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Footnote Skulduggery and Other Bad Habits

Arthur Austin

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Footnote* Skulduggery** and Other Bad Habits***

ARTHUR AUSTIN****

The question gets even thornier when we consider how . . . a law review article is formulated. There is typically a page of footnotes for each page of text. The author may not assert so much as "The sun rises in the east" without citing Copernicus.¹

I. INTRODUCTION	1010
II. THE FOOTNOTE AND THE CHALLENGE OF NEW MOTIVATIONS	1012
III. CAUSES OF NEW CITATION MOTIVATIONS	1014
A. <i>Evolution in Law Journals Creates Pressure for More, More, More</i>	1014
B. <i>Publish or Perish Motivates Footnote Differentiation</i>	1015
IV. THE OPIATE OF THE MASSES: DENSITY AND THE NUMBERS GAME	1016
V. THE TITILLATING NOTE	1018
VI. NON-VERIFIABLE NOTES	1020
A. <i>Conversation Cites</i>	1020
B. <i>The Author's Note</i>	1021
VII. THE IDEOLOGICAL NOTE	1024
VIII. SELF-CITATION	1026
IX. THE TECHNICAL JARGON DILEMMA	1028
X. CONCLUSION	1029

* Footnotes are, therefore, a common thing to thousands of people but who among those thousands can say when they began?

I have not been able to discover their origin. Articles have been written to both condemn and defend them, but none, that I can find, to trace their origin. They therefore seem to be the mark of a scholar but not the object of his study.

Barr, *The Origin of Footnotes*, 5 RQ 16, 16 (1966).

** Over the years the footnote has regularly provided a safe refuge for untenable hypotheses. Writers are inclined to behave as if they will be held less accountable for indiscretions committed below the text than in it. . . . Lunacy in small print is lunacy nonetheless, and it is particularly reprehensible when it is not even amusing.

Bowersock, *The Art of the Footnote*, 53 AM. SCHOLAR 54, 61 (1983/84).

*** Since the use to which the notes will be put by the reader is practical—to assess or verify an assertion in the source or to seek more information from it—footnotes should never be used as ornamentation or ballast for your text. The quality and extent of your scholarship are not measured by the number of notes or by their elaborateness.

J. BARZUN & H. GRAFF, *THE MODERN RESEARCHER* 361 (4th ed. 1985).

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1. Coleman, *Dilemmas*, STUDENT LAW., Feb. 1989, at 13.

I. INTRODUCTION²

Second-year law review acolytes are forced to dedicate at least one year of a putatively prosperous legal career to footnotes.³ Each day, they spend hours interpreting arcane sections of the *Bluebook*⁴ and then forfeit good beer time on the weekends in order to verify "fugitive"⁵ citations.⁶ By the time law students become clerks,⁷ lawyers,⁸ or dropout law professors,⁹ they have been trained to intimidate and confuse the world with a profusion of self-serving,¹⁰ tedious, and lengthy notes.

2. This Article incorporates many of the suggestions and comments made in response to my essay on footnotes: Austin, *Footnotes as Product Differentiation*, 40 VAND. L. REV. 1131 (1987).

A condensed version of this Article was presented to the National Conference of Law Reviews, Toledo College of Law, Toledo, Ohio, March 31, 1989.

The encouragement and support of Colonel Mosby (Saint Bernard AKC No. WF565359) is appreciated. The St. Bernard Mosby is much more docile than his namesake, John Singleton Mosby, who was expelled from the University of Virginia for shooting a fellow student. Mosby used his fighting skills to become a ranger for the South during the Civil War. Marshall, *The 'Grey Ghost' at Virginia: The Story of a Rebel Expelled*, U. of Va. Alumni News, Mar./Apr. 1986, at 10.

3. The discipline of cite checking and of adherence to the complexities of the *Bluebook* is thought to instill "nonshirking" habits in young associates—a habit highly valued by mega law firms. Gilson & Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 327 (1985).

Writing in 1966, Martin Mayer said law review editors "gain access to the best jobs: the big law firms, with their starting salaries of \$9,200 and up, recruit almost exclusively from the law reviews." M. MAYER, *THE LAWYERS* 111 (1966). By the eighties, the going rate was \$70,000 at the mega firms. Austin, Book Review, 11 HARV. J.L. & PUB. POL'Y 527, 528 n.10 (1988). Steven Brill observed that the scarcity of top talent "is approaching crisis proportions at any firm worried about quality control, [and that] a going rate of \$100,000 might make economic sense." Brill, *Forget the Going Rate*, AM. LAW., May 1987, at 3.

4. A UNIFORM SYSTEM OF CITATION (14th ed. 1986). Despite competition from the *Maroon Book* (THE UNIVERSITY OF CHICAGO MANUAL OF LEGAL CITATION (rev'd ed. 1986)), most law reviews still adhere to the *Bluebook*.

5. See *infra* notes 59-66 and accompanying text.

6. Third year students spend "endless hours" in their "coffee cup cubicles discussing such moon-shattering subjects as whether 'compare' is really different from 'compare . . . with' or whether '(8 Wheat)' is surplus." Tobin, Book Review, II STAN. L. REV. 410, 411 (1959) (footnote omitted).

7. As clerks, they continue the footnote obsession by corrupting opinions with long memos supported by numerous footnotes. Hewitt, *One Way to Ensure Judges Be Brief*, Wall St. J., July 28, 1986, at 14, col. 3.

8. As lawyers, they seek to avoid page limitations on briefs by "moving gobs of text into single-spaced footnotes, thereby leaving essentially the same number of words in the brief." Harlan, *A Dangling Modifier, No Doubt, Warrants a Citation for Contempt*, Wall St. J., Nov. 1, 1988, at B1, col. 1.

9. "With few exceptions . . . people are law professors because they tried practice and didn't like it." M. MAYER, *supra* note 3, at 117. "And once the requisite footnoted law review articles have been spun, paving the tunnel to the tenure track, it gets harder to leave." Repa, *Taking Leave*, STUDENT LAW., Oct. 1988, at 21.

10. See *infra* notes 121-33 and accompanying text.

Despite their ubiquity,¹¹ footnotes are often misunderstood, misused, or abused.¹² They are, moreover, like Pareto's bats:¹³ some people view them as a subversive breed of mice ("pestilent excrescences on erudition"),¹⁴ while others see them as elegant birds that convey a message of "miracle, mystery, and authority."¹⁵ Whatever the general perception, the reality is that footnoting in law journals is no longer a painful hangover from the composition of the main event of the text; the "barking"¹⁶ from the cellar of the page has taken over. Authors have recognized that discerning, intelligent—or unethical—manipulation of footnotes can be a significant factor in achieving promotion, tenure, and status.¹⁷ Paradoxically, many student editors are unaware of both the new trend and their role in its development.¹⁸

11. Barr, *supra* note *.

12. Judge Mikva, in his campaign against footnotes, argues that footnoting is often intellectual gamesmanship that can pervert precedent. Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647, 648 (1985). For earlier criticism of legal writing, see Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 41 (1936).

13. "Pareto once remarked that the statements of Karl Marx are like bats; from one angle they resemble birds while from another view they look like mice." E. MASON, *ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM* 391 (1957).

14. Barr, *supra* note *, at 16 (quoting Ayscough, [Francis Browning Drew Bickerstaffe-Drew], *Footnotes*, LEVIA-PONDERA: AN ESSAY BOOK 274-77 (1913)).

15. Austin, *supra* note 2, at 1154 (citing F. DOSTOYEVSKY, *THE BROTHERS KARAMAZOV* 303 (Modern Library ed. 1950)).

16. Tobin, *supra* note 6, at 412.

17. See *infra* notes 130-32 and accompanying text. Writers compete to publish the article with the "most footnotes." The *New York Law School Law Review* claims title with Jacobs, *An Analysis of Section 16 of the Securities Exchange Act of 1934*, 32 N.Y.L. SCH. L. REV. 209 (1987), which contains 4,824 notes. In defending the article, a research editor described it as "[a]n article many years in the making, sure to be a landmark in Sec. 16 construction and comprising over 4,600 footnotes." Letters, Nat'l L.J., July 4, 1988, at 12, col. 3 (Letter from Brian Graifman).

What constitutes a "record" is a matter of dispute.

In "*Numerous Notes No Shot in Foot*" (NLJ, Jan. 16), Fred Shapiro, head of public services at Yale Law Library, is quoted as saying that Arnold S. Jacobs' record of 4,824 footnotes in a single law review article "is the Hank Aaron of footnotes." But Hammerin' Henry is the lifetime home run king, not the *single season* home run king. Does this mean that Mr. Shapiro will next be feeding us totals of the numbers of footnotes by Mr. Jacobs (and others) on a lifetime basis rather than just in single articles?

Letters, Nat'l L.J., Jan. 30, 1989, at 12, col. 3 (Letter from Benjamin H. Cohen).

According to Professor Shapiro, the most footnoted judicial opinion is *United States v. E.I. DuPont de Nemours & Co.*, 118 F. Supp. 41 (1953), with 1,715 notes. Kaplan, *Law Schools*, Nat'l L.J., Mar. 18, 1985, at 4, col. 3.

18. In a discussion with upcoming editors after my talk in Toledo, *supra* note 2, they expressed shock and dismay that footnotes are manipulated for reasons beyond scholarship. To them, footnotes are "neutral" and "objective."

II. THE FOOTNOTE AND THE CHALLENGE OF NEW MOTIVATIONS

The basic function of a footnote is to allow "the interested reader to test the conclusions of the writer and to verify the source of a challengeable statement."¹⁹ To fulfill this function, editors must verify the existence of the source,²⁰ make sure that the text material is in fact supported by the reference,²¹ and then apply the proper *Bluebook* (or

19. Frost, *The Use of Citations in Literary Research: A Preliminary Classification of Citation Functions*, 49 LIBR. Q. 399, 399 (1979).

Footnotes can also be used to "persuade" the author's peers that his methods and findings are correct. Brooks, *Private Acts and Public Objects: An Investigation of Citer Motivation*, 36 J. AM. SOC'Y FOR INFO. SCI. 223 (1985).

20. Verification of note sources can be difficult and sometimes indeterminate. A Noel Coward experience demonstrates the problem. Bowersock attributed Coward with saying: "Encountering [a note] is like going downstairs to answer the doorbell while making love." Bowersock, *supra* note **, at 54. I cited Bowersock as authority for this statement. Austin, *supra* note 2, at 1152 n.92. The *Wall Street Journal* used the comment without attribution. Barrett, *To Read This Story in Full, Don't Forget to See the Footnotes*, Wall St. J., May 10, 1988, at 1, col. 4 n.1. Rice, in a subsequent article, gave attribution to me. Rice, *In Defense of Footnotes*, Nat'l L.J., June 20, 1988, at 14, col. 1 n.13. In concluding that "the boilerplate attribution may be wrong and, worse, bowdlerized," Aaron M. Fine offered the following quote by Coward's biographer:

My interpolations in quotations from Noel's writings and letters are contained within square brackets, which will I hope make for smoother reading and will avoid the bane of footnotes, which Noel would have hated. He could never bring himself to glance at one, he said, after John Barrymore expressed the opinion that having to look at a footnote was like having to go down to answer the front door just as you were —.

Letters, Nat'l L.J., July 4, 1988, at 12, col. 3 (Letter from Aaron M. Fine (quoting Cole Lesley)).

There is another twist of verification irony in Rice's article defending footnotes: in citing my Vanderbilt article, *supra* note 2, he refers to me as "Hahn." (I am the holder of the Edgar A. Hahn Professor of Jurisprudence Chair). Rice, *supra*, at 14 nn.13-15 & 25.

For an amusing tale of fact-verification, see Blow & Posner, *Are You Completely Bald?*, NEW REPUBLIC, Sept. 26, 1988, at 23. For a description of fact checking generally, see Lipman & Landro, *Caveat Lector: Recent Cases Spark Debate on Fact Checking of Books*, Wall St. J., Aug. 6, 1987, at 27, col. 4.

21. Fraud does occur. To embellish their discussion of automobile seat belts, two writers attributed this statement to the Earl of Andrews: "Quoth what fool darest upon the highways of this realm without properly strapping his ass to his cart." Høglund & Parsons, *Caveat Viator: The Duty to Wear Seat Belts Under Comparative Negligence Law*, 50 WASH. L. REV. 1, 2 n.3 (1974). The editors subsequently discovered that the quote and citation was a hoax:

Contrary to numerous personal assurances by the authors that the quoted statement was accurate, the Editorial Board has learned that neither the quote nor the reported source exist. A card on file at the Washington Supreme Court Law Library, personally viewed by Review personnel, was apparently a forgery, part of a hoax perpetrated by the authors of the article. While acknowledging the sophistication of the authors' humor, we apologize to our readers for the authors' indiscretion and our dupability.

Errata, 50 WASH. L. REV. 230 (1975).

The ultimate of literary crimes, plagiarism, is a constant problem for law reviews. See

Maroon Book)²² rules on form in order to maintain uniformity.

Competition now rages in developing new footnote techniques; "clever writers learned to exploit footnote techniques to create a unique package distinguishable from the conventional format."²³ Density—"[t]he quotient derived by dividing the number of lines of footnotes by the total number of text and footnote lines"²⁴—is increasing at exponential rates.²⁵ Citation motivations are increasingly varied and are often inconsistent with conventional academic objectives.²⁶ The resulting tensions are challenging editors with a heretofore overlooked issue—footnote ethics.²⁷

Traditionally, a writer and an editor co-exist as participants in a fragile, sometimes hostile, relationship. With the protective instincts of the originator, the writer will fiercely resist any effort to change the work product.²⁸ The editor, on the other hand, has a responsibility to

Coleman, *Briefly*, STUDENT LAW., Feb. 1988, at 6; Comment, *Plagiarism in Legal Scholarship*, 15 U. TOL. L. REV. 233 (1983).

22. THE UNIVERSITY OF CHICAGO MANUAL OF LEGAL CITATION (rev'd ed. 1986). It has been praised by Judge Posner, Posner, *Goodbye to the Bluebook*, 53 U. CHI. L. REV. 1343 (1986), and condemned by the *Harvard Law Review*, Book Note, 101 HARV. L. REV. 1323 (1988).

23. Austin, *supra* note 2, at 1139.

24. Wheeler, *The Bottom Lines: Fifty Years of Legal Footnoting in Review*, 72 LAW LIBR. J. 245, 248 (1979).

25. See Jacobs, *supra* note 17.

26. See Frost, *supra* note 19 and accompanying text.

27. Noting that on occasion "law reviews have succumbed to improper pressures in carrying out their official responsibilities," Professor Closen has proposed a code of professional responsibility for law reviews. Closen, *A Proposed Code of Professional Responsibility for Law Reviews*, 63 NOTRE DAME L. REV. 55, 56 (1988). Closen does not, however, specifically address footnote problems.

The most discussed ethical problem comes from the author's side—the use of the law review to publish an article favoring a client's position. See Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 228-29 (1965).

Professor Jensen complains of another problem involving the author: multiple submissions of articles. He proposes a guideline: "No one should have more than five copies of any manuscript circulating for consideration for publication at one time." Jensen, *The Law Review Manuscript Glut: The Need for Guidelines*, 39 J. LEGAL EDUC. 383, 386 (1989). The proposal is obviously naive and unworkable. Very few non-tenured faculty members, living on the edge of faculty review and possible extinction and always desperate for an acceptance, would have the confidence and discipline to limit distribution to five journals. Personal experience and conversations with other authors shows the normal distribution rate to be twenty to thirty manuscripts per mailing.

28. The story is still told of the Articles Editor at Columbia who presumed to edit an article by the renowned British jurisprudential philosopher H.L.A. Hart. Professor Hart's characterizations of the editing ranged from "utterly ridiculous" to "incomprehensible." Only the intervention of sober authorities at Columbia saved the article for that school's Law Review.

D. WHITE, THE OFFICIAL LAWYER'S HANDBOOK 53 n.** (1983).

advise and, when necessary, to interfere.²⁹ Law journal editors, already disdained as students and chastised for their "neophytic judgment,"³⁰ are now further challenged by footnote gamesmanship and evolving cite motivations.³¹ Lacking the experience of professionals,³² however, student editors are often unaware of the difficult judgments that should be made on footnotes.

III. CAUSES OF NEW CITATION MOTIVATIONS

A. *Evolution in Law Journals Creates Pressure for More, More, More*

Legal journals subsidized by law schools have evolved through three generations: (1) the initial appearance of student-edited journals;³³ (2) the post-World War II explosion in the number of publications;³⁴ and (3) the recent appearance of special interest journals.³⁵ Although the second and third generations of law review literature overlap, the second generation still dominates in numbers and influence.

Within the overlap market of the second and third generations is

29. For description of how Maxwell Perkins, undoubtedly the best editor, handled talents like Hemingway, Fitzgerald, Rawlings, Wolfe, and others, see A. BERG & M. PERKINS: *EDITOR OF GENIUS* (1978).

30. Jensen, *supra* note 27, at 383.

31. "Both the proponents and the critics of citation indexing seldom consider that scholars may have complex citation motives that cannot be satisfactorily described unidimensionally." Brooks, *Evidence of Complex Citer Motivations*, 37 J. AM. SOC'Y FOR INFO. SCI. 34, 34 (1986).

32. The major criticism of student edited law journals is that the editors are not peers of the authors they evaluate and thus lack the expertise to make critical judgments. Student edited reviews have been criticized for lack of quality, too much footnoting, and turgid style. Cramton, "The Most Remarkable Institution": *The American Law Review*, 36 J. LEGAL EDUC. 1, 8 (1986). One bitter writer said: "Student-edited journals are the scandal of legal publishing. You get these kids who check for all the commas but not for substance." Gray, *Harvard's Faculty Stirs a Tempest with Plans for New Law Journal*, Wall St. J., May 28, 1986, at 37, col. 4 (quoting Professor Marc Galanter, University of Wisconsin). On the other hand, student editors complain that they are pressured to accept poor quality articles from their own faculty. Cahan, *Briefly*, STUDENT LAW., Sept. 1985, at 5.

33. The first student edited law review was the *Albany Law School Journal*, published in 1875. Swygert & Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739, 764 (1985).

34. There were 42 law school journals in 1927; by 1984 the number was approximately 250. Austin, *supra* note 2, at 1137 n.26.

35. The third generation is eclectic in coverage and style, including newsletters published by law firms, gossip publications such as Steven Brill's *American Lawyer*, and a new wave of "academic" publications. It is a significant increase, with schools such as Boston University subsidizing seven journals. *Legal Publications: A New Growth Industry*, N.Y. Times, Aug. 19, 1988, at B5, col. 3. This growth may have a negative effect: "We spread ourselves very thin. We have so many journals and so many scholars or would-be scholars that the quality across the board may tend to dip." *Id.* (quoting Larry W. Yackle, Associate Dean at Boston University Law School).

a small submarket of "better law reviews,"³⁶ which are largely exempt from intense competition for lead articles.³⁷ Second- and lower-tier journals, however, must scrounge to get manuscripts. "Each of these many journals has an editor whose measurement of success is largely dependent upon meeting his publication deadlines and filling a certain preplanned number of pages for each particular issue."³⁸ Consequently, the longer the article, the higher its market value to the journal, to the author, and to the institution.³⁹ Both writers and editors thus have a common goal: the use of notes to lengthen articles.⁴⁰ One scholar, observing that his pieces were invariably edited to double or triple the number and density of the footnotes, described this experience with a law review: "[T]hey will offer publication of my latest article, if only I will agree to about thirty more footnotes!!"⁴¹

B. *Publish or Perish Motivates Footnote Differentiation*

Competition exploded on the supply side when pre-tenure faculty were forced to "publish or perish."⁴² Ambitious writers were forced to look for ways to get published as quickly and as frequently as possi-

36. Jensen, *supra* note 27, at 383. The ranking of law schools, such as the "Gourman Report," J. GOURMAN, *THE GOURMAN REPORT* (1980), or by the news media, creates more controversy and ill feeling than abortion and flag burning combined. The "top ten," having made the elite category, can be generous by criticizing the ratings; the schools placed in the second- and third-tier position, however, see an elitist conspiracy.

37. "An informal phone survey reveals that the *California Law Review* gets 1000 manuscripts per year, *Penn* over 500, *Virginia* 1,000, and *Michigan* around 700." Austin, *Some Thoughts on Legal Scholarship*, Case W. Res. L. Alumni Bull., Jan. 1988, at 27, col. 1, 28, col. 1.

38. Murray, *Publish and Perish—By Suffocation*, 27 J. LEGAL EDUC. 566, 567 (1975).

39. Footnote density increases the number of published pages by faculty, which Northwestern University School of Law, in its private rating system, deems relevant in ranking law schools. According to its own survey of pages published by faculty, Northwestern, which ranked sixteenth in the *U.S. News & World Report Survey*, should have been ranked seventh. *A Law School Does Its Own Rankings*, Wall St. J., Feb. 15, 1989, at B1, col. 1. Professor Banzhaf replies: "But that's exactly the kind of half-truth that keeps many of my colleagues legal eunuchs, unwilling to use (and incidentally to test) their legal abilities in the real world when they can advance the public good, rather than simply accumulate page counts and pad resumes." Letters, Nat'l L.J., Apr. 3, 1989, at 16, col. 3 (Letter from John F. Banzhaf III).

40. A study by Professor Michael J. Saks of the University of Iowa College of Law indicates that the ultimate result is an increase in the size of law journals. Middleton, *Law Reviews Get Fatter and Longer*, Nat'l L.J., Jan. 9, 1989, at 9, col. 4.

41. Letter from David L. Gregory, Kenneth Wang Research Professor of Law, St. John's University, to Author (Dec. 10, 1987) (on file with Author).

Recalls one law professor who asked that his name not be used for fear of alienating the editors: "It was a ghastly experience, easily one of the more horrible of my professional life. Every time the phone rang, my stomach sank. They always wanted more footnotes, more rewriting, more, more, more."

Gray, *supra* note 32, at 37, col. 5.

42. "Whatever the reason, it seems clear that demonstrated achievement in scholarship as

ble. They encountered a problem: The committee editing system inflicted by the elite journals (and slavishly imitated by others) imposed an unimaginative style on authors. Writers were conditioned to "cultivate a most dismal sameness of style, a lowest-common-denominator style."⁴³ Flair, humor, and individualism were not tolerated in the text.

Faced with banality, authors turned underground to the note area to unleash a new fashion of footnote differentiation that has resulted in a cluster of unique cite motivations.⁴⁴ Because the *Bluebook* and manuals in other disciplines do not educate editors as to the existence and diversity of the product differentiation motives,⁴⁵ the footnote invasion of law journal writing was easily accomplished. Even the "best and brightest" of law student editors overlook cite motivations such as density, titillation, non-verifiable notes, and ideological preaching.

IV. THE OPIATE OF THE MASSES: DENSITY AND THE NUMBERS GAME

"Happiness is a long footnote. Happiness for whom?

For him who writes it?"⁴⁶

"Airing it out"⁴⁷ for a high density ratio accompanied by a copious number of notes is now taken for granted.⁴⁸ The expectation is that expanding the footnote turf at the expense of the text connotes

a requirement for tenure is becoming more significant and widespread." Zenoof & Moody, *Law Faculty Attrition: Are We Doing Something Wrong?*, 36 J. LEGAL EDUC. 209, 221 (1986).

Tenured faculty are now feeling pressure to publish as well. Stanford Dean Paul Brest says: "In the law schools that make the distinction, scholarship [as measured by publication rate and quality] is one of the factors that determines the goodies." Markoff, *Law Schools*, Nat'l L.J., Feb. 27, 1989, at 4, col. 3.

43. Posner, *supra* note 22, at 1349.

44. "By imitating the seller who engages in 'product differentiation' to build consumer preference for his products, clever writers learned to exploit footnote techniques to create a unique package distinguishable from the conventional format." Austin, *supra* note 2, at 1138-39 (footnotes omitted).

45. The twelfth edition of the *Bluebook* has been criticized for its "failure to say anything even faintly disapproving about the addiction to footnotes which mangles all legal writing." Benton, Book Review, 86 YALE L.J. 197, 199 (1976). The failure has continued through the fourteenth edition.

46. Dunkin, *Happiness Is a Long Footnote*, 7 LIBR. RESOURCES & TECHNICAL SERVICES 403, 405 (1963).

47. To football quarterbacks like Mr. Bernie Kosar of the Cleveland Browns, this means throwing a long pass in expectation of scoring a touchdown. Austin, *supra* note 2, at 1141 n.47.

48. It is now a new contest of numbers; records are kept and publicized. See *supra* note 17.

thorough research and a dedication to scholarship.⁴⁹ The practical result is that density and a high footnote count get articles published. "In my early days on Law Review," according to footnote opponent Judge Mikva, "I was told that the footnotes are the real measure of worth in legal writing."⁵⁰ In advising new writers, Professor Delgado says that student editors associate a paucity of footnotes with the work of an inexperienced author.⁵¹ Hence the obvious tactic: Go for the record!⁵²

Density, however, may cloak ploys of questionable ethical credibility. Is it, for example, acceptable to fill a page of string cites from every jurisdiction when several references would suffice?⁵³ Quality and judgment likewise may succumb to density as authors sneak in cites to vacuous and repetitive student notes, worthless commentary, and material of doubtful relevance.⁵⁴ Editors should screen out notes written by students that restate the obvious, pay homage to banality, and regurgitate precedent.

The conventional assumption is that authors carefully select and read the material that they cite; however, the addiction to density renders this reckoning at best dubious, and in reality, ridiculous.⁵⁵ Frequent references to books and treatises could reflect scholarship, but are more likely to constitute blatant footnote padding and perhaps a

49. "It is even rumored that some legal academics measure scholarly achievement by citation mass." Zenoff, *I Have Seen the Enemy and They Are Us*, 36 J. LEGAL EDUC. 21, 22 (1986).

50. Mikva, *supra* note 12, at 653.

51. Delgado, *How to Write a Law Review Article*, 20 U.S.F. L. REV. 445, 451 (1986).

52. Without high density, a record number of footnotes would be declassée. "While the sheer number of footnotes is important, the average number of footnotes per page and the ratio of footnotes to actual text is far more important in determining whether an article can be meaningfully utilized by practitioners without subjecting them to the use of bifocals and magnifying glasses." Kaplan, *Law Schools*, Nat'l L.J., July 15, 1985, at 4, col. 4 (quoting Dennis J. Mahr). What is the record for the most "dense" note? Mr. Alfred J. Sciarrino points to his article, "Free Exercise" Footsteps in the Defamation Forest: Are "New Religions" Lost?, 7 AM. J. TRIAL ADVOC. 57 (1983), in which note 317 is five pages long. "It was supposed to be an appendix, but the editors decided to put it in as a footnote." Kaplan & Metaxas, *Law Schools*, Nat'l L.J., June 17, 1985, at 4, col. 3 (quoting Alfred J. Sciarrino).

53. See, e.g., Note, *Saving the Child: Rejuvenating a Dying Right to Rehabilitation*, 11 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 123, 150 nn.141-42 (1985).

54. No matter how carefully chosen, law review editors usually lack the knowledge or practical experience to write probing legal analyses or studies of the empirical consequences of law. In a word, they tend to hide behind their footnotes, substituting a forest of annotations and the most "neutral" or "reasonable" synthesis of formal legal doctrines for original examination of what the law actually is or ought to be.

J. SELIGMAN, *THE HIGH CITADEL* 183 (1978).

55. As George Stigler says: "To read an article carefully and thoughtfully is often a task of hours" G. STIGLER, *MEMOIRS OF AN UNREGULATED ECONOMIST* 65 (1988).

form of plagiarism.⁵⁶ Moreover, it is not uncommon for student assistants to research and write footnotes⁵⁷ which are used without close scrutiny by the author.

Citing unread material is an ethical lapse by the author. Yet, it is a lapse that is largely beyond the control of the journal. Editors who attempt to verify that an author has actually read a source are faced with a Catch-22 quandary: they can confront the authors, seek assurances, and get them—with no guarantee that the assurances thus received are any more reliable than the original representations. Or, they can seek assurances—and get the article pulled by an insulted author. The politic solution is to ignore the problem and simply check the cite to ensure that it supports the “challengeable statement.”⁵⁸

V. THE TITILLATING NOTE

By adopting the “fancy”⁵⁹ style of writing, authors create a wider universe of citation sources. The result is one of the newest and most pervasive fads: the “titillating” footnote. The objective of the titillating note is to embellish the text with sources that add flair, pique

56. Some critics have gone beyond the questioning stage and have charged that authors are fraudulent in making references to other publications. . . . “The author selects citations to serve his scientific, political, and personal goals and not to describe his intellectual ancestry.” One consequence . . . is carelessness; another is “plagiarism of other people’s citations without having actually used them.”

Broadus, *An Investigation of the Validity of Bibliographic Citations*, 34 J. AM. SOC’Y FOR INFO. SCI. 132, 132 (1983) (quoting *Abuses of Citation Indexing*, 156 SCIENCE 890, 890 (1967) (Letter from Kenneth O. May, Department of Mathematics, University of Toronto, Canada)).

57. To justify their existence, student assistants are likely to supply numerous high density notes. If they are moonlighting from law review, they are trained to exalt footnotes. Law journal editors continue the habit when they pass on to clerkships. Former Justice Goldberg blamed clerks for “the proliferation of footnotes in court opinions. In all probability this can be traced to the invaluable assistance of law clerks who conceive, law review style, that footnotes are essential to good opinions.” Goldberg, *The Rise and Fall (We Hope) of Footnotes*, 69 A.B.A. J. 255, 255 (1983).

58. The most prudent recourse is the one adopted by the *Case Western Reserve Journal of International Law*, which is to caution the author: “Authors should cite only to authorities which they have personally consulted.” 20 CASE W. RES. J. INT’L L., publication page (1988).

59. The user of fancy scholarship strives as much as possible to include as many obscure, impenetrable, and ponderous thinkers per footnote as possible. The best luminaries, of course, are the ones who have said as little as possible about contemporary law: Tolstoy, Jung, and Schopenhauer seem like good, as yet largely unclaimed, candidates. Fancy scholarship is characterized by the unverifiable, but no doubt masterful, deployment of the complex and arcane vocabulary of some foreign discipline like psychology or rhetoric or something altogether different.

Schlag, *The Brilliant, the Curious, and the Wrong*, 39 STAN. L. REV. 917, 917 (1987) (footnote omitted).

interest, and convey the impression that the author's scholarship has gone beyond the mundane.

Creative and "fancy" writers titillate with cites to "newly discovered, unusual, or exotic"⁶⁰ material. With the Woodstock generation of the 1960's now retiring to the friendly bosom of academe,⁶¹ rock lyrics have become a popular titillator.⁶² The trend toward "law and a banana"⁶³ courses provides unusually rich opportunities and sources for titillation. For example, writers in law and economics can impress the reader with mathematical equations, graphs, and diagrams. Law and psychiatry writers can use provocative insights from the Freudians. Sports fanatics are no longer excluded—they can write about the infield fly rule,⁶⁴ while titillating readers with references to George Brett, Billy Martin, and the relationship between art and baseball.⁶⁵ Gorilla cartoons can enliven boring articles on civil procedure.⁶⁶ Feminists and critics can foreplay with their choice of

60. Austin, *supra* note 2, at 1147.

61. A number of prominent former New Left activists now hold teaching jobs, and many are carrying on the battles of the protest movement in the contexts of their academic disciplines. No definitive numbers are available on how many former radicals have become faculty members, but many old New Leftists say—and many conservatives complain—that the university has become the new front line of radical politics.

Hirschorn, *A New-Left Challenger Comes to an Uneasy Peace with Academe*, Chron. Higher Educ., June 29, 1988, at A3, col. 2; see Bishop, *From the Inside Out*, N.Y. Times, Jan. 8, 1989, § 4A (Education Life Magazine), at 21, col. 1.

This perhaps accounts for the new interest in the activism of the 1960's. See Berger, *60's Find a Place in 80's Classrooms*, N.Y. Times, Apr. 27, 1988, at B11, col. 1.

62. To support the statement: "Otherwise, outsiders who become insiders simply define new groups as 'other,'" Professor Minow cites:

See Holly Near & Adrian Torf, *Unity*, a song recorded on *Speed of Light* (Redwood Records, 1982) ("One man fights the KKK/ But he hates the queers/ One woman works for ecology/ It's equal rights she fears;/ Some folks know that war is hell/ But they put down the blind/ I think there must be a common ground/ But it's mighty hard to find.").

Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 60 & n.58 (1988).

Harvard Law School has embraced rock as a teaching technique. Mr. Steveland Morris, better known as Stevie Wonder, delivered a lecture at Harvard on "[t]he importance of getting people's attention and then using that attention to make a better world." Klima, *Wonder Speaks, Sings*, 78 Harv. L. Rec., Apr. 27, 1984, at 1, col. 1 (quoting Stevie Wonder).

63. Rothfeld, *What Do Law Schools Teach? Almost Anything*, N.Y. Times, Dec. 23, 1988, at B8, col. 3; see *supra* notes 60-62 and accompanying text; *infra* notes 64-68 and accompanying text.

64. Aside, *The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474 (1975).

65. Cochran, *The Infield Fly Rule and the Internal Revenue Code: An Even Further Aside*, 29 WM. & MARY L. REV. 567, 567 n.2, 575 n.57 (1988).

66. See Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1057 n.137 (1987).

"F-words,"⁶⁷ or "f-words."⁶⁸

Indeed, *anything* that makes the "antediluvian or mock-heroic"⁶⁹ style of legal writing more interesting and readable should be encouraged.⁷⁰ The editorial obligation is to separate the trivial footnotes of the pompous⁷¹ and the *poseur*⁷² from the polish and imagination of the innovative writer.⁷³ Notes that are obviously "cute" and lack nexus with the text should be excised; citations that are relevant and improve reader interest⁷⁴ should be retained.

VI. NON-VERIFIABLE NOTES

The footnote that cannot be verified according to normal practices and procedures, and yet is accepted, is a perverse anomaly to the footnote canon of verification.⁷⁵ It is accepted as "valid" only because it is virtually impossible to verify. Such non-verifiable notes generally fall into two categories—the "conversation cite" and the "Author's Note."

A. Conversation Cites

It is now common for authors to give attribution for ideas or insights gleaned through informal contacts, such as hallway conversations with colleagues,⁷⁶ the informal dialogue of the "call girl" cir-

67. "Feminism is a dirty word" that has been likened to the "F" word. Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 3 n.1 (1988). For a discussion of the sexual "F" word, see Dworkin, "Abortion" Chapter 3, *Right-Wing Women*, 1 J. LAW & INEQUALITY 95, 108 (1983).

68. Whether feminist-feminism is capitalized is a hot issue. Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School"*, 38 J. LEGAL EDUC. 61, 61 n.1 (1988) (No: "'Critical legal studies' is lower cased in order to avoid privileging it over feminism."); Penelope, *Language and the Transformation of Consciousness*, 4 J. LAW & INEQUALITY 379, 379 n.1 (1986) (Yes: "I capitalize *Feminist* and *Feminism* in order to signal the importance I assign to the terms.").

69. Rodell, *supra* note 12, at 38.

70. The turgid writing style of the legal profession is notorious. See Goldstein, *Drive for Plain English Gains Among Lawyers*, N.Y. Times, Feb. 19, 1988, at B7, col. 3. Goldstein notes that "[m]any blame bad legal writing on a seemingly uncontrollable urge to use footnotes." *Id.* at B7, col. 6.

71. See, e.g., Richmond, *Advice to the Untenured*, 13 NOVA L. REV. 79, 79 n.1 (1988).

72. See, e.g., Collins & Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189, 189 n.2 (1988).

73. See, e.g., Martineau, *supra* note 66, at 1057 n.137 (the gorilla cartoon).

74. See, e.g., Kidwell, Book Review, 1986 AM. B. FOUND. RES. J. 349, 349 n.1 (the titillating use of the word "synchronicity").

75. Frost, *supra* note 19, at 400.

76. See, e.g., Calkins, *Developments in Antitrust and the First Amendment: The Disaggregation of Noerr*, 57 ANTITRUST L.J. 327, 348 n.110 (1988) ("I am indebted to Richard Harris for forcefully emphasizing the differences."); West, *Jurisprudence and Gender*, 55 U.

cuit,⁷⁷ or even wisdom from class discussion.⁷⁸ Normally, this practice does not pose an ethical problem.⁷⁹ Attribution protects the cautious writer from being accused of pilfering ideas from others,⁸⁰ although there may be a risk to the author's reputation when it is obvious that as a non-tenured faculty member—and thus always in need of help⁸¹—he is reduced to making conspicuous “brown nose” attributions. In any case, these references are likely to be too infrequent and self-defeating to justify serious concern by editors.

B. *The Author's Note*

Footnotes have become, perhaps inadvertently, a part of the “reputational research” air that now characterizes much of academic literature. Rather than informing us of the nature of a reference, notes recite litanies of names. In their most extreme and cluttered presentations, they resemble obscure personality cults.⁸²

Law professors are chagrined and embarrassed by the fact that the primary vehicle of scholarly publication—the student edited law

CHI. L. REV. 1, 45 n.50 (1988) (“Conversations with Marcy Wilder and Toni Fitzpatrick (Stanford Law School '88) have helped me see the gender bias in Gabel's work.”).

77. A. KOESTLER, *THE CALL GIRLS* (1973). Koestler describes the interaction of a group of academic parasites:

“What do you think I was doing? Yawning my head off at a symposium on Hierarchic Order in Primate Societies. I knew what each of them would say—Lorenz and that Schaller woman, and the Russells and the rest—and they knew what I was going to say, but I had to go. Why? Because I am an academic Call Girl. We are all Call Girls in this bus.”

Id. at 7.

78. See, e.g., *Aside, Don't Cry over Filled Milk: The Neglected Footnote Three to Carolene Products****, 136 U. PA. L. REV. 1553, 1561 & n.40 (1988) (“As one legal scholar put it, ‘[a]ll words are different. That's why we have different words.’ . . . Statement of Professor Gary Francione to first year Torts class, University of Pennsylvania Law School (September 1985)”); Lewis, *From this Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 YALE L.J. 1783, 1783 n.1 (1988) (“But to name, at times, is to empower. Lecture by Professor Toril Moi at Yale Graduate School (December 1987)”).

79. It may, however, raise problems such as common law copyright and unfair competition (misappropriation of ideas). See, e.g., *Williams v. Weisser*, 273 Cal. App. 2d 726, 78 Cal. Rptr. 542 (1969); *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1968); see also Harris, *Note Sales Banned as Professors Protest Students Buying Their Way Through Classes*, U.: The Nat'l C. Newspaper, Mar. 1989, at 1, col. 2.

80. This is somewhat ironic because authors often plagiarize “other people's citations without having actually used them.” *Abuses of Citation Indexing*, 156 SCIENCE 890, 890 (1967) (quoting Letter from Kenneth O. May, Department of Mathematics, University of Toronto, Canada).

81. For a fictional, but often realistic, account of the academic politics of promotion and tenure in law school, see M. LEVIN, *THE SOCRATIC METHOD* (1987); Austin, Book Review, 1989 DUKE L.J. 495.

82. Arnold, *Footnotes Should Provide Maximum Information with Minimum Distraction*, Chron. Higher Educ., Apr. 20, 1988, at B3, col. 1.

review—is not refereed by peers.⁸³ To assuage their inferiority complex—and to counter the smirks of “refereed” colleagues⁸⁴—they have created a “shadow” peer review system by using the Author’s Note to list people who have read their manuscript.⁸⁵ Over the course of time, this system has been exploited for purposes that go well beyond legitimate references to those who helped in research and provided other assistance.

The most frequent perversion of the Author’s Note as a substitute peer review system is to advertise associations with established scholars that, in fact, may be minimal.⁸⁶ References to the well-known presumes their approval or support and can seduce impressionable student editors into accepting articles of suspicious quality. Author’s Notes may also facilitate “conspiratorial cross-referencing”⁸⁷ in which authors cite each other as experts to enhance every-

83. The mode of publication of legal scholarship is unusual by the standards of most other fields of academic inquiry Most papers are not submitted for publication until they have been given at one or more workshops at which the author is exposed to the criticism of both peers and graduate students. The paper is then submitted to a journal that is edited by the author’s peers, not by his students, and normally the editors do not make a publication decision without submitting the paper to one or more referees, who are scholars familiar with the particular subject on which the author is writing. Whether or not the paper is accepted by the journal, the referee’s anonymous comments are sent to the author to help him improve it.

Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1123-24 (1981).

84. Not everyone accepts the credibility of refereed journals:

Often the basic requirement is publication in a “refereed” journal, even though, at their worst, such journals can be like an old boys’ clique, taking care of each other’s careers in a narrowly defined speciality, and (like some Ph.D. committees) encouraging insiders’ careers while knowingly blocking those of outsiders. Aside from being hard on some scholars, the requirement also may not be in an institution’s best interest.

Sachs, *The Publication Requirement Should Not Be Based Solely on “Refereed” Journals*, Chron. Higher Educ., Oct. 19, 1988, at B2, col. 1.

Peer review has been accused of being “biased and generally unreliable as a judge of the objective merit of a piece of scholarship.” Coughlin, *Concerns About Fraud, Editorial Bias Prompt Scrutiny of Journal Practices*, Chron. Higher Educ., Feb. 15, 1989, at A4, col. 2, A6, col. 3. One cynic tested the system by submitting two versions of an article. One conclusion favored the prevailing view; the other challenged it. His peers favored the mainstream view. Mahoney, *Scientific Publication and Knowledge Politics*, 2 J. SOC. BEHAV. & PERSONALITY 165, 168 (1987).

85. See, e.g., Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1415 n.* (1989); Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 COLUM. L. REV. 199, 199 n.* (1989).

86. Austin, *The “Custom of Vetting” as a Substitute for Peer Review*, 32 ARIZ. L. REV. 1 (1989). The “established scholar” serves as a type of “honorary reviewer,” akin to an “honorary co-author.” “In practice, the names of scientists are often added as purely honorific distinctions; they do little work on the research described and may not even have read the article that they were supposed to have co-written.” C. SYKES, PROFSCAM 249 (1988).

87. “It is not unusual for researchers who are working on a common problem to cite each

one's reputation and increase their citation count.⁸⁸ The result is a form of "ProfScam": "Through the footnotes, the journals create a vast network of cross-validation—the academic equivalent of *I'm OK, You're OK*."⁸⁹ The Author's Note also presents an unlimited potential for academic politics. Established scholars can use the Author's Note to cite young newcomers and thereby entice them into joining a network of supporters. Non-tenured people can stockpile "brown-nose" points by referring to tenured colleagues. Slothful colleagues who need recognition are especially receptive to being mentioned as a "referee."

To my knowledge, editors never verify these references.⁹⁰ They are perhaps considered too trivial for scrutiny. Lack of coverage by the *Bluebook* may be another reason they are ignored. Nevertheless, the Author's Note should be examined carefully: references may be name-dropping⁹¹ or fraudulent;⁹² a history of the paper as it gestates through seminars, lectures at various institutions, and dialogues with colleagues, borders on self-advertisement;⁹³ and attribution to a casual "friendly" reading may not be peer review, but merely frivolous sur-

other's work almost conspiratorially. Each one cites all the other's work and thus both secure increased personal and research exposure." Thorne, *The Citation Index: Another Case of Spurious Validity*, 33 J. CLINICAL PSYCHOLOGY 1157, 1160 (1977).

88. "The most likely consequence [of citation indexing as a basis for promotion and tenure] will be an inflation of citations; as the importance of being footnoted becomes increasingly clear, each author will footnote more people—to gain their friendship and their footnotes in return." Wiener, *Footnote—Or Perish*, 21 DISSENT 588, 590 (1974).

89. C. SYKES, *supra* note 86, at 121.

90. I wonder how many times editors check with Judge Richard Posner, the unofficial leader in acknowledgments, to verify that he read and commented upon articles that acknowledge his assistance. One law review *did* check an acknowledgment to Duncan Kennedy and Lawrence [sic] Tribe, among others. Said the former editor-in-chief of the *Florida Law Review*: "In this case I did some checking up. Mr. [Duncan] Kennedy never heard of the guy. Mr. [Lawrence] [sic] Tribe thought they once may have attended the same conference, at the end of which Mr. Tribe had said, 'Good luck on your project.'" Yeager, *So You Want to Be Editor?*, Nat'l L.J., Sept. 4, 1989, at 13, col. 1, 14, col. 2.

91. Name-dropping of dubious credibility can have unwanted consequences. Vice-presidential candidate Lloyd Bentsen's assertion that "Jack Kennedy was a friend of mine," was called "the most memorable put-down of the 1988 campaign." Lowenheim, *Bentsen's Line Stretched His Kennedy "Ties"*, Cleveland Plain Dealer, Oct. 15, 1988, at 7-B, col. 5. But later on, the "friendship" was attacked as highly doubtful. *Id.*

92. See *supra* note 21. Recent episodes of fraud in research dramatize the problem and indicate that it is more than a casual occurrence. Begley & Drew, *Fraud in the Laboratory?*, NEWSWEEK, Apr. 11, 1988, at 69. Indeed, political plagiarism has become a tradition. See Posner, *The Culture of Plagiarism*, NEW REPUBLIC, Apr. 18, 1988, at 19.

93. My nomination for the most eloquent Author's Note appears in Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common Law Justification*, 63 CORNELL L. REV. 707, 707-08 (1978). At least one writer has repudiated what he calls "the custom of vetting." Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CALIF. L. REV. 235, 235 n.1 (1989).

plusage. Moreover, some people may not want their name used—especially if the cite is without permission or the article is inferior. Most importantly, however, the Author's Note can mislead the unwary reader because it does not include the reviewer's commentary and notes which may, in fact, totally refute the author's judgments and conclusions.

In its worst manifestation, the Author's Note has degenerated into a side show of genuflections⁹⁴ of acknowledgment to "mother,"⁹⁵ "father,"⁹⁶ "grandfather,"⁹⁷ "friends,"⁹⁸ "beautiful wife,"⁹⁹ "sons,"¹⁰⁰ "Bicentennial baby,"¹⁰¹ "sister,"¹⁰² "community,"¹⁰³ "women in the audience,"¹⁰⁴ "obituary,"¹⁰⁵ and "Mosby."¹⁰⁶

VII. THE IDEOLOGICAL NOTE

*"I am indebted to . . . for . . . sharing my outrages"*¹⁰⁷

Radical changes have occurred in student edited publications over the past decade. Many schools subsidize journals that cover perceived societal problems with an ideological bias.¹⁰⁸ With Gonzo¹⁰⁹ enthusiasm, ideological journals eschew objectivity to spread the

94. "No professor ever could be blessed with a finer research assistant and colleague in the law." Zagrans, *"Under Color of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499, 499 n.* (1985).

95. Oliver, *Municipal Liability for Police Misconduct Under 42 U.S.C. § 1983 After City of Oklahoma City v. Tuttle*, 64 WASH. U.L.Q. 151, 151 n.* (1976).

96. Goedan, *Foreign and International Law Research Centers in West Germany: The Max Planck Institutes*, 76 LAW LIBR. J. 464, 464 n.* (1983).

97. Dodier, *Meritor Savings Bank v. Vinson: Sexual Harassment at Work*, 10 HARV. WOMEN'S L.J. 203, 203 n.* (1987).

98. Foy, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501, 501 n.* (1986).

99. Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 U. MIAMI L. REV. 693, 727 n.* (1987).

100. Reitz, *Against Notice: A Proposal to Restrict the Notice of Claims Rule in U.C.C. § 2-607(3)(a)*, 73 CORNELL L. REV. 534, 534 n.* (1988).

101. Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 281 n.† (1987).

102. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 401 n.* (1987).

103. *Id.*

104. Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1985 BERKELEY WOMEN'S L.J. 64, 64 n.†.

105. Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 590 n.† (1987).

106. See *supra* text accompanying note 2.

107. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 121 n.* (1985).

108. See *supra* note 35.

109. Gonzo journalism is a style attributed to Dr. Hunter Thompson. *Case Dropped Against Hunter Thompson*, Chicago Tribune (North Sports Final Edition), at 12, col. 1.

didactic of enlightenment. According to *Do It!*¹¹⁰ journalism, nothing is sacred, including the puritanical handcuffs of the *Bluebook*. "Fugitive" sources with political connotations are chic;¹¹¹ citations have been ideologicalized. The underlying assumption is that citations are "political acts"¹¹² and, as such, should be used to advance the cause. This includes only citing authors who produce work that has an approved ideological bias.¹¹³ Those who disagree with the "right" bias should be ignored.¹¹⁴

Another objective is footnote evangelism, most notably by feminists. For example, one author dedicated her essay to the "many feminists . . . who live feminism and struggle daily to end the oppression of women."¹¹⁵ Coombs dedicates her article to her "daughter . . . who, like many women of her generation, needs feminist analysis and politics more than she knows."¹¹⁶ Wishik uses footnotes to spread the influence of feminist poetry.¹¹⁷ Others use citations to discuss gender preference.¹¹⁸ Editors endeavor to support alternative lifestyles of their authors in notes; for example, the editors of the *Journal of Law & Inequality* tell us that one writer is "currently working on a dyke trivia game, a book of found goddesses, . . . and books on strategies of language use and what feminists can learn from football."¹¹⁹ Likewise, one author used a footnote to make a personal revelation to support her ideology.¹²⁰

(noting that Hunter Thompson is best-known for his "exaggerated first-person accounts of drug and alcohol abuse, a writing style that became known as 'gonzo' journalism.").

110. J. RUBIN, *Do It!* (1970). "We've combined youth, music, sex, drugs and rebellion with treason—and that's a combination hard to beat." *Id.* at 249.

111. See *supra* note 62.

112. Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-up Ground*, 11 HARV. WOMEN'S L.J. 1, 5 (1988).

113. Matsuda calls for "affirmative action scholarship" which involves "making a deliberate effort to buy, order, read, cite, discuss, and teach outsiders' scholarship." *Id.* at 4. Citing "outsiders" (minorities) can improve their citation count—the frequency of citation—which helps promotion. *Id.* at 3, 5.

114. Delgado argues that "white scholarship" has excluded minority academics by not citing their work. Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

115. Bender, *supra* note 67, at 3.

116. Coombs, *Crime in the Stacks, or a Tale of a Text: A Feminist Response to a Criminal Law Textbook*, 38 J. LEGAL EDUC. 117, 117 (1988).

117. Wishik, *supra* note 104, at 70 n.34.

118. Menkel-Meadow, *supra* note 68, at 61 n.1.

119. Penelope, *Language and the Transformation of Consciousness*, 4 J. LAW & INEQUALITY 379, 379 n.** (1986).

120. The author is an open lesbian, in a monogamous and committed relationship; she likes sex, and she loathes violence; she finds vibrators, winks, teddy bears, and kitty cats sexy; she feels disturbed by sadomasochism, in part because of childhood and adolescent physical, emotional and sexual abuse of which she is a

Whether this type of material is acceptable depends on relevancy and good taste.¹²¹ Comments that embellish the text or theme in some way should pass muster,¹²² as should information on an author's background and involvement in a field¹²³—especially when it could reflect a bias. Extraneous views, or personal comments that refer to third persons, however, are unacceptable—if the journal wants to be taken seriously. If it is a Gonzo journal, then anything is acceptable.¹²⁴

VIII. SELF-CITATION

The easiest way to avoid the dustbin of the uncited is to cite oneself.¹²⁵

Self-citation, like venereal disease or rejection slips from publishers, is rarely discussed in polite academic circles. Yet, it is estimated that "eight to ten percent of all citations are self-citations to one's own previous work."¹²⁶ It is done for ego¹²⁷ and for the very practical reason that it pads the author's citation count, thereby increasing rep-

recovering survivor, in therapy; she believes in the Bill of Rights as a wild but still-too-elitist experiment in which women, in and among other oppressed groups, are struggling for inclusion; she is generally optimistic, as opposed to cynical, about legal process, even as she is very exasperated and disgusted with the repression of people by law in this society.

Dunlap, *Sexual Speech and the State: Putting Pornography in Its Place*, 17 GOLDEN GATE U.L. REV. 359, 363 n.10 (1987).

121. This Author questions the relevance or good taste of a writer expressing "appreciation to her lover." Rothberg, *Sex, Politics & The Law: Lesbians & Gay Men Take the Offensive*, 14 N.Y.U. REV. L. & SOC. CHANGE 891, 891 n.* (1986). Her "lover" reciprocated. *Id.* at 1016 n.*.

122. Merton's discussion of egalitarianisms at the Law School of the City University of New York falls within this category. He says: "While Duncan Kennedy may talk about paying janitors and deans the same, CUNY is the only law school I know in which the 'professionals' have organized and implemented a system for re-allocation of hard cash." Merton, *The City University of New York Law School: An Insider's Report*, 12 NOVA L. REV. 45, 45 n.1 (1987).

123. See Douglas, *supra* note 27, at 227.

124. These comments are not meant to condemn the new political journals. Many are refreshing alternatives to the old line student edited journals. At the least, they have pressured the conventional journals to relax their rigid style.

125. Wiener, *supra* note 88, at 590.

126. Kaplan, *The Norms of Citation Behavior: Prolegomena to the Footnote*, 16 AM. DOCUMENTATION 179, 180 (1965).

127. "To paraphrase Thomas Hobbes: to be cited regularly, is felicity; to be cited most, bliss; and not to be cited at all, death." Wiener, *supra* note 88, at 588.

"That people are writing for nobody except themselves may account for the curious fact that self-citation of previous work enhances the chances that a new piece will be accepted." Bracey, *The Time Has Come to Abolish Research Journals: Too Many Are Writing Too Much About Too Little*, Chron. Higher Educ., Mar. 25, 1987, at 44, col. 2.

utation and status.¹²⁸

A citation index is a count of the frequency with which an article is cited.¹²⁹ In many disciplines, especially in closed groups like the social sciences, indexes are "a standard measure of academic prestige."¹³⁰ A high citation index can be a significant factor in getting grants, promotion, and recognition.¹³¹ "One imagines the eventual establishment of a social science ticker tape which would spread citation rates to the offices of deans and department chairmen instantaneously."¹³²

At the present time, indexing is not a serious factor in legal academe.¹³³ Law journals only recently began reporting research on citation counting.¹³⁴ It is, nevertheless, an emerging topic of interest,¹³⁵ especially among the underground of non-tenured people who consider the cites to constitute tangible proof of success and recognition among peers. Moreover, a citation index standard that is quantitative and easy to calculate will appeal to administrators and to promotion and tenure committee members.¹³⁶ Thus, the use of self-citing to pad their cite index will not escape shrewd writers.¹³⁷

128. See *infra* notes 129-30.

129. E. GARFIELD, CITATION INDEXING: ITS THEORY AND APPLICATION IN SCIENCE, TECHNOLOGY, AND HUMANITIES 1 (1979).

130. Matsuda, *supra* note 112, at 3.

131. [Indexing] is being used to do such things as evaluate the research role of individual journals, scientists, organizations, and communities; define the relationship between journals and between journals and fields of study; measure the impact of current research; provide early warnings of important, new interdisciplinary relationships; spot fields of study whose rate of progress suddenly begins accelerating; and define the sequence of developments that led to major scientific advances.

E. GARFIELD, *supra* note 129, at 62; Thorne, *supra* note 87, at 1157.

132. C. SYKES, *supra* note 86, at 121 (citing Wiener, *The Footnote Fetish*, 31 TELOS 172 (1977)).

133. The irony is that "[t]he first citation indexes were the Shepards' system of citators," introduced in 1873. Shapiro, *The Most-Cited Law Review Articles*, 73 CALIF. L. REV. 1540, 1540 (1985).

134. See, e.g., Mann, *The Use of Legal Periodicals by Courts and Journals*, 26 JURIMETRICS J. 400 (1986); Maru, *Measuring the Impact of Legal Periodicals*, 1976 AM. B. FOUND. RES. J. 227; Shapiro, *supra* note 133, at 1540.

135. "The reason 'citation analysis' is vogueish is that law students and faculty are not charged for the Lexis and Westlaw databases they use to tally citations. The school simply picks up a yearly tab for unlimited use." Letters, Nat'l L.J., Apr. 28, 1986, at 14, col. 3 (Letter from John Kareken).

136. "If colleagues or departments are judged by the number of publications and citations, and by similarly quantitative teaching ratings then—it is argued—no personal bias can enter." Bavelas, *The Social Psychology of Citations*, 19 CANADIAN PSYCHOLOGICAL REV. 158, 162 (1978).

137. "They will cite their own and their friends' papers more (a friend is someone who cites in return), cite a wider variety of papers than before so as to attract people who might (and perhaps should) miss the paper, and cite 'obvious' sources." *Abuses of Citation Indexing*, 156

Even if aware that an author is indulging in self-citation, the accommodating editor's instinct is to tolerate young writers and allow them to build their citation count. It is a quid pro quo: the editor gets a long article, the writer builds his count and makes friends. Of course, self-citation has its limits. If egregious and obviously scattered under *see generally* and other *Bluebook* inflators, the journal appears careless and obsequious. For self-citation, as for any citation, the basic theme should prevail—is the cite relevant to the challengeable statement?

IX. THE TECHNICAL JARGON DILEMMA

Now some people say there will be no law in the law schools.¹³⁸

Until recently, the backbone of law journal subject matter had been the doctrinal article.¹³⁹ Traditionalists like Prosser¹⁴⁰ and Corbin¹⁴¹ produced a steady stream of "law" scholarship. Cites were to treatises, decisions and "leading" doctrinal articles. The new trend is interdisciplinary scholarship—an integration of law and other disciplines. This new scholarship incorporates fields that are specialized and narrowly focused; the authors speak in private languages.¹⁴² Law professors endeavor to impress the tenure committee with articles integrating law and an esoteric field.¹⁴³ But rather than take a chance on a rejection from a referred journal in the specialized disciplines, law professors opt to stay in the safe confines of student edited law reviews where they can avoid peer review.¹⁴⁴

Whether student editors are even capable of comprehending and evaluating sophisticated but traditional doctrinal writing by experienced writers has long been a matter of debate.¹⁴⁵ There is considera-

SCIENCE 890, 890 (1967) (Letter from Kenneth O. May, Department of Mathematics, University of Toronto, Canada).

138. Rothfeld, *supra* note 63, at B8, col. 1 (quoting Professor Martin Redish, Northwestern University School of Law).

139. Posner defines the doctrinal article: "It involves the careful reading and comparison of appellate opinions with a view to identifying ambiguities, exposing inconsistencies among cases and lines of cases, developing distinctions, reconciling holdings, and otherwise exercising the characteristic skills of legal analysis." Posner, *supra* note 83, at 1113.

140. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* (4th ed. 1971).

141. A. CORBIN, *CORBIN ON CONTRACTS* (1963).

142. See Rothfeld, *supra* note 63, at B8, col. 3.

143. "Traditional doctrinal work . . . increasingly is looked down upon as less-than-serious scholarship—and may even block tenure." Middleton, *Legal Scholarship: Is It Irrelevant?*, Nat'l L.J., Jan. 9, 1989, at 1, col. 2, 8, col. 1.

144. They also have the advantage of creating their own group of "peers" in the Author's Note. See *supra* notes 83-89 and accompanying text.

145. See Gray, *supra* note 32, at 37, col. 4.

bly more doubt when experts in other disciplines, or law professors with extra backgrounds in economics, psychology, or philosophy, submit articles dealing with the law. When footnotes are technical "it is less likely that a randomly selected student editor will be able to detect outrageous *non sequiturs*, let alone subtler analytic failures that might seem obvious to *cognoscenti*."¹⁴⁶

When befuddled by technical footnotes, editors have three choices: 1) reject the article if it is non-doctrinal with comprehension problems; 2) accept the article, verify the correctness of the sources, and assume that the "expert's" interpretation is correct; or 3) accept the article only if an expert is available for peer review. All of these, however, are problematic responses. The first eliminates the prospect of publishing a "good" or perhaps "breakthrough" piece—resulting in embarrassment and loss of prestige if a rival review picks it up.¹⁴⁷ The second option creates another type of risk: the publication of inferior or error-infected papers. The third option poses the problem of establishing a network of peers who are readily available. Moreover, unless the referees have a background in the law, the peer evaluation system would be suspect.¹⁴⁸

X. CONCLUSION

Anyone who treats footnoting as trivial "barking" and an after-thought gesture to the text is not reading or writing legal literature. Footnotes are, to paraphrase Mr. Reggie Jackson, the straw that stirs the drink.¹⁴⁹ "In the hands of a master . . . [a footnote] can become a work of art and an instrument of power."¹⁵⁰ "Footnotes are a way of preserving the grace and brevity of a text, while allowing the reader to seek detailed authority and examples in the margin."¹⁵¹ However,

146. Ackerman, *The Marketplace of Ideas*, 90 YALE L.J. 1131, 1136 (1981).

147. Professor Galanter's article on social research was reportedly rejected "by about a dozen student journals before being published in the scholarly *Law & Society Review* in 1974." Gray, *supra* note 32, at 37, col. 6.

148. Posner's solution is to create a utopian law school with a "comfortable habitat for a diverse group of disciplines." His utopia would have a faculty edited refereed journal dedicated to publishing articles on law, especially articles written from the standpoint of the social sciences. Posner, *supra* note 83, at 1130. The existence of a large number of faculty journals would divert the more sophisticated interdisciplinary work away from student law reviews, thereby allowing student reviews to handle the familiar doctrinal work.

149. "I'm the straw that stirs the drink. It all comes back to me. Maybe I should say me and Munson. But really he doesn't enter into it Munson thinks he can be the straw that stirs the drink, but he can only stir it bad." D. SCHAAP, STEINBRENNER 176 (1982) (quoting Reggie Jackson).

150. Bowersock, *supra* note **, at 54.

151. Wall St. J., June 9, 1988, at 31, col. 1 (Letter from Professor Park, University of Minnesota).

they can also be used to slip a subversive "mickey" into the drink to sabotage legitimate research and scholarship aspirations.

Cite motivations will continue to evolve as writers tune into the self-serving implications of footnoting. Faced with the River Styx of publish or perish, opportunistic writers will exploit notes to cloak vacuous text.¹⁵² The ideologization of legal education continues, encouraging the proselytizing of value judgment below the text. New journals offer virgin territory for skulduggery.

The *Bluebook* fails to provide education and warning. Footnote steroids like *supra*, *cf.*, and *infra* can cross-reference a single source into infinity.¹⁵³ *Id.* is the ultimate footnote steroid, seducing one author into using 444 *id.*s out of a total of 574 footnotes.¹⁵⁴ Posner cannot be ignored: "The Bluebook creates an atmosphere of formality and redundancy in which the drab, Latinate, plethoric, euphemistic style of law reviews and judicial opinions flourishes."¹⁵⁵ It imposes "uniformity on more mundane spheres of human activity."¹⁵⁶ The parallel between the inflation of the *Bluebook*—from 26 pages to 225¹⁵⁷—and footnote inflation is no accident. The "best and brightest" of four of our "tier one" law schools exalt gamesmanship over substance.¹⁵⁸

152. One former law professor sees the push for law professors to publish or miss out on promotions or tenure spots as something worse—a waste of paper. . . . "Frankly, I wouldn't have spent time doing research just to get published. I didn't think I had anything unique to say. Some people should spend their lives thinking and writing about law, but most should not."

Repa, *supra* note 9, at 23 (quoting Mitch Rothman, former Hamline University professor). The best known condemnation of legal writing came from Fred Rodell in 1936. Rodell, *Good-bye to Law Reviews*, 23 VA. L. REV. 38 (1936).

153. The current numbers champion, Jacobs, *supra* note 17, is glutted with cross-references. Perhaps Jacobs also set a record with 16 consecutive *see infra*. *Id.* at 572 nn.3523-27 & 573 nn.3528-38.

154. Buchanan, *A Comparative Analysis of Name and Likeness Rights in the United States and England*, 18 GOLDEN GATE U.L. REV. 301 (1988).

155. Posner, *supra* note 22, at 1349.

156. Benton, Book Review, 86 YALE L.J. 197, 197 (1976).

157. "The Bluebook has swollen over the years, much like the law itself. What took 26 pages to cover in 1926 takes 255 today, and now includes everything from the proper use of 'hereinafter' (when *supra* simply won't do) to the correct shorthand for the Manitoba and Saskatchewan Tax Reporter (Man. & Sask. Tax Rep.)." Margolick, *At the Bar*, N.Y. Times, Nov. 4, 1988, at 25, col. 1.

158. To divert editors from substantive "interruptions," some authors do not conform to the *Bluebook*.

Since second year editors have a compulsion to edit (just as censors have a compulsion to censor), I have found that including a number of footnotes intentionally not conforming to Bluebook style permits the editors to feel that they have done their job. Otherwise, they feel compelled to edit the text, virtually always without understanding or sensitivity to the author's meaning.

Even legendary editors encounter problems dealing with writers "who as a class have distinguished themselves as barroom brawlers, drawing-room wolves, breakers of engagements, defaulters of debts, crying drunks, and suicidal maniacs."¹⁵⁹ Student editors are challenged by an even more unscrupulous gang: a horde of non-tenured opportunists desperately trying to get into the tenure sanctuary. The students are at a distinct disadvantage; they know nothing about footnotes and had they known of the *Bluebook*, most would have opted for Moot Court. Training is virtually non-existent, consisting of the third year blind leading the second year blind. Relying on faculty advice is like inviting the fox into the chicken house. Under these conditions, writers have the advantage of "unfair surprise."¹⁶⁰

Letter from Professor Howard M. Friedman to the Author (Nov. 12, 1986) (on file with Author).

159. M. COWLEY, *UNSHAKEN FRIEND: A PROFILE OF MAXWELL PERKINS* 5 (1972).

160. U.C.C. § 2-302 official comment (1977).