Law Review Articles Have Too Many Footnotes

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I. Introduction, Body, and Conclusion

Law Review articles have too many footnotes.[1]

Lori McPherson is J.D., *cum laude,* T.C. Williams School of Law, University of Richmond (1996). The inspiration for this article comes from a tweet by Paul Musgrave, Assistant Professor of Political Science at the University of Massachusetts at Amherst, in which he lamented the existence of a single page from a recent law review article consisting *entirely of footnotes*. Paul Musgrave (@profmusgrave), Twitter (Oct. 5, 2017, 9:52 AM), https://twitter.com/profmusgrave/status/915937707892903942. The article in question, along with the offending page, has been located. Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. Rich. L. Rev. 801, 855 (2011) (total footnotes in the article: 398). I am simultaneously proud and unsurprised that my alma mater published the piece. I would be remiss if I did not thank my forebears for the development of the genre of legal satire as reflected in Peter Goodrich, *Satirical Legal Studies: From the Legists to the Lizard*, 103 Mich. L. Rev. 397 (2004), and if I did not point out that, not counting the contents of this asterisk and the following footnote, this is, in fact, the shortest law review article ever written, *see* Erik M. Jensen, *The Shortest Article in Law Review History*, 50 J. Legal Educ. 156 (2000) (seven words to Jensen's nine).

1. Elyce H. Zenoff, *I Have Seen the Enemy and They Are Us*, 36 J. Legal Educ. 21, 21 (1986). As one who has been swimming in the sea of legal scholarship for the better part of the past three decades, I find it sometimes takes an outsider such as Professor Musgrave, *supra* note *, to point out the obvious regarding our common style of citation. We must admit that our footnotes, at once detail-oriented, comprehensive, and accurate, ofttimes go overboard in our attempts to impress one another—and to see our work get published. Those of us who seek to share with the world our wealth of legal knowledge learn quite early in our careers that the secret to publication is often footnotes, footnotes, and more footnotes. *See, e.g.*, Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 Mich. L. Rev. 1483, 1485 (2010). Whether by design or default, the field of citology, wherein scholars analyze footnotes, is now a real thing. *See, e.g.*, Arthur Austin, *Footnote* Skulduggery** and Other Bad Habits****, 44 U. Miami L. Rev. 1009 (1990); Herma Hill Kay, *In Defense of Footnotes*, 32 Ariz. L. Rev. 419 (1990); Charles A. Sullivan, *The Under-Theorized Asterisk Footnote**, 93 Geo. L.J. 1093 (2005).

Whither the footnote? Where did this little beast originate and what is our fascination with the creature? For the love of God and all that's holy, why don't we just put what we are saying *in the text of the article*? We cannot honestly say it is because we want to save paper. Attorneys are not by their nature ecologically friendly animals; entire forests have died on their way to becoming appellate court briefs, transcripts, or motions. Using ten-point font in a footnote as opposed to twelve-point in the text may save a handful of pages in a journal, but not so much as to be meaningful to those truffula trees. *See generally* DR. SEUSS, THE LORAX (1971).

How far we have fallen. In its first edition in 1891, the Yale Law Journal used *letters* to indicate footnotes, "apparently not being able to imagine an article that required more than twenty-six footnotes." *The Under-Theorized Asterisk Footnote*,* at 5. By 1987, greed was good, and we hit our record of *4,824* footnotes in a single article. Arnold S. Jacobs, *An Analysis of Section 16 of the Securities Exchange Act of 1934*, 32 N.Y.L. SCH. L. REV. 209 (1987).

Lawyers are taught early on that we have no original thoughts. We may from time to time have an original argument, but everything else—*everything* else—derives from another, and we must cite our sources, or else face the consequences. Neither judicial notice nor common sense prevails when the dogs of "accusations of plagiarism" and "burdens of proof" bark at our heels. As an example, I wrote the entirety of the text of this article on my own, then in the course of researching this footnote, found that someone else had written half of my sentence while I was still a freshman in high school. Ergo, the direct citation.

The origins of our habits being understandable, and utilitarian considerations aside, we find in the footnote a willing coconspirator in our efforts to show our humor, cleverness, wit, and—above all—our general superiority to our colleagues. Most certainly a sarcastic remark in a serious article can hold no water, but perhaps we can sneak one by a bedraggled student editor in footnote 297 of a last-minute submission. *See generally* Thomas E. Baker, *A Compendium of Clever and Amusing Law Review Writings: An Idiosyncratic Bibliography of Miscellany with In-Kind Annotations Intended as a Humorous Diversion for the Gentle Reader*, 51 DRAKE L. REV. 105 (2002) (describing dozens of law review articles with witty footnotes). The majority will not explicitly sign on to a certain key proposition, so a justice moves it to a footnote buried on page 152 of the opinion, leaving its significance and weight to be argued by their brothers and sisters at the Bar for years on end. United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938). And who, pray tell, *who* would argue with the author of an article that has more than 1,000 footnotes supporting the propositions? Surely (don't call me that), AIRPLANE! (Paramount Pictures 1980), such persons knows whereof they speak.

Still, we all seem to instinctively know that we have a problem. *See* Joan Ames Magat, *Bottomheavy: Legal Footnotes*, 60 J. LEGAL EDUC. 65 (2010), *and articles cited therein*. Even top-level law school journals at times wrestle with the import of the footnote:

The footnote is inconsequential, inessential, an intellectual bauble that one could, in theory, do without. That is why it is excluded, marginalized, banished to the bottom of the page or the end of the book. Moreover, it is a dangerous inconsequentiality, infecting the purity and coherence of legal argument.

J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1989) (article contains 104 footnotes).

It is widely understood that the first step in addressing a problem is to understand and accept that the problem, in fact, exists. To demonstrate the overdependence on our beloved "intellectual bauble," I propose a simple metric to guide our steps: the ratio of footnotes to pages, which generates an FPP (footnotes-per-page) score for an article. For example, I have published two law review articles before this one. My most recent has an FPP of 5.73; the article is fifty-six pages long and has 321 footnotes. Lori McPherson, *The Sex Offender Registration and Notification Act (SORNA) at 10 Years: History, Implementation, and the Future*, 64 DRAKE L. REV. 741 (2016) [hereinafter (*SORNA*) *at 10 years*]. My first published piece had an FPP of 5.34; it was twenty-three pages long and had 123 footnotes. Lori M. McPherson, Note, *Liteky v. United States: The Supreme Court Restricts the Disqualification of Biased Federal Judges Under 455(A)*, 28 U. RICH. L. REV. 1427 (1994).

Let us, then, consider the relative FPPs from the five top-ranked law reviews:

Harvard, Yale, Stanford, Columbia, and Penn. Bryce Clayton Newell, *2016 Meta-Ranking of Flagship US Law Reviews*, PrawfsBlawg, (April 4, 2016), http://prawfsblawg.blogs.com/prawfsblawg/2016/04/2016-meta-ranking-of-flagship-us-law-reviews.html. From their most recent full-year published volumes, there are two scores to behold: (1) the highest number of footnotes in any article; and (2) the highest FPP in any article. May it be noted here that I controlled neither for typeface nor margin size, and leave the task of truly accurate analysis to those better-qualified in time and talent to handle it. *See Bottomheavy* at 65 (analyzing footnotes by lines of text rather than by number).

The high footnote scores in every journal all marked at 500 or above. Andrew D. Bradt, *'A Radical Proposal': The Multidistrict Litigation Act of 1968*, 165 U. Pa. L. Rev. 831 (2017) (586 footnotes); Dov Fox, *Reproductive Negligence*, 117 Colum. L. Rev. 149 (2017) (569 footnotes); Daniel E. Ho, *Does Peer Review Work? An Experiment of Experimentalism*, 69 Stan. L. Rev. 1 (2017) (500 footnotes); Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 Harv. L. Rev. 1995 (2017) (544 footnotes); Douglas NeJaime, *The Nature of Parenthood*, 126 Yale L.J. 2260 (2016) (546 footnotes).

While the race to the "most footnotes" title was won by faculty across the board, students brought their own in the fight for the highest FPP score. In all but one case it was the students—not the faculty—who scored the highest FPP in each journal's most recent volume. Note, *Clarifying Kiobel's 'Touch and Concern' Test*, 130 Harv. L. Rev. 1902 (2017) (222 footnotes in twenty-two pages, FPP: 10.09); Grace E. Hart, Note, *State Legislative Drafting Materials and Statutory Interpretation*, 126 Yale L. J. 438 (2016) (280 footnotes in forty pages, FPP: 7.0); Ashley Robertson, Note, *Revisiting* Turner v. Rogers, 69 Stan. L. Rev. 1541 (2017) (434 footnotes in forty-nine pages: FPP 8.85); Nicole E. Smith, Note, *The Old College Trial: Evaluating the Investigative Model for Adjudicating Claims of Sexual Misconduct*, 117 Colum. L. Rev. 953 (2017) (244 footnotes in thirty-seven pages, FPP: 6.59). The lone faculty victor in our sample was David Marcus, *The Short Life and Long Afterlife of the Mass Tort Class Action*, 165 U. Pa. L. Rev. 1565 (2017) (280 footnotes in thirty-two pages, FPP: 8.75).

How much is too much? How high is too high? At what point do our string citations and references to the Star Chamber become so much puffery? Does that appellate court judge *really* care that I booked legal history (I did), or would my client best be served if this brief in response used that space for a substantive argument? Are we so esoteric that only the most brilliant of the most brilliant of the most brilliant could ever understand us?

Yes, there is a time and place for any skill, and the art of deeply reasoned legal arguments is one we should continue to hone. But perhaps we would be well to also remember some common wisdom: If you have something to say, *say it with your chest*. That is, be neither afraid nor retiring in your advocacy. Refine your words. Say what you mean and mean what you say; the present example notwithstanding, don't hide your light under a footnote. *See Luke* 8:16; *Matthew* 5:15; *Mark* 4:21. If possible, cite to a source that has *already compiled* the sources you would otherwise cite individually. If that collective source does not exist, then by all means let yourself become the source that others might utilize. One of my proudest moments as a legal writer was compiling a string citation that, until the moment I wrote it, existed nowhere else. *(SORNA) at 10 Years*, 64 Drake L. Rev. at 778 n.211. There will always be room for that kind of scholarship. That being said, realize that *very little* of what we do is new. Someone else out there *really has* done a lot of the work already. Give that person the credit, add your piece, and get on with it.

A quick note to the long-suffering editors out there: If an article is "too long," don't just shift everything into the footnotes; break it into two (or three) parts, or facilitate the publication of a special issue. If it's important enough to publish, then let it be said.

Much as the kind editors, here, have done.