided to work for another year. I would refocus my writing and consider other options, one of which was law school. Since childhood I had been encouraged by certain family members to consider law. “You need to be a lawyer,” my mother would say, “because you argue so much!”

“I do not argue,” I would respond, “and there’s really no evidence to support your position.”

In early 1975 I took the LSAT and, at the urging of my father-in-law, O.C. Burnside² of Lake Village, applied for admission to the up and coming

* Vic Fleming is a judge for the Little Rock District Court, Second Division. A 1973 graduate of Davidson College and a 1978 graduate of the University of Arkansas at Little Rock School of Law, Judge Fleming served as Executive Editor of Volume 1, Number 2 of the *UALR Law Journal*. He was the 1999 recipient of the Arkansas Bar Association Maurice Cathey Award for Outstanding Contributions to the *Arkansas Lawyer* magazine and the 2002 recipient of an Arkansas Bar Foundation Writing Excellence Award. From 1981–2001 he served on the Arkansas Bar Foundation’s Writing Awards Committee, chairing it for twelve years.

1. In 1998, beginning with volume 21, the *UALR Law Journal* became the *UALR Law Review*. For purposes of this article, the word “review” is used exclusively in reference to that periodical.

2. Ohmer C. “Googie” Burnside was admitted to the Arkansas bar following his

University of Arkansas at Little Rock (UALR) School of Law. This urban institution, situated in the middle of the central Arkansas legal community, would provide me with a top-notch legal education, he said. The move would also bring his daughter much closer to home. I studied the literature he sent me. The place looked interesting, if a bit obscure.

The pile of rejection slips doubled in size during my second year in Chapel Hill. Thus, the acceptance letter from the UALR School of Law was a welcome sight. With the intent to abandon creative writing altogether, I moved to Little Rock—right after mailing an essay, on an obscure but interesting topic, to the Burlington Writers' Festival in North Carolina.

My early academic standing was not sufficient to elicit an invitation to join the *UALR Law Review* ("*Law Review*"), that bastion of obscure, yet somehow interesting, legal writing. But my grades were not too far off the mark, and, frankly, I was jealous of those who had been chosen. Besides that, early in the first semester, I learned that the essay I had sent to Burlington had won first prize, which included, I believe, twenty-five dollars. I was suddenly an award-winning professional writer!

Additionally, without giving it much thought, that first semester I had written a satirical piece on judicial language in appellate opinions. I shared it with my criminal law professor, the late Colonel James Murphy,³ who gave it high praise and insisted I submit it to *The Student Lawyer*, a publication of the American Bar Association's Law Student Division. Lo and behold, it was published.⁴ Not only that, the editor of *The Student Lawyer* asked me to write a feature article on the "all or nothing" concept of law school exams⁵ for a future issue. I was on a roll.

The decision to give up writing was abandoned, and when the *Law Review* writing competition was announced, I was ready with a case note. I dissected a recent case in which the Arkansas Supreme Court had tinkered with the third party beneficiary doctrine in contracts law—obscure stuff, and not very interesting. This dry and dreadful item, which, mercifully, was never published, was nevertheless sufficient to bring me aboard the *Law Review* staff.

graduation from the University of Arkansas Law School in Fayetteville in 1947. After several years with Tennessee Gas and Transmission Company, he settled into a general law practice in his hometown of Lake Village, where he continues to reside in retirement.

3. Colonel James Murphy (ret.) received law degrees from Cumberland Law School (LL.B. 1934), Tulane Law School (J.D. 1951), and New York University (LL.M. 1965). He served on the faculty of the University of Arkansas at Little Rock School of Law (and its predecessor, the Little Rock Division of the University of Arkansas Law School) from 1965–1980, where he taught criminal law and procedure, as well as family law.

4. See Victor A. Fleming, *Libeling the Language*, *STUDENT LAW.*, Jan. 1976, at 4.

5. See Victor A. Fleming, *Sudden Death Exams*, *STUDENT LAW.*, Sept. 1976, at 18.

My obsession with grammar, punctuation, and accuracy of allusion so impressed my classmate and friend Diane Mackey⁶ that, on becoming Editor-in-Chief, she asked me to serve as Executive Editor. She said I would be “perfect for the job” because I was such a “citation guru and expert on the English language.” Besides that, as I recall, her first choice had turned down the job. Never one to be turned off by flattery, I accepted.

Once in the Executive Editor’s slot, I learned more than I knew there was to learn about checking the citations in law review articles. When asked to write this memoir, I had a series of cite-check flashbacks to the summer of 1977. As law school memories go, nothing in general supersedes the image of stalking obscure (but interesting) legal sources in the library stacks of the Pulaski County Bar Center, where for years the UALR School of Law and its library were exclusively located. That place, with its three levels of books, plus the scenic view of the Arkansas River from each level, became a metaphor for my legal journey (but that is a topic for another article).

While my memory has faded some with the passage of time, recalling the summer of 1977 brought to mind many highlights of my tenure as Executive Editor. Showing the type of courage that would later typify her exemplary legal career, Diane went out on a creative limb in accepting for publication a book review⁷ written by Henry Woods,⁸ who at the time was a principal in McMath, Leatherman & Woods and one of Arkansas’s leading trial lawyers. Gingerly rewriting more than a few sentences of this item was a trial-by-fire initiation rite for me. This federal judge-to-be was a past president of the Arkansas Bar Association and had written a treatise that was awaiting publication,⁹ and *I* was his editor!

Whatever else may be said, a review of *The Annotated Sherlock Holmes* was not standard law review fare. Being a fan of Sir Arthur Conan Doyle myself, I was charged with making that cutting-edge project the best that it could be. My first impression of the earliest draft of Judge Woods’s

6. Diane Mackey was admitted to the Arkansas bar in 1978, following her graduation from the University of Arkansas at Little Rock School of Law. She clerked for United States District Judge G. Thomas Eisele; served several years as an Assistant United States Attorney; and is now a partner with Friday, Eldredge & Clark of Little Rock.

7. See Henry Woods, *The Annotated Sherlock Homes*, 1 U. ARK. LITTLE ROCK L.J. 407 (1978) (book review).

8. Henry Woods served as United States District Judge for the Eastern District of Arkansas from his appointment to that post by President Jimmy Carter in 1980 until his death on March 14, 2002. Admitted to the Arkansas bar in 1940, he served six years as an agent for the Federal Bureau of Investigation before beginning a law practice in Texarkana. In 1969 he and former Governor Sid McMath, representing an injured plaintiff, recovered the first million-dollar jury verdict ever awarded by an Arkansas jury.

9. See HENRY WOODS, *COMPARATIVE FAULT—THE NEGLIGENCE CASE* (1978). A second edition of this work was released in 1987, as well as a third edition in 1996, under the title *Comparative Fault*.

review was that while his use of the English language was grammatically flawless, it was a bit verbose in spots. I recall the trepidation with which I approached the author on a late summer's afternoon, unsure how he might react to my having parsed his compound sentences. Ever the gentleman, Judge Woods acted as though he did not even notice, treating me as an author treats an editor. I left his office uplifted with confidence.

A second memorable experience as Volume 1, Number 2 progressed toward publication, was the "Perroni Problem." Sam Perroni,¹⁰ who at the time was an Assistant United States Attorney for the Eastern District of Arkansas, had written an article on impeaching witnesses with prior inconsistent statements.¹¹ The *problem* was that, among my team of cite-checkers and me, no one could be found who had yet taken Evidence.

Sam's article was pristinely written and well-organized, but it also was deep into the nuances of evidentiary rulings by various courts throughout history. By *deep* I mean 147 footnotes, with citations to British cases from the 1600s and 1700s, not to mention multiple cites to Wigmore,¹² Weinstein,¹³ and McCormick.¹⁴ I spent what seemed like weeks in the stacks with Sam's article. Often I was just trying to minimize the degree of stupidity I would feel the next day when asking him about a phrase or cite that had me bumfuzzled. To this day I believe that dialoguing with Sam and editing his article gave me an edge in the following semester's Evidence course, where I was able to garner the American Jurisprudence Award for the highest exam grade.

My most vivid *Law Review* memory, however, centers on a last-minute project no one had anticipated. As our final deadline drew nigh, Diane and I had become increasingly worried about an out-of-state lawyer who had promised a dynamite article on some timely and topical issue (which neither Diane nor I can now remember). At some critical juncture, it became clear that the author was not going to deliver. All deadlines had passed, and we were a brick shy of a load, an article shy of an issue.

Diane and I caucused about this crisis. Would we try to solicit another article from a local lawyer? If so, who would we dare ask to write something scholarly on such a short deadline? The articles we had finished work-

10. Samuel A. "Sam" Perroni was admitted to the Arkansas bar following his graduation from the University of Arkansas Law School, Little Rock Division, in 1974. After serving as an Assistant United States Attorney for five years, Sam entered private practice in Little Rock and serves as a principal in Perroni & James.

11. See Perroni, *Impeachment of One's Own Witness by Prior Inconsistent Statements Under the Federal and Arkansas Rules of Evidence*, 1 U. ARK. LITTLE ROCK L.J. 277 (1978).

12. JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* (rev. ed. 1970).

13. JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S EVIDENCE* (1977).

14. CHARLES T. MCCORMICK ET AL., *MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE* (2d ed. 1972).

ing on had been written months earlier. There was no time. We would have to go with a shorter issue than we had promised, unless . . .

Beset by a wild-haired thought and being twenty-five years old (not to mention an award-winning professional writer), I could not keep my mouth shut. I had become fascinated with the writings of Franz Kafka during my senior year in college. I had read his every published word¹⁵ and at least one biography.¹⁶ During my rejection slip collecting days, I had even read every published commentary I could find on "Before the Law," a brief parable that Kafka, himself a lawyer, wrote in 1914 or 1915 and later incorporated into *The Trial*, his first novel. I had kept notes on what I had read. I had even published a guest column in the UALR student newspaper on this parable in March of 1977.¹⁷

Stressing that Kafka's work was relevant to our "mission," I told Diane that I thought I could write an article that would work for Volume 1, Number 2. It would be obscure, I warned, but interesting. It would contrast the ideal of the Law, as we were being taught it, with the plight of Kafka's man from the country, who travels to the door of the Law, seeking admittance, and then withers and dies outside the Law because he does not know how to get past the doorkeeper. It would contain, I said, literary criticism, analysis of metaphors, and possibly a bit of my own soul.

Diane thought it over, but not for long. We were desperate, and she liked the idea. Again showing her creative courage, she told me to "go for it." I searched my closets for the shoebox in which I had kept my Kafka research from three summers before. I went to the public library and

15. Franz Kafka (1883–1924) was born in Prague, Bohemia, Austria-Hungary, studied at Prague's Karl-Ferdinand University, and was awarded a doctorate in jurisprudence. He used his legal education in his position with the Workers' Accident Insurance Institution for about five years (1917–1922), writing in his spare time, until repeated sick leaves due to his tuberculosis forced him to retire early. Most of Kafka's works, including all three of his novels—*The Trial* (1925), *The Castle* (1926), and *Amerika* (1927)—were published posthumously. His collected short stories fill one volume. See, e.g., FRANZ KAFKA, *THE COMPLETE STORIES* (Nahum N. Glatzer ed., 1946). Other published items include two volumes of diaries and several collections of letters. See FRANZ KAFKA, *DIARIES 1910–1913* (Max Brod ed., Joseph Kresh, trans., Schocken Paperback ed., Schocken Books 1965) (1948); FRANZ KAFKA, *DIARIES 1914–1923* (Max Brod ed., Martin Greenberg & Hannah Arendt, trans., Schocken Paperback ed., Schocken Books 1965) (1949); see also FRANZ KAFKA, *LETTER TO HIS FATHER* (Ernst Kaiser & Eithne Wilkins trans., Schocken Books 1953) (1919); FRANZ KAFKA, *LETTERS TO FELICE* (Erich Heller & Jürgen Born eds., James Stern & Elisabeth Duckworth trans., Schocken Books 1973) (1953); FRANZ KAFKA, *LETTERS TO FRIENDS, FAMILY, AND EDITORS* (Richard Winston & Clara Winston trans., Schocken Books 1977); FRANZ KAFKA, *LETTERS TO MILENA* (Willy Haas ed., Tania Stern & James Stern trans., Schocken Books 1974).

16. See MAX BROD, *FRANZ KAFKA: A BIOGRAPHY* (G. Humphreys Roberts & Richard Winston trans., Schocken Paperback ed. 1963) (1937).

17. See Vic Fleming, *Doors of the Law*, U. ARK. LITTLE ROCK F., Mar. 23, 1977, at 2.

checked out a dozen books that I had already read (for cite-checking, of course). And I began to burn the proverbial midnight oil. Four thousand words and forty-nine footnotes later, the *Law Review* had its first article¹⁸ for indexing in the category of "Law and Literature."

The parable is worth retelling. In *The Trial*, the protagonist, Joseph K., goes to a cathedral to visit a priest about the difficulties involved in his own legal case. In the first chapter of the novel, K. is told, "[Y]ou are arrested . . . Proceedings have been instituted against you, and you will be informed of everything in due course."¹⁹ Over 250 pages later, despite numerous efforts on his part, including conferences with a lawyer and interviews with various authorities, K. is unable to learn even a scintilla about the charges or how the case will proceed. When K. tells the priest that K. trusts the priest more than "any of the others . . . who belong to the Court," the priest replies, "You are deluding yourself about the Court." K.'s delusion, the priest says, is described in "the writings which preface the Law."

The priest then recites the parable, which begins, "[B]efore the Law stands a doorkeeper [to whom] there comes a man from the country who begs for admittance to the Law." The doorkeeper indicates that he cannot let the man in just now, but when the man asks if he might get in later, he's told that that's a possibility. The door "into the Law" is open. The doorkeeper steps aside. The man from the country peers in. The doorkeeper laughs and dares the man to "try to get in without my permission. But note that I am powerful. And I am only the lowest doorkeeper. From hall to hall, keepers stand at every door, one more powerful than the other. And the sight of the third man is already more than even I can stand."

The man from the country believes that the Law "should be accessible to everyone at all times." But, examining this guard, "in his furred robe, with his huge pointed nose and long thin Tartar beard, he decides that he had better wait until he gets permission to enter." The doorkeeper gives the man a stool, where he then "sits waiting for days and years," attempting repeatedly to be allowed inside.

From time to time, the doorkeeper engages the man in brief conversation, asking about his home and such, but "the questions are put quite impersonally, as great men put questions, and always conclude with the statement that the man cannot be allowed to enter yet." Well-equipped for his journey, the man tries to bargain his way in, parting "with all he had . . . in hope of bribing the doorkeeper." Continuing to deny admittance, the door-

18. See Victor A. Fleming "Before the Law": An Analysis for the Legal Profession, 1 U. ARK. LITTLE ROCK L.J. 321 (1978).

19. See FRANZ KAFKA, *THE TRIAL* 5-6 (Willa Muir et al. trans., Vintage Books ed. 1969) (1925).

keeper accepts every gift, saying, "I take this only to keep you from feeling that you have left something undone."

The man "forgets about the other doorkeepers," so that "this one seems to him the only barrier between himself and the Law." At first the man curses his fate aloud, but later, "as he grows old, he only mutters to himself." The man becomes "childish, and since, in his prolonged study of the doorkeeper, he has learned to know even the fleas in his fur collar, he begs the very fleas to help him persuade the doorkeeper to change his mind."

At last his eyesight begins to fail and the man "does not know whether the world is really darkening around him or whether his eyes are deceiving him," but he perceives through the darkness "a radiance that streams inextinguishably from the door of the Law." As he is about to die, "all that he has experienced during the whole time of his sojourn condenses in his mind into one question, which he has never yet put to the doorkeeper." He beckons the guard, who "has to bend far down to hear him, for the difference in size between them has increased very much to the man's disadvantage." The doorkeeper shouts, "What do you want to know now? . . . You are insatiable."

The man says, "Everyone strives to attain the Law . . . How does it come about, then, that in all these years, no one has come seeking admittance but me?"

Perceiving that the man is dying, the doorkeeper shouts into the man's ear, "No one but you could gain admittance through this door, since this door was intended for you. I am now going to shut it."²⁰

Reflecting on the process that produced my eleven-page first experience as a legal periodical author was the consummate flashback. Here I was, with all this obscure (but interesting) research, writing an article that was guaranteed to be published in the quintessential journal—a law review! Coaxing myself out of the paralysis I experienced during the first few hours of reviewing my index cards from years earlier, I finally made a frontal assault on the task.

In my most pseudo-scholarly tone, I noted a commentary that suggested the parable "confirms the incompatibility between the Law and human consciousness."²¹ Continuing, I cited another commentary, holding that the parable was a "Spinozistic argument, one sentence of which merely serves to invalidate the other."²² Looking back on this project, I laugh now at my sense of inflation. What did I know of human consciousness or of Spinoza? A thimble would have been a more than ample container for my

20. *See id.* at 267–69.

21. Fleming, *supra* note 18, at 324–25 (citing FRANZ KUNA, FRANZ KAFKA: LITERATURE AS CORRECTIVE PUNISHMENT 133 (1974)).

22. *Id.* at 325 (citing Egon Vietta, *The Fundamental Revolution, in* THE KAFKA PROBLEM 338 (Angel Flores ed., 1946)).

knowledge on matters of existential philosophy. But, being a twenty-five-year-old law student (not to mention an award-winning professional writer), I moved on, alluding to one of my wife's favorite authors, who had compared the Law and its doorkeeper to modern bureaucracy.²³

In retrospect, I cannot imagine that my self-centered approach to that article would, under any circumstances, have produced less than at least one footnote for each source I had consulted years earlier. I even cited myself, noting in the opening paragraph that the parable "has been said . . . to describe 'the American system of law so well that it is hard to understand why it is not given more recognition in legal writings.'"²⁴ (That remark had been made, to my knowledge, only because I had made it!)

I recall the difficulty I had in bringing that article to a conclusion. I cringe when I read the 179-word final paragraph. But as I force myself to consider it, the following jumps out at me: "Adequate preparation for the particular goal—whether it be a jury verdict, a favorable . . . settlement, . . . election to a judgeship, or whatever—will lead to true entitlement and obviate the necessity for any close encounters with intimidating doorkeepers."²⁵ To me today it reads like something out of a motivational speech or a stewardship sermon.

Of course, I had no idea when I wrote those words that nineteen years later I would test them in a judicial race. But I would like to think that by that point in my career, I had employed them repeatedly in the jury verdict, favorable settlement, and *whatever* categories.

The Kafka parable, now widely published on Web sites, has since been used by many others to illustrate legal principles—proving that my idea was hardly novel. Moreover, the article that seemed so splendiferous to me in 1977 was apparently superfluous to the rest of the world, as a recent Shepardization reflects that it has never (until now!) been cited in another work.

I went on to write a few more obscure and, I hope, interesting nonfiction items during the ensuing twenty-five years, including more *Law Review* stuff.²⁶ I owe a debt of gratitude to the UALR William H. Bowen School of

23. *Id.* (citing ERICH FROMM, *THE REVOLUTION OF HOPE: TOWARD A HUMANIZED TECHNOLOGY* 6–7 (1968)).

24. *Id.* at 321 (citing Victor A. Fleming, *Doors of the Law*, U. ARK. LITTLE ROCK F., Mar. 23, 1977, at 2).

25. *Id.* at 331.

26. See, e.g., Fleming, *Amendment 7 Referendum: Power to the People*, 2 U. ARK. LITTLE ROCK L.J. 65 (1979); Fleming, *Municipal Gone District: Jurisdiction in New Court of First Resort*, 24 U. ARK. LITTLE ROCK L. REV. 277 (2002). (There I go, citing myself again!) (EDITORS' NOTE: Actually, since abandoning his abandonment of creative writing, Judge Fleming has been published widely. He is the author of *Real Lawyers Do Change Their Briefs* (1989) and *Perry's Dead! (And the 'Juice' Is Loose)* (1995), and editor of the Arkansas Bar Association *Law Office Handbook* (1993) and *The Sovereignty of Grace* by J. Allen

Law for the *Law Review* experience I was privileged to have as a student. As this periodical celebrates its twenty-fifth anniversary, my class (1978) will have its twenty-fifth reunion. I congratulate the current editors and staff on the excellent work they have done in recent years and commend them on their vision and creative leadership in making this issue of the *Law Review* something special.

Smith (1992). He wrote a quarterly column ("Law, Literature & Laughter") for *The Arkansas Lawyer* from 1984–1999 and a weekly column ("I Swear") for Little Rock's *The Daily Record* from 1993–2000. See also, e.g., Vic Fleming, *Breaking Branches and Widening Doorways*, ROSE (Emmanuel Church, Athens, Ga.), Winter-Spring 2002, at 1; Vic Fleming, *Clown Archetype Emerges To Heal*, HUMOR CONNECTION (Ass'n Applied & Therapeutic Humor, Phoenix, Az.), July/Aug. 2002, at 3; Vic Fleming, *Outreach for Y2K and Beyond*, HIGHWAY TO JUSTICE (Am. Bar Ass'n & Nat'l Traffic Safety Admin.), Summer 2000, at 4; Vic Fleming, *Spared Over*, ROSE (Emmanuel Church, Athens, Ga.), Summer-Fall 2002, at 18; Victor A. Fleming, *About Real Lawyers*, in LAURENCE BEHRENS, MAKING THE CASE—AN ARGUMENT READER 22 (2001) (appearing in a college writing text between Jonathan Swift, *Gulliver on Lawyers*, in BEHRENS, *supra*, at 20, and Scott Turow, *The Great Perini*, in BEHRENS, *supra*, at 26); Victor A. Fleming, *About Real Lawyers*, TRIAL, Sept. 1993, at 84; Vic Fleming, *Campus Court/Alcohol Awareness: Outreach for Y2K and Beyond*, ATLA DOCKET (Ark. Trial Lawyers Ass'n, Little Rock, Ark.), Winter 2000, at 22; Vic Fleming & Mary Ann Aguirre, *Courage To Live 2000: Taking a Positive Step*, NJC ALUMNI, Fall 2000, at 20; Vic Fleming, *Defining Our Drinking Responsibilities*, ARK. DEMOCRAT-GAZETTE, Mar. 22, 1998, at 3J; Vic Fleming, *How To Avoid the Dreaded 'Dee Wee,'* DROP ZONE (Little Rock Air Force Base, Little Rock, Ark.), June 16, 2000, at 3; Vic Fleming, *Judge Stalked by the Coronary Shadow*, ARK. DEMOCRAT-GAZETTE, May 6, 2002, at 1E; Vic Fleming, *Think Before Getting Behind the Wheel*, DROP ZONE (Little Rock Air Force Base, Little Rock, Ark.), July 30, 1999, at 3; Vic Fleming, *Toward Balance Through Healthy Humor*, ORANGE COUNTY LAW., Sept. 1996, at 10.)

