

The Green Bag's

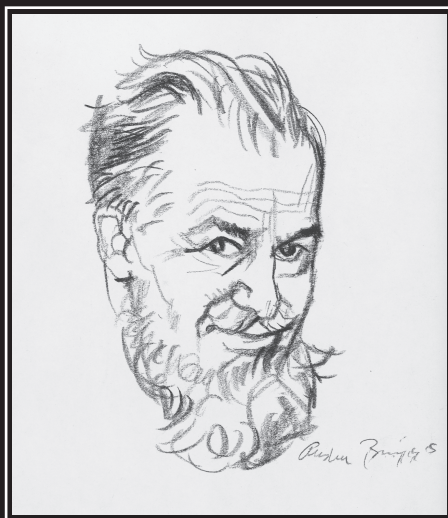
2012 ALMANAC

HIGHLIGHTS
AND
EXCERPTS

of useful and entertaining tidbits for lawyers for the year to come and

READER

of exemplary legal writing from the year just passed (see honorees on back cover)



featuring the creations of

REX STOUT

including

Nero Wolfe and Archie Goodwin in a **Thrilling Courtroom Drama**

Simon Leg and Dan Culp in **'Justice Ends at Home'**

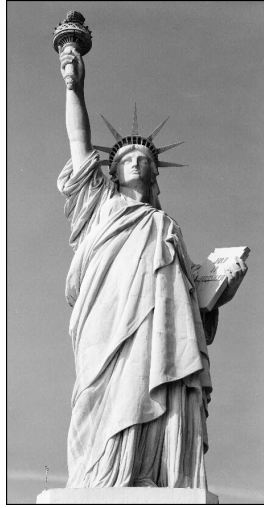
Canby Rankin in **'The Last Drive'**

plus commentary galore, including

Ira Brad Matetsky on Stout and Wolfe in American Jurisprudence

Leiv Blad on Stout's American Cuisine and the Nero Wolfe Cookbook

Presented with support from the George Mason University School of Law



“Marko had a high regard for American law.”

Wolfe nodded. “Not unmerited.”

*Rex Stout,
The Black Mountain, ch. 2 (1954)*

GREEN BAG **READER**

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THE
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ALMANAC
&
READER

2012



REX STOUT, 1886-1975

Author, developer of the Educational Thrift System (ETS),
chairman of the Writers' War Board, president of the Authors Guild,
United World Federalist, carpenter, baseball fan.

See JOHN MCALEER, REX STOUT: A MAJESTY'S LIFE (1977).

THE
GREEN BAG

ALMANAC

OF USEFUL AND ENTERTAINING TIDBITS FOR
LAWYERS FOR THE YEAR TO COME

2012

— AND —

READER

OF EXEMPLARY LEGAL WRITING FROM THE
YEAR JUST PASSED

2011

SELECTED BY THE
LUMINARIES AND SAGES ON OUR BOARD OF ADVISERS

— AND FOR THIS YEAR ONLY —

SPECIAL EDITION OF
THE GAZETTE: THE JOURNAL OF THE WOLFE PACK

EDITED BY ROSS E. DAVIES & IRA BRAD MATETSKY



GREEN BAG PRESS
WASHINGTON, DC
2011

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Rex began to read law at a law office on Euclid Avenue [in Cleveland, Ohio, in 1907]. He stayed at it for just two months. Being a lawyer, he decided, was “much too low-down a profession for an honest man.” Time would mellow this view. “I really have no antipathy toward lawyers,” Rex told me; “it’s just that the nature of their profession makes nearly all of them overly cautious and pernickety.

*John McAleer, Rex Stout:
A Majesty’s Life 96 (1977)*

PREFACE

This is the seventh *Green Bag Almanac and Reader*. For a reminder of the reasons why the world needs our almanac and our reader, read the “Preface” to the 2006 edition. It is available on our web site (www.greenbag.org).

OUR DILIGENT BOARD

Our selection process for “Exemplary Legal Writing of 2011” 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 would know it when they saw 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) ballot 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 is 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 belong in a collection of good legal writing. When they find worthy morsels, they send them to the *Green Bag*. “Good legal writing” is read broadly for our purposes. “Good” means whatever the advisers and the volume editor think it does. 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 are looking for works that have something of each. “Legal” means anything written about law — opinions, briefs, articles, orders, statutes, books, motions, letters, emails, contracts, regulations, reports, speeches, and so on. “Writing” means ink-on-paper or characters-on-screen.

Step 2: The *Green Bag* organizes the advisers’ favorites into categories, and then sends a complete set to every adviser. Advisers’

names are not attached to the works they nominate. In other words, everything is anonymized. Advisers vote without knowing who nominated a piece. Similarly, their rankings are secret. No one but the volume editor ever sees individual advisers' rankings or knows who voted in which categories. And the editor destroys all individualized records once the *Almanac* is in print.

Advisers are free to vote in as many categories — or as few — as they desire. That is, although there may be scores of nominated works in total, they are free to select the types of writing they want to evaluate. Almost all — but invariably not all — advisers vote in each category.

Step 3: The volume editor tallies the rankings and compiles the “Reader” portion of the *Almanac* based on the results, reserving, as editors tend to do, the right to add, subtract, and reorganize within reason. Nominated works not published in the book are listed in the “Recommended Reading” section.

Step 4: The advisers and the editor start over for next year's edition — a process that has been underway since last Halloween (recall that our cycle for selection of exemplary legal writing begins and ends on October 31), with dozens of nominees already in the queue for the next *Almanac*.

Despite the substantial work involved in this business, most of our advisers seem to enjoy participating. Those who don't enjoy it appear to view it as some sort of professional duty. Either way, we're glad to have them. But these are people with day jobs, other commitments, and at least a little something in the way of sleep requirements. So not everyone can pitch in every year. Being listed as an adviser implies that a body has done some advising, however, and it doesn't seem right to burden someone with a slice of the collective responsibility (or credit, if there is any) for a project in which they did not participate, at least this time around. So the list of board members in this *Almanac* has changed since last year and will, we expect, continue to change from year to year. The fact that people come and go from the board does not necessarily indicate anything about their ongoing commitment to the *Almanac*, other than when they have had the time and inclination to participate. Of course, we hope they always will.

IRA BRAD MATETSKY,
EDITOR EXTRAORDINAIRE

We have a fairly well-settled tradition of selecting a theme for each *Almanac* and then working hard to gather useful and entertaining tidbits that fit within that theme. This year's theme is Rex Stout and his work, and for the first time I enlisted a collaborator — a guest editor — to upgrade our thematic gatherings. It worked.

This *Almanac* is filled with nifty Stout material, in no small part due to the energetically applied experience and intelligence of guest editor Ira Brad Matetsky. Ira's day job involves the practice of law at Ganfer & Shore, LLP, in which he is a partner. But before and after hours, he serves as Werowance¹ of the Wolfe Pack,² an organization devoted to the study and enjoyment of Stout's most famous work: his detective stories featuring Nero Wolfe and Archie Goodwin. This *Almanac* would not have been possible, or at least would not have been good, without Ira. Thank him when you get the opportunity. I do.

HOMER KEEPS NODDING . . .

We continue to struggle, and fail, to produce a flawless big fat book in a hurry. Here are the errors we are sure we made in the 2011 *Almanac and Reader*:

Page 9: Professor Laura Appleman points out that we got a bit too casual with our listing of Nick Rosenkranz's article, failing to give the full name of the author (Nicholas Quinn Rosenkranz) and full title of the work (The Subjects of the Constitution).

Page 12: Justice Richard G. Mosley of the Canadian Federal Court in Ottawa corrects an error, and follows up with an appealing suggestion:

As you appear to collect mistakes that appear in the *Almanac* for correction in the next edition, this is to advise that the *Guelph Mercury*, cited by Prof. Garner in his Chronicle for February at page 12 of the 2010-2011 edition, is not published in Toronto but rather in Guelph, Ontario as one might expect. For the record, Guelph, founded in 1827 at the confluence of the Speed and Eramosa Rivers, is a delightful city of roughly 115,000, the seat of Wellington County and lies approximately 100 kilometres west of downtown Toronto. Among other attributes, it is the home of Sleeman Breweries who produce an excellent range of ales and lagers that Prof. Garner would be advised to sample if he were ever to venture to Ontario.

Page 214: There should be a period at the end of the sentence that ends "(Ye true Story of Little Red Riding-Hood)".

¹ "A chief of the Indians of Virginia and Maryland in early colonial days." *Werowance*, OED ONLINE, www.oed.com/view/Entry/227860; see also REX STOUT, TOO MANY COOKS ch. 5 (1938) ("I'm going to call you Werowance instead of Boss as long as we're in this part of the country.").

² See www.nerowolfe.org.

IN OTHER BUSINESS

Our goals remain the same: to present a useful and entertaining, perhaps even inspiring, monthly dose of our stock in trade — good legal reasoning and reporting, well-written — with moderate amounts of the traditional almanac potpourri of useful and distracting information thrown in. Like the law itself, the 2011 exemplars republished in this volume are wide-ranging in subject, form, and style. This year most of the potpourri has to do with Nero Wolfe; next year is an open field. 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.

• • • •

Finally, the *Green Bag* proffers the customary thanks to 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; the George Mason University School of Law and the George Mason Law & Economics Center for their continuing generous support of the *Green Bag*; Leiv Blad of Bingham McCutcheon for his sage remarks on food in this volume;³ Paul Haas for extraordinary librarianship; Susan Davies, whose work on the *Almanacs* is in fact perfection, except for a slight excess of bouquet garni; and Green Bag Fellows Liz Heaps and Cattleya Concepcion.

And most especially, we thank Rebecca Stout Bradbury.

Ross E. Davies
December 25, 2011

* * *

But they were interested in Shakespeare?
Oh, yes. Not many lawyers or professors
would dare to say no.

Rex Stout,
A Right to Die, ch. 6 (1964)

³ His outlook and qualifications are of the sorts that Rex Stout would appreciate: "As for my culinary bio, I don't really have anything relevant. I never took any classes or worked in a commercial kitchen. The most I can say is that I haven't given anyone botulism yet." Email from Leiv Blad to Ross Davies, Dec. 8, 2011.

INTRODUCTION TO THE WOLFE PACK

Ellen E. Krieger[†]

Given the low esteem in which Nero Wolfe holds lawyers, except possibly Henry Barber and later Nathaniel Parker, there is an amusing irony in the fact that this year's edition of *The Green Bag Almanac and Reader* focuses on Nero Wolfe and the Law. It is also fun to speculate on how Mr. Wolfe would react to the use of the word "Tidbits" in the title, given his unfortunate experience with a tinned liver paté, Tingley's Tidbits.

Of course, I myself have been involved for more than three decades in The Wolfe Pack, a group that Mr. Wolfe would undoubtedly regard no more highly than he does lawyers. There are, to the best of my knowledge, no references in the Corpus of Rex Stout's Nero Wolfe novels and novellas to fan clubs, but I imagine that Mr. Wolfe would hold the members of such groups in some contempt, although he might take secret pride in being the subject of one.

The gestation period for The Wolfe Pack makes the elephant look like the fruit fly. There were rumblings of an association for Wolfe aficionados in 1969, when The Viking Press promoted its publication of William S. Baring-Gould's *Nero Wolfe of West Thirty-Fifth Street* with a full-page advertisement in *The New York Times Book Review*, inviting readers to enter a "Mammoth New Nero Wolfe Contest." The hardly "mammoth" contest consisted of answering four extremely simple questions about the Wolfe books, to become charter members of a non-existent West 35th Street Irregulars. When I sent in my completed contest form, and received by return mail a certificate signed by one L.T. Cramer, I hoped that this organization would develop into something more than a name derived from a publicity campaign, but it was almost a decade before anything came of it.

On November 3, 1977, Carol Brener, then the owner of the Murder Ink bookstore in New York (and no known relation to Fritz Brenner) held the memorable "Maitre D'tective Dinner" to celebrate the publication of John McAleer's definitive biography of Rex Stout. At least, I assume the dinner was memorable to those who attended, although I was unfortunately not among them. But I was (and alas remained) on the waiting list for this event, so I

[†] Founding Werowance of The Wolfe Pack. Copyright © The Wolfe Pack. Reproduced with permission.

received a copy of a questionnaire that Carol distributed at the dinner to ascertain the extent of interest in forming a Wolfe Pack (John McAleer had rejected “The West 35th Street Irregulars” as a name for the group, as being “too Holmesian”), and to solicit volunteers to plan and run the organization. Possibly because of my disappointment at having missed the dinner, I volunteered my services to The Wolfe Pack in just about every capacity imaginable. As a result, Carol turned over to me her material on the Pack, consisting of seventy completed questionnaires and some very helpful preliminary organizational work.

On June 6, 1978, I laid in a supply of beer and invited six total strangers with a professed interest in murder to my apartment to lay the groundwork for The Wolfe Pack. It was a congenial meeting (even though no one touched the beer), as well as a productive one (possibly because no one touched the beer). At the end of the meeting, the seven of us wrote checks for \$10 each, payable to The Wolfe Pack, and turned them over to our newly-appointed treasurer, becoming the Pack’s first official members.

Six months later, the Pack held its first annual Black Orchid Banquet, a festive occasion made all the more so by the attendance of Rex Stout’s widow, Pola Stout. Three decades later, one of Rex Stout’s daughters and several grandchildren often attend the banquet, which is held annually on the first Saturday in December (a date selected to commemorate Mr. Stout’s birthday on December 1). In the years since 1978, the Pack’s activities have expanded to include a bimonthly book discussion group, an annual Assembly of speakers preceding the banquet, and many memorable special events — pilgrimages to Rex Stout’s home “High Meadow” in Brewster, New York, and to the archive of his papers at Boston College; weekends at the Greenbrier in White Sulphur Springs, West Virginia (widely believed to be the model for *Too Many Cooks’* Kanawha Spa); a visit to the Toronto set of A&E’s Nero Wolfe TV series. The Wolfe Pack’s journal, *The Gazette*, is about to enter its twentieth volume.

All Wolfe Pack members are receiving this year’s edition of *The Green Bag Almanac and Reader*, which is also designated as an issue of *The Gazette* — representing a partnership between the legal profession and Wolfeans. To this Mr. Wolfe might say “Pfui,” but I, on behalf of The Wolfe Pack, give it a resounding “Satisfactory”.



THE EDITOR'S DESK

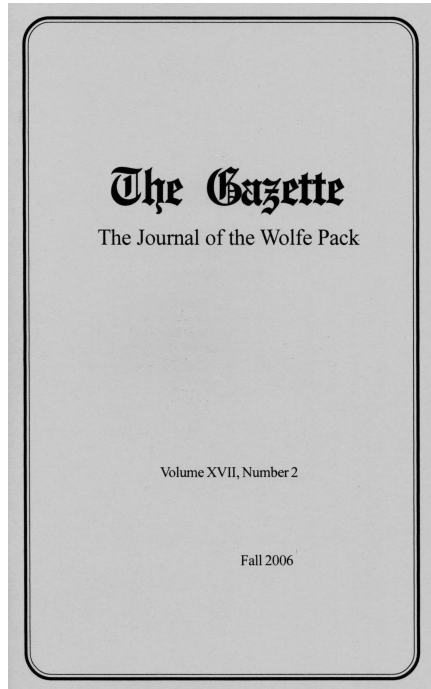
Jean Quinn[†]

Welcome to a very special edition of *The Gazette, The Journal of The Wolfe Pack*. This issue is being published in collaboration with *The Green Bag Almanac and Reader*, and it has been written by legal professionals for a dual audience of lawyers, law professors, and judges as well as Wolfe Pack members.

This issue is intended to be a definitive legal guide to the world of Nero Wolfe and his creator, Rex Stout. However, it is far more likely to become known as the definitive Nero Wolfe guide to the legal profession. Mr. Wolfe always listens carefully to legal advice, albeit less so to angry attorneys threatening legal action against him, and then proceeds to do as he sees fit. Mr. Wolfe takes a firm hand with attorneys.

Mr. Wolfe does not think highly of attorneys or the legal profession, in general, and I ask the indulgence of the legal scholars new to the *Gazette*: Please do not take this personally. Regardless of their professions, Mr. Wolfe holds few men, and even fewer women, in high esteem. He is of the belief that attorneys are “inveterate hedgers. They think everything has two sides, which is nonsense. They are insufferable word-stretchers.” Pfui.

His distain is not based on ignorance of the law. Mr. Wolfe knows a tort when he sees one. It's just that laws get in the way of doing things his way, and lawyers will go on and on about legal ramifications and such. And, attorneys most frequently bill by the hour, unlike Mr. Wolfe, who price-gouges based upon the com-



[†] a/k/a Lon Cohen; Editor-in-Chief, *The Gazette, Journal of the Wolfe Pack*. Copyright © The Wolfe Pack. Reproduced with permission.

plexity of the case, his current temperament, or both. A client would pay dearly for presenting a difficult case the same day Mr. Wolfe discovers spider mites on the Cattleyas.

It is essential that a private detective have an attorney, and a good one. When the occasion arises, and it frequently does, that Archie Goodwin or Mr. Wolfe needs legal representation, the call for assistance goes to a Mr. Parker, whose name is either Nathaniel or Henry George. Evidently, Mr. Wolfe likes Mr. Parker well enough to invite him to dinner, but not enough to call him by his correct name.

Mr. Wolfe never lets his opinion of the legal profession reflect on the hospitality offered to all who entered the Brownstone. "The guest is a jewel resting on the cushion of hospitality," he told Archie Goodwin. This editor will do the same and offer a warm, if not bejeweled, welcome to the guest editor of this issue of the *Gazette*.

Submissions to the *Gazette* are always appreciated and may be sent by e-mail to loncohen@nerowolfe.org.



I read it to him from the notebook, filling
in the gaps from memory, though I didn't
need much because I've condensed my
symbols until I can take down the
Constitution of the United States on the
back of an old envelope, which might be
a good place for it.

*Rex Stout,
The Red Box, ch. 12 (1937)*

RECOMMENDED READING

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 on the list below by a little ★. There were plenty of other good works on the ballot. We list them here. Congratulations to all.

• • • •

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Frank H. Easterbrook, *U.S. v. Holcomb*, 657 F.3d 445 (7th Cir. 2011)

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★ Richard A. Posner, *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011)

★ John G. Roberts, Jr., *FCC v. AT&T Inc.*, 131 S.Ct. 1177 (2011)

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Emilio M. Garza, *Fisher v. University of Texas*, 631 F.3d 213 (5th Cir. 2011)

Sandra S. Ikuta, *Miller v. City of Los Angeles*, 661 F.3d 1024 (9th Cir. 2011)

★ Elena Kagan, *Arizona Christian School Tuition Org. v. Winn*, 131 S.Ct. 1436 (2011)

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- Brett M. Kavanaugh, *In re: Aiken County*, 645 F.3d 428 (D.C. Cir. 2011)
- ★ Alex Kozinski, *U.S. v. Alvarez*, 638 F.3d 666 (9th Cir. 2011)
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