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# When a Rose isn't "Arose" isn't Arroz: A Guide to Footnoting for Informational Clarity and Scholarly Discourse

WILLIAM B.T. MOCK\*

## I. INTRODUCTION

Not every proposition in a law review article requires citation,<sup>129</sup> nor does every footnote require cited authority.<sup>130</sup> Indeed, only a few of the several possible types of footnotes require the author to cite to authority. Unfortunately, many student editors and research assistants do not understand the distinctions among types of footnotes and expect each to look the same – a reference to some other author's research or thoughts on the subject mentioned in the text. I<sup>131</sup> have therefore written this article explaining the different types of footnotes and how to prepare them.

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\* Professor of Law and Associate Dean for Academic Affairs, The John Marshall Law School, Chicago, IL. This work has evolved over several years in response to my need to educate generations of research assistants about the distinctions between the different uses for law review footnotes. This educational effort has required me to develop footnotes about footnotes – for guidance on the highly recursive nature of this work, see David H. Kaye & Ira Mark Ellman, *The Pitfalls of Empirical Research: Studying Faculty Publication Studies*, 36 J. LEG. ED. 24 (1986); DOUGLAS R. HOFSTADER, *GODEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID* (1980). Three people have contributed more than others to this work: my colleague Professor Mark Wojcik, my former research assistant Robert Berman '95, and my wife and best editor Laura Lynn Michaels, Esq.. I thank them all.

<sup>129</sup> Authors of law review articles should sometimes be allowed to take “judicial notice” of obvious propositions. How much latitude they should get in this regard should be a product of how much *gravitas* they have accumulated in the field. In other words, is the matter of which they take notice something that should be considered within their scope of authority as experts within the field, speaking with their own voices? For a tongue-in-cheek work providing a handy citation source for dozens of obvious but hard-to-document legal propositions, see Patrick M. McFadden, *Fundamental Principles of American Law*, 85 Cal. L. Rev. 1749 (1997).

<sup>130</sup> Many student law review editors would ask me to support this statement – unnecessarily. I make this statement on my own authority as the author of this article. See footnote 2, *supra*.

<sup>131</sup> I have written this article in the first person, because first person, though less common than third person, often produces a less convoluted text. In an article stressing the need for clarity, this can only be a virtue. In addition, I believe that my

First, I introduce the different types of footnotes. Then, I explain by way of text and example what kinds of text and reference each type of footnote requires. Finally, I provide some suggestions about how to do legal research in a manner that simplifies the eventual process of footnote preparation. This article is tailored to the needs of those writing and editing legal scholarship, primarily law review articles. My comments, however, should apply equally to work undertaken for monographs, book reviews, or any other form of scholarly legal writing.

One note: this article is not about the forms of citation within footnotes. For that type of information, readers should turn to their citator of choice – either the Blue Book,<sup>132</sup> the Maroon Book,<sup>133</sup> or the ALWD Citation Manual.<sup>134</sup>

Finally, I must alert the reader to a typographical convention, which I have adopted for the sake of clarity. Throughout this article, I present examples of textual statements that require footnotes. These statements are ones that might appear in a typical law review article relating to the subject of the sentence. In the footnotes themselves, I present what I believe to be the proper footnote information, along with some additional discourse (“metadiscourse”) from myself as author of *this* article to the readers of *this* article. In order to keep the normal footnote information distinct from the metadiscourse, I have placed the metadiscourse within sets of angle brackets «like these.» In this manner, the reader should be able to distinguish between the footnote-proper and the footnote-commentary.

## II. THE BASIC TYPES OF FOOTNOTES

There are three basic types of text requiring footnotes. It is important to keep these distinct, because the footnotes for each type of material will have their own purposes, which must be understood if the right footnote is to be written. Within each type of footnote, there are some variations that I will discuss below.

The three types of footnotable text are those containing:

- References,

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guidelines will be useful to students responsible for preparing or editing scholarly legal footnotes, but make no claim to the universal value for this article that might be suggested by a third person voice.

<sup>132</sup> THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (18th ed. 2005).

<sup>133</sup> Richard A. Posner, Goodbye to the Bluebook – Appendix: University of Chicago Manual of Legal Citation, 53 U. Chi. L. Rev. 1343 (1986).

<sup>134</sup> ALWD Citation Manual: A Professional System of Citation (2d ed. 2003).

- Facts, and
- Ideas.

Each of these types of footnotable text requires its own footnote treatment, in the form of either identification or expansion, and each type of footnote serves a distinct purpose:

- Footnotes for *References* are designed to allow your readers to retrace your research and to decide for themselves whether your line of analysis is correct.<sup>135</sup> They are also designed to allow future authors to build upon your work without having to redo all of the preliminary research.
- Footnotes for *Facts* are designed to inform your reader further about the information you have stated. They provide informational context and, in some cases, support for less well-known facts, so that any reader wanting to know more has a starting-point for further reading.
- Footnotes for *Ideas* are designed to place your arguments, opinions, and analyses in the broader intellectual context of those scholars who have also considered your subject and related subjects. They provide a way for the reader to learn more about the give-and-take of discussion on this topic and how your scholarship relates to that of others. Let us look at each type of footnote in greater detail.

### III. EXPLANATIONS AND EXAMPLES

#### a. *Reference Footnotes*

Reference footnotes are the easiest type of footnote for most law students to identify and understand. When I refer to a case, a law, a treaty, a book, an article, or any other particular, identifiable public document, I should provide a citation that tells the reader where and how to locate the document. For example, the following references would all need to be identified for the curious reader:

- i. *Miranda v. Arizona*,<sup>136</sup>
- ii. the Antidumping Act of 1921,<sup>137</sup> and

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<sup>135</sup> This concern may arise where a source, like a judicial authority or a preliminary scientific finding, appeared sound when it was cited but has since been overruled or rejected. It may also arise where there is reasonable scope for disagreement with the findings of the original source, which might never be discovered if the source is not identified.

<sup>136</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>137</sup> The Antidumping Act of 1921, ch. 14, title II, 42 Stat. 11 (1921)(repealed by the Trade Agreements Act of 1979, Pub. L. 96-39, Title I, § 106(a) at 93 Stat. 193 (1979)).

iii. this article.<sup>138</sup>

Sometimes the reference is not made directly, but is nevertheless implicit and should be supplied to the reader. This typically occurs in circumstances where the text does not mention a case, a law, a treaty, a book, or a similar document, but makes an assertion that must be supported by citation to a reference that stands for the matter asserted. This, too, is fairly familiar to most student research assistants and law review editors. For example, the following statements would need reference footnotes:

- iv. The Supreme Court requires police to advise criminal suspects of their constitutional rights before commencing custodial interrogations.<sup>139</sup>
- v. Dumping, or the sales of imported goods at less than fair value (essentially defined as the home market value), was considered an unfair trade practice under United States law long before the GATT negotiations following World War II.<sup>140</sup>

Such assertions go beyond simple references, but essentially rely upon claims that the matter asserted is accurate because they are supported by the materials in the cited references. It is the reference material behind the assertion that needs to be revealed to the reader. In effect, each of the last statements could have been re-written in the following manner:

- 1. In *Miranda v. Arizona*,<sup>141</sup> the Supreme Court established the principle that police must advise criminal suspects of their constitutional rights before commencing custodial interrogations.
- 2. The Antidumping Act of 1921<sup>142</sup> demonstrates that the United States considered dumping, or the sales of imported goods at less than fair value (essentially defined as the home market value), to be an unfair trade practice long before the issue was addressed by GATT negotiations following World War II.

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<sup>138</sup> William B.T. Mock, "When a Rose isn't 'Arose' isn't Arroz: A Guide to Footnoting for Informational Clarity and Scholarly Discourse," (200\_). «Now I know that this article will have been cited at least once.»

<sup>139</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>140</sup> The Antidumping Act of 1921, ch. 14, title II, 42 Stat. 11 (1921)(repealed by the Trade Agreements Act of 1979, Pub. L. 96-39, Title I, § 106(a) at 93 Stat. 193 (1979)).

<sup>141</sup> 384 U.S. 436 (1966).

<sup>142</sup> The Antidumping Act of 1921, ch. 14, title II, 42 Stat. 11 (1921)(repealed by the Trade Agreements Act of 1979, Pub. L. 96-39, Title I, § 106(a) at 93 Stat. 193 (1979)).

For the reader who checks footnotes, examples (d) and (f) have the same content and examples (e) and (g) have the same content. The decision as to whether to make the reader check the footnotes to learn the name of the basic authority is generally the author's to make, and rests upon a sense of the flow and density of the text.

Every reference citation should be to the most authoritative source available. Thus, it is preferable to cite to an official reporter rather than to unofficial ones,<sup>143</sup> to the original document rather than to some other citation or application of it,<sup>144</sup> and, if appropriate, to the relevant section or sections of the larger document.<sup>145</sup>

It is almost always wrong to cite to a casebook or hornbook, even if that is where you first found the ultimate source. It is always wrong to cite to a casebook's statutory supplement. Both of these are no better than hearsay – go find the authoritative original.

With such reference citations, there is no discretion. The footnote has to be there if the text refers to the source. Only documents as well known as the Declaration of Independence<sup>146</sup> or the United States Constitution<sup>147</sup> can safely be referred to without telling the reader how to find them.

#### ***b. Fact Footnotes***

Fact footnotes are also relatively straightforward. In such footnotes, you should provide information beyond what appears in the text, to allow your reader to place your textual information in a broader context. Such a footnote is appropriate whenever a vaguely obscure item or event is mentioned in the text.

Usually, there is no single authoritative source, unlike the situation with reference citations, but some sources are clearly better than others. Where the reader could easily look something up in any number of good sources, only an identifying statement is necessary. In addition, a reference to some source for further explanation may be included as a favor to the reader. Among examples of these might be references to:

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<sup>143</sup> Rule 10.3.1, BLUEBOOK, *supra* note 5.

<sup>144</sup> Sometimes, it may be appropriate to use an “as cited in” or “available in” form of citation. Compare Rule 1.4 to Rule 1.6, BLUEBOOK, *supra* note 5.

<sup>145</sup> Rules 3.1-.5, BLUEBOOK, *supra* note 5.

<sup>146</sup> «As the text points out, this footnote is unnecessary, since you surely know where to find a good copy of the Declaration of Independence.»

<sup>147</sup> «Id.»

- h) United States Supreme Court Justice George Shiras,<sup>148</sup>
- i) the Group of 77,<sup>149</sup> and
- j) the theory of mercantilism.<sup>150</sup>

Unless I were making a special point, I would not need to footnote a reference to:

- k) President Abraham Lincoln,<sup>151</sup>
- l) World War II, or
- m) the United Nations.

The more obscure the fact referenced, the more necessary the reader will find the information in the footnote. In such obscure cases, it is important to direct the reader to a source of further information. It will often be appropriate to include some additional information for the benefit of those readers who do not choose to pursue the reference. Among examples involving more obscure facts might be references to:

- n) the Axumite Kingdom,<sup>152</sup>
- o) the debasement of medieval European silver coinage,<sup>153</sup> and

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<sup>148</sup> Associate Justice Shiras was appointed by President Benjamin Harrison. He sat on the United States Supreme Court from 1889 to 1893.

<sup>149</sup> The Group of 77 is comprised of developing nations in Africa, Asia, and Latin America, and was formed at the U.N. Conference on Trade and Development in Geneva in 1964. The Group's joint declaration called for substantial income transfers to developing countries from developed ones, and urged a restructuring of the world trading system. LEWIS A PRESNER, *THE INTERNATIONAL BUSINESS DICTIONARY & REFERENCE* 148 (1991).

<sup>150</sup> Mercantilism was the system of economics adopted by major trading nations in the 16<sup>th</sup>, 17<sup>th</sup>, and 18<sup>th</sup> centuries. The premise of the theory was that a nation increased its wealth by exporting goods and collecting bullion in return. Since this system favored foreign trade over domestic trade, state action was deemed essential to accomplish its goals. Economists have pointed out that mercantilism was not beneficial, since it increased a nation's money supply, causing inflation to rise. *See* COLUMBIA UNIVERSITY PRESS, *THE NEW COLUMBIA ENCYCLOPEDIA* 1750 (4<sup>th</sup> ed. 1975).

<sup>151</sup> «You already know more about President Lincoln than I could possibly put into a footnote. Making you look down here in an ordinary article would waste both your time and mine.»

<sup>152</sup> The Axumite (also spelled "Aksumite") Kingdom was a very powerful kingdom in northern Ethiopia in the early Christian era. During the period between the 3<sup>rd</sup> and 6<sup>th</sup> centuries A.D., the Axumite Kingdom grew to become the largest market of northern Africa. For a discussion of the Axumite Kingdom and its role in Africa's history, *see* J.D. PAGE, *A HISTORY OF AFRICA* 36, 53 (1988). «This is an example of a scholarly work on a broad subject, which is a fine source for a reader wishing to follow up on a general historical fact, like the existence of the "Axumite Kingdom.»»

<sup>153</sup> PETER SPUFFORD, *HANDBOOK OF MEDIEVAL EXCHANGE* (1986). «This is an example of a scholarly monograph on a fairly narrow subject, which is a

p) Spencer Roane's theories on federalism.<sup>154</sup>

In general, scholarly monographs or articles are good reference sources for this kind of footnote. If these cannot be found, a specialized reference work<sup>155</sup> or a highly-respected encyclopedia<sup>156</sup> will do.

Sometimes, the footnote merely serves to resolve a textual ambiguity, where failure to do so might provide an ongoing distraction to the reader:

q) Presidents Adams, Bush, Harrison, and Roosevelt hold special positions in U.S. history in that they cannot be uniquely identified.<sup>157</sup>

Whether to insert a fact footnote involves a judgment call on the part of the author or editor of the work, based largely upon a sense of how familiar the audience for the work will be with the facts mentioned in the text. Truly obscure facts should be footnoted, but editorial differences on somewhat unfamiliar facts are not crucial, given the availability of common reference sources and today's ease of research on the world wide web. In such cases, the author's preferences should provide primary editorial guidance.

### c. Idea Footnotes

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good type of reference to use when footnoting a more narrow fact, like "the debasement of medieval European silver coinage." If such a scholarly monograph is not available, a more general reference work is also acceptable, of course, so long as it accomplishes the general purpose of making the curious reader more familiar with the subject.»

<sup>154</sup> Samuel R. Olken, *John Marshall and Spencer Roane: An Historical Analysis of their Conflict over U.S. Supreme Court Appellate Court Jurisdiction*, 1990 J.S. CT. HIST. 125. «An author might also choose to include at this point an explanation of who Spencer Roane was, to assist readers unfamiliar with this historical figure.»

<sup>155</sup> For example, EDMUND JAN OSMANČZYK, *ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL AGREEMENTS* (2<sup>nd</sup> ed., 1990).

<sup>156</sup> For example, *THE ENCYCLOPEDIA BRITANNICA*, in any recent edition.

<sup>157</sup> In each instance, there are two presidents bearing the family name: Presidents John and John Quincy Adams, Presidents George H.W. and George W. Bush, Presidents William Henry and Benjamin Harrison, and Presidents Theodore and Franklin Delano Roosevelt. «Note the choice of where to place the footnote – here, at the end. Putting four separate footnotes, one after each name, would spoil the effect of the sentence, by giving away the "answer" and releasing the tension too soon. Note also that with the exception of example (q), all of the examples in this section of this article have merely identified persons, places, or events, and the footnotes have supplied readers with information needed to learn more about these. Although example (q) went beyond this to make a simple assertion, all this footnote needed to do was provide the factual background to allow the reader the context to understand the assertion.»



Arguments, opinions, and analyses are at the heart of any legal scholarship that goes beyond mere reportage. It is only by engaging the arguments of other scholars that I can hope to influence any aspect of the development of thought in my field. It is therefore essential that I demonstrate where my ideas fit within broader intellectual discussions. Idea footnotes provide a major opportunity to supply this context.

There are two varieties of idea footnotes. The first variety is that in which I present alternate lines of analysis and tangents to my main thesis. The second variety is that in which I place my own analysis into perspective of the views of others who have written about my subject. Where the alternate line and tangents are explored more fully in the works of other scholars, idea footnotes should be a blend of the two varieties.

Where I choose to present alternate lines of analysis, it is often better to do so in footnotes, so that readers can choose whether to consider this distraction or to continue with the main line of my exposition. Perhaps I am telling the reader of invalid lines of analysis, to support my main arguments. Perhaps I am offering alternate approaches that would reach the same result I reach. Perhaps I am telling the reader that some interesting line of analysis split off from my primary analysis and that I am not choosing to address those lines at this time, other than to identify them.<sup>158</sup> Among examples of this might be the following:

- r) In proposing an alternate model for publication of legal scholarship, this article pays particular attention to the lack of professional perspective and editorial expertise of student-edited law reviews.<sup>159</sup>
- s) Securities prospectuses should be readable by every competent investor, no matter what that investor's level of formal education.<sup>160</sup> This article will next attempt to define more precisely how to satisfy such a broad standard.

The examples just given help the reader to understand where I am and where I am not going with my lines of analysis. They may or may not help my reader to follow up and learn more about the intellectual debate on my

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<sup>158</sup> C.f., Robert Frost, *The Way Not Taken* in LOUIS UNTERMEYER, ed., MODERN AMERICAN POETRY, MODERN BRITISH POETRY 187 (1962).

<sup>159</sup> In focusing on the problems student-edited law reviews pose for the orderly development of legal scholarship, possible benefits in the form of experience and credentials gained by student editors will not be considered.

<sup>160</sup> An alternative model of securities regulation could be developed through greater reliance upon the market effect of informational intermediaries such as brokers and independent analysts. Such an approach would naturally result in shorter, more expert-oriented prospectuses, but would also require almost every investor to incur additional expenses before investing intelligently.

subject, depending upon how familiar my reader is with my field. The second variety of idea footnote also provides intellectual context, but does so more fully.

My ideas do not arise in a vacuum. As Isaac Newton once remarked, “If I have seen farther, it is by standing on the shoulders of giants.”<sup>161</sup> If I, too, owe intellectual debts (and I always will), I should acknowledge them. If my ideas differ from those of others whose views are worthy of consideration, I should mention that, too. For example, I would wish to provide context for the following statements:

- t) The use of surrogate country analysis for analyzing allegedly unfair trade from non-market countries, whereby the Commerce Department must determine “fair value” by using economic figures from a market economy country considered to be at a comparable stage of economic development, regularly produces absurd results.<sup>162</sup>
- u) Application of complexity theory to issues of politics and political fundraising may reveal the sort of feedback loops that could explain the range of political opinions staked out by incumbent Senators in the last several elections.<sup>163</sup>
- v) The death penalty fails to provide an effective deterrent to the commission of capital crimes.<sup>164</sup>

Idea footnotes are a source of potential confusion and conflict between authors and student researchers or editors. The primary reason for this is the difficulty that those who are not well-versed in a specialized field

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<sup>161</sup> For an extended scholarly discussion on this one remark, readers should turn to ROBERT K. MERTON, *ON THE SHOULDERS OF GIANTS: A SHANDEAN POSTSCRIPT* (1985), the faceplate of which contains a reproduction of the statement in Newton’s own hand.

<sup>162</sup> *Accord*, Alford, *When is China Paraguay? An Examination of the Application of the Antidumping and Countervailing Duty Laws of the United States to China and Other ‘Nonmarket Economy’ Nations*, 61 S. CAL. L. REV. 79, 100-35 (1987). See also, William Mock, *Economic Advantage in East-West Trade: Abandoning Market Fictions in Trade with Nonmarket Economy Countries*, 14 N.C.J. INT’L L. & COMM. REG. 55 (1989).

<sup>163</sup> Similarly, Stanford economist Paul Krugman has attempted to apply complexity theory – developed primarily to analyze data from the physical sciences, such as weather patterns and patterns of mass extinction – to such economic phenomena as the spatial growth of cities and the temporal patterns of economic downturns. PAUL KRUGMAN, *THE SELF-ORGANIZING ECONOMY* (1996).

<sup>164</sup> For an analysis of arguments on both sides of this issue, see ADAM BEDAU, ed., *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* (Oxford 1997).

often have in distinguishing between derivative ideas and original ideas:<sup>165</sup>

“Please footnote that idea – whose is it?”

“It’s mine – that’s why I wrote this article!”

Although the act of placing the author’s ideas in the context of a broader intellectual discussion is not discretionary, the manner of placing it in that context is. Only the author, or someone equally familiar with the scholarly discussion of the field, knows the discussion well enough, and knows what ideas are new, and what others are (or are not) respected, to be able to link this article’s ideas to the works of others. Indeed, the very act of linking to the broader context is part of a scholar’s responsibility, and it cannot be one that is mechanically imposed by a student editor. Although the job has to be done, the author is really the only person with the judgment to do it.

#### IV. Suggestions Concerning Preliminary Research

Anyone undertaking preliminary research, of the sort that may eventually lead to footnotes, needs to keep two simple principles in mind. These principles are straightforward, and they will simplify matters greatly when the time comes to prepare those footnotes.

The first principle is that *it is very important to know how significant and relevant a reference source is*. A fine-sounding quotation will often lose its charm once it is placed in the context of an irrelevant discussion and ordinary words may resound when made in a context directly on point. Similarly, it is a great help to know precisely who is the author of a referenced work. By “who” I mean more than just the author’s name,<sup>166</sup> but also the author’s reputation in the field, since the value of the scholarship will often depend greatly upon the reputation of the scholar. Rather more weight will be given to an analysis from an established scholar than to one expressed in a student note or comment. Similarly, I need to know whether that “authoritative” article on free enterprise in Hungary was published in 1987 or 1997, because economic and political conditions in central Europe changed dramatically between those dates.

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<sup>165</sup> Variations on the following exchange have occurred to me and have been reported to me by a number of publishing colleagues at several law schools around the United States.

<sup>166</sup> For example, consider the different levels and areas of expertise of L. Holmes (a late twentieth-century pugilist), O.W. Holmes, Jr. (a late nineteenth-century and early twentieth-century legal scholar and jurist), and S. Holmes (a fictional nineteenth-century consulting detective). Similarly, in the title of this article, a romantic flower is not the same as the past tense of “to arise,” and neither is the same as the Spanish term for rice, despite superficial aural similarities.

Incomplete information will leave me wondering what materials I am relying upon. That, in turn, will make it more difficult both to write the primary text and to determine what footnote references to prepare. At a preliminary stage, too much information can be very useful.

The second principle is that *it is a waste of time and effort to have to repeat the research just to write the footnote*. That means knowing what kind of information the Bluebook or other citator<sup>167</sup> requires for each type of source that arises. Generally speaking, this will include at least all information needed to pinpoint the source in a decent law library other than the one in which the research is being done.<sup>168</sup> Once again, too much information is better than too little, since editing needless information (with citator in hand) is much easier than making another trip to the library to get some detail that was not recorded. This is especially so if the detail is necessary in order to find the reference!

## V. Conclusion

The essence of footnoting is communication with the reader, but footnote communication that is literally subordinate to the primary text. What a footnote communicates therefore depends upon and extends what the primary text communicates, from telling the reader where to find the source of a reference made in the text through guiding the reader to the different ideas of other members of the invisible college of scholars in the field. By remaining sensitive to the purposes of different footnotes and the needs of the reader, effective footnoting can make a valuable contribution to scholarship.

For Gertrude Stein, it was fine to say that “Rose is a rose is a rose is a rose.”<sup>169</sup> With footnotes, it just isn’t so.

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<sup>167</sup> See notes 5 and 6, *supra*.

<sup>168</sup> Consider a book. To complete a proper citation, I will need to know the author’s name, the title of the book, the date and edition of this copy, as well as the page numbers of any quotation or important ideas that I am referencing. Except for the page numbers, the key information can usually be found on the front and back of the book’s title page. Make it a habit to copy these and include these copies in your research files. For law reviews, copy the cover page of the journal and the page of the table of contents that includes the article being referenced. If you develop these habits, you should never have to run back to the library to look up missing information.

<sup>169</sup> Gertrude Stein (1874-1946) wrote this passage, not the often misquoted version that formed the basis of this article’s title – “A rose is a rose is a rose” – in *Sacred Emily*, published in 1913. JOHN BARTLETT, FAMILIAR QUOTATIONS (16<sup>th</sup> ed. 1992).