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Those Pesky Footnotes – Part II

by Douglas E. Abrams *

Part I contrasted citation footnotes and textual footnotes. The article identified important roles for efficient citation footnotes, but said that “[h]ardly anyone wants to read textual footnotes, and hardly anyone ever does.”¹ The article ended by discussing footnoting in briefs, and Part II now discusses footnoting in judicial opinions, law reviews, and books.

JUDICIAL FOOTNOTES

Judges write opinions not as private citizens, but as public officers vested with constitutional authority to publish with the force of law. Judicial footnotes can be troublesome because *stare decisis* means that anything said in an opinion can later be cited as authority.

Footnotes may suggest that the court did not deem the footnoted material sufficiently important to warrant inclusion in the main text, but also that the court did not deem the material so unimportant as to warrant exclusion from the reporter. Lawyers and courts in later cases are left to grapple with the significance of the footnoted facts, law or citations.

Courts themselves have achieved no consensus concerning the precedential force of judicial footnotes. “Many legalists insist that footnotes are part of the opinion and entitled to full faith and credit,” Judge Abner J. Mikva found, but “others insist that they are just footnotes.”² Judge Richard A. Posner, for example, says that “a court’s holdings are authoritative wherever they appear on the

page.”³ Chief Justice Charles Evans Hughes, however, reportedly said (though not in a published opinion) that “I will not be bound by a footnote.”⁴

The Supreme Court sets an example for the lower federal and state courts. Oliver Wendell Holmes, Jr. and Benjamin N. Cardozo secured their places in American jurisprudence by the force of their writing atop the page, without dependence on footnotes. By the mid-1980s, however, Milton Handler criticized the Court’s “addiction to . . . voluminous footnotes which seem to increase term after term.”⁵ The Justices’ majority, concurring and dissenting opinions carried 3,460 footnotes in the 1984 Term alone, leading Professor Handler to complain that “it is not the function of the highest court of the land to produce a new edition of *Corpus Juris* in its opinions.”⁶ In 1990, Judge Ruggero J. Aldisert called the Court “an institution that gorges on the unnecessary and spits out footnotes in a sort of postgraduate show-and-tell.”⁷

Supreme Court footnoting conventions seem to have changed for the better in recent Terms. Justice Stephen G. Breyer has sworn off footnotes in his opinions because judges write “to explain as clearly as possible and as simply as possible . . . the reasons” for the decision.⁸ “[E]ither a point is sufficiently significant to make, in which case it should be in the text,” says Justice Breyer, “or it is not, in which case, don’t make it.”⁹

Other Justices have resisted footnotes in recent years.¹⁰ Justice Ruth Bader Ginsburg, for example, has praised “opinions that both get it right, and keep it tight, without undue digressions or decorations.”¹¹ Justice Sandra Day O’Connor once disparaged footnotes to her law clerk: “If you have something to say, just say it. Don’t weasel around down in the brush.”¹²

Most lower court judges taking a position lately have also inched toward forgoing or resisting footnotes. Judge Mikva said that using footnotes often “perverts judicial opinions.”¹³ Judge Robert

E. Keeton said that “drafting an opinion with no . . . footnotes is harder work,” but that “the result, if well done, is a clearer and more readable opinion, with fewer ambiguities.”¹⁴

Judge Posner warns that judicial footnotes can cause mischief by retaining “some propositions that are superfluous or questionable or both.”¹⁵ “[O]ften, the opinion writer will have placed material in a footnote because he was not quite sure it was right and yet the material seemed in some way necessary to complete his argument or at least supportive of it.”¹⁶ Yesterday’s footnoted dictum can become tomorrow’s holding when a court cites it, sometimes with little or no further analysis.

Judicial footnotes, Judge Aldisert writes, generally “obfuscate as much as they illuminate, creating muddlement and even generating additional litigation.”¹⁷ Judge Aldisert nonetheless finds limited roles for judicial footnotes, such as (1) to “dispose of collateral issues, controlled by precedent, that would disrupt flow or organization of text,” (2) to “record related issues not reached,” (3) to “set forth trial testimony that supports facts in text,” or (4) to “respond to concurring or dissenting opinions.”¹⁸

Writing in the *Washington University Law Quarterly*, Judge Edward R. Becker spiced the judicial debate with a pro-footnote stance. “[I]f the body of the text reads persuasively in its own,”¹⁹ he wrote, “judicious use of footnotes allows judges to communicate most effectively with their diverse audiences,”²⁰ while omitting “material that is peripheral to the essential meaning of the case.”²¹ The primary audience, the litigants and their lawyers, can benefit from footnotes (1) demonstrating that the court considered collateral claims not discussed in the text, (2) “elaborating the reasoning stated succinctly in the body of the opinion,” or (3) “furnishing a fuller understanding of the background and nuances of the case.”²²

Judge Becker also approved of (1) footnotes containing citations, statutory quotations, historical matter or theoretical discourse that reduce the need to “guess about the building blocks of the court’s reasoning,” and (2) footnotes that “buttress the holding, qualify it, or otherwise reflect on its utility.”²³ Footnotes may also question the state of the law, recommend law reform to the legislature, or respond to concurrences or dissents.²⁴

Judge Becker’s bottom line? “Moderation,” not “elimination.”²⁵

Amid the judges’ debate, the wisest approach may be a rule-of-reason grounded in stylistic judicial restraint. “No footnotes,” then-Judge Breyer promised when President Clinton nominated him to the Supreme Court in 1994. But then the nominee hedged: “Or as few as possible.”²⁶

LAW REVIEW FOOTNOTES

Law reviews have been criticized for holding only limited appeal to the bench and bar,²⁷ a destructive disconnect caused at least partly by the “footnote creep” that infects so many of these journals. Efficient citation footnotes remain central to law reviews because readers need to know the writer’s sources and authorities, but dense textual footnotes distract and annoy because they merely continue the main discussion.

Law review writing is “no different from any other writing in its basic function: communication. But the geometric growth of footnote density is fundamentally at odds with that purpose.”²⁸ When editors of the nation’s leading law reviews recently called for shorter manuscripts, I suspect that the editors conjured images of textual footnotes, whose sheer volume remains a major reason why so many articles are simply too long nowadays.²⁹

The apparent all-time winner of the “most footnotes in a law review article” sweepstakes is Arnold S. Jacobs, a securities lawyer whose 1987 *New York Law School Law Review* article was

laced with 4,824 footnotes.³⁰ One law school librarian anointed Jacobs “the Hank Aaron of footnotes,”³¹ though Jacobs had much more behind-the-scenes help than the slugger, who homered 755 times without help from the dugout. Dozens of Jacobs’ footnotes were variants of “*See infra* [or *See supra*] text accompanying note __,” the thoroughly annoying guideposts routinely added by student editors applying conventions which presume that law review readers, unlike readers of nearly all the world’s other literature for ages, need footnoted assistance to shepherd them through a text.

Some law reviews strive for pages containing one-third text and two-thirds footnotes.³² Footnotes sometimes consume an entire page, without a single line of text at the top. When footnotes subordinate the text, the tail wags the dog and readers inevitably lose confidence. “[O]ne always suspects that a law review article whose footnotes continually creep up over half of the page has been poorly written – it could have been rewritten to get rid of at least some of those footnotes if the author cared enough or had enough time.”³³

Law review writers have plenty valuable to say, backed by the intellect, detachment and opportunity for reflection needed to say it. Our voices can enrich the national dialog, however, only when we hold the attention of readers willing to listen.

My Winter 2007 article said that “[w]riters communicate best when we recognize that just because we put something on paper does not necessarily mean that people will read it.”³⁴ Writers earn “the right to a reader” by avoiding barriers to communication.³⁵ One sure way to squander this right in law reviews, says Judge Mikva, is to use textual footnotes as “trash can[s] for . . . semirelevant material.”³⁶ Or to “provide a citation for every proposition,” which “distracts the reader and may contribute more to form than substance.”³⁷

Law review writers emotionally unwilling to let go of pre-publication research and prose may

feel tempted merely to “drop it into a footnote,” though pressing the “delete” key might better serve the writer’s core aims – precision, conciseness, simplicity and clarity.³⁸ “Discipline to delete” is particularly central for writers of law review articles, which, unlike judicial opinions, hold no binding legal force. Readers obligated to plumb judicial footnotes for precedential effect can ignore law review footnotes altogether, or even heed the advice of Stanford legal historian Lawrence M. Friedman, who urged “putting down that law review and picking up a good novel. It does wonders for the soul.”³⁹

BOOK FOOTNOTES

Books are not extended law review articles. Efficient citation footnotes provide sources and authorities, but most readers do not want or expect textual footnotes from books. As a price for enjoying a good book, readers should not be coerced to play vertical “visual tennis” with textual footnotes, an irksome optical game that one writer aptly called an “enjoinable nuisance.”⁴⁰

The injunction is particularly appropriate today, when book “notes” generally mean endnotes, which hold even greater potential for distraction than footnotes. “Reading endnotes,” Judge Becker observed, “involves fingers, mouth and neck – fingers for turning pages, mouth for licking fingers, and neck for head-twisting – an effort much more cumbersome than the head-bobbing that footnotes require.”⁴¹

Books offer writers flexibility in citation form normally unavailable in law reviews. Some authors helpfully omit endnote numbers from the text entirely, and then collect citations chapter-by-chapter in notes following the last chapter. Each note indicates the chapter, page and sentence to which its citations refer, but readers unconcerned with citations may ignore the notes entirely.

Other writers use only one citation endnote per paragraph, following the last sentence. The

endnote collects all the paragraph's citations, separated by semicolons. Each citation carries a parenthetical to indicate relevance.

Treatise writers sometimes use textual footnotes because they know that most readers examine only a few paragraphs or sections, without proceeding from cover to cover. Even readers who choose such selective examination, however, need to know the importance the expert writer attaches to a proposition. If the proposition is worth stating, it belongs in the main text (with citation notes providing relevant legislative history, jurisdiction-by-jurisdiction decisional law or secondary sources). If the proposition is not worth stating, it should be omitted, rather than consigned to the “netherworld of footnotes.”⁴²

CONCLUSION

More than 250 years ago, Enlightenment philosopher Jean-Jacques Rousseau candidly appraised the endnotes in his book, *Discourse on the Origin and Foundations of Inequality Among Men*. “I have added some notes to this work, following my lazy custom of working in fits and starts,” he wrote. “These notes sometimes stray so far from the subject that they are not good to read with the text. I have therefore relegated them to the end Those who have the courage to begin again will be able to amuse themselves the 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.”⁴³

I seek a reputation for candor but not laziness, so I close by reassuring readers about the footnotes that will accompany my future “Writing It Right” articles. I borrow from Professor David Mellinkoff's preface to his classic book, *The Language of the Law*: “The footnotes are for reference only. Anything worth saying has been said in the body of the text.”⁴⁴

* Douglas E. Abrams, a law professor at the University of Missouri-Columbia, has written or co-authored five books. Four U.S. Supreme Court decisions have cited his law review articles.

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