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## Footnotes as Product Differentiation

Arthur D. Austin

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# ESSAY

## Footnotes as Product Differentiation

*Arthur D. Austin\**

*Product differentiation is propagated by differences in the design or physical quality of competing products, by efforts of sellers to distinguish their products through packaging, branding, . . . and sales-promotional efforts designed to win the allegiance . . . of the potential buyer.<sup>1</sup>*

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## I. THE CRUSADE AGAINST FOOTNOTES

When Professor Fred Rodell announced his first *Goodbye to Law Reviews*<sup>2</sup> in 1936, he established the accepted wisdom for law review criticism. Rodell complained that law review literature had two serious defects—style and content.<sup>3</sup> Subsequent criticism has been persistently harsh;<sup>4</sup> the common theme is that “[t]he extraordinary proliferation of law reviews, most of them student edited and all but a handful very erratic in quality, has been harmful for the nature, evaluation, and accessibility of legal scholarship.”<sup>5</sup>

2. Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936). For background of the controversy surrounding Rodell's career and a discussion of his literature see Note, *The Relentless Realist: Fred Rodell's Life and Writings*, 1984 U. ILL. L. REV. 823.

3. Rodell, *supra* note 2, at 38. Still cynical after 26 years, Professor Rodell broke his pledge to quit writing law review articles, see Rodell, *supra* note 2, at 38, and fired a “final” shot at law review scholarship. Rodell narrowed his criticism to the “nonsensical, noxious notion that a piece of work is more scholarly if polysyllabically enunciated than if put in short words.” Rodell, *Goodbye To Law Reviews—Revisited*, 48 VA. L. REV. 279, 287 (1962).

4. Some commentators complain that law review articles are “descriptive,” *i.e.*, a mild form of plagiarism in which the author rehashes court opinions. See Nowak, *Woe Unto You, Law Reviews!*, 27 ARIZ. L. REV. 317, 322-23 (1985). Justice William O. Douglas complained that the ostensibly “neutral” law review format is exploited by hacks who are paid to write articles espousing the views of clients. Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227 (1965). Professor Arthur S. Miller contends that “objectivity” in legal writing is impossible because of the lawyer's commitment to advocacy. Miller, *The Myth of Objectivity In Legal Research and Writing*, 18 CATH. U.L. REV. 290, 295 (1969) (indicating that “[m]embers of the legal profession are ideologues in the sense that lawyers tend to have an ideology”). Judge Richard H. Chambers of the United States Court of Appeals for the Ninth Circuit condemned law review editors for interfering with the judicial process by publishing student commentary on litigation that still is winding through the appellate process:

Law reviews used to wait until the judicial process in a case was complete before entering the fray. Now they chaperone us during the pendency of a case. This is their First Amendment right.

But if this practice of citing their current comment continues, then we shall be out lining up law reviews to support our views. After that we shall be taking the step of quoting the New York Times and the Chicago Tribune. And it will be an easy jump then to include in our opinions the current comments of the Abilene Bugle and Bisbee's Brewery Gulch Gazette.

GTE Sylvania, Inc. v. Continental T.V., Inc., 537 F.2d 980, 1018 (9th Cir. 1976) (Chambers, J., concurring and dissenting). This is a plausible concern; a *Harvard Law Review* student note was challenged by a New York law firm for its possible impact on a Delaware court that was considering pending litigation involving the firm's client. Martin, *The Law Review Citadel: Rodell Revisited*, 71 IOWA L. REV. 1093, 1095 & n.12 (1986).

Finally, a more fundamental criticism congregates around the lingering doubt that scholarship *qua* scholarship on “law” even exists. See *Legal Scholarship: Its Nature and Purposes*, 90 YALE L.J. 955 (1981) (symposium edition).

5. Cramton, “The Most Remarkable Institution”: *The American Law Review*, 36 J.

Having exhausted complaints on substance, critics uncovered another mischievous threat. They discovered that articles are Typhoid Marys of an insidious plague—footnotes. Second-rate style and pedantic substance are subverted further by cosmetic and trivial pursuits in footnoting.<sup>6</sup> What started as incidental and functional, footnoting now is thought to be a Frankenstein monster, rambling uncontrolled at the bottom of the page to serve “devious purposes.”<sup>7</sup> A chorus of critics argue that footnotes have become a serious embarrassment to legal scholarship and one of the main culprits “in the death of decent writing in law reviews”<sup>8</sup> by contributing more to “form than substance.”<sup>9</sup>

One of the most vehement critics of footnotes is Judge Abner Mikva, of the United States Court of Appeals for the District of Columbia Circuit, who bluntly calls footnotes “an abomination.”<sup>10</sup>

LEGAL EDUC. 1, 8 (1986). Outrage at the uneven quality of student edited reviews has generated challenges from faculty edited publications. Members of the Harvard faculty are finalizing a review in which “[a]rticles will be shorter, more provocative and have fewer footnotes than those in the Harvard Law Review.” Gray, *Harvard's Faculty Stirs a Tempest With Plans For New Law Journal*, Wall St. J., May 28, 1986, § 2, at 37, col. 4. Noting dissension among the Harvard faculty, student editors joke that the faculty “probably won't be able to agree on typeface, much less content.” *Id.* In response to the new threat, the *Harvard Law Review* countered with a Commentary section. See, e.g., Edwards, *Alternative Dispute Resolution: Panacea Or Anathema*, 99 HARV. L. REV. 668 (1986). Yale entered the competition with Essay and Dialogue sections in its law journal. See, e.g., Scales, *The Emergence of Feminist Jurisprudence*, 95 YALE L.J. 1373 (1986) (essay); Duke, *Making Leon Worse*, 95 YALE L.J. 1405 (1986) (dialogue). The *Michigan Law Review* now has a Correspondence section. See, e.g., Garvey, *A Comment on Religious Convictions and Lawmaking*, 84 MICH. L. REV. 1288 (1986).

6. Professor Rodell included footnoting in his condemnation of law review literature. According to Rodell,

[T]he footnote foible breeds nothing but sloppy thinking, clumsy writing, and bad eyes. Any article that has to be explained or proved by being cluttered up with little numbers until it looks like the Acrosses and Downs of a cross-word puzzle has no business being written. And if a writer does not really need footnotes and tacks them on just because they look pretty or because it is the thing to do, then he ought to be tried for willful murder of his readers' (all three of them) eyesight and patience.

Rodell, *supra* note 2, at 41.

7. See D. MELLINKOFF, *LEGAL WRITING: SENSE AND NONSENSE* 94 (1982). Professor David Mellinkoff asserts that “[o]ften the footnoter is more devious than lazy. The footnote becomes, like its companion fine print, a means of concealment. Law that one hesitates to flaunt above the line sneaks into the footnote. Hedges against forthright statements in the text are squirreled away for a rainy day.” *Id.*

8. Nowak, *supra* note 4, at 318.

9. Cramton, *supra* note 5, at 5. According to Professor Cramton, “The tendency to provide a citation for every proposition distracts the reader and may contribute more to form than substance.” *Id.*

10. Mikva, *Goodbye To Footnotes*, 56 U. COLO. L. REV. 647 (1985). Judge Mikva's primary target is judicial literature. He says: “While much of what I have to say may apply to footnotes wherever they may be found, my emphasis, both as to problems and solutions, is

Echoing others,<sup>11</sup> Judge Mikva complains that the pervasive *obiter dictum*<sup>12</sup> footnote is either superfluous or a misleading source that results in intellectual gamesmanship or fuzzy precedent.<sup>13</sup> Moreover, the constant vertical shifting between text and footnote breaks concentration and produces eye fatigue. Extending Professor Rodell's crusade against law review articles to encompass footnotes, Judge Mikva recommends abstinence and vows *Goodbye to Footnotes*.<sup>14</sup>

Judge Mikva and the footnote critics conduct a plausible campaign. Anyone who follows legal literature experiences the frustration of plowing through tedious and verbose notes. It is exasperating to lower your eyes from text only to discover meaningless signals like *id.* or *supra*. Having to jog your memory for the meaning of *cf.*, *but see*, or *but cf.* is even worse.<sup>15</sup> Likewise, footnotes often have negative effects on the substantive quality of articles and judicial opinions.<sup>16</sup> Footnotes also frequently send bewildering

on judicial opinions." *Id.* at 647.

11. Former United States Supreme Court Justice Arthur J. Goldberg wrote: "Footnotes, in my experience, cause more problems than they solve." Goldberg, *The Rise and Fall (We Hope) of Footnotes*, 69 A.B.A.J. 255 (1983); see also Wheeler, *The Bottom Line: Fifty Years of Legal Footnoting in Review*, 72 L. LIBR. J. 245 (1979).

12. "A judge is reluctant to excise some beautiful prose or sage advice that colleagues or clerks have challenged as superfluous to the decision. What to do? Put it in a footnote." Mikva, *supra* note 10, at 648.

13. *Id.* at 649.

The rules about the precedential significance of judicial footnotes are very fuzzy. Many legalists insist that footnotes are part of the opinion and entitled to full faith and credit; others insist that they are just footnotes. What is clear is that *obiter dictum* footnotes are used with reckless abandon and frequently overwhelm the text. All too often, yesterday's *obiter dictum* becomes tomorrow's law of the land.

*Id.*

14. Instead of numbers, Judge Mikva uses asterisks. "I hope that the embarrassment of an opinion chock full of asterisks will control my willingness to succumb to footnotes." *Id.* at 652.

Others have supported Mikva's position. See, e.g., Letter, *Down With Footnotes*, 22 TRIAL, Nov. 1986, at 10. In his letter Justice Donald C. Wintersheimer of the Kentucky Supreme Court stated, "I am delighted to say that in 10 years of writing opinions, I have not entered one substantive footnote. Footnotes in judicial opinions are foolish. They create distractions and waste lawyers' time." *Id.*

15. A UNIFORM SYSTEM OF CITATION 8-9 (14th ed. 1986).

16. Justice Goldberg noted an appellate opinion with over 500 footnotes and observed: "Had I remained on the Supreme Court, I would have reversed him on this ground because of the sheer impossibility of reviewing an opinion of this type." Goldberg, *supra* note 11.

Law clerks, according to a former clerk for the late Judge Roger Bobb of the United States Court of Appeals for the District of Columbia, are the cause of excessive footnoting in opinions:

Law clerks are not paid by the word. But in the battles that go with the circulation of draft opinions between chambers for comment by other judges, brevity is more often

signals.<sup>17</sup>

Nevertheless, the attack has been too extreme with overzealous and indiscriminate condemnation of footnotes. The sweeping censure of footnotes fails to acknowledge some practical dynamics of current legal writing. Specifically, this criticism ignores the new reality: footnoting is now the law professor's most effective method of differentiating his work from that of his rivals. Footnoting has evolved from primitive origins<sup>18</sup> and use as a "pure" reference<sup>19</sup> into an artistic and abstruse discipline that functions as a subtle, but critical, influence in the determination of promotion, tenure, and professional status.

than not mistaken for weakness. The length of an opinion—however deadening—and the number of footnotes—however astonishing—are totems of excellence. Sheer length can also serve to choke off argument. Who wants to rebut a 100-page monster?

Hewitt, *One Way to Ensure Judges Be Brief*, Wall St. J., July 28, 1986, at 4, col. 3.

Brief writing also has succumbed to footnote mania. In its appellate brief filed in appealing Pennzoil's favorable judgment, Texaco, represented by the New York City firm of Cravath, Swaine & Moore, attached 301 footnotes to 122 pages of text. Petzinger, *Next Round of Texaco-Pennzoil Battle to be Fought at Houston Law School*, Wall St. J., July 30, 1986, at 6, col. 1.

The footnote disease is ubiquitous, causing turmoil in genteel fields like poetry. Author John Updike, "disturbed" to discover footnotes appended to various selections of poetry, complained of a "decadent trend." Updike acknowledges, however, the artistry of T.S. Eliot's footnotes to "The Wasteland." Updike, *Notes*, 32 NEW YORKER, Jan. 26, 1957, at 28. For excellent literary footnotes, see THE TRAGEDY OF HAMLET, INTRODUCTION AND NOTES (H. Hudson ed. 1909).

17. For example, see Footnote 59 of *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940), which has been heralded as "one of the most important footnotes in Supreme Court annals." Rahl, *Price Competition and the Price Fixing Rule—Preface and Perspective*, 57 Nw. U.L. REV. 138, 141 (1962). It is also one of the most confusing notes and has left a trail of uncertainty over the application of the per se rule to various types of price-fixing. See H. HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* 128-34 (1985).

Footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), also has sparked commentary. See, e.g., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087 (1982). In this article United States Supreme Court Justice Lewis F. Powell noted that "*Carolene Products* retains its fascination solely because of Footnote 4—the most celebrated footnote in constitutional law." *Id.* at 1087; see also *id.* at n.4 (citing the voluminous scholarly literature on Footnote 4 of *Carolene Products*).

18. See generally Cooper, *Anglo-American Legal Citation: Historical Development and Library Implications*, 75 L. LIBR. J. 3 (1982).

19. "A legal citation serves two purposes. First, it indicates the nature of the authority upon which a statement is based. Second, it contains the information necessary to find and read the cited material." Axel-Lute, *Legal Citation Form: Theory and Practice*, 75 L. LIBR. J. 148 (1982).

A citation is a means "for the interested reader to test the conclusions of the writer and to verify the source of a challengeable statement. As Louis Gottschalk suggests, the footnote thus takes the place of the summons to a witness in a court of law." Frost, *The Use of Citations In Literary Research: A Preliminary Classification of Citation Functions*, 49 LIBR. Q. 399, 400 (1979), citing L. GOTTSCHALK, *UNDERSTANDING HISTORY: A PRIMER OF HISTORICAL METHOD* 19 (1950).

## II. FOOTNOTE MOTIVATION

Emerging research indicates that the use of footnotes reflects a variety of motivations.<sup>20</sup> According to one study, cite motives range "along a scale from true scholarly impact at one end, *e.g.*, significant use of the cited author's theory, paradigm, or method, to ignoble purposes at the other end, *e.g.*, citing a friend."<sup>21</sup> Somewhere on the spectrum are the ego sustaining self-citations and the use of irrelevant, inaccurate, and unread citations.<sup>22</sup>

Intuition would suggest that law writers have similar cite motivations as their colleagues in other disciplines. The facile assumption is that legal writers use citations to persuade,<sup>23</sup> to demonstrate the author's knowledge of relevant scholarship, or perhaps to conform to a tradition of scholarship.<sup>24</sup> The unique character of law review literature, the tradition of the law review system, and the intense pressures on nontenured faculty to publish,<sup>25</sup> however, suggest that different cite motivations may influence law writers. Experience, discussions with numerous authors, and a survey of law review literature indicate that authors rely on "footnote differentiation" as the primary vehicle to distinguish their articles from those of their rivals.

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20. See, *e.g.*, Broadus, *An Investigation of the Validity of Bibliographic Citations*, 34 J. AM. SOC'Y INFO. SCI. 132 (1983); Brooks, *Evidence of Complex Citer Motivations*, 37 J. AM. SOC'Y INFO. SCI. 34 (1986) (using seven "citer motives"—currency, negative credit, operational information, persuasiveness, positive credit, reader alert, and social consensus—to evaluate twenty scholarly articles); Brooks, *Private Acts and Public Objects: An Investigation of Citer Motivations*, 36 J. AM. SOC'Y INFO. SCI. 223 (1985); Kaplan, *The Norms of Citation Behavior: Prolegomena to the Footnote*, 16 AM. DOCUMENTATION 179 (1965); Thorne, *The Citation Index: Another Case of Spurious Validity*, 77 J. CLINICAL PSYCHOLOGY 1157 (1977).

21. Brooks, *Evidence of Complex Citer Motivations*, *supra* note 20, at 34, citing Bavelas, *The Social Psychology of Citations*, 19 CANADIAN PSYCHOLOGICAL REV. 158, 160 (1978).

22. Bavelas, *supra* note 21.

23. "Persuasiveness" is the author's effort to convince his peers of the correctness of his methods and findings. See Brooks, *Private Acts and Public Objects*, *supra* note 20, at 227. Research by Professor Terrence A. Brooks of the University of Iowa School of Library and Information Science indicates that persuasiveness "achieved remarkable success as a motivation." *Id.* He notes: "Authors can be pictured as intellectual partisans of their own opinions, scouring the literature for justification." *Id.*

24. See Kaplan, *supra* note 20, at 181. Professor Norman Kaplan notes that "the number of specialists in a particular field of inquiry is likely to be small and these specialists are likely to know whether proper credit has or has not been given. If it has not been given, they are likely to spread the word that there has been an infringement of the norm to acknowledge the help of others." *Id.*

25. The existence of increasingly stringent tenure publishing standards is discussed in Zenoff & Moody, *Law Faculty Attrition: Are We Doing Something Wrong?*, 36 J. LEGAL EDUC. 209 (1986).

Parts III and IV of this Essay describe the evolution and the various techniques of article differentiation and its impact on an author's status and career. Part V of this Essay identifies the current trends in article differentiation.

### III. THE EVOLUTION OF ARTICLE DIFFERENTIATION

#### A. *A Dilemma Surfaces*

The post-World War II proliferation of law schools and the concurrent creation of law reviews<sup>26</sup> made it possible for any reasonably competent author to publish in one of the new, article hungry publications.<sup>27</sup> As one commentator noted, "[L]egal articles in a discipline that did not know the constraints of the refereed journal were in great demand because of the law reviews' need to fill up the front part of their issues with faculty articles . . . ."<sup>28</sup> Hence, getting an article published in a "top echelon" law review did not provide an automatic edge in promotion.

The absence of editorial expertise and discipline in an author's market bred mediocre prose and flabby content. As Professor Fred Rodell correctly observed, prose whose banality was exceeded only by its homogeneity flooded the market.<sup>29</sup> Eschewing flair, humor, or bite, articles settled into a rut of substantive thinness and stylistic conformity to become as interchangeable as bags of cement and as exciting as growing grass.<sup>30</sup> The law review tradition was or-

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26. In 1927 there were 42 law school journals in existence. See S. REED, *PRESENT DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA* 566 (1928). By 1984, the number was approximately 250. See Cramton, *supra* note 5, at 2 n.7. There was a parallel growth in the publication of law books. See generally Prince, *Law Books, Unlimited*, 48 A.B.A.J. 134 (1962).

27. See R. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 271 (1983) (indicating that "The emphasis of law professors on article writing flourished in the 1950s as the number of law reviews grew"). In 1959 the Association of American Law Schools adopted standards imposing a duty on faculty to research and publish. Harper, *Caution, Research Ahead*, 13 J. LEGAL EDUC. 411 (1961).

28. R. STEVENS, *supra* note 27, at 271.

29. Rodell, *supra* note 2, at 38.

30. One interesting exception is a short story by Louis Auchincloss. See Auchincloss, *The Senior Partner's Ghosts*, 50 VA. L. REV. 195 (1964). According to Mr. Auchincloss: "I was asked to write an original (unpublished) short story for the 50th anniversary issue . . . because I had been an editor of the Review, and the editors wanted a novelty for the Special issue. The story was reprinted in *Tales of Manhattan*." Letter from Louis Auchincloss to Author (Aug. 7, 1986) (on file with Author). To break the monotony, writers sometimes rely on nontraditional formats like the socratic dialogue, see, e.g., Junger, *A Dialog Concerning Delivery of Gifts*, 38 U. MIAMI L. REV. 123 (1983), or the epistolary style, see, e.g., Grey, *The Hermeneutics File*, 58 S. CAL. L. REV. 211 (1985).



ained: "Published articles lack originality, are boring, too long, too numerous, and have too many footnotes, which are also boring and too long."<sup>31</sup>

The author's dilemma was exacerbated by a new and more threatening pressure. Looking for a way to achieve a "serious" image in order to compete successfully for bright students, ambitious schools followed academic tradition by giving first priority to research and scholarship.<sup>32</sup> Change typically was initiated at the critical point of promotion and tenure.<sup>33</sup> "Publish or perish" descended on law schools with a vengeance.

These pressures created a forbidding dilemma for writers, especially those competing for promotion and tenure: how could one operate within the established conventions and limitations of the conservative law review culture and yet differentiate his article from that of his rivals?

### B. *Resolving the Dilemma: Taking A Cue From Product Differentiation Tactics*

Taking a cue from the Madison Avenue advertising tactics that exult the irrelevant and divert consumers' attention from the values of substance by resorting to mind conditioning techniques,<sup>34</sup> writers turned to the footnote as the agent for article differentiation. By imitating the seller who engages in "product differentia-

31. Zenoff, *I Have Seen The Enemy and They Are Us*, 36 J. LEGAL EDUC. 21, 21 (1986) (footnotes omitted). For a more positive view see Rotunda, *Law Reviews—The Extreme Centrist Position*, 62 IND. L.J. 1 (1986).

32. See Zenoff & Moody, *supra* note 25, at 221.

The recent emphasis on scholarship by law schools may be a response to pressure from the ABA-AALS inspection teams, the desire to compete with other schools reputed to have a "writing faculty," or by disappointment in the results of their past predictions of future productivity. Finally, the belief that scholarship is an important component of an educator's responsibilities and leads to better teaching is becoming more widespread among law school faculties. Whatever the reason, it seems clear that demonstrated achievement in scholarship as a requirement for tenure is becoming more significant and widespread. Concomitantly, the probationary period is being extended to allow candidates sufficient time to meet the requirement and to allow the law schools time to assess, rather than predict, scholarly achievement.

*Id.* (footnotes omitted); see also Heller & Mangan, *Many Professors Reject The 'Shibboleth' That Research Is The Enemy Of Teaching*, Chron. Higher Educ., Jan. 28, 1987, at 11, col. 1.

33. See Zenoff & Moody, *supra* note 25, at 219.

34. See generally M. McLuhan, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* (1964); D. Ogilvy, *CONFESSIONS OF AN ADVERTISING MAN* (1964). The ultimate conditioning technique is "subliminal" advertising which relies on quick flashes of messages across the television or movie screen to influence viewer behavior. See generally Klass, *The Ghost of Subliminal Advertising*, 23 J. MARKETING 146 (1958).

tion" to build consumer preference for his products,<sup>35</sup> clever writers learned to exploit footnote techniques to create a unique package distinguishable from the conventional format.<sup>36</sup> It was perhaps no accident that the footnote explosion paralleled the emergence of Madison Avenue as the cultural guide to persuasive advertising and mass consumption.<sup>37</sup>

Those who read promotion and tenure articles and keep pace with the flow of law review literature notice the new differentiating techniques in footnoting. One commentator verified this perception with research concerning (1) the absolute number of footnotes per article, and, (2) footnote "density," *i.e.*, "the quotient derived by dividing the number of lines of footnotes by the total number of text and footnote lines."<sup>38</sup> While the level in both categories has increased, the "density" factor has expanded the most dramatically.<sup>39</sup> A high density measurement is the most reliable indication that the author has opted to exploit footnote differentiation tactics.

Although law review contributors in general adopted footnote differentiation, those struggling for academic survival—the nontenured—have exploited it most ardently. One study "shows that the contributors who, as a major group, footnote most profusely in legal journals are Assistant and Associate Professors of Law."<sup>40</sup> This group has pushed the art of footnoting to the outer limits of

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35. See J. BAIN, *supra* note 1, at 114. Professor Bain concludes that the principal effect of product differentiation is that the "seller gains some independent jurisdiction over his price, relative to the prices of his rivals." *Id.*

36. Writers found a willing group of accomplices in student editors who are trained to venerate excessive footnoting. See J. SELIGMAN, *THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL* 183 (1978). Seligman observes that the editors "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." *Id.*

37. For representative literature describing this period, see J. GALBRAITH, *THE AFFLUENT SOCIETY* (1958); V. PACKARD, *STATUS SEEKERS* (1959); D. POTTER, *THE PEOPLE OF PLENTY* (1954).

38. Wheeler, *supra* note 11, at 248.

39. *Id.* at 251. Mr. Wheeler's study showed that "[w]hile the [density] for 1958 was only .20, that for 1978 had risen to .31 (Sum Totals). This represents an increase of more than fifty percent over a twenty-year period." *Id.*

40. *Id.* at 252. A study showing that only 44.21% of senior faculty published during a three year research period supports the notion that tenured professors are not active competitors in the publishing market. Swygert & Gozansky, *Senior Law Faculty Publication Study: Comparisons of Law School Productivity*, 35 J. LEGAL EDUC. 373, 393 (1985). The authors stressed that only 40.45% of all full-time senior faculty members were included in the study. See *id.* at 375. For a critical reply see Kaye & Ellman, *The Pitfalls of Empirical Research: Studying Faculty Publication Studies*, 36 J. LEGAL EDUC. 24 (1986).

gamesmanship and creativity.

Other than the nit-picking and landscaping restraints of *A Uniform System of Citation*, whose primary role is analogous to "Amy Vanderbilt, the Rules of Baseball, and totalitarian regimes [who engage] in a modest quest to impose uniformity on more mundane spheres of human activity,"<sup>41</sup> authors have unlimited discretion in the selection of differentiating maneuvers. Legal education's growing interest in other disciplines,<sup>42</sup> such as economics, psychology, and sociology, creates a wide universe for ideas and thus provides an opportunity to develop creative strategies for article differentiation.<sup>43</sup> One consequence, perhaps indigenous to legal

41. Benton, Book Review, 86 YALE L.J. 197, 197 (1976) (reviewing *A Uniform System of Citation* (12th ed. 1975)).

The *University of Chicago Law Review's* introduction of an alternative to *A Uniform System of Citation*—the *Bluebook*—was accompanied by additional criticism of traditional law review citation form. Judge Richard A. Posner writes:

The *Bluebook* displays an excessive, an unhealthy—one is almost tempted to say, since this is still the land of freedom, an un-American—obsession with uniformity. By teaching that uniformity is one of the most important things in law, the *Bluebook* encourages the tendency of young lawyers, many of whom in their larval stage are law review editors and in their chrysalis stage the ghostwriters of judges and senior partners (the butterflies), to cultivate a most dismal sameness of style, a lowest-common-denominator style.

Posner, *Goodbye To The Bluebook*, 53 U. CHI. L. REV. 1343, 1349 (1986).

The *Wall Street Journal* detected a more subtle and dangerous ramification in "bluebooking":

Behind this delightful, formalistic skirmish, of course, lies a public-policy issue of keen interest to the general public. Judge Posner has argued in the past that the solution to improper judicial activism is more candor by judges. If they are off making policy, let them at least say so. The public deserves to know what's going on. The formalism of legal writing that the *Bluebook* demands is a boon for those who prefer to obfuscate their political intent with law.

Editorial, *Grabbing the Hypertrophy*, WALL ST. J., Feb. 11, 1987, at 26, col 1.

42. According to Professor Clark Byse of Harvard Law School:

[Y]ounger members of law faculties today manifest a greater interest in the interrelationship of law and the social sciences than was true in the beginning years of my career [mid-1930s]. Law teachers with these kinds of educational backgrounds and interests are more likely than my generation of law teachers to utilize the insights and materials of related disciplines in both their teaching and their scholarship.

Byse, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063, 1069 (1986).

43. Cross-fertilization may have negative trade-offs. Former Yale Dean Harry Wellington has expressed concern that "some law professors today are more concerned with intellectual currents among their colleagues in the arts and sciences and less concerned about law practice and the output of the bench. He added that this 'scorn' for the practicing lawyer's work contributes to the 'extensive and intense unhappiness of law students.'" Metaxas, Nat'l L.J., Sept. 22, 1986, at 4, col. 3.

Professor Pierre Schlag of the University of Puget Sound Law School complains that cross-fertilization results in "fancy scholarship."

Fancy scholarship is characterized by the unverifiable, but no doubt masterful, deployment of the complex and arcane vocabulary of some foreign discipline like psychology

scholarship, is that the infinite range of note sources produced by cross-disciplining encourages authors to rely on absolute numbers of footnotes as a differentiating tactic.

#### IV. DIFFERENTIATION TECHNIQUES

##### A. *The Numbers Game*

Footnote strategy invariably begins with the author focusing on a "numbers" decision—how many? Neophyte writers have a tendency to go for quantity. The motivation behind a high number is to issue a direct challenge to rivals. The customary objective is 500 or more footnotes. Exceeding 500 is a dramatic expression of footnote machismo. Implicit is the message that the higher the number count, "the more authoritative will be the article."<sup>44</sup>

Exceeding the magic one thousand level might produce notoriety—and a more positive differentiation image—by attracting media attention. *The National Law Journal* has, for example, kept a running scoreboard on the law review article with the most footnotes.<sup>45</sup> In addition to the media, "[i]t is even rumored that some legal academics measure scholarly achievement by citation mass."<sup>46</sup>

The importance of "airing it out"<sup>47</sup> for numbers is verified by the compulsion that young professors have for checking the competition's numbers by turning immediately to the last page of a

or rhetoric or something altogether different. For some reason, when that foreign terminology is commandeered and applied to law, all our legal artifacts and problems mysteriously seem to fall into place—leaving us in complete wonder as to why no one has thought of doing this before.

Schlag, *The Brilliant, the Curious, and the Wrong*, 39 *STAN. L. REV.* 917, 917-18 (1987).

44. Thorne, *supra* note 20, at 1159.

45. Kaplan, *The Article in a Law Review That Included the Most Footnotes Is . . .*, *Nat'l L.J.*, Mar. 18, 1985, at 4, col. 3. So far, the answer is 1247 in an article by Arnold S. Jacobs, a partner at the New York City law firm of Shea & Gould. *Id.*; see Jacobs, *The Meaning of 'Security' Under Rule 10b-5*, 29 *N.Y.L. SCH. L. REV.* 211 (1984). United States v. E.I. DuPont de Nemours & Co., 118 *F. Supp.* 41 (1953), is the alleged record holder for judicial opinions with 1715 footnotes. Kaplan, *supra*.

46. Zenoff, *supra* note 31, at 22. Footnote "mass" also aids acceptance for publication. See *infra* note 105.

There is one rumored exception. According to Professor Rotunda, Professor Prosser's widely cited *The Assault Upon The Citadel (Strict Liability To The Consumer)*, 69 *YALE L.J.* 1099 (1960), was pulled from the *Harvard Law Review* because "the editors thought that Prosser had too many footnotes (a rare complaint for a law review)." Rotunda, *supra* note 31, at 2 n.3.

47. This is a sports colloquialism that means a long pass. Bernie Kosar, Cleveland Browns' quarterback, told me that he gets an "emotional high" from airing it out. Mr. Kosar audited a course at Case Western Reserve Law School, Summer, 1986.

colleague's reprint.<sup>48</sup> A sigh of relief means that the rival's footnote count is not high enough to pose a threat.

Nevertheless, experience is still the best mentor and teaches the sophisticated writer that reliance on brute numbers is academically uncouth. It is ostentatious overkill. Moreover, "numbergrubbers" have a tendency to rely on "inflators" such as *supra*, *infra*, *ibid.*, and *id.*<sup>49</sup> and, as a result, are vulnerable to justified chastisement for sneaking in "useless" notes.<sup>50</sup> They may get too cute and start an article with "the" and a citation to the definition in the *Oxford English Dictionary*.<sup>51</sup> In short, unrefined numbergrubbing can result in negative differentiation impressions, especially among senior faculty who are threatened by articles with note numbers exceeding anything they have produced or those, like Judge Mikva, who have developed an antipathy to any footnoting.<sup>52</sup>

Gaining a differentiation advantage in the numbers game requires discipline. Motivation is more effective when guided by subtlety and not a blunderbuss. The experienced writer has learned that the ideal footnote limit is in the 290 range. This demonstrates the capacity to stretch it out to 500 footnotes plus, while conveying the message that the author consciously has opted for self-restraint and quality. Critical to the success of this tactic is a paucity of *id.*, *ibid.*, and other sneaky inflators. Ending on an odd number three footnotes below 300 reinforces the message of discipline and adds a touch of insouciance.

Serious practitioners of note differentiation periodically plant the seeds of anxiety among rivals by "minimalizing."<sup>53</sup> In a

48. The fact that the young professors have recently gone through law review experience and are trained to "provide a citation for every proposition" reinforces the urge to "air it out." Cramton, *supra* note 5, at 5.

49. "[A]ll of which have given footnotes a bad name." Bowersock, *The Art of the Footnote*, 53 AM. SCHOLAR 54, 55 (1984).

50. Posner, *supra* note 41, at 1345.

51. See, e.g., Comment, *The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474 (1975).

52. Mikva, *supra* note 10, at 647; see also Nowak, *Attacking the Judicial Protection of Minority Rights: The History Ploy*, 84 MICH. L. REV. 608, 621 n.38 ("I really hate footnotes.").

53. This term is derived from the "yuppie" culture, where the standard advice is "think minimalist." M. PIESMAN & M. HARTLEY, *THE YUPPIE HANDBOOK* 34 (1984).

Novelist John Barth views "minimalism" as a permanent fixture of civilization. It is a cyclical correction:

[A] cycle to be found as well, with longer rhythms, in the history of philosophy, the history of the culture. Renaissances beget Reformations, which then beget Counter-Reformations; the seven fat years are succeeded by seven lean, after which we, no less than the people of Genesis, may look forward to the reconnection."

straightforward display of contempt for numbers, the author uses fewer than 100 footnotes. The most effective minimalization range is in the sixties, which conveys a blunt signal to the marketplace that the writer does not participate in the numbers race. To emphasize the point, each footnote should be "pure," *i.e.*, references to one or two decisions devoid of interpretation or discursive commentary.<sup>54</sup> Confident writers display disdain for the research of others by not citing their articles or treatises. The objective of footnote minimalizing is to announce that the author's work is above and beyond the mediocrity of mainstream establishment scholarship.

As mentioned earlier, the number of an article's last footnote gets the immediate attention of colleagues. Perceptive authors recognize that this number should be selected for symbolic significance. For example, to the Pythagoreans, the number one symbolized reason, while even numbers were considered feminine and odd numbers masculine.<sup>55</sup>

## B. *The Visual Factor in Motivation*

### 1. The "Lead-In" Quotation

Like advertising,<sup>56</sup> article differentiation seeks to create a visually attractive package that produces a positive reaction in a con-

Barth, *A Few Words About Minimalism*, N.Y. Times, Dec. 28, 1986, § 7, at 1, col. 1, & at 25, col. 1.

54. For a classic example of "minimalizing," see Turner, *The Validity of Tying Arrangements Under The Antitrust Laws*, 72 HARV. L. REV. 50 (1958), in which the author used 55 footnotes in a 25 page article. Writing in a field that inspires runaway footnote mania (antitrust), Turner's notes were "pure" references and generally without discussion. He cited two law review articles in the 55 footnotes. Subsequently, Turner produced another excellent example of "minimalizing." See Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962) (67 footnotes over 51 pages).

55. G. FLEGG, *NUMBERS: THEIR HISTORY AND MEANING* 273 (1983). For a discussion of numerology and literature, see J. MACQUEEN, *NUMEROLOGY: THEORY AND OUTLINE HISTORY OF A LITERARY MODE* (1985).

56. According to one advertiser, "We're not selling products these days as much as we're selling packaging." See J. SELDIN, *THE GOLDEN FLEECE: SELLING THE GOOD LIFE TO THE AMERICAN PEOPLE* 151 (1963). See generally E. DICHTER, *THE STRATEGY OF DESIRE* (1960).

Packaging has now become "visual literacy," a characteristic with some negative side effects:

Along with this rise in visual literacy has come an almost desperate desire to be stimulated, a belief that our eyes will not see properly unless they are bombarded, over and over again, with the most intense and spectacular imagery. We have become a visually alert culture, but we have become a visually glib one as well.

sumer-reader. Visual strategy begins on the first page. The most pretentious form of first page differentiation is the "lead-in" quotation whereby the author prefaces the main body of the text with a quote from an esteemed scholar, a famous decision, or some other prestigious source.<sup>57</sup> Literary quotes are popular, with Charles Dickens' observation on "the best of times" and "the worst of times" from a *Tale of Two Cities* a favorite.<sup>58</sup> *Alice's Adventures In Wonderland* and Kafka's *Trial* are also popular sources. The objective of the "lead-in" quote is to spark immediate attention with a titillating sample of erudition, humor, or impertinence.

Writers recognize that the differentiation effectiveness of the lead-in quote depends on careful and thoughtful selection. Resorting to Latin, Shakespeare, and the *Bible* are obvious exercises in intellectual affectation and therefore likely to be considered *déclassé*. Ideally, the lead-in quote should be obscure—oriental sources are recommended—and should not have a substantive link to the subject matter of the article. Lack of linkage provokes mystery and forces the reader to ponder the author's hidden (albeit nonexistent) reason for using the irrelevant quote. This technique can generate guilt among readers who suspect the game but lack the nerve to speak out.

It is important that the lead-in quote be used without citation. Merely cite the source below the quote without reference to the page. Full citation is unnecessary for the *cognoscenti*.

## 2. The Density Factor

Shrewd authors know that the visual impact from the juxtaposition of footnotes and text contributes valuably to differentiation culture. The objective is to arrange a contrast that will convince the reader that the footnotes are as significant and informative as the text.<sup>59</sup> For graphic visual contrast, the "density" quotient<sup>60</sup>

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Goldberger, *Design: The Risks Of Razzle-Dazzle*, N.Y. Times, Apr. 12, 1987, § 2, at 1, col. 1.

57. As extraneous to the text, lead-in quotes are a special form of footnote, *i.e.*, a "lead-in note."

58. Dickens has long been a source of curiosity to lawyers. See generally Vaughan, *Dickens and His Lawyers: A Literary Mystery That Remains Unsolved*, 41 A.B.A.J. 595 (1955). For a discussion of "why academic lawyers are interested in literature," see Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351 (1986).

59. Creating contrasts is an advertising technique used to gain the reader's attention. The principle of contrast "states that, other things being equal, the duration and degree of attention depend upon the contrast of an object with surrounding objects." D. STARCH, *PRINCIPLES OF ADVERTISING* 634-35 (1923).

60. See Wheeler, *supra* note 11, at 248.

should be high, with notes occupying one-quarter to one-third of the bottom of each page.<sup>61</sup> An additional visual requirement for a tenure piece is the contrast between one page with two to five sentences of text at the top supported by four or five long footnotes packed with provocative discussion.

Getting a piece positioned as the "lead" article is a visual coup and scores automatic differentiation points. To exploit this advantage fully, the only footnote to appear on the lead page should be the "author's note"—a differentiation ploy of great potential.

### C. *The "Author's Note": Making Friends and Networking*

*Writing a book is often sheer pain and drudgery, but writing the dedication is a moment most authors savor, a chance to pay back old debts, even the score or give one's spouse (or former spouse) a reward for putting up with all those nights of writer's angst. Dedications are sometimes as original, humorous and witty as the books they precede. And a few are as banal.<sup>62</sup>*

Like a book dedication, the "author's note" is used to express gratitude to various people for reading and critiquing the article or providing other assistance.<sup>63</sup> Ostensibly, the motivation is academic courtesy; in reality, this note provides the opportunity to consummate a cluster of self-serving goals.<sup>64</sup> Crediting established leaders in the field for reading the manuscript provides the non-tenured instructor with the imprimatur of instant credibility. These credits state implicitly that the article is "serious" because the author is sufficiently confident to risk the arbitrary and backstabbing evaluation of the establishment. Circulating the manuscript among colleagues also suggests that the article survived a long gestation period of research, thought, and numerous revisions. The net effect is that in one carefully constructed note, an author can gain recognition as a contributing member of a "network" of successful academics. Moreover, how can tenured faculty vote against an article they implicitly approved?

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61. In addition to density measurement, authors also exploit note length for attention. The *National Law Journal*, in monitoring the footnote game, describes a note spanning five pages discovered in Sciarrino, "Free Exercise" *Footsteps in the Defamation Forest: Are "New Religions" Lost?*, 7 AM. J. TRIAL ADVOC. 57 n.317 (1983) (the footnote contains 195 single-spaced lines). Sciarrino is quoted as saying: "Legal writing gets to be absurd. I hope I never see an article like this again." Kaplan & Metaxas, *Longest Footnote*, Nat'l L.J., June 17, 1985, at 4, col. 4.

62. Schumer, *Lovers, Enemies and Other Dedictees*, N.Y. Times, Sept. 28, 1986, § 7, at 1, col. 1.

63. Query: Do law reviews verify the author's note?

64. See Schumer, *supra* note 62, at 39 (indicating that "Louis L'Amour dedicated one of his novels to all the members of the Bantam Book sales force").



Publishing a stream of names in an author's note can sustain a movement to higher status and reputation. The tacit code assumes reciprocity; if you mention a colleague, he is obligated to use your name. This is a form of the "conspiratorial cross-referencing" motivator recognized in other disciplines. According to one commentator, "It is not unusual for researchers who are working on a common problem to cite each others' work almost conspiratorially. Each one cites all the others' work and thus both secure increased personal and research exposure."<sup>65</sup>

Counterproductive or superfluous chatter sometimes diminishes the effectiveness of the author's note. Congratulating the library staff for help is a nice gesture but detracts attention from the more important career-building references. Likewise, acknowledgment of student research aid should be brief—if at all—lest suspicion be aroused that student participation was more extensive than represented. Thanking a secretary is too effusive and condescending to get any points. On the other hand, thanking "Mom" for "constant support and encouragement" is so guileless and odd that it is likely to titillate and create a positive impression on the elder members of the faculty.<sup>66</sup>

Tenured academics are equally familiar with the benefits of the author's note.<sup>67</sup> At this level, the motivation is to solidify and

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65. Thorne, *supra* note 20, at 1160. Footnote networks can be proprietary and self-selective. See Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984). Professor Richard Delgado detected this effect in civil rights literature. After compiling a list of the twenty most frequently cited articles he "noticed that each of the authors was white. Each was also male. . . . Further, a review of the footnotes of these articles disclosed a second remarkable coincidence—the works cited were also written by authors who were themselves white and male." *Id.* at 561. Delgado concluded: "It does not matter where one enters this universe; one comes to the same result: an inner circle of about a dozen white, male writers who comment on, take polite issue with, extol, criticize, and expand on each other's ideas. It is something like an elaborate minuet." *Id.* at 563.

66. See, e.g., Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975 (1986).

Dedication to a "beautiful wife . . . whose cheerful smile has helped me make it through law school," however, is likely to disconcert the reader. See Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 U. MIAMI L. REV. 693, 727 (1987).

67. The most effective author's note I have encountered was composed by Professor Robert S. Summers of Cornell Law School. Summers starts with the advantage of the "lead" article position, uses a "lead-in" quote from Justice Holmes (a common refuge for the lazy—loses points), retains copyright (suggests that the article is part of a soon to be published book), and then drops in an author's note that: (1) acknowledges help from judges attending various seminars Summers conducted; (2) lists lectures on the topic he gave at various schools; and (3) expresses gratitude to 30 colleagues and 4 students for help in perfecting the article. According to my count, Summers' total of 34 names is a record for law

further expand establishment image. One note technique emphasizes the author's status by mentioning only "star" colleagues.<sup>68</sup> A more productive empire building tactic is to identify young potential "stars" and give them recognition in an author's note. Flattered by attribution from a tenured member of the chorus, the young and ambitious newcomer becomes a member of the master's private network. Moreover, under the code of conspiratorial reciprocity, the followers are obligated to pay deference in their author's notes.

#### D. Note Content: Fugitive Sources

The use of "fugitive" material in footnotes elevates the differentiation campaign to the ultimate level of polish and style and separates the artist from the poseur. "Fugitive" material means that the source is newly discovered, unusual, or exotic. For example, the Nixon tapes provided an exotic antitrust quote: "[The Antitrust Division has] gone off on a kick, that'll make them big goddamn trust busters. That was all right fifty years ago . . . It's not a good thing for the country today."<sup>69</sup> Within several sentences, a President of the United States blasts an American institution in the language and style that evokes the image of "robber barons" like Judge Elbert H. Gary and John D. Rockefeller.

The Nixon citation is especially effective because it provides an opportunity for a "doubleheader" fugitive quote. Consider the impact on the reader from the provocative comparison of Nixon's outburst with that of Justice Oliver Wendell Holmes, who said:

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review articles. See Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common Law Justification*, 63 CORNELL L. REV. 707-08 (1978).

68. Tenured faculty can indulge in reverse psychology by expressing gratitude to mystery people. I make it a practice to mention Oscar Bealing, a retired attorney and scholar from Hinckley, Ohio. See A. AUSTIN, *COMPLEX LITIGATION CONFRONTS THE JURY SYSTEM: A CASE STUDY* viii (1984).

This is a "self-citation" that increases my cite index count. See *infra* note 91. "The easiest way to avoid the dustbin of the uncited is to cite oneself. From the viewpoint of the citation indexers, this is perfectly kosher; for all the computer knows, another person with your name is citing you." Wiener, *Footnote—Or Perish*, 21 DISSENT 588, 590 (1974). According to Kaplan, "Something on the order of eight to ten percent of all citations are self-citations to one's own previous work." Kaplan, *supra* note 20, at 180.

There is another reason for self-citation: "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.

69. *Nixon's Own Views on Antitrust Policy, Big Business Didn't Require ITT Lobbying Blitz, Documents Show*, Wall St. J., July 22, 1974, at 3, col. 1.

"[I] have been in a minority of one as to the proper administration of the Sherman Act. I hope and believe that I am not influenced by my opinion that it is a foolish law. I have little doubt that the country likes it and I always say . . . that if my fellow citizens want to go to Hell I will help them."<sup>70</sup> Uncovering a consensus between Justice Holmes and President Nixon should merit positive differentiation points.

A cursory survey indicates that unpublished manuscripts provide the most fertile source of fugitive literature. Access to non-public material makes the author an "insider" to a mysterious clique or a ferocious archaeologist of buried scholarship. There is, moreover, a curiosity factor: is the material too "hot" or controversial to publish? Trial transcripts are also impressive, especially from old and obscure trials. The message is thoroughness; the author gets credit for plowing through pages of dusty transcripts to flush out gold nuggets.<sup>71</sup>

Citations to personal letters from established names are effective because they allude to a personal relationship.<sup>72</sup> Letters reinforce the author's status as a member of the elite. More importantly, this is "insider" information at its best and, properly exploited, can conjure up a comparison to the Holmes-Laski exchange.

## V. CURRENT TRENDS IN ARTICLE DIFFERENTIATION

### A. *Differentiation Spreads to Book Reviews*

The complex techniques and motivations of footnote competition has spread to book reviews. For decades book reviews were nonfootnote sanctuaries where one enjoyed freedom to be spiteful, speculative, or sycophantic without fear of condemnation or an obligation to cite sources. "When it comes to book reviews," Professor Rodell pithily remarked, "company manners are not so strictly enforced and it is occasionally possible to talk out loud or crack a joke."<sup>73</sup> The reason for this safe harbor was that book reviews were

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70. HOLMES-LASKI LETTERS, 1916-1935, at 248-49 (M. Howe ed. 1953).

71. Here is a nugget: West Publishing Company owns controlling interest in Foundation Press, Inc. Telephone Conversation with Mr. Roger Noreen, Vice-President and Manager, West Publishing Company (Jan. 13, 1987).

72. See, e.g., the Auchincloss Letter, *supra* note 30; see also *infra* note 98.

73. Rodell, *supra* note 2, at 44. Rodell continued: "As a result, the book reviews are stuck away in the back like country cousins and anyone who wants to take off his shoes and feel at home in a law review will do well to come in by way of the kitchen." *Id.*

irrelevant—no one read them.<sup>74</sup> Since reviews were considered trivial exercises that had no significance to promotion or status, there was no need to waste time by digging for citations and certainly no justification for sophisticated note differentiation.<sup>75</sup>

Searching for new forms of one-upmanship, perspicacious writers discovered that they could exploit book reviews to provide backdoor passage onto the pages of prestigious law reviews. To build credibility and convince the academic community that their products were legitimate forms of scholarship, authors lengthened their reviews.<sup>76</sup> Eventually a reverse trade-off occurred; once the establishment took book reviews seriously, editors and writers reverted to the convention of the standard law review article. The result: following the evolutionary cycle of articles, book reviews became boring, long, and unoriginal.<sup>77</sup>

Under these conditions, footnote differentiation was inevitable. Moreover, copious footnoting made it possible for writers to convert the book review into the prestigious "Review Essay."<sup>78</sup> As a result, the subtle footnote motivations used in articles became mandatory for book reviews and review essays.<sup>79</sup>

Differentiation in book or essay reviews provides a unique asset—a rare (or only?) forum for "footnote criticism." The reviewer can analyze and critique the quality and depth of an author's notes. An interesting contrast occurred in the *Michigan Law Review's* 1986 *Annual Survey of Books*. In his review of Professor

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74. See Allen, *In Praise of Book Reviews*, 79 MICH. L. REV. 557 (1981); Cavers, *Book Reviews in Law Reviews: An Endangered Species*, 77 MICH. L. REV. 327 (1979). The January-March 1979 issue of the *Michigan Law Review* contains only book reviews.

75. On the other hand, the isolation of book reviews made them a good source to cite as an expression of "fugitive" material. Moreover, citing book reviews suggests thorough research.

76. The *Michigan Law Review* acknowledges the new status of book reviews with its annual "Survey of Books Relating to the Law." See, e.g., *supra* note 74.

77. At this point, formerly obscure book reviews lost value as good sources for fugitive citations.

78. E.g., Weyrach, *Essay Review, Legal Practice as Search for Truth*, 35 J. LEGAL EDUC. 123 (1985). Criteria for distinguishing "regular" reviews from "essays" remains a mystery. Compare Austin, *Book Review*, 58 TUL. L. REV. 1282 (1984) with Weyrach, *supra*. In this instance, the book review is longer, has more notes, and is more vigorous. Another variation is the Bibliographic Essay. E.g., Brickner, *Bibliographic Essay*, 54 U. CIN. L. REV. 839 (1986) (comparing T. McCRAW, *PROFITS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS AND ALFRED E. KAHN* (1984) with P. STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* (1984)).

79. This includes a high "density" rating. See, e.g., Kurzban, *Book Review*, 99 HARV. L. REV. 1681 (1986) (density rating of 50%). Reviewers also resort to the author's note. See Schwarschild, *Book Review*, 99 HARV. L. REV. 685 (1986).

Laurence Tribe's *Constitutional Choices*, Judge Richard Posner complained of too many notes, poor positioning (as "end notes"), and lack of quality.<sup>80</sup> Judge Mikva, an antifooter,<sup>81</sup> praised another of Tribe's books because it included "no footnotes, no long, uninvolved reconciliations of conflicting views on obscure points."<sup>82</sup>

### B. *The New Chic in Footnoting*

The current fashion of applying economics to law and life has revolutionized note differentiation. Numerous theories have rationalized the law-economics fetish. Professor Arthur Leff, for example, explained that law professors assumed (incorrectly) that economics could supply their discipline with the certainty unavailable in the prevailing dogma of legal realism.<sup>83</sup> An alternate, and equally plausible, explanation exists: perceptive authors recognized economics as a potential source of a baffling language that could provide a flexible conduit for new forms of note differentiation.

The new language is the mathematical idiom of equation supplemented by a diagram or graph. Authors developed overnight skills in mathematizing dry legal rules and splicing together economic mumbo jumbo to create footnote surrealism. The new, chic footnotes range from esoteric incomprehension to restatements of irrelevant chatter.<sup>84</sup>

Because an author can design footnotes to create an aura of dignity and mystery for the most mundane text, the new wave in visual contrasts is the diagram and graph.<sup>85</sup> As litigators have learned, visuals convey "a more objective truth, which is not so

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80. Posner, *The Constitution as Mirror: Tribe's Constitutional Choices*, 84 MICH. L. REV. 551 (1986). "[T]hose 1829 end notes contain few references to the world of thought that exists outside of recent Supreme Court opinions (many drafted by twenty-five-year-old law clerks fresh out of law school) and the professional commentary on them." *Id.* at 567.

81. See *supra* note 10. But Judge Mikva has capitulated at least once. See *infra* note 104.

82. Mikva, *Judge Picking*, 84 MICH. L. REV. 594 (1986). As Judge Mikva promised in *No More Footnotes*, *supra* note 10, he did not use footnotes in his review of Tribe's book.

83. Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974). See generally Cramton, *The Place of Economics In Legal Education*, 33 J. LEGAL EDUC. 183 (1983). The irony is that economists made a similar trade-off. See Boulding, *Economics as a Moral Science*, 59 AM. ECON. REV. 1 (1969) (suggesting that the cloak of objectivity derived from mathematics was the primary reason for recognition of economics as a "pure" science).

84. To avoid retribution, I will not cite examples.

85. Graphs get respect. Working with a learned economist as a coauthor, I included several graphs as footnotes. Much to our amusement, the two graphs appeared in the final version as full page representations. Austin & Solomon, *A New Antitrust Problem: Vertical Integration in Correspondent Banking*, 122 U. PA. L. REV. 366, 374-75 (1973).

open to interpretation but can stand alone.”<sup>86</sup> The primary advantage of graphic and diagrammatic visuals is originality; as self-created, they do not rely on other citations. Hence, one could write an article using copious footnotes of diagrams and graphs without citing a single outside source.

### C. Other Differentiating Motives

#### 1. Personalizing Notes

Occasionally a writer will personalize footnotes by shifting from the conventional third person in the text to first person in the notes. Because this is a departure from convention,<sup>87</sup> it can be counted on to pique the reader's interest. Use of first person connotes subjectivity. Hence, shifting from third person text to first person footnotes can be interpreted as the author's way of adhering to the creed of “objectivity”<sup>88</sup> in the text, while releasing personal views at the bottom of the page. Moreover, by disdaining the hypocrisy of “objectivity,” the use of first person in the notes openly indicates a proficiency in the subtleties of cite differentiation.

A “personal” note is an effective vehicle for the “negative credit.”<sup>89</sup> By removing the cloak of anonymity, the author can unleash direct and vigorous criticism at established conventions or rivals.<sup>90</sup> There is, however, an undesirable trade-off; if you cite your opponent, albeit critically, you increase his citation index count.<sup>91</sup>

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86. S. HAMLIN, WHAT MAKES JURIES LISTEN 383-84 (1985).

87. It is against custom to use the first person in law review articles. As Professor John Nowak observed:

No author, if he wishes to lay claim to the title of “scholar,” can state that he personally finds the result of a court decision to be immoral, socially harmful, or just plain stupid. . . . If the author admits that the views contained in an article are his own, rather than drawn from some discovered source of ultimate truth in the “The Law,” the worth of his views will be suspect.

Nowak, *supra* note 4, at 318.

88. See Miller, *supra* note 4.

89. See Brooks, *Evidence of Complex Citer Motivations*, *supra* note 20, at 35.

90. One author complained that relegating criticism of his views to footnote level was denigrating: “that is how seriously he takes me.” O’Connell, *Bhopal, the Good Lawyer, and the American Law School: A Torts (and Insurance) Professor’s Perspective*, 36 J. LEGAL EDUC. 311, 315 (1986).

91. A citation index counts the frequency that an article is cited. “It is constructed by a purely clerical and computer process, whereby all reference lists for a selected set of journals are fed in, sorted out, and then reversed, so to speak, so that each cited article is listed by first author, subsuming all citing articles.” Bavelas, *supra* note 22, at 158. Indexing “is

## 2. Frustration Notes

Using a citation that frustrates law review editors because it cannot be accommodated by the *Bluebook* or conventional guidelines merits positive recognition from discriminating peers. The most ingenious tactic is to challenge the verification phobia of circumspect and timid editors by citing a conversation with a colleague as a source for an idea or interpretation. "This interpretation came from a recent discussion with Professor Phlegm Snopes" is the typical attribution. Knowing that editors must rely on the memory of the author for verification of an unrecorded conversation retaliates effectively for absurd editorial sniping. Another benefit is that the quoted colleague now must return the favor. Moreover, a "conversation" footnote suggests that the author is an "active" scholar, constantly engaged in serious dialogue, and has the integrity and confidence to acknowledge the source of new information.

## VI. CONCLUSION

*Encountering [a footnote], is like going downstairs to answer the doorbell while making love.*<sup>92</sup> —Noel Coward

According to the "devil theory of footnoting," any note other than a "pure"<sup>93</sup> citation is excrement in the corridors of academe. While other disciplines, such as the sciences, seemingly maintain the proper perspective, "purists" contend that legal footnoting is so out of control that it disrupts and subverts legitimate scholarship. Only librarians, who live in a cloistered world of tedium, esteem footnotes.<sup>94</sup>

The critics' devil theory is infected with irony and hypocrisy. Many of those who once engaged in gamesmanship to gain tenure

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being used to do such things as evaluate the research role of individual journals, scientists, organizations, and communities; define the relationship between journals and fields of study; measure the impact of current research; provide early warnings of important new interdisciplinary relationships; spot fields of study where rate of progress suddenly begins accelerating; and define the sequence of developments that led to major scientific advances." E. GARFIELD, *CITATION INDEXING—ITS THEORY AND APPLICATION IN SCIENCE, TECHNOLOGY, AND HUMANITIES* 62 (1979).

92. See Bowersock, *supra* note 49, at 54.

93. See *supra* note 19.

94. Law librarians account for most of the index-citation research on legal literature. See Axel-Lute, *supra* note 19; Shapiro, *The Most-Cited Law Review Articles*, 73 CALIF. L. REV. 1540 (1985); Wheeler, *supra* note 11. But see Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381 (1977).

now seek to impose their born-again purity on the subculture of the struggling nontenured.<sup>95</sup> In today's publish or perish environment, footnote trashing is the slothful tenured establishment's last refuge of snobbery.<sup>96</sup>

Footnote differentiation, as a manifestation of creativity, contributes significantly to legal scholarship. The quality of the footnotes reveals the author's range and comprehension of the topic.<sup>97</sup> In a notoriously risk averse discipline, footnotes are the accepted forum for risk-taking. Footnotes leave permanent passages and landmarks to obscure information.<sup>98</sup> As literary submarines, footnotes can torpedo established doctrine with frontier perspectives. They serve as embryos for new ideas and an underground source for humor,<sup>99</sup> fugitive nuggets,<sup>100</sup> and candor.<sup>101</sup> "In the hands of a

95. Coping with footnote "purists" is thus another pressure for nontenured professors who already must contend with tough promotion standards. See Zenoff & Moody, *supra* note 25, at 220-26.

96. See Swygert & Gozansky, *supra* note 40.

97. According to Professor Martin:

Aside from their usefulness to the reader, footnotes are also important in maintaining the high level of scholarship found in law review articles. Writing footnotes forces the author to justify each substantive point, and the process of editing the footnotes increases the likelihood that the editors will uncover any shortcomings or shortcuts in the substance of the article.

Martin, *supra* note 4, at 1097.

Tedious footnote checking disciplines student editors and creates a "non-shirking" attitude. Gilson & Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry Into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 377 (1985).

98. For example, a footnote discovered by an intern at the *Paris Review* led to the discovery of an unpublished Ezra Pound short story.

The footnote referred to a short story written by Pound when he was around college age, which laid among his papers at the Beinecke Library in New Haven, and which had never been published . . . .

The reproduction appears in our Fall 1986 issue . . . . To be frank, the only reason, I'm sure, for the story's not having been published years ago is that it's not terribly good. Nevertheless, it is, we thought, of some interest.

Letter from Jonathan Dee, Senior Editor of the *Paris Review*, to Author (Dec. 4, 1986) (on file with Author).

Mr. Dee is correct; the article should have remained buried in the dust at Beinecke Library. Read the article: Pound, *In The Water-Butt*, PARIS REV., Summer/Fall 1986, at 303.

99. "There is the old story of the sadist and the masochist who got married. On their wedding night the masochist begged: 'Darling, beat me! Hurt me! Hurt me!' The sadist said: 'No.'" Junger, *A Recipe for Bad Water: Welfare Economics and Nuisance Law Mixed Well*, 27 CASE W. RES. L. REV. 3, 65 n.178 (1976).

100. One footnote read:

The Blimp is shaped like a football. Whether this purely physical similarity accounts for the long and well-documented relationship between the Blimp and the [football] game, no one can safely say. For a discussion of the aerodynamics of oblate spheroids,



master . . . [a footnote] can become a work of art and an instrument of power," and deception.<sup>102</sup> Even Judge Mikva, who said "goodbye" to footnotes in 1985,<sup>103</sup> fell off the wagon in 1986.<sup>104</sup> Most importantly, artistic footnoting can grease the path to promotion and tenure.<sup>105</sup>

Tenure and academic gamesmanship aside, there is a practical reason for serious dedication to footnoting. All of the obvious and conventional ploys—especially numerosity and lengthy dialogue—operate to remind the practicing bar that law professors are ostensibly the ultimate repository of knowledge. To those uninitiated to the game, footnotes convey a message of "miracle, mystery, and authority"<sup>106</sup> that elevates the market value of academic commentary. This impression is reinforced by the judiciary, who, as Judge Mikva laments, now flatter academe by resort to copious use

see R. VON MISES, *THEORY OF FLIGHT* 102 (1959). For a discussion of the rising fortunes of the Goodyear Blimp, see *Navy and Coast Guard Show Interest in Blimps*, N.Y. Times, Aug. 6, 1985, at C3, col 1.

Foy, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501, 501 n.1 (1986).

101. "I am grateful to . . . the Guggenheim Foundation, which thought it was supporting something else." Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986) (author's note).

102. Bowersock, *supra* note 49, at 54. Footnotes can hide financial ploys. See R. REICH, *THE NEXT AMERICAN FRONTIER* 153 (Penguin ed. 1984). Reich notes Chrysler's use of the footnote to make financial disclosures in an unobvious place. "Chrysler did nothing illegal. Indeed, it disclosed in a footnote to its annual report that it had made the actuarial change, although it did not state any figures." *Id.* (footnote omitted).

Footnotes also can be a source of financial misery and headache. A three word footnote in the Tax Reform Act of 1986 "is now poised, like a retrovirus, to wreak havoc on charitable-gift annuities, normally part of the lifeblood of college and university fund raising. . . . The previously little-noticed footnote is causing consternation because it could force colleges for the first time to pay taxes on charitable-gift annuities." Bailey, *Footnote in Tax Law Threatens Colleges' Charitable-Gift Annuities*, Chron. Higher Educ., Feb. 18, 1987, at 26, col. 1.

103. See *supra* note 10. This is an "inflator" note.

104. Mikva, *How Should the Courts Treat Administrative Agencies?*, 36 AM. U.L. REV. 1 (1986). Judge Mikva nevertheless hangs tough: "The numbered footnotes contain only citations to cases and other authorities. Nothing of substance can be found in the footnotes." *Id.* at 1, n.\*\*; see *supra* note 14 (explaining that Judge Mikva uses asterisks instead of numbers).

105. Footnotes get articles published. "In my early days on Law Review, I was told that the footnotes are the real measure of worth in legal writing." Mikva, *supra* note 10, at 653. Professor Richard Delgado agrees. Delgado, *How To Write a Law Review Article*, 20 U.S.F. L. REV. 445, 451 (1986).

106. "There are three powers; three powers alone, able to conquer and to hold captive forever the conscience of these impotent rebals for their happiness—those forces are miracle, mystery and authority." F. DOSTOYEVSKY, *The Grand Inquisitor*, in *THE BROTHERS KARAMAZOV* 303 (Modern Library ed. 1950).

of footnotes.

The "miracle, mystery, and authority" generated by footnote gamesmanship creates a status that furnishes the academic with consulting fees. Lawyers bask in the reflected glory of parading a professor before clients, while reminding them of his extensive literary output. The convincer is to exhibit an article bulging with footnotes. My most pleasant consulting experience occurred when a lawyer solicited my services on the basis of "a long article full of incomprehensible footnotes." As he candidly admitted, I was the right person to confuse his opponents.<sup>107</sup>

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107. The "density quotient" of this article is 52.8%. Footnotes in this article conclude on an odd and thus masculine number. *See* G. FLEGG, *supra* note 55.

