

# Bottomheavy: Legal Footnotes

Joan Ames Magat

## I. Introduction

Not so long ago, a professor contributing to an academic listserv asked the participants what they knew of “the continued viability or happy demise of the 2:1 footnote ratio ‘rule.’”<sup>1</sup> (Presumably, this ratio referred to twice the lines of footnotes as of text per page.)<sup>2</sup> The prof reported that, the preceding year, a third-year journal editor had threatened not to credit a student’s journal note “because it did not strictly conform to the 2:1 footnote ratio.”<sup>3</sup> The prof advised the student that such a rule was bunk and referred her to an article that remarked on the danger of citing quantities of sources (a practice facilitated by using key words to locate any number of related articles on databases), rather than sources read, digested, and selected for their appropriateness and quality.<sup>4</sup>

Amazingly, other writing profs’ e-responses to the ratio rule indicated that, apocryphal as it appeared to be, the rule had somehow seized the conscientious consciousnesses of the most ambitious of third-years—journal editors—and had transformed the rationale for the footnote into some kind of medieval rack upon which text is stretched...and distorted. The higher the number of

**Joan Ames Magat** is the General Editor of *Law & Contemporary Problems*, and Senior Lecturing Fellow at Duke University School of Law. I am indebted to the Legal Writing Institute’s 2008 Writers’ Workshop for its participants’ encouragement and thoughtful suggestions as to how to reform footnote practice and how to model this article on those precepts, and to Duke Law School for funding my participation in the Workshop.

1. Posting of Ruth Anne Robbins, Clinical Professor of Law, Rutgers University School of Law LRWPROF-L@LISTSERV.IUPUI.EDU (Sept. 11, 2007) (on file with author).
2. Oddly, this presumption reverses one scholar’s measure of the relative density of footnotes to text in nine American law reviews over the period 1938–1978. A density metric of .33 signified an average of twice as many text lines as footnote lines. Of the nine law reviews surveyed, .33 was the average for all nine in 1978. The range was .24 (Cal. L. Rev.) to .44 (Colum. L. Rev.). Edd D. Wheeler, *The Bottom Lines: Fifty Years of Legal Footnoting in Review*, 72 *Law Libr. J.* 245, 250–51 (1979).
3. Posting, *supra* note 1.
4. See Colin Jones, *Unusual Citings: Some Thoughts on Legal Scholarship*, J. Legal Writing Inst. 377 (2005).

notes, the greater the “measure of its erudition.”<sup>5</sup> “[A]cademically uncouth” as this assumption may be, it is a particularly common one for the unanointed: “Neophyte writers have a tendency to go for quantity.... The customary objective is 500 or more footnotes. Exceeding 500 is a dramatic expression of footnote machismo. Implicit is the message that the higher the number count, ‘the more authoritative will be the article.’”<sup>6</sup>

Putting aside such myths, though, does not get us very far. Academic legal writing is still plagued with lead feet below the line.<sup>7</sup> Any modification must slip between the Scylla of absent authority and the Charybdis of sheer excess.

Amelioration might come not only from slinging a hatchet—reducing cites to the utterly necessary ones or banning exegesis—but it might come also from a reassignment of responsibilities and expectations among the author, the editor, and the reader. Consider the model of the peer-reviewed journal. Editors of these journals have entirely different responsibilities than student law-review editors. The editor of a peer-reviewed journal distributes submitted articles to scholars thoroughly familiar with the subject area addressed by the author. Positive assessments signal that the article is authoritatively sound. No need for chain cites demonstrating that the author has examined the underside of every scholarly stone on the subject. The editor then approves or disapproves the article for publication. A professional copyeditor may or may not be involved. The reader of the peer-reviewed journal is provided with bibliographic information for each source cited. If, despite her own expertise, she is not familiar with each item in the bibliography, she can most likely access the journals in which they are published; if the reader wishes to check the accuracy of claims made for the source or simply to know more, she knows where to go.

Models for citation form and use in peer-reviewed journals are sometimes governed by journal convention, sometimes by such citation manuals as the *MLA* (Modern Language Association) *Style Manual* and the American Psychological Association (APA) *Publication Manual*. Some use endnotes,<sup>8</sup> which at least clean clutter from the bottom of text pages. Some depend on no more than the author’s name and the page number of the source parenthetically inserted into the text; sources are listed at the end. This model, suggested

5. Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 *Harv. L. Rev.* 926, 937 (1990).
6. Arthur D. Austin, *Footnotes as Product Differentiation*, 40 *Vand. L. Rev.* 1131, 1141 (1987) (quoting Frederick C. Thorne, *The Citation Index: Another Case of Spurious Validity*, 77 *J. Clinical Psychol.* 1157 (1977)).
7. “The line” is that separating text (above the line) from footnotes (below the line). For articles that focus on footnotes in judicial opinions, see *Sources infra*.
8. *E.g.*, Walter S. Achtert & Joseph Gibaldi, *The MLA Style Manual* 190 (Modern Language Assn. of America 1985) [hereinafter *MLA Manual*] (manuscripts for publication).

by both the MLA and APA manuals,<sup>9</sup> is alluring for its simplicity; but for a number of reasons the shoe doesn't fit the gargantuan foot that academic legal writing has become.

Nonetheless, what can these other models teach us about how to shake, or at least modulate, what has become a big, bad habit?

Law reviews depend on student labor, and students' roles on law reviews are appreciated by prospective employers because the editors are learning valuable skills—the “careful and critical perspective” that comes from checking cites,<sup>10</sup> critical reading of analysis, a sense of sound organization and development, an eye for detail, an ear for writing that is concise, clear, and fluid, and a nose for bullshit. Except for intimate knowledge of legal citation form,<sup>11</sup> none of these skills would be affected by reducing the plenteous lines of footnote material, except maybe the olfactory last. So there is little pedagogical reason to leave the system exactly as is. Moreover, the danger with current footnote practice is that the tail can wag the dog. When student editors select articles for publication based in the first instance on the density of their footnotes,<sup>12</sup> the dog wags. How are six unexamined citations more authoritative than a single unexamined one? After all, “only the relatively few readers who have trawled their nets through the same archival waters can identify the catch in any given set of notes with ease and expertise.”<sup>13</sup>

Perhaps those most put out by change would be authors—both those who wish to demonstrate the thoroughness of their research (if not their knowledge) and those who cannot resist expressing below the line thoughts that pertain only tangentially to the text.

As for the reader of law reviews, he is now spoon-fed: a plethora of signaled cites attest to the writer's having located, read, and considered every publication on point; and everything that can be pincited is. The writer is encouraged to supply as many sources as she can possibly find, on point or almost so, and the editor does her the favor of checking all these for accuracy. Should the writer

9. For the MLA rule, see *id.* at 165–90 (documenting sources). For the APA rule, see <http://owl.english.purdue.edu/owl/resource/560/02/> (In-Text Citations: The Basics) [hereinafter Purdue APA Style Guide].
10. Eugene Volokh, *Academic Legal Writing: Law Review Articles, Student Notes, and Seminar Papers* 133 (West 2003).
11. Such form will comply with the guidelines of one of the three most popular manuals, Association of Legal Writing Directors & Darby Dickerson, *ALWD Citation Manual* (2d ed. Aspen Pub. 2003) [hereinafter ALWD], *The Bluebook: A Uniform System of Citation* (18th ed. Harvard Law Rev. Assn. 2005) [hereinafter Bluebook], or *The University of Chicago Law Review Style Sheet for Vol. 74*, available at [lawreview.uchicago.edu/resources/docs/stylesheetv-74.pdf](http://lawreview.uchicago.edu/resources/docs/stylesheetv-74.pdf) [hereinafter Maroonbook].
12. See Arthur D. Austin, *Footnote Skulduggery and Other Bad Habits*, 1989 U. Miami L. Rev. 1009, 1015 (1990) (implying that editors of lower-tier journals, eager to fill a preplanned number of pages, opt for longer articles, which include “the use of notes to lengthen” them).
13. Anthony Grafton, *The Footnote: A Curious History* 7 (Harvard Univ. Press 1997).

come up short, editors have been known to satisfy the arbitrary quota.<sup>14</sup> The beneficiary is the reader—not every reader, but chiefly the researcher seeking her own source list.

Readers come to a text with a range of expertise and a range of wants. Textual footnotes are expected to span the gaps—to inform the neophyte who cannot fully understand the text without further explanation, or, for the cognoscenti, to expand on the text’s simpler point.<sup>15</sup> Some readers are seeking chiefly what the text above the line has to say; others will read more cynically, examining sources and surfing every tangential wave. Some are generalists, some are specialists. Given that readers differ, how can the use of footnotes be reformed without depriving them of what footnotes now provide?

One solution is to envision just one particular kind of reader: “cultivated, literate lawyers with broad interests, and also educated laymen who can follow a discourse on legal matters with a minimum of incidental explanation”—law students, for example.<sup>16</sup> If we know our audience, we can adapt our writing styles both above and below the line to satisfy its expectations and needs. Such a “new Law Review would have the same relationship to law that the *Scientific American* has to current science. It would be literature as well as law.”<sup>17</sup>

Well, that would be nice. And as an aspirational goal, it is noble and sound. But, realistically, readers of law reviews are becoming more diverse, not less. If “cultivated” or “educated” means knowledge of the Western canon, that qualifier had best be dropped.

A better question from the standpoint of reforming footnote practice than what the reader seeks or already knows is, perhaps, this: What sources can the reader readily access? Most readers nowadays inhabit a technological jurisdiction combining the printed word and the virtual one. When the baton has passed from one to the other (and it will), so will access to the source. Even now, URLs are common in law-review footnotes. But in the interim—if the reader should seek the very page on which a proposition is put, or should she be reading off paper, not screen—what does she need to scratch her intellectual itch? What information *must* the footnote supply? Footnote cites ought to be restricted, whenever possible, to the primary source, whether to substantiate a statement of fact or to acknowledge a thought’s origin. We are not all on a quest for a comprehensive source list on every point and proposition put forth

14. Austin, *supra* note 12, at 1015. For specifics, see *infra* text accompanying note 121.

15. Scott M. Martin, *The Law Review Citadel: Rodell Revisited*, 71 *Iowa L. Rev.* 1093, 1097 (1986) (“The explanatory footnotes enable authors to write to two audiences simultaneously: to a sophisticated audience in the text, while filling in the more basic elements for the neophyte in the footnotes, or the reverse, with basic text and elaborating footnotes.”).

16. *Cf.* Louis B. Schwartz, *Comment: Civilizing the Law Review*, 20 *J. Legal Educ.* 63, 63 (1968) (“The reviews are published primarily to serve the ends of the writers, not the readers. They afford students practice in ‘legal’ writing, professors an outlet for the ‘production’ which is a professional necessity, polemicists a platform however lowly.”).

17. *Id.*

in an article. Why not, at the very least, put the source list helpfully at the end of the article rather than scatter string cites throughout the footnotes?

This article reviews, as many others have,<sup>18</sup> why and to what extent we footnote in legal academic writing. Unlike most others, it suggests amelioration—that footnotes should follow a rational rule around which the following objectives should orbit: First, satisfy the reader’s most basic need in letting her eye drop below the line in the first place—*attribution*. Elucidation is the other important reason.<sup>19</sup> Yet if the text above the line doesn’t satisfy that latter need at the outset, then it ought to. It might just be that we should not expect journal articles, like dissertations, to display every dimension of the writer’s research, knowledge, and cogitation. It might just be that we should be reading these articles chiefly for what they have to say. Which comes around to the most important reason for a rule of reason: to make the articles themselves readable.

## II. Why Footnote?

“So far as I can make out, there are two distinct types of footnotes. There is the explanatory or if-you-didn’t-understand-what-I-said-in-the-text-this-may-help-you type. And there is the probative or if-you’re-from-Missouri-just-take-a-look-at-all-this type.”<sup>20</sup>

Criticism of the footnote is just about as old as the footnote itself.<sup>21</sup> The voice of the critic has been sober; it has been satirical. Funny, that with so many great minds denouncing its worth, the footnote has not just survived; it has flourished. As the 2:1 ratio and other density counts attest, it’s gone viral.<sup>22</sup>

18. *See infra* Sources.

19. A third, economic, reason is to minimize editorial labor in checking citations and to minimize costly space on the printed page now devoted to footnotes that might be elided.

20. Fred Rodell, *Goodbye to Law Reviews*, 23 Va. L. Rev. 35, 40 (1936-1937). Subspecies of footnotes include the author’s note and the omnibus note. *See infra* subsection E. Subspecies.

21. *See infra* III. It Has Been Worse.

22. Or fungal: “[T]he use of footnotes in legal writing...has spread like a fungus...” Abner Mikva, *Goodbye to Footnotes*, 56 U. Colo. L. Rev. 647, 647 (1984-85). Judicial opinions have also been infected. Critics of footnotes in judicial opinions are rife—with even better reason for the mischief they can cause as to whether they are precedential. For examples of judicial footnotes stirring such debate, see *infra*, Sources.

The critics' themes are these:

- Footnotes distract.
- Footnotes cause the reader to suffer eye strain.<sup>23</sup>
- Footnotes are “phony excrescences.”<sup>24</sup>
- Footnotes facilitate and are symptomatic of “sloppy thinking [and] clumsy writing.”<sup>25</sup>
- Footnotes are an irrational form of communication.<sup>26</sup>

Without question, both probative and exegetical footnotes deserve such criticism. And it has been ample.

#### *A. The Probative Footnote: Rationale*

The rationale for probative footnotes varies, depending on point of view. For the author, the first, most obvious reason for documentation is to give credit where credit is due. The obligation to cite the origin of a quotation, of another's expression paraphrased, or of another's idea is de rigueur in today's scholarly writing, whatever the discipline.<sup>27</sup> The obligation is an ethical and, through the Copyright Act, a legal one: the Act's fair-use provisions afford no license for taking another's ideas or expression without attribution.<sup>28</sup>

The writer has other reasons to footnote, though, which may contribute to her credibility and which surely contribute to bulk below the line. One is that citations can indicate the quality and, more perceptibly, the quantity of support for a writer's point. Another is that they demonstrate the writer's diligence, “that [her] positions are well researched and well supported.”<sup>29</sup>

From the reader's point of view, though, of what use is a citation? Primarily verification, surely. An argument resting on dubious facts is a house of cards. The argument is pitched in the text, its premises supported by sources credited in the footnotes. The *Bluebook* cuts no slack for generally known or easily accessed facts: “In general, you should provide attribution for all sources—

23. A writer who tacks on footnotes “just because they look pretty or because it is the thing to do...ought to be tried for willful murder of his reader's...eyesight and patience.” Rodell, *supra* note 20, at 41.

24. Fred Rodell, Goodbye to Law Reviews—Revisited, 48 Va. L. Rev. 279, 289 (1962).

25. *Id.* at 282.

26. “If footnotes were a rational form of communication, Darwinian selection would have resulted in the eyes being set vertically rather than on an inefficient horizontal plane.” Mikva, *supra* note 22, at 648.

27. *E.g.*, MLA Manual, *supra* note 8, at 4; APA Style Tutorial, Ch. 6, <http://flashir.apa.org/apastyle/basics/index.htm> (“Cite the work of those individuals whose ideas, theories, or findings have directly influenced your work, even if you are paraphrasing or describing someone else's idea.”).

28. *See generally* 17 U.S.C. § 107 (2006).

29. ALWD, *supra* note 11, at 3.

whether legal or factual—outside your own reasoning process.”<sup>30</sup> The *Bluebook*’s chief rival in the small pond of legal citation, the *ALWD*, simply reminds the legal writer of the reasons one cites a source in the first place: to show the reader where to find it; to signal its weight and persuasiveness; to indicate whether it in fact supports, can be distinguished from, or contradicts the point tagged with a footnote; or to demonstrate that sound research supports a proposition in the text.<sup>31</sup>

One writer suggests that the resulting sheer copiousness of probative law-review citations might be explained as part of the legal-education process: “[T]he unnatural rigor by which the support for factual assertions in a published article must [be] both...provided by its author and demanded by the publication’s editorial staff might make sense.... Perhaps it is part of the training that goes into generating the level of excessive attention to detail [deemed desirable] in young lawyers.”<sup>32</sup> But of course, the writer continues, this cross-eyed scrutiny of minutia, this obsessive marshaling of authority for every fact, is not what we want in a lawyer, whether in scholarly text or in the courtroom: it’s the *quality* of the evidence that convinces the jury, not its quantity. Nor can notes, no matter how abundant, be comprehensive. “No accumulation of footnotes can prove that every statement in the text rests on an unassailable mountain of attested facts.”<sup>33</sup>

Secondarily, the sources cited invite further study. For the researcher, footnotes are finding tools. They are themselves sources. A good, fat footnote is like standing at the library shelf with the book one seeks under one’s nose and even better ones, perhaps, aligned to the left and right. Useful as the finding function is to the researcher, though, it is of little value to the reader who simply wants to see what this author has to say. (And it is nothing but trouble for the student editor who must locate and verify the particulars of each source).

At the bottom of the rationale heap is the footnote of value chiefly to the writer and her peers—the footnote citing a source just for the sake of its being cited. This includes citing generously to impress readers with the thoroughness of the writer’s research.<sup>34</sup> And it includes such “ignoble purposes [as] citing a friend”<sup>35</sup> or oneself.<sup>36</sup> Alas, academic prowess is based in part upon the number

30. *Bluebook*, *supra* note 11, at 3 (Rule B1).

31. *ALWD*, *supra* note 11, at 3.

32. Jones, *supra* note 4, at 382–83.

33. Grafton, *supra* note 13, at 22.

34. “We use footnotes to impress each other with our erudition.” J.M. Balkin, *The Footnote*, 83 *Nw. U.L. Rev.* 275, 276 (1989).

35. *Id.* at 1136 (quoting Terrence A. Brooks, *Evidence of Complex Citer Motivations*, 37 *J. Am. Soc’y Info. Sci.* 34 (1986)).

36. James H. Fowler & Dag W. Aksnes, *Does Self-Citation Pay?*, 72 *Scientometrics* 427 (2007). The authors’ question is addressed to the publication of scientific articles. The authors’

of articles in which one's work is cited. Ask any tenure-review committee.<sup>37</sup> But how is the reader to sort such chaff from the wheat? Where draw the line?

*B. The Probative Footnote Reviled, Defended*

"[T]o one digging into the bowels of the law," Judge Fuld wrote, "a fat footnote is a mother lode, a vein of purest gold."<sup>38</sup> Judge Fuld's metaphor is so richly mixed that one is tempted to incant Freud. But, mixed, it's an apt metaphor. If there's gold, then it comes with an attendant stink. Happily, the critics of the stink write with wit and color.

In an article that seems to have started the critical ball rolling, Fred Rodell wrote,

It is the probative footnote that is so often made up of nothing but a long list of names of cases that the writer has had some stooge look up and throw together for him. These huge chunks of small type, so welcome to the student who turns the page and finds only two or three lines of text above them, are what make a legal article very, very learned. They also show the suspicious twist of the legal mind. The idea seems to be that a man can not be trusted to make a straight statement unless he takes his readers by the paw and leads them to chapter and verse. Every legal writer is presumed to be a liar until he proves himself otherwise with a flock of footnotes.<sup>39</sup>

The problem is not just assuming that the writer cannot be trusted to report truthfully and the reader a boob who cannot swallow a fact without every detail of its origins; it's simple excess: "Cite authority for every proposition, however obvious," Judge Posner advises, tongue very much in cheek. "[M]aximize the ratio of citations to pages. Save time and thought by copying string citations (unread) from previous articles or opinions."<sup>40</sup> "[A]ny unread article may still be cited."<sup>41</sup> The writer eventually becomes expert in "extruding names of authors, titles of books," and so forth. "In the end, the production of footnotes sometimes resembles less the skilled work of a professional carrying out a precise function to a higher end than the offhand production and disposal of waste products."<sup>42</sup>

---

answer is, yes: "[T]he more one cites oneself the more one is cited by other scholars," *id.* at 1, to the tune of three cites from others for every self cite, *id.* at 8. See generally Austin, *supra* note 12, at 1026-27.

37. "Footnoting...functions as a subtle, but critical, influence in the determination of promotion, tenure, and professional status." Austin, *supra* note 6, at 1135.

38. Stanley H. Fuld, A Judge Looks at the Law Review, 28 N.Y.U. L. Rev. 915, 919 (1953).

39. Rodell, *supra* note 20, at 40-41.

40. Richard A. Posner, Goodbye to the Bluebook, 53 U. Chi. L. Rev. 1343, 1350 (1986).

41. Ronald D. Rotunda, Law Reviews—The Extreme Centrist Position, 62 Ind. L.J. 1, 3 n.7 (1986).

42. Grafton, *supra* note 13, at 6.

At least one scholar accuses writers—particularly those up for tenure or wishing to demonstrate their competence in a new field—of “strategic footnoting,” which “serve[s] to indicate a relationship, not merely between texts, but between the author of the article and the authors of the cited materials.”<sup>43</sup> “[I]t often appears that it is at least as important that the appropriate people be cited as that the appropriate statements be supported.”<sup>44</sup> “Hat-tipping citations” to prestigious authorities, particularly, serve two purposes: They indicate that the author has “done his homework,” and they reflect “respectability by association with recognized sources.”<sup>45</sup>

Not far from hat-tipping is the duty of reciprocity: you cite me; I cite you. Such “conspiratorial cross-referencing” is “not unusual for researchers... working on a common problem.... Each one cites all the others’ work and thus both secure increased personal and research exposure.”<sup>46</sup> Kin to the conspiratorially, mutually beneficial footnote are “conspicuous ‘brown nose’ attributions” of the untenured author to the works or ideas of her more-secure colleagues, thanking those others for insights gained and wisdom shared.<sup>47</sup>

Many who defend probative footnotes that run to bibliographic bulk appreciate footnotes as finding sources. Others cite the treasures one can read between the lines: “Footnotes allow us not only to see the prejudices of old sources, but the biases and convictions of the footnoter himself. They provide readers with the intellectual map that the writer has used to arrive at her conclusions.”<sup>48</sup> “Ideally,” the same defender writes, “footnotes are also a graceful acknowledgement that today’s community of scholars is linked to and dependent on yesterday’s community.... The very word ‘scholar’ has its root in the Latin ‘schola’ or ‘school,’ and bespeaks a community or network of people striving together for understanding. ‘Footnotes are reminders that scholarship is an intrinsically communal enterprise—building on, revising or replacing the work of predecessors.’”<sup>49</sup> Still others cheer the space below the line as the proper repository for “empirical data and [citations to] non-legal research projects.”<sup>50</sup>

43. Mary Coombs, *Lowering One’s Cites: A (Sort of) Review of the University of Chicago Manual of Legal Citation*, 76 Va. L. Rev. 1099, 1107 (1990).

44. *Id.* at 1108.

45. Thorne, *supra* note 6, at 1159.

46. *Id.* at 1160.

47. Austin, *supra* note 6, at 1021. *Cf.* such attribution in the asterisk, or author’s note, *infra* text accompanying notes 79–86.

48. Bruce Anderson, *The Decline and Fall of the Footnote*, *Stanford Alumni Mag.*, Jan./Feb. 1997, available at <http://www.stanfordalumni.org/news/magazine/1997/janfeb/articles/footnotes.html>.

49. *Id.* (quoting Kenneth L. Woodward, *In Praise of Footnotes*, *Newsweek*, Sept. 9, 1996, available at <http://www.newsweek.com/id/102788>).

50. Timothy R. Rice, *In Defense of Footnotes*, *Nat’l L.J.*, June 20, 1988, at 13.

Surprisingly, one reader admittedly enamored of footnotes begins his reading there: "I always scan the endnotes before taking up the text: it's the surest way to discover whether the author has done his homework."<sup>51</sup> So says Mr. Hyde. But Dr. Jekyll, the "intellectually impoverished," hypercritical reader "can think of nothing better to do when assessing a book than to add a few missing items of bibliography."<sup>52</sup> Well, again, readers differ in their objectives and their approaches. Mr. Hyde (or his mean-spirited alter-ego), like the researcher-reader, might appear to be happier swimming in the source list than in the text, oblivious to the possibility that, in its abundance, it may be "where authors can easily list more books than they have actually read."<sup>53</sup>

### *C. The Explanatory Footnote: Rationale*

Sources aside, a footnote is room for the text to stretch into parenthetical comment. Definitions of unfamiliar terms end up here, though they'd be more helpful if integrated into the text. Explanatory notes sometimes expand on the text for the benefit of the specialist; or they explain complex text for the benefit of the generalist. If they try to do both, the notes exhibit a kind of informational schizophrenia confounding both genres of reader. The effect can be as unsettling as the "schizophrenic style" of a "desiccated scholar" above the line who "suddenly turns a cartwheel" below it.<sup>54</sup> Too many explanatory footnotes are not just *sotto voce* asides or the entertaining release of the author's inner child; they are loud and lengthy detours. Such avoidable tangles of tangents are more often than not an irritation and a distraction; only occasionally are they more compelling, or at least more witty, than the text.<sup>55</sup> This is not to justify such footnotes; it's just one reason they're there.

For the author, the discursive note is a "soapbox"<sup>56</sup>: "[T]he footnote permits the scholar to say another word, just one other word, just one word more, before he has to stop."<sup>57</sup> Such footnotes are now moribund in scholarship that follows the *MLA Style Manual*, which advises, "Avoid essaylike notes, which divert the reader's attention from the primary text. In general, if you cannot fit

51. Woodward, *supra* note 49, at 1.

52. G.W. Bowersock, *The Art of the Footnote*, *The Am. Scholar* 54, 57 (Winter 1983/84). "Footnotes do not exist as a receptacle for learning literature," the author chides. "The very presence or absence of an item is, in itself, an expression of the author's judgment." *Id.*

53. *Id.*

54. Mary-Claire van Leunen, *Handbook for Scholars* 8 (Oxford Univ. Press 1992).

55. For examples of such spoofs see Sources, *infra*.

56. van Leunen, *supra* note 54, at 8.

57. *Id.*

comments into the text, omit them.”<sup>58</sup> They have been “all but forbid[den]”<sup>59</sup> as well by the *Scribes Journal of Legal Writing*.<sup>60</sup> But they are missed. By some.

*D. The Explanatory Footnote Defended, Reviled*

“The best-loved footnote is the aside—the tidbit, the comment, the sidelight, the joke.”<sup>61</sup>

Of the literary scholars who mourn the MLA-driven demise of the discursive note, one recalls wistfully “the writer’s direct address to the reader, a message slipped under the door, a whispered aside in counterpoint to the formal discourse of the text.”<sup>62</sup> Another feels the discursive note is the author’s beckoning finger, inviting the reader into an intimate space in which “the good stuff” would be revealed. “[T]he appearance of the footnote parallels the moment when we draw our chairs closer to the speaker and bend forward: Now we’re getting closer to the good stuff, now we’re getting to the heart of it.”<sup>63</sup>

Some rushing to the defense of the explanatory footnote assume its “vitality,” describing it as “an awkward tool, inelegant, all thumbs, but it has the breath of life to it.”<sup>64</sup> Or, better, it’s art:

In the hands of a master, the potentially pedestrian footnote is elevated to a rhapsodic grace note. It can inform and entertain, clarify and illuminate. The artful practitioner “knows how to instruct and to amuse...to unite utile with dulci in accordance with the unrivaled precept of Horace two thousand years ago.”<sup>65</sup>

The artful footnote is a “variation on a theme” offered in the text, “a kind of counterpoint”: it is brisk and it is “more or less free,...connected...to what stands above it,” yet, unlike the text, not bound to that “seamless fabric of

58. MLA Manual *supra* note 8, at 182.

59. Bryan A. Garner, *The Citational Footnote*, 7 *Scribes J. of Legal Writing* 97, 97 (1998–2000).

60. “We discourage footnotes that contain substantive discussion; footnotes used to cite pertinent materials are fully acceptable.” *Scribes J. Legal Writing* (“Information for Contributors,” “Manuscripts,” inside front cover).

61. van Leunen, *supra* note 54, at 98.

62. Betsy Hilbert, *Elegy for Excursus: The Descent of the Footnote*, 51 *College English* 400, 400 (April 1989). Hilbert continues, tellingly, “Footnotes could elucidate, castigate, praise, blame, and crow. Notes might wander off on scenic side-trips, discourse eloquently on stuff and nomenclature, and run happily on for pages and pages until the reader quite forgot she was supposed to be back in the text by dinnertime. Material could slip into a footnote that simply would not fit in the body of the work: [one scholar] used a footnote to present his wife’s...recipe for roast bologna.”

63. van Leunen, *supra* note 54, at 89.

64. *Id.*

65. Anderson, *supra* note 48 (quoting Bowersock, *supra* note 52, at 59).

sentences.” It “looks neither backward nor forward.” And it is short: the “accomplished footnoter resembles...the author of *pensées* or aphorisms.”<sup>66</sup>

Explanatory footnotes can be so complete (and ample) as to comprise a second text; indeed, Jean Jacques Rousseau may have been one model for this practice, warning readers of the 1755 edition of the Second Discourse that its notes “sometimes stray so far from the subject that they are not good to read with the text.” Implicitly acknowledging that different readers have different needs, he continues,

I have therefore relegated them to the end of the Discourse, in which I have tried my best to follow the straightest path. Those who have the courage to begin again will be able to amuse themselves a second time in beating the bushes, and try to go through the notes. There will be little harm if others do not read them at all.<sup>67</sup>

Rousseau’s indulgence can perhaps be excused, one historian notes, as “the philosopher’s privilege”—to be allowed such an “esoteric strategy, saying one thing in the text and another in the notes,” just as it is his privilege “to be a thinker rather than a scholar, drawing upon inner ‘resources,’ which are not readily documented, rather than external ‘sources,’ which are.”<sup>68</sup>

Contemporary legal scholars and aficionados of the “second text” class of explanatory notes instead modulate their own indulgence with a modicum of self-mockery: “My attempt,” says one, “was to make the footnotes just as important as the proper text of this paper.... The purpose of this technique is to eliminate the mystique of second-class status that is generally communicated through the use of a footnote.... Footnotes are not meant to be glossed over... ”<sup>69</sup> To illustrate that footnotes read separately from the text they support are so comprehensive as to enable a reader to divine “the line of argument and the principal points made” in the article itself, one admitted “footnote junkie” published her speech first as “an article of footnotes,” then as a (footnoted) article of text.<sup>70</sup>

66. Bowersock, *supra* note 52 at 55-56.

67. Gertrude Himmelfarb, Where Have All the Footnotes Gone?, in *On Looking Into the Abyss* 122-30, 123 (Alfred A. Knopf 1994) (quoting Jean-Jacques Rousseau, Preface, in *The First and Second Discourses* 98 (Roger D. & Judith R. Masters trans., St. Martin’s Press 1964)).

68. *Id.*

69. John M. Ohle, Constructing the Trannie: Transgender People and the Law, *J. of Gender, Race & Just.* 237, 238 (2004). Elided text includes these sentences: “In some instances I have put substantial discussions of topics within the footnotes; sometimes removing a full section from the proper text of the paper and placing it in a footnote.... Transgender individuals are often relegated to the footnotes; therefore I rise in opposition in two ways. First, I empower the footnote.”

70. Herma Hill Kay, In Defense of Footnotes, 32 *Ariz. L. Rev.* 419, 420 (1990).

Happily for readers of literary scholarship who miss the discursive footnote, it has moved into the margins of the novel, where it is perhaps best suited from the standpoint of entertainment, if not of elucidation.<sup>71</sup>

But the law-review article is, ordinarily, intended not to entertain, but to enlighten. And the author's intrusion via footnote is a messy means to that end. Explanatory footnotes permit the legal academic "[to] be obscure and befuddled in the body of his article and then say the same thing at the bottom of the page the way he should have said it in the first place."<sup>72</sup> Posner advises similarly (and sardonically), "Use long textual footnotes to make your work hard to follow, and to avoid having to integrate your ideas in a logical structure." This kind of footnote is a friend to the writer for whom tight, exact expression is elusive.<sup>73</sup> The only virtue of such footnotes, if a virtue it be, is that their style is more relaxed, Rodell observed, saying nothing of particular value in the active rather than in the passive voice.<sup>74</sup>

### E. *Subspecies*

Subspecies of probative or explanatory notes are those, like rock lyrics or charts and graphs, that titillate the reader and characterize the writer's turn of scholarly mind as one that "go[es] beyond the mundane."<sup>75</sup> Or such notes might cite "fugitive'...newly discovered, unusual, or exotic"<sup>76</sup> material demonstrating the writer's "thoroughness" by having unearthed the fossil.<sup>77</sup> Writers will explain their evangelism in the "ideological note," the citation as "political act." Although resulting citations of "[f]ugitive' sources with political connotations" are particularly "chic," their acceptability, as with any footnote, "depends on relevancy and good taste."<sup>78</sup>

Then there's the footnote that's all about the author, usually signaled with an asterisk—"industrialized civilization's equivalent to the ancient invocation of the Muse."<sup>79</sup> The author's note, which initially (around 1948) provided the author's academic degrees and current affiliation, has burgeoned to include

71. Footnoted fiction has been around as long as the novel itself, from Laurence Sterne's *Tristram Shandy* and Henry Fielding's *Tom Jones* in the 18<sup>th</sup> century, to Herman Melville's *Moby Dick* in the 19<sup>th</sup> century, to novels by J.D. Salinger, Vladimir Nabokov, and John Barthes in the 20<sup>th</sup>.
72. Rodell, *supra* note 20, at 40.
73. Posner, *supra* note 40, at 1350.
74. Rodell, *supra* note 20, at 40 ("It is suggested' in the body of an article might carry an explanatory footnote to the effect that 'This is the author's own suggestion.'").
75. Austin, *supra* note 12, at 1018-19.
76. Austin, *supra* note 6, at 1147. See also Kenneth Lasson, *supra* note 5, at 948 ("[F]or many a law professor image is easily as important as substance. To treat the arcane in traditional academic prose is to impress one's colleagues.").
77. Austin, *supra* note 6, at 1148.
78. Austin, *supra* note 12, at 1025-26.
79. Grafton, *supra* note 13, at 17.

acknowledgement of financial support and that of research assistants, to place the article in the context of the author's oeuvre, to cite conferences or workshops at which the paper was presented or whose participants played a role in its inspiration or development, to dedicate to spouse or pet, "to disclaim implied approval of the author's views by others,"<sup>80</sup> or to warn of authorial bias.<sup>81</sup>

Some writers use the author's note "as a substitute peer review system,"<sup>82</sup> listing the names of those who have read the manuscript: "Publishing a stream of names in an author's note can sustain a movement to higher status and reputation."<sup>83</sup> Motivational kin to these are "non-verifiable" references to notable colleagues with whom conversation proved fruitful for the article's inspiration and development. Such prefatory notes "evoke a Republic of Letters—or at least an academic support group—in which the writer claims membership." To what end? "[C]redentials perform what used to be the function of guild membership or personal recommendations: they give legitimacy."<sup>84</sup>

The growth in the asterisk note may have contributed to what one scholar sees as the decline of the "omnibus note," which would immediately follow. The omnibus note cites "all basic scholarship related to the topic," including sources that the author "didn't understand well enough to cite for a particular proposition."<sup>85</sup> The effect of the ruse is, at the article's very outset, to "make the writer appear very learned, indeed."<sup>86</sup>

### III. It Has Been Worse

We should remember that although we are plagued with excess, scholarship is better off from the standpoint of both ethics and efficiency than it's been in the past. Attribution for direct quotes was spotty in ancient scholarship.<sup>87</sup> Interestingly, this appears to have been because such literature, if available to the reader at all, was memorized. References to the source of a quote "rarely appeared in ancient literary prose, since the well-educated author cited texts from memory, not from books."<sup>88</sup> Roman scholars were more punctilious, as were medieval ones.<sup>89</sup>

80. Charles A. Sullivan, *The Under-theorized Asterisk Footnote*, 93 *Geo. L. J.* 1093, 1101 (2005).

81. *Id.* at 1101-08.

82. Austin, *supra* note 12, at 1022.

83. Austin, *supra* note 6, at 1146.

84. Grafton, *supra* note 13, at 17.

85. Sullivan, *supra* note 80, at 1094 n.5.

86. *Id.*

87. Grafton, *supra* note 13, at 29.

88. *Id.*

89. *Id.* at 30.

The purpose of footnotes has changed, too—surely for the better. Medieval and Renaissance scholars cited authorities, “great writers,” whose mention “sanction[ed]” what they had to say in their texts; modern ones by contrast cite to the primary source, the document itself, that is the bone beneath the scholar’s verbal meat.<sup>90</sup> The footnote “explain[ing] the methods and procedures that should be used to consume” the text itself is also largely gone.<sup>91</sup> This is not necessarily the case for historians, though, for whom the path of the scholar’s research is itself of interest.<sup>92</sup> Nor is it the case for literary writers (for example, T.S. Eliot in *The Waste Land*<sup>93</sup>) or their students (for example, Alfred Appel in *The Annotated Lolita*<sup>94</sup>) who still find reason to annotate a text in order that it be understood.

But, in the past, the sheer surfeit of footnotes has in fact been worse. The earliest footnotes, penned by scholars of the Roman Empire and ancient Israel, were copious commentaries on the complex texts contributing to their scriptures.<sup>95</sup> Over the next several centuries, the scholar’s attention shifted to parsing secular Latin texts, his objectives eventually supplementing scrutiny of grammar with “correcting every error, explicating every literary device, and identifying every thing or custom that cropped up in a classical text.”<sup>96</sup> “By the late fifteenth century the poems of Virgil were already ringed with a band of text wider than the original, printed in illegibly small type, in which commentators ancient and modern, literal and allegorical debated the meaning and application of his texts.”<sup>97</sup>

In the seventeenth century, Pierre Bayle’s historiography, written for the sole purpose of “expos[ing] errors and contradictions[] between...his despised... predecessor in the dictionary-making game, and the sources; between the sources themselves; between the sources and common sense”<sup>98</sup> resulted in a work that not only *had* footnotes, but consisted largely of footnotes, “and even footnotes to footnotes.”<sup>99</sup> Edward Gibbon’s *History of the Decline and Fall of the Roman Empire*, published in England at the end of the next century, modeled footnotes that meticulously and comprehensively cited sources but also, like

90. *Id.* at 33.

91. *Id.*

92. *See id.* at 22.

93. T. S. Eliot, Notes on *The Waste Land*, in *The Complete Poems and Plays* 50 (Harcourt, Brace & World 1952).

94. Alfred Appel, *The Annotated Lolita* (McGraw Hill 1955).

95. Grafton, *supra* note 13, at 27.

96. *Id.* at 114.

97. *Id.* at 115.

98. *Id.* at 195.

99. *Id.* at 191 (citing Bayle’s *Historical and Critical Dictionary*, which “offer[s] the reader only a thin and fragile crust of text on which to cross the deep, dark swamp of commentary”).

its predecessors, generously (and often sarcastically) commented on the text.<sup>100</sup> By the time Alexander Pope penned his commentary in the parodic *Dunciad* and Jonathan Swift wrote his satirical *Battle of the Books*, Gibbon's model of sarcastic commentary on the events of the past had been whittled into witty invective targeting the authors' contemporaries.<sup>101</sup> By the 19<sup>th</sup> century, only the art was lost:

Footnotes flourished most brightly in the eighteenth century, when they served to comment ironically on the narrative in the text as well as to support its veracity. In the nineteenth century, they lost the prominent role of the tragic chorus. Like so many Carmens, they found themselves reduced to laborers and confined to a vast, dirty factory. What began as art became, inevitably, routine.<sup>102</sup>

The footnote's "stylistic decline" in the 19<sup>th</sup> and 20<sup>th</sup> centuries to "a list of highly abbreviated archival citations"<sup>103</sup> may have come as a loss for readers of history who loved artful commentary. Some contemporary historians, though, wishing to please both scholarly and generalist readers, have practiced a variation on the "second text" theme by subsequently publishing endnotes in a separate volume or depositing an annotated manuscript in the Library of Congress.<sup>104</sup> To the chagrin of "historian[s] of the old school,"<sup>105</sup> other "revisionist historians" have dispensed with footnotes altogether, one describing them as "a fetish" that, in exhibiting the discursive and reflective mind of the author, "interferes with careful intellection and rumination" of the reader.<sup>106</sup>

The radical notions of revisionist historians has influenced legal writers not a whit. Commentary has burgeoned in American law reviews. One scholar categorized and counted footnotes in nine representative law journals in ten-year periods from 1938 through 1978. "Discursive footnotes," those "at least a half...page in length and not...compelled by parent ideas and arguments

100. Grafton, *supra* note 13, at 102-03, 169 (describing "the great neoclassical country house and witty gazebos of the Decline and Fall").

101. *See id.* at 114 (Pope "used the footnote throughout [the *Dunciad*] as the hockey-masked villain in an American horror film uses a chain saw: to dismember his opponents, leaving their gory limbs scattered across the landscape."); Jonathan Swift, *The Battle of the Books in Gulliver's Travels and Other Writings* 360 (Louis A. Landa ed., Houghton Mifflin 1960) (maligned the classicist Richard Bentley).

102. Grafton, *supra* note 13, at 229.

103. *Id.* at 228.

104. Himmelfarb, *supra* note 67, at 128-29. Michael Holroyd, Himmelfarb reports, "omitted notes from his three-volume biography of George Bernard Shaw," publishing them all later in the final, fourth volume. Daniel Boorstin was he who resorted to the Library of Congress depository for The Discoverers.

105. *Id.* at 123, n.\*.

106. *Id.* at 129 (quoting Lucy S. Dawidowicz, *What is the Use of Jewish History?: Essays* 123 (Neal Lozodoy ed., Schocken Books 1992)).

in the text,<sup>107</sup> he reported, were less than half as numerous in 1938 (22) as in 1978 (49).<sup>108</sup> Comparable figures since 1978, if extant, needn't be cited here. It is enough that anyone cares enough to count. For no discernable good reason other than shock value, perhaps, *The National Law Journal* once reported the article (495 pages) with the most footnotes (4824) at the time, surpassing the previous record-holder (1611 notes in 212 pages).<sup>109</sup> If there's a new one, it's a pity.

#### IV. It Can Be Better

##### A. Footnoting Authority

###### 1. To Cite or Not to Cite?

The major citation manuals all mandate that direct quotations be footnoted and that the footnote include a pinpoint citation.<sup>110</sup> This mandate cannot be faulted. How many words before quotation marks are called for? Even one, if its use is unique.<sup>111</sup>

For anything other than a direct quote, the directives are less than unanimous. "In general," says the *Bluebook*, "you should provide attribution for all sources—whether legal or factual—outside your own reasoning process."<sup>112</sup> How much help is *that*, I ask you? "[I]n general"? "[O]utside your own reasoning process"? Two open-ended directives in one sentence. One law professor tells his students that their footnotes "should reflect that you have taken into account every significant book[] or article that is out there"; the only exceptions to sentences needing footnotes are "pure argument, topic sentences, and conclusions."<sup>113</sup>

(As to this last bit of advice, perhaps before we go farther we should distinguish between an article intended for general consumption and an article intended for submission to one's seminar professor or dissertation committee. For the latter, proof of comprehensive research and attribution is one measure of what the student has learned. Such proof is of little interest to the law-review reader, unless insufficient research results in a half-baked argument. But such are flaws that peer readers (and experts in her field on her tenure

107. Wheeler, *supra* note 2, at 248.

108. *Id.* at 251.

109. Kris Oser, Numerous Notes No Shot in Foot, *Nat'l L.J.*, Jan. 16, 1989, at 35.

110. Purdue APA Style Guide, *supra* note 9; The Chicago Manual of Style 594, 598 (15<sup>th</sup> ed. Univ. of Chicago Press 2003); MLA Manual, *supra* note 8, at 163; Maroonbook, *supra* note 11, at 1.

111. See *supra* text accompanying note 56 ("soapbox").

112. *Bluebook*, *supra* note 11, at 3 (Rule B1).

113. Richard Delgado, How to Write a Law Review Article, 20 U.S.F. L. Rev. 445, 451 (1986).

committee) are likely to catch, and the author knows it. The incentives to be thorough are at least as effective as a grade; but its proof need not be compiled ad nauseam below the line.)

“[C]ommon knowledge,” we are told, “has almost no application to legal scholarship.”<sup>114</sup> It is such advice that prompted the umbrage of one author at a student editor’s request that he locate and cite an authority to verify that the standard of proof for criminal trials in the United States is proof “beyond a reasonable doubt.”<sup>115</sup> After all, what knowledge is “common” and could thus, other rules of thumb aside, escape authentication below the line depends on what the reader already knows. Except for predictably specialized readers of specialized journals, describing what knowledge is “common” is perhaps impossible. For a law review, one can fairly safely assume that the reader has some level of legal training. But, short of surveying journal subscribers or ascertaining that all have passed the multistate, who can tell what that level is? For multidisciplinary journals, the only safe assumption is that our readers can read English. That leaves the writer (and the editor behind her) with authenticating a source for every fact short of sunrise. Absurd, but common practice.

The *MLA Style Manual*, like the *Bluebook*, says, “Everything derived from an outside source requires documentation—not only direct quotations and paraphrases but also information and ideas.”<sup>116</sup> Notably unlike the *Bluebook*, though, the *MLA Style Manual* permits the rule to be tempered by “good judgment as well as ethics”: one needn’t cite “sources for familiar proverbs (‘You can’t judge a book by its cover’), well-known quotations (‘We shall overcome’), or common knowledge (‘George Washington was the first president of the United States’).”<sup>117</sup> The *Chicago Manual of Style* advises identifying the sources “of any facts or opinions not generally known or easily checked.”<sup>118</sup> What is “generally known” is the “common knowledge” question again. But “easily checked”—now, there’s a rule of thumb with roots in common experience, specialized or not. Contrasted with the *Bluebook* “outside your own reasoning process” rule, it is positively liberating. Imagine, if “easily checked” were grafted onto the *Bluebook* rule, what the weight would be lifted from below the line!

114. Elizabeth Fajans & Mary R. Falk, *Scholarly Writing for Law Students* 100, 100 (2d ed., West 2000).

115. Confidential e-mail to author (Oct. 20, 2008) (on file with author). See Martin, *supra* note 15, at 1097 n.18, recalling a footnote in an article for attorneys “that took pains to explain the rather obvious (and unnecessary) point that the name ‘Bluebook’ for the Harvard Uniform System of Citation is derived from the color of the book’s cover.”

116. *MLA Manual*, *supra* note 8, at 163.

117. *Id.*

118. The *Chicago Manual of Style*, *supra* note 110 at 594. Cal. State L.A. ASA Style Guide Handout rule is similar: “Use footnotes to cite materials of limited availability.” Cal. State L.A. ASA Style Guide Handout, <http://www.calstatela.edu/library/bi/rsalina/asa.styleguide3.html>.

What might be “easily checked,” of course, needs its own gloss. The gloss itself varies with what sources are “easily” available to the reader and, of course, reliable. Before online resources, these were restricted to the printed page, and, of those, who is to know what is available to every reader? Do such sources include the books at her elbow or what she can fetch from the university library? The gloss depends, too, on the reader’s discipline. Every specialty has its own canon to which its scholars might well be expected to have ready access. But, apart from the Constitution, what can the legal reader “easily check”? Such an amorphous standard has been ignored by the *Bluebook* and *ALWD* editors, perhaps for good reason.

Might it not now be possible nonetheless to apply such sane if relaxed rules to law journals? Might they also be applied to interdisciplinary journals, whose readership is even broader and not necessarily even legally trained?

We’ve moved out of the archives, into the ether. The Internet is our new standard of what is “easily checked” or readily available. Even if we don’t yet read our journals online, what can be “easily checked” should include what can be accessed online. One, perhaps audacious, rule of thumb might be that a footnote to ascertain a fact is unnecessary if the fact can be found on Wikipedia. This would facilitate the editor’s task, certainly, but Wikipedia alone is not any more reliable than some bloke’s blog.<sup>119</sup> Another rule of thumb might be that a source found in at least three online sources needn’t be cited. Yet the reliability of three (or of five<sup>120</sup>) is not necessarily any more dependable than the reliability of one, and, from the editor’s point of view, it’s probably easier to cite one source than to search for three. Is the relief below the line worth the cost of its license?

Probably not. But the congestion in footnotes does not come from too many primary sources. It comes from chain cites of secondary sources, from a plethora of “ids,” and from the undisciplined use of signals.

## 2. How Much Is Enough?

One scholar reported watching his footnotes multiply in the hands of the law-review editors. “They will offer publication of my latest article,” he said, if only I will agree to about thirty more footnotes.<sup>121</sup> But authors, too, sometimes court the lengthy probative note: “[M]any modern professors tend to toss

119. Nor, for that matter, is any secondary source reliable—online or otherwise. “Verification of note sources can be difficult and sometimes indeterminate.” Austin, *supra* note 12, at 1012 n.20. For example, a notable number of the articles unearthed in research for this article recounted Noel Coward’s line that “Encountering [a footnote] is like going downstairs to answer the doorbell while making love.” It turns out, Arthur Austin reports, that the quote originated with John Barrymore, not with Coward, nor, as one writer had it, with Austin himself. *Id.*
120. “[W]riters in some other disciplines,” the authors report, “[are exempted] from the duty to document information found in five or more sources....” Fajans & Falk, *supra* note 114, at 100.
121. Austin, *supra* note 12, at 1015 (quoting letter from David Gregory, Kenneth Wang Professor of Law, St. John’s University to Austin).

their excess research into the annotation hopper and leave it to their readers (or editors) to separate the salient stuff from the mildly tangential.”<sup>122</sup> It is the author himself to whom resulting “hypertrophic” probative notes chiefly appeal: “It spares him the pain of having to discard anything he considers to have some value or interest, and it enables him to show, or at least pretend, that he is hard-working, learned, and scrupulous.”<sup>123</sup>

How much proof is truly necessary? One cite: the primary source. A secondary source if it figures in the discussion above the line. That’s two, max. Unless the fact is disputed. Then a “but see” and one more source. Only when the author is trying to demonstrate an array of opinions or different treatment of the same legal issue by courts in different jurisdictions might there be reason for a string cite. Yet, even then, if the point is so controversial and intriguing, that varied treatment should be examined in the text.

### 3. Pincites

Direct quotes must be referred to with a specific, pinpoint citation (the “pincite”). According to the nebulous guidelines of the *Bluebook* and the *ALWD Manual*, paraphrased material would be treated likewise. The APA and ASA back off only slightly, “encourag[ing]” but not requiring pincites.<sup>124</sup>

Banishing pincites for all but direct quotes is alluring. Only the editor, whose task is to ascertain that the paraphrase accurately reflects the original, would be seriously inconvenienced. Yet the responsibility to accurately represent the notions of another is ultimately that of the writer. The editor shoulders it to some extent, as well, as a favor to the writer and the writer’s reputation, ascertaining that a paraphrase is in fact accurately paraphrased (and not, in fact, a quote). So long as an editor is involved, though, this is a good use of her labors. Pincites even for paraphrased text will forestall the inadvertent, unattributed assumption of others’ material as one’s own by the scholar whose working notes are not what they should be.

Whether the urge to revise current footnote use targets the reader’s distraction or simply the appalling copiousness of what’s below the line, keeping or dropping pincites will make no significant difference, except in one regard: frequency of citations.

### 4. Frequency of Citation

When a single thought is being developed and a single source discussed, there is no reason to have more than one footnote. That footnote can go at the end of the paragraph, so long as, from beginning to end, neither a direct quote

122. Lasson, *supra* note 5, at 937.

123. David Margolick, *At the Bar; The Footnote Fetish in Judicial Opinions: A Weather Vane of High Court Philosophy?* N.Y. Times, Jan. 4, 1991, at B14 (quoting Richard Posner).

124. Purdue APA Style Guide, at <http://owl.english.purdue.edu/owl/resource/560/02/>.

nor another source is involved. In this text by a historian, a single footnote is capable of indicating sources for both discrete sets of facts in the text:

Many Renaissance authors, from Petrarch on, came to see themselves as writing for a posterity as distant as they themselves were from the classics. Hence they began to record in writing the sorts of historical and biographical information they themselves most prized when studying the Romans—as Petrarch did, imitating Ovid, in his prose letter to posterity and elsewhere. Johannes Kepler—whose historical sense was as acute as his scientific talent—wrote a formal commentary in middle age on his own first book, the *Mysterium cosmographicum*, in order to explain to readers in a distant future the personal circumstances and particular experiences that had given that book its shape and content.[\*]

[\*] For Petrarch and Kepler, see the provocative and insightful analysis of H. Günther, *Zeit der Geschichte* (Frankfurt, 1993). Kepler’s commentary on the *Mysterium* appears in vol. VIII of his *Gesammelte Werke*, ed. M. Caspar et al. (Munich, 1937).<sup>125</sup>

In legal writing, pincites for every paraphrase or allusion proliferate a chain of “ids.” For an entire paragraph that relies on the same source, a single citation should suffice; if the information derives from a series of pages, a page span will do. For illustrative purposes, every sentence after the two topic sentences in the following passage is footnoted—unnecessarily. Apart from the pointless consumption of space, paper, and ink, the overnice repetition of the identical cite for one sentence after another creates visual clutter.

Separating spouses who both want a continuing relationship with the children cannot make a “clean break.” They must continue to have some sort of relationship with each other, since they remain parents if not partners. In *Dividing the Child*, Maccoby and Mnookin identify three common patterns of co-parenting relationships after the breakup.[1] The most common is spousal disengagement, which essentially involves parallel parenting with little communication.[2] A second pattern is conflictual, with parents exhibiting and communicating high levels of emotion.[3] The third pattern is cooperative, in which high communication leads to low conflict.[4] The impact on the children is predictable: in the conflict pattern the children are caught in the middle and are adversely affected; in the disengagement pattern, the effects on children are intermediate; the cooperative pattern conveys real psychological, social, and economic benefits to the children.[5]

[1] See ELEANOR MACCOBY & ROBERT MNOOKIN, *DIVIDING THE CHILD* 276–78 (Harvard Univ. Press 1992).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*<sup>126</sup>

125. Grafton, *supra* note 13, at 28–29.

126. Robert Mnookin & Alain Verbeke, Persistent Nonviolent Conflict with no Reconciliation:

Eliminating the chain of “ids” requires modified behavior by both author and reader. The reader would have to learn to wait for the cite; the writer would have to provide signals in the syntax to make clear what can be ascribed to the cited source and what is her own. In the above paragraph, the syntax tipoff is the repeated terms (conflictual, conflict, cooperative, disengagement, patterns). If this is not obvious enough, the last sentence could more overtly indicate that the source has not changed:

*[The authors note a predictable impact on the children in each group]:* in the conflict pattern the children are caught in the middle and are adversely affected; in the disengagement pattern, the effects on children are intermediate; the cooperative pattern conveys real psychological, social, and economic benefits to the children.

Alternatively, a paragraph break would signal that the writer has resumed her own voice.

*[The impact on the children in each group is predictable]:* in the conflict pattern the children are caught in the middle and are adversely affected; in the disengagement pattern, the effects on children are intermediate; the cooperative pattern conveys real psychological, social, and economic benefits to the children.

Such signals are the hallmarks of careful, clear writing, which enable the reader to grasp the source of each point without having to chase the footnote numbers to the bottom of the page.

---

The Flemish and Walloons in Belgium, 72 *Law & Contemp. Probs.* 151, 186 (Spring 2009). All but n.1 above are added.

The same suggestion goes for textual footnotes, which can suffer the same glut of “ids.” In footnote text, the effect is doubly distracting, for the “ids” and their pincites erupt between sentences. One cite and a page span is enough when the text obviously comes from the same source, as it does here:

[\*]...Professor Brophy reports that in the seventeenth century, many ex-indentured servants went on to own land. However, they acquired significantly less property than the average free person, and opportunities to own land became more limited by the eighteenth century as wealth became less distributed across the population and more concentrated in the hands of a few. Even so, ex-indentured servants’ opportunities to advance in the eighteenth century are subject to debate. According to Pennsylvania tax records, ex-servants rarely stayed in the same area for long, and many migrated from eastern to western Pennsylvania, where they obtained land and became quite successful. The mere fact they appeared on tax records indicates some degree of wealth. Those who remained in eastern Pennsylvania struggled to obtain land due to stiff competition and were too poor to pay taxes. The stories of success are tempered, however, by stories of tragedy. Though able to find employment as unskilled labor, some ex-servants were unable to pay their debts and wound up in prison. *Id.* at 115–22.<sup>127</sup>

The absence of “id.” or “id. at X” following every sentence facilitates the read. What the reader ultimately needs—enough information to find the source on her own—is supplied. Convenient as they are for the reader qua researcher, the general reader would be happy to see the surplus “ids” and their pincites go when a single cite and a page span will do.

## 5. Signals

One species of footnote clutter in law-review text is the signaled cite and its too-common parenthetical comment. If law-review footnotes are excessive, here (explanatory footnotes aside) is the culprit, in both the bibliographic accretion of sources they invite, and in the explanations that their use may require. The *Bluebook* “strongly recommends” explanatory parentheticals only for “cf.” and its flipside, “but cf.”<sup>128</sup> The *ALWD Manual*, though, “strongly encourages” including explanatory parentheticals whenever a signal of any sort is used.<sup>129</sup> The *Maroonbook* opines, baldly, “Explanatory text is good,” whether the citation is preceded by a signal or not.<sup>130</sup> But the editors specify,

127. Trina Jones, Race, Economic Class, and Employment Opportunity, 72 *Law & Contemp. Probs.* 57, 61 n.29 (Autumn 2009) (citing Alfred Brophy, Law and Indentured Servitude in Mid-Eighteenth Century Pennsylvania, 28 *Willamette L. Rev.* 69 (1991)).

128. *Bluebook*, *supra* note 11, at 47 (Rule 1.2(a), (c)).

129. *ALWD*, *supra* note 11, at 301 (Rule 44.4).

130. *Maroonbook*, *supra* note 11, at 12 (Rule 3.4 (a)).

more rationally, that “[a]dditional information should be provided if it helps explain the force or meaning of the authority, or if the authority makes a point different from that in the text.”<sup>131</sup>

Students have been warned not to offer articles for publication with but “sporadic” footnotes “devoid of signals,” for this would suggest to the articles editor not only that “the author is inexperienced” but that the editors themselves would have to supply the signals and supply as well “textual footnotes” (which means, presumably, stating the reason for the citation either in footnote text or nested in parentheses).<sup>132</sup> Yet footnotes introduced by signals are invitations to excess. Restrict the citation that follows the signal to as few sources as possible without further explanation, and the text above the line will again have legitimate claim to the page.

#### A. SEE

*See* is Pandora’s box. It means, says the *Bluebook*, that the “[c]ited authority clearly supports the proposition” but does not state it directly. “[T]here is an inferential step between the authority and the proposition it supports.”<sup>133</sup> That is, the point does not originate with, but is supported by the authority cited. *The University of Chicago Law Review Style Sheet* (the *Maroonbook*) suggests using *see* “if the cited authority is described or paraphrased by the citing text, or if the cited authority provides indirect but obvious support for the citing text.”<sup>134</sup> (Here the *Bluebook* and the *Maroonbook* appear to differ, for a paraphrase is not an inference, but a restatement.<sup>135</sup>)

The “*see*” cite most often appears in league with a sentence mixing the author’s own observation or generalization with information—for which a source is cited—supporting or supplementing that observation. In this setting, the author will ordinarily refer to just one source. This is a sound and sensible use of a footnote.

The “*see*” cite can spell superabundant trouble, though, when the reason the author is citing an authority is less obvious than in the mixed sentence. “*See*” and its cite can hardly be avoided if the writer is drawing an inference from another’s observation or idea. But it need not—indeed, should not—be reflexively accompanied by explanation. In all its days, no version of the *Bluebook* has commanded or even suggested that “*see*” cites be followed by a

131. *Id.*

132. Delgado, *supra* note 113, at 451.

133. *Bluebook*, *supra* note 11, at 46 (Rule 1.2(a)). ALWD similarly advises that “*see*” introduces an authority that “(a) supports the stated proposition implicitly” or, for cases, “(b) contains dicta that supports the proposition.” ALWD, *supra* note 11, at 300.

134. *Maroonbook*, *supra* note 11, at 9 (Rule 3.1(b)(1)).

135. *See* Fajans & Falk, *supra* note 114, at 101 (“No signal...is...appropriate for...accurate paraphrase of a source.”).

parenthetical answer to “why see?”<sup>136</sup> Nonetheless, the practice appears to have become stuck as a mandate to the pages of too many law-review operations manuals. The result is verbiage, distorted in most instances by the editor’s manual-driven compulsion to initiate every explanatory phrase that is not a quotation or a word or terse phrase with a present participle.<sup>137</sup>

Ideally, the author’s own text has made clear why the reader might want to consult the cited source. When it does not, the author or editor feels compelled to provide the implied link between the author’s point and her suggestion that the reader consult the cited authority.<sup>138</sup> This trouble could be avoided if the link were clearly, and routinely, stated in the text. It ought to be. Here, for example, is text that makes clear “why see” the cited source.

[S]ince *Daubert* the federal judiciary and the courts in many states have adopted a more active posture in assessing the quality of a party’s experts.[1]

[1] See Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 Geo. L.J. 1983 (1999); Joseph Sanders, *Scientifically Complex Cases, Trial by Jury, and the Erosion of Adversarial Processes*, 48 DEPAUL L. REV. 355 (1998).<sup>139</sup>

Pretty obviously, these two articles (and the first is alone sufficient) marshal evidence supporting the author’s stated generalization about judicial scrutiny of experts’ qualifications. No further explanation is needed. To offer more is unnecessary for the purposes of most readers; if they’re curious, they can find ample examples in the cited sources, themselves, which are easy enough to access. To provide, parenthetically, that (and why) the judiciary played a more active role in breast-implant and asbestos class actions, among others, is an intriguing but unnecessary tangent.

136. The Bluebook: A Sixty-Five Year Retrospective, vol. 1, 2 (1<sup>st</sup>–15<sup>th</sup> ed. 1998); The Bluebook 22 (16<sup>th</sup> ed. 1996); The Bluebook 22–23 (17<sup>th</sup> ed. 2000); Bluebook, *supra* note 11, at 46.
137. See Bluebook *supra* note 11, at 51–52 (Rule 1.5(a)). Judge Posner complains that not only do student editors consider parenthetical explanation a mandate, but that its exercise is ludicrous: “This produces such absurdities as attempting to boil down Leviathan or The Republic to a sentence fragment.” Posner, *supra* note 40, at 1346.
138. Although the compulsion to include explanatory parentheticals is not driven by Bluebook precept, the Bluebook’s two current examples of a “see” cite include either a parenthetical explanation or a textual one accompanying the cite. Bluebook, *supra* note 11, at 48 (Rule 1.2(e)(examples)).
139. Joseph Sanders, Science, Law, and the Expert Witness, 72 Law & Contemp. Probs. 63, 78 (Winter 2009).

Admittedly, detail enhances credibility, even when it is tucked below the line. When the author's generalization would be supported by a number of examples, the sources multiply, and with them the assumed need for parentheticals to distinguish the supporting detail of one source from that of another. For example,

Cochabamba was not a unique event. Similar protests over drinking water have played out in Paraguay, South Africa, the Philippines, and elsewhere.\*

\*See Neil Ford, Tanzania: Water Concession Goes Down the Drain, *Afr. Bus.*, July 1, 2005, at 50 (describing controversy over and cancellation of water privatization contract in Dar es Salaam, Tanzania); Juan Forero, Latin America Fails to Deliver on Basic Needs, *NEW YORK TIMES*, Feb. 22, 2005, at A1 (describing popular opposition to water privatization in Bolivia, Nicaragua, and Mexico); Kate Joynes, Paraguayan Government Concedes to Anti-Privatization Protesters, *WORLD MARKETS ANALYSIS*, Aug. 20, 2004 (describing opposition to water privatization in Paraguay); Water Companies in the Third World; No Easy Life, *THE ECONOMIST*, Aug. 26, 2004, at 58 (describing problems surrounding water privatization in Shanghai, Jakarta, Buenos Aires, and Manila).<sup>140</sup>

Even here, though, the verbiage is heftier than is necessary: the parentheticals are mouthfuls of participles when they need be but nibbles of proper nouns. The author's point that protests over water are ubiquitous is adequately supported by the sites of the protests reported in each article:

\*See Neil Ford, Tanzania: Water Concession Goes Down the Drain, *Afr. Bus.*, July 1, 2005, at 50 (Dar es Salaam, Tanzania); Juan Forero, Latin America Fails to Deliver on Basic Needs, *NEW YORK TIMES*, Feb. 22, 2005, at A1 (Bolivia, Nicaragua, and Mexico); Kate Joynes, Paraguayan Government Concedes to Anti-Privatization Protesters, *WORLD MARKETS ANALYSIS*, Aug. 20, 2004 (Paraguay); Water Companies in the Third World; No Easy Life, *THE ECONOMIST*, Aug. 26, 2004, at 58 (Shanghai, Jakarta, Buenos Aires, and Manila).<sup>141</sup>

Perhaps their role as buttresses supporting the wall of argument is the reason explanatory parentheticals have such staying power. Too often, though, one has the impression that these buttresses are not structural but decorative.

"See" has yet another purpose, which scholars in the humanities call "bibliographic"<sup>142</sup> and social scientists, "content"<sup>143</sup> notes. Their mission is to direct the reader to additional sources (and, in so doing, to explain why those might be useful). For example, "For a sampling of useful source materials,

140. James Salzman, *Thirst: A Short History of Drinking Water*, 18 *Yale J. L. & Human.* 94, 96 (2006).

141. *Id.* (abbreviated).

142. *MLA Manual*, *supra* note 8, at 184.

143. *Purdue APA Style Guide*, at <http://owl.english.purdue.edu/owl/resource/560/04/>. The *MLA Manual*, by contrast, calls "content" notes those that "are essential to justify or clarify" what has been written above the line. *MLA Manual*, *supra* note 8, at 182.

sec...,”<sup>144</sup> or “See Blackmur (1995), especially chapters three and four, for an insightful analysis of this extraordinary animal.”<sup>145</sup> Framed as note text, these samples differ little from what “see” cites and their explanations would provide. But they would appear, notably, as endnotes, not as pogo-stick interruptions to the text.<sup>146</sup>

In a law review, there is no good reason to pack a catalogue of sources into a footnote, even sources on a particular point. If the author really wants to do the readers a favor, she should supply a list of sources at the end of the article—ideally, annotated.

#### B. SEE ALSO

A citation preceded by “see also” typically comes after a citation to the primary source. It’s just like “see” except that the reader already has all he needs: direct authority.

The writer should use the footnote to inform the reader of the source, not of her search for the source and all its resulting booty. Too often, a chain of “see also” cites indulges, with sheer bulk, the writer’s urge to demonstrate the wide range of her intellectual curiosity. Who is to tell which of these is worth pursuing? “Where is the quality control and the sense of context in the authorities chosen?”<sup>147</sup> Begin with the obvious: one direct source per fact or point of view. “[C]ite only enough authority to spike the point to the mast, to dispel the suspicion that some quirk of circumstance or oddity of fact motivated the conclusion.”<sup>148</sup> This means that everything after “see also” should go. If a fact is disputed or a perspective debated, then “but see” and a second source (and a parenthetical explanation of the difference, if this is not obvious). No “see also.” Moreover, if the debate is so pertinent, it might instead be described in the text.

#### C. E.G.

Like the apocryphal 2:1 text-to-footnote rule, “e.g.” has accumulated usage myths of its own. A contributor to *Law & Contemporary Problems* recently asked whether the journal follows “the traditional three examples” after an e.g. signal. The answer: One will suffice.

144. MLA Manual, *supra* note 8, at 184.

145. Purdue APA Style Guide, at <http://owl.english.purdue.edu/owl/resource/560/04/>.

146. See, e.g., examples in MLA Manual, *supra* note 8, at 184.

147. Jones, *supra* note 4, at 383. The context of this remark is the author’s criticism of “the unnatural rigor by which the support for factual assertions [are] provided by the author and demanded by the...editorial staff.” But behind “see also” is where so many of these extraneous citations too often land.

148. Fuld, *supra* note 38, at 919.

## D. Cf.

Then there's "cf.," the only signal of support for which the *Bluebook* still "strongly recommends" explanatory parentheticals. "Cf.," or "compare," unlike "compare...with," signals authority that "supports a proposition different from the main proposition but sufficiently analogous to lend support."<sup>149</sup> Or, slightly more succinctly, it means "that the proposition in the text can be derived by analogy from the cited source."<sup>150</sup> The explanation is necessary because such support is "tenuous." But if support is tenuous, what is the point of citing it? A writer wishing in all honesty to reveal and differentiate another's approach or opinion on a matter from her own might make fair use of "cf." But such use carries its own risks and should be judiciously manipulated and exercised, for it can weaken her argument.

For historians, "cf." appears to have a somewhat different effect. Rather than signal support, however tenuous, it appears to signal contrast, with a taint. Historians "often...quietly set the subtle but deadly 'cf.'...before [a citation]. This indicates, at least to the expert reader, both that an alternative view appears in the cited work and that it is wrong."<sup>151</sup>

The *Maroonbook*, in accord with its rejection of the *Bluebook's* "elaborate" but not "purposive" detail,<sup>152</sup> has shown "cf." the door. Like the *Bluebook* and *ALWD Manual*, it advises using "compare...with" for two or more authorities. But, sanely, "compare" alone suffices for "cf." when only one source is cited.<sup>153</sup>

## E. BUT...

"Show me someone who can explain the difference between *but see* and *but cf.* and I'll show you a world-class master of utterly useless distinctions."<sup>154</sup> Well, yes. The distinction does appear useless. There is one, of course: "but see" has to do with direct contradiction; "but cf." has to do with a contradictory source, one not directly so, but contrarily analogous<sup>155</sup>—a differentiation that belongs in *Through the Looking Glass*.

The reason to use "but" signals at all is to acknowledge difference of opinion. In any argument, acknowledging but minimizing articulation of the opponent's point of view is wise. A mere signal and cite is about as minimal as this acknowledgment can get. No wonder that in historical scholarship a "cf." can be a slight.

149. *Bluebook*, *supra* note 11, at 47 (Rule 1.2(a)).

150. Fajans & Falk, *supra* note 114, at 101.

151. Grafton, *supra* note 13, at 8.

152. Posner, *supra* note 40, at 1343-44.

153. *Maroonbook*, *supra* note 11, at 10 (Rule 3.1(b)(8)).

154. Lasson, *supra* note 5, at 940.

155. "But cf." signals a source that "clearly supports a proposition analogous to the *contrary* of the main proposition." *Bluebook*, *supra* note 11, at 47 (Rule 1.2 (c)) (emphasis added).

At any rate, for each of these, too, one carefully selected source will do (with or without adding “e.g.”).

### B. Explanatory Footnotes

One law professor taught his students that “textual footnotes carry on the argument from the text. You put there material that would clutter up the text and detract from the narrative flow.”<sup>156</sup> What odd advice. How would extraneous material allowed to overflow from the text into a footnote interrupt the text any less than if it were permitted to remain above the line? If it’s too voluminous for the text, it ought to be left out. If the footnote’s objective is to extenuate argument, then the writer should ask herself whether her argument isn’t best argued in a straight line, not in zigzag. If a footnote is necessary to explain what the writer means in the text, then it should be said clearly *in* the text at the outset.

Former Supreme Court Justice Arthur Goldberg was right: regarding footnotes in judicial opinions, he wrote, “If an issue is important, it should be incorporated in the opinion and not relegated to footnotes.”<sup>157</sup> The same goes for law-review text. Examples of authorial frolics and detours from exposition and argument are ample. If an explanation, like defining a term, is necessary for the reader to properly understand the text, it belongs *in* the text. If it’s not directly on point but necessary, and brief, that’s what parentheses are for.

The nature of the scholarly mind is not to travel in a straight line, but in evocative loops, embracing and cogitating related but not directly pertinent points. These loops are problematic only when they are indulged in the footnotes. Scholarly legal writers could cure their addiction to demonstrating the calisthenics of their exploratory thinking either by eliminating “essaylike” exegesis cold turkey, like those compliant scholars following the MLA recommendation; or editors could permit exegesis as endnotes, which APA guidelines likewise discourage, but permit.<sup>158</sup> Apart from endnotes, another solution, for now, is a compromise: permit such explanation as is truly necessary, such as the context for a quote.<sup>159</sup> And these should be restricted to, say, one sentence. Or two. No essays, no perambulations in the park. No explanations so deep and boggy that the reader might lose her foothold in the text.

156. Delgado, *supra* note 113, at 451.

157. Arthur J. Goldberg, *The Rise and Fall (We Hope) of Footnotes*, 69 ABA J. 255, 255 (1983) (commenting that the plethora of footnotes in federal judicial opinions “cause more problems than they solve”).

158. Purdue APA Style Guide, at <http://owl.english.purdue.edu/owl/resource/560/04/> (Footnotes and Endnotes).

159. For examples of theses, see text accompanying note 69 *supra*.

*C. Footnote Subspecies*

The author's note and the omnibus note are both opportunities for self-aggrandizement. Authors' notes should be brief and they should be modest. The information they relay should be directly pertinent to the topic, and it should be scrutinized for artificiality: "references may be name-dropping or fraudulent; a history of the paper as it gestates through seminars, lectures at various institutions, and dialogues with colleagues, borders on self-advertisement; and attribution to a casual, friendly reading may not be peer review, but merely frivolous surplusage."<sup>160</sup>

As for the omnibus note, it belongs instead, alphabetized, in a list of sources.

*D. Where to Stick It: Footnotes, Endnotes, and In-Text Citations*

Fred Rodell complained of the dizzying crossword-puzzle effect of all those little numbers hiccupping through above-the-line text.<sup>161</sup> But consider the alternative—the APA and MLA style of sticking bare-boned names and page numbers, in parentheses, straight into the text. If such source references were any more detailed, they would be but irritating static. But such noise is muted by placing all other bibliographic information in the "works cited" list at the end of the article.<sup>162</sup> And it is no harder for the social-science or humanities scholar to ignore the brief parenthetical cites than it is for lawyers to read judicial opinions in which citations appear parenthetically between or in the midst of sentences. The advantage of both practices is that the reader's eye needn't bounce along pogo-stick vectors; the disadvantage is that the writer's message is visually occluded by source material.

The crossword effect of footnotes' little numbers is more easily ignored, but this cannot be said for the verbal static below the line. If allowing the reader to waltz through the text unimpeded by noise is the goal, this can be satisfied, as can the writer's urge to tell all, via endnotes.

Still, if footnotes require "head-bobbing," some contend that endnotes are worse: "Reading endnotes involves fingers, mouth and neck—fingers for turning pages, mouth for licking fingers, and neck for head-twisting.... In this most ungraceful maneuver, endnotes require readers to keep one hand locked on the text while using the other hand to flip to the appropriate endnote."<sup>163</sup> Ultimately, "[g]iven the annoyance and physical strain, the reader is apt to avoid the endnotes altogether."<sup>164</sup> But if the author cannot resist luxuriating

160. Austin, *supra* note 12, at 1023.

161. Rodell, *supra* note 20, at 41.

162. Purdue APA Style Guide, at <http://owl.english.purdue.edu/owl/resource/560/04/>. Disciplines using the APA style manual include psychology, sociology, business, economics, nursing, social work, and criminology. <http://www.apastyle.org/whouses.html>.

163. Edward R. Becker, In Praise of Footnotes, 74 Wash. U. L.Q. 1, 12 (1996).

164. *Id.*

in discursive footnotes, this is where they belong. Endnotes adeptly handled create a second text that the particularly interested reader can read separately, after or even *before* reading the article or essay.<sup>165</sup>

One interesting compromise between the endnote and the footnote is to have it both ways—explanatory notes at the foot of the page, where they can explain and enrich the text (should the reader need or want such), and probative notes at the end of the article.<sup>166</sup> Such a solution will satisfy the devotee of the discursive note but not the reader whose first interest is ready proof of an assertion's veracity. The benefit of the both-ways solution is that the reader knows where to go for what she wants.

A third alternative is sidenotes, little blocks of source material in a diminished font adjacent to the main text. This is exemplified in books by Edwards Tufte, appropriately, a scholar in and expert on information design and visual literacy.<sup>167</sup> Applying this reader-friendly alternative to academic legal writing, though, would have two drawbacks: First, it would require authorial restraint so that the blocks of marginalia did not exceed the block of text. Second, if the author did, against all odds, restrict supportive verbiage, the resulting white space would unnerve the publisher anxious about publication costs.

Whether citations and explanation go at the bottom of the page, in its margins, or at the end of the article, it is up to the author to ascertain that everything above the line is complete and does not drive the reader elsewhere. And it is up to the reader who does not wish to examine every cite or follow every tangent to keep her eyes on the text.

## V. What's Ahead

No more paper, just electronic journals with links to sources. That's what's ahead.<sup>168</sup> All this current, *Bluebook*-inspired preoccupation with small caps and

165. Try, for example, reading the endnotes to any one chapter in James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Univ. of Chicago Press 1990). And see Herma Hill Kay's "article of footnotes," published preceding the article itself. Kay, *supra* note 70.
166. The publishers of Gertrude Himmelfarb's *On Looking into the Abyss* followed this practice, somewhat to the author's chagrin. "[S]cholars, who love footnotes (some prefer the footnotes to the text),... are sorely inconvenienced [by "hiding the scholarly paraphernalia" in endnotes]. Instead of dropping their eyes to the bottom of the page to find the source of a quotation... and returning to the text without skipping a beat, they are now obliged to turn to the back of the book, thus interrupting their reading of the text and losing their place to boot." Himmelfarb, *supra* note 67, at 124.
167. See, e.g., Edward R. Tufte, *Envisioning Information* (Graphics Press 1990). This method is imitated in Microsoft Word's Track Changes feature. Thanks, though, to Mark Lomas, an early reader of this article, for making me aware that this style exists in publications, as well—at least in Tufte's.
168. In 1990, Kenneth Lasson suggested a "modest (and unoriginal) proposal for reform": to "put[] all articles onto a computerized database instead of into print. Students and professors alike would thereby be able to polish their research and writing skills—without

spacing initials and the like will go the way of the mastodon. One of these days, we'll have just URLs. They'll have to be correct, or they won't work. And they'll have to last.<sup>169</sup> But from the standpoint of citing authoritative support, life below the line will be a breeze.

This does not alleviate the heft of the explanatory footnote, though, which—then as now—ought to follow a rule of reason.

## VI. Liposuction for Legal Footnotes

### *A. Footnote Modifications*

A rational approach to footnotes in academic legal writing might include one or more of these modifications:

- In the asterisk, or author's, note, put what's directly pertinent: the author's degrees and academic affiliation and any other biographical information that is truly relevant to his or her knowledge of the topic. Acknowledgment of the *significant* help of others in the article's coming to fruition should be permitted but moderation urged.
- Cite to a single source for each fact, observation, or idea that does not originate with the author.
- Do not provide citations for facts, observations, or ideas that can be easily located and verified—taking, as a starting point, such that can be easily accessed online in a source of sterling repute, like the *Encyclopedia Britannica*<sup>170</sup> or *Black's Law Dictionary*.<sup>171</sup>
- Require pincites for direct quotes, only. Pincites are permissible for paraphrase.
- Absent direct quotes, the development of a single thought in a single paragraph owing its inspiration to a single source needs only one footnote to that source, with a page span, if necessary. There should be no excuse for a chain of "ids."

---

wasting the time of printers and publishers, postal workers, law librarians, and compulsive readers of junk mail." Lasson, *supra* note 5, at 934-35. With freely available publication via SSRN (Social Science Research Network), <http://www.ssrn.com/>, and BePress (The Berkeley Electronic Press), <http://law.bepress.com/repository/>, the future is now (though these don't—as yet—replace, but supplement printed journals).

169. For a discussion of "link rot" and less ephemeral alternatives to the URL, see Susan Lyons, Persistent Identification of Electronic Documents and the Future of Footnotes, 97 *Law Libr. J.* 681, 681 (2005).

170. *Encyclopedia Britannica*, available at <http://www.britannica.com/>.

171. Bryan Garner, *Black's Law Dictionary* (8<sup>th</sup> ed. West 2004).

- Exercise judgment in the use of signals. Avoid “see also.” One source is enough for “e.g.” Ordinarily, “see” should need no explanatory parenthetical, for the reason to see should be made plain in the text. When, one hopes, rarely, explanation of the context for the inference is too lengthy or complex for the text, it can go in the footnote as textual or parenthetical explanation. For an example, *see* note 12 *supra*.
- Lengthy textual footnotes snip the thread of the author’s argument or exposition. If explanatory notes longer than a sentence or two cannot be avoided altogether,<sup>172</sup> all notes should be endnotes. The reader who wishes to dive into their depths may. But for most readers, if the text does not suffice without the notes, it should be made to do so. This isn’t easy. “[I]t’s harder to write without footnotes than with them: it takes a good writer to decide what’s on point and what’s off—it’s easier to keep the baby and the bathwater in the same textual tub.”<sup>173</sup>
- Provide an annotated list of all sources a reader out to mine the vein of gold might want to see. Keep such lists out of the notes.

## B. Responsibilities

### 1. The Author’s

- Trim the fat from probative footnotes. Cite one primary source; “see” just one source. Satisfy “e.g.” with one cite. No “see also.”
- For the benefit of the scholar panning for gold, provide a list of annotated sources at the article’s end to demonstrate the thoroughness of your research. (Flagging sources cited not only aids the reader who wishes to revisit the text for how they were used, but attests to your having assimilated their contents.)
- Restrain yourself. Avoid discursive footnotes and tangents. If these would weaken or distract from your argument in the text, they will distract from your argument even more if placed elsewhere.

### 2. The Editor’s

- For “see” cites, ascertain that the text stands alone without explanatory parentheticals whenever possible.
- If all the facts and ideas in a single paragraph derive from the same source, one footnote will suffice. No chains of “ids.”

172. “Gradually, legal writers will learn to put all citations in footnotes but to refrain from saying anything else.” Garner, *supra* note 59, at 105.

173. Kenneth Lasson, *supra* note 5, at 937.

- Flag excess in the author's draft. It's tricky business to suggest trimming or deleting material after an author (or her research assistant) has gone to the trouble of composing lists of "see" or "see also" works and lengthy but unnecessary background or tangential notes. But the editor can forewarn authors submitting manuscripts that "light footnotes" are a journal policy and provide an example of what is meant.

### 3. The Reader's

- Keep your eye on the text. Unless you have a reason to travel below the line, for example to check on a source for a point you question, don't go there.
- In the short term, trust the author to be telling the truth. If, in the longer run, your doubts as to veracity or authoritativeness tickle your attention, flag the spot and carry on above the line. Or, go ahead: stop reading the text, drop your eyes, and start reading notes. At that point, it's your call.

## VIII. Conclusion

Footnote glut can be alleviated by giving the reader less and trusting the author more. The author implicitly stands behind her cited authority, anyway, just as she stands explicitly behind her argument. Student editors provide authors the service of checking the author's cites for accuracy and appropriateness, but it is the author, not the editor, who is ultimately responsible for both, just as the author is responsible for winnowing all sources consulted to citing the best source. The editor can help by urging less, not more. The reader more interested in substance than in sources will be grateful. The only losers will be those who relish a romp through discursive notes tickling both intellect and wit. But who's to say the witty, intellectually curious author must exercise such gifts only below the line? Any writer with rapier wit should be wielding it in the text. It's the absence of wit that, among other bad habits, has stultified law-review prose style, as Rodell reminds us:

[T]he explosive touch of humor is considered just as bad taste as the hard sock of condemnation.... I know no field of learning so vulnerable to burlesque, satire, or occasional pokes in the ribs as the bombastic pomposity of legal dialectic. Perhaps that is...why law review editors knit their brows overtime to purge their publications of every crack that might produce a real laugh. The law is a fat man walking down the street in a high hat. And far be it from the law reviews to be any party to the chucking of a snowball or the judicious placing of a banana-peel.<sup>174</sup>

At bottom, the message to law-review editors and authors alike is this: Above the line, loosen up; below the line, lighten up. Relieve reader vertigo.

174. Rodell, *supra* note 20, at 40.

**Sources**  
**(\*cited sources)**

Douglas E. Abrams, *Those Pesky Footnotes—Part I*, PRECEDENT (2007) (restating criticism of footnote excess in articles and briefs).

\*WALTER S. ACHTERT & JOSEPH GIBALDI, THE MLA STYLE MANUAL 190 (1985).

\*Bruce Anderson, *The Decline and Fall of the Footnote*, STAN. ALUMNI MAG. (Jan/Feb 1997) <http://www.stanfordalumni.org/news/magazine/1997/janfeb/articles/footnotes.html> (reflecting on the media-reported demise of the footnote and, briefly, on writers whose literary footnotes entertain at least as much as they enlighten, from Nabokov to Gibbon).

Aside, *The Common Law Origins of the Infield Fly Rule*, 12 U. PA. L. REV. 1474 (1957) (copiously annotated spoof).

Aside, *Don't Cry Over Spilled Milk: The Neglected Footnote Three to Carolene Products*, 136 U. PA. L. REV. 1553, 1565 (1988) (spoof aimed at both law-review style and *The Bluebook*, pretending to find in footnote three jurisprudential depth akin to that other scholars have plumbed in footnote four).

\*ASSOCIATION OF LEGAL WRITING DIRECTORS & DARBY DICKERSON, ALWD CITATION MANUAL: A PROFESSIONAL SYSTEM OF CITATION (2d ed. 2003) (citation manual alternative to the *Bluebook*).

\*Arthur D. Austin, *Footnotes as Product Differentiation*, 40 VAND. L. REV. 1131, 1153 (1987) (sardonically examining authors' professional motivation for their contribution to law-review-footnote-glut, including, most notably, differentiating their articles visually with, among other tricks, especially dense footnotes and abstruse sources).

\*Arthur D. Austin, *Footnote Skulduggery and Other Bad Habits*, 1989 U. MIAMI L. REV. 1009 (wittily examining footnote glut as a feature of law-review tradition, then classifying footnotes, many of which are driven more by self-promotion than by scholarship).

\*J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1989) (briefly reviewing “the problem of the footnote,” generally, and considering in considerable detail the famous footnote 4 in *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938)).

\*Edward R. Becker, *In Praise of Footnotes*, 74 WASH. U. L.Q. 1 (1996) (adding to the list of troublemaking footnotes in judicial opinions, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193-94 n.12; *Sedima v. Imrex Co.*, 473 U.S. 479, 496 n.14; and *Dirks v. SEC*, 463 U.S. 646, 655 n.14).

\*THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 18th ed. 2005) (legal citation manual).

\*G.W. Bowersock, *The Art of the Footnote*, THE AM. SCHOLAR 54, 59 (Winter 1983/84) (spurning the “pedantic footnote, both long and boring” and praising footnotes by such “great practitioners of [the] art” as Gibbon and P.N. Furbank, biographer of E.M. Forster, who amuse and enlighten with facts “divulged nowhere else” and amuse).

\*Mary Coombs, *Lowering One's Cites: A (Sort of) Review of the University of Chicago Manual of Legal Citation*, 76 VA. L. REV. 1009 (August 1990) (reviewing, tongue in cheek, development of interest in footnotes qua footnotes, noting others' criticism, offering a brief comparison of the *Bluebook's* rules indicating its formalism to the *Maroonbook's* standards indicating its permissiveness, and ridiculing signals).

Christian C. Day, *In Search of the Read Footnote: Techniques for Writing Legal Scholarship and Having It Published*, J. LEG. W. INST. 229 (2000) (advising how to write and market a law-review article).

\*Richard Delgado, *How to Write a Law Review Article*, 20 U.S.F. L. REV. 445, 451 (1986) (self-explanatory).

Paul S. Dunkin, *Happiness Is a Long Footnote*, 7 LIB. RESOURCES & TECH. SVCS 403, 404 (Fall 1963) (distinguishing between a list of footnotes as a finding list and a bibliography, and opining that a footnote is “no place for a long discourse”).

K.K. DuVivier, *Footnote Citations?*, COLO. LAWYER 47 (May 2001) (opining that footnotes in judicial opinions will not enhance readability).

\*James H. Fowler & Dag W. Aksnes, *Does Self-Citation Pay?*, 72 SCIENTOMETRICS 427 (2007) (demonstrating that the more one cites oneself, the more one is cited by others).

\*Stanley H. Fuld, *A Judge Looks at the Law Review*, 28 N.Y.U. L. REV. 915 (1953) (musing on the effect on judges of their law-review critics and of doctrinal scholarship).

\*Bryan A. Garner, *The Citational Footnote*, 7 SCRIBES JOURNAL OF LEGAL WRITING 97 (1998–2000) (urging that citations in judicial opinions be moved to footnotes).

\*Arthur J. Goldberg, *The Rise and Fall (We Hope) of Footnotes*, 69 ABA J. 255 (1983) (criticizing footnotes in judicial opinions).

\*ANTHONY GRAFTON, *THE FOOTNOTE: A CURIOUS HISTORY* (1997) (eloquently and thoroughly tracing the history of annotation from Greek texts to those of the 20<sup>th</sup> century).

Thomas Haggard, *In Defense of the Lowly Footnote*, 8 SCRIBES J. OF LEG. WRITING 173 (2001–02) (defending citational, not explanatory, footnotes, and urging their use in judicial opinions).

\*Betsy Hilbert, *Elegy for Excursus: The Descent of the Footnote*, 51 COLLEGE ENGLISH 400–04 (1989) (lamenting the euthanization of the footnote by the Modern Language Association).

\*Gertrude Himmelfarb, *Where Have All the Footnotes Gone?*, in *On Looking Into the Abyss* 122, 128–29 (Alfred A. Knopf 1994) (remarking on the practice of revisionist historians to publish without any footnotes whatsoever, either for the benefit of the presumably note-phobic “general reader,” for that of the scholar who would find such sources inaccessible or unintelligible, or for that of the author, himself, for whom citing from a list so vast would be “impractical”).

\*Colin Jones, *Unusual Citings: Some Thoughts on Legal Scholarship*, J. LEG. WRITING INST. 377 (2005) (recounting the snowball effect of being cited as an authority, sometimes for universally known facts as evidence of law reviews’ habitually excessive citations).

\*Herma Hill Kay, *In Defense of Footnotes*, 32 ARIZ. L. REV. 419 (1990) (contending—and demonstrating—that footnotes can be read as a text in and of themselves, and can so reflect the article’s argument and main points).

Jack L. Landau, *Footnote Folly*, OR. ST. BAR BULL. 19 (Nov. 2006) (tracing the inception of the footnote habit with Justinian through American legal treatises, then noting “footnote creep” affecting academic journals and criticizing the habit particularly in judicial opinions).

\*Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926 (1990) (criticizing the length, staleness, substantive esoterica, and pompous and turgid style of law-review articles; their authors’ motivation driven by criteria for promotion; and, of course, footnote excess).

Gerald Lebovits, *The Bottom Line on Footnotes and Endnotes*, N.Y. ST. BAR J. 64 (Jan. 2003) (advising restraint and methodology for footnotes or endnotes in judicial opinions).

\*Susan Lyons, *Persistent Identification or Electronic Documents and the Future of Footnotes*, 97 LAW LIBR. J. 681 (2005) (considering the problem of URL “link rot”).

David Margolick, *At the Bar; The Footnote Fetish in judicial Opinions: A Weather Vane of High Court Philosophy?* N.Y. TIMES, Jan. 4, 1991, at B14 (reporting majority criticism and minority praise for footnotes in judicial opinions).

\*Scott M. Martin, *The Law Review Citadel: Rodell Revisited*, 71 IOWA L. REV. 1093 (1986) (examining whether law reviews have moved on from Rodell’s damning them as “spinach” and proposing, given their value for student editor, that membership be open to all students interested in participating).

Ira Brad Matetsky, *The Footnote Argument—Sustained at Last?*, GREEN BAG 33 (2002) (observing the uneven, ironic fate of the Second Circuit’s instruction that federal courts not consider opinions in judicial opinions authoritative).

Paul F. McAloon, *Defending the Lowly Footnote*, N.Y. ST. BAR J. 64 (March/April 2001) (noting value of footnotes in briefs).

Andrew McClurg, *The World’s Greatest Law Review Article*, ABA J. 84 (Oct. 1995) (spoof).

\*Abner Mikva, *Goodbye to Footnotes*, 56 UNIV. COLO. L. REV. 647 (1984-85). (listing judicial footnotes that have become so seminal as occasionally to “swallow[] up the holding of the case itself”—*United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940); *Crane v. Commissioner*, 332 U.S. 1, 14, n.37 (1947); Rice’s *Toyota World, Inc., v. Commissioner*, 752 F.2d 89, 94 n.5 (1985); *Terry v. Ohio*, 392 U.S. 1, 19, n.16 (1967). *Id.* at 649-50.).

Richard W. Millar, Jr., *Millar’s Jurisdiction—Beware the Footnote Must: A Lawyer Gets Sanctioned*, ORANGE CTY. LAWYER 10 (April 2003) (noting footnote in brief insulting the reviewing court).

Scott Moise, *Footnotes*, S.C. LAWYER 50 (Nov. 2005) (footnotes in briefs).

\*John M. Ohle, *Constructing the Trannie: Transgender People and the Law*, J. OF GENDER, RACE & JUSTICE, 237, 238 (2004) (empowering the footnote in opposition to its lowly status—and to transgender people’s “often [being] relegated to the footnotes”).

\*Kris Oser, *Numerous Notes No Shot in Foot*, NAT’L L.J. JAN. 16, 1989, at 35, col. 1 (noting the latest article with record number of footnotes (4824)).

\*Richard A. Posner, *Goodbye to the Bluebook*, 53 U. CHIC. L. REV. 1343 (1986) (reviewing University of Chicago Law School’s *Manual of Legal Citation (Maroonbook)*, criticizing *Bluebook* rules, and criticizing prose style engendered and encouraged by the aura of the latter).

\*Timothy R. Rice, *In Defense of Footnotes*, NAT’L L.J. (June 20, 1988) 13 (self-explanatory).

\*Ruthann Robson, *Footnotes: A Story of Seduction*, 75 UMKC L. REV. 1181 (Summer 2007) (spoof: all footnotes, no text).

\*Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 35, 40-41 (1936) (disparaging law review style, including footnotes).

\*Fred Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 287 (1962) (including the 1936 article and correcting its “shotgun type of attack on law review style and motivation, focusing instead on their language”).

\*Ronald D. Rotunda, *Law Reviews—The Extreme Centrist Position*, 62 IND. L.J. 1 (1986) (defending law reviews for their educational benefit to students and benefit of speedy publication—compared to refereed journals—to the profession).

\*Louis B. Schwartz, *Comment: Civilizing the Law Review*, 20 J. LEGAL EDUC. 63 (1968) (proposing modification of law-review policy to cater to readers, not contributors, themselves).

Louis J. Sirico, *Fiddling with Footnotes*, U. CINN. L. REV. (Spring 1992) (critique of *The Bluebook*, 15<sup>th</sup> ed.).

\*Charles A. Sullivan, *The Under-theorized Asterisk Footnote*, 93 GEORGETOWN L. J. 1093 (2005) (plumbing the purposes of an article’s initial, author’s note).

Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739 (1985) (tracing the development of scholarly legal writing from treatises and published cases to legal periodicals, including, ultimately, student-edited law reviews and their influence on legislation and jurisprudence).

\*Frederick C. Thorne, *The Citation Index: Another Case of Spurious Validity*, 77 J. CLINICAL PSYCHOL. 1157 (1977) (observing the strategic use of footnotes in scientific journals to inflate citation indices, particularly by psychologists, to enhance one’s professional status).

Roger J. Traynor, *To the Right Honorable Law Reviews*, 10 U.C.L.A. LAW REV. 3 (1962–63) (generally lauding the products of law reviews, but gently shaking a finger at patronizing critiques of judicial opinions, urging such critics to focus not on destruction, but on “what now?”).

\*EDWARD R. TUFTE, *ENVISIONING INFORMATION* (1990) (employing blocks of marginal notes adjacent to the text to which they refer).

\*THE UNIVERSITY OF CHICAGO LAW REVIEW STYLE SHEET FOR VOL. 74, *available at* [lawreview.uchicago.edu/resources/docs/stylesheetv-74.pdf](http://lawreview.uchicago.edu/resources/docs/stylesheetv-74.pdf) (style sheet incorporating the *Maroonbook*).

\*EUGENE VOLOKH, *ACADEMIC LEGAL WRITING: LAW REVIEW ARTICLES, STUDENT NOTES, AND SEMINAR PAPERS* (2003).

\*Edd D. Wheeler, *The Bottom Lines: Fifty Years of legal Footnoting in Review*, 72 LAW. LIBR. J. 245 (1979) (hypothesizing that footnotes are becoming more plentiful, more dense, more ancillary and discursive, and tabulating data for nine academic law reviews—plus two trade reviews and one foreign journal—supporting these hypotheses).

Jon Wiener, *Footnote—Or Perish*, 21 DISSENT 588, 588 (1974) (bemoaning the appearance and use of the *Social Sciences Citation Index*, “dedicated to the proposition that the best way to find out what an article is about is to look not at its title, but at its footnotes,” to the ends that the works one cites are a measure of the value of her own piece and that the frequency of being cited becomes a measure of one’s “true influence” and “impact” in her field).

