

Start of page 676

## Fussnotes and other Annotational Engines

### Part II

FRANCIS BENNION\*

#### The Function Of Footnotes

The main distinction is between reference notes and notes of substance. This is illustrated by the notes to the Everyman editions of Jane Austen's novels, where the notation system is complicated. For example in the Everyman edition of *Emma* the Introduction has its own set of notes, notes of substance being placed at the end of the Introduction while reference notes are located in its text.<sup>35</sup> Notes of substance to the text of the book itself are located at the end of the book and indicated by superscript asterisks in the text.

A more detailed description of the varied functions of footnotes now follows.

#### (1) To identify the source

Footnotes confirming direct quotations from the source relied on have been referred to as *probationes* (proofs).<sup>36</sup> Scholarship requires that a text should possess originality and also that its sources be acknowledged. However this should not be taken so far as to demand that *each sentence* of the text is both original and also has a source.<sup>37</sup> Proper scholarship requires glosses to identify themselves as such, and this is where footnotes exercise one of their prime functions, to identify the source of material referred to. In historical scholarship this practice has a long history. Grafton mentions the sixteenth-century antiquaries such as Justus Lipsius:

All of them cited their authorities lavishly. Lipsius, for example, built his account of the Roman army around the relevant sections of the Greek text of book VI of Polybius' history of Rome, which he translated and analyzed in an extensive commentary. He thus taught a formidable lesson in the importance of using primary sources. So, even more directly, did the seventeenth- and eighteenth-century antiquaries who collected medieval historical and legal texts in vast folios that remain essential parts of any working historical library – even though most of these editors found the texts themselves, considered as literature, impoverished. Most

---

\*Francis Bennion is a member of the Oxford University Law Faculty and a Research Associate, Oxford University Centre for Socio-Legal Studies

<sup>35</sup> See *e.g.* p. xxxvi.

<sup>36</sup> Grafton, p. 104. These are what Fred Rodell called 'the probative or if-you're-from-Missouri-take-a-look-at-this type of footnote': see n. 5 above, p. 38 at 40.

<sup>37</sup> See Grafton, p. 143: A set of critics 'identified a genuine paradox in the modern routine of documentation, which claims to require that one prove both that each sentence is original and that it has a source'.

excused, rather than praised, themselves for printing such unpleasant but indispensable sources.<sup>38</sup>

Many of these early sources were unreliable, or even forged. For example Brian Twyne (born in 1580), who was one of the greatest of Oxford antiquaries, accused Camden of *Britannica* fame of being an accessory to the insertion in Asser's *Life of King Alfred* of a forged passage suggesting that Oxford University was founded by Alfred.<sup>39</sup> Also writing in the seventeenth century was the historian Pierre Bayle, who said of his more conscientious colleagues:

They try to verify everything, they always go to the source, they examine the author's intent, they do not stop at the passage they need, but examine closely what precedes and what follows it. They try to make suitable applications, and to list their authorities well. They compare them with one another – or indeed, they show that they conflict. Moreover they make it their religion, when points of fact are concerned, to make no assertion that has no proof.<sup>40</sup>

Bayle tantalisingly noted that 'If an author asserts things without citing his source, the reader has occasion to believe that he speaks only on the basis of hearsay. If he does cite, the reader fears he quotes the passage wrongly or misunderstands it'.<sup>41</sup> Speaking of Gibbon and his critic Davis of Balliol, Grafton writes-

Both assumed – without arguing the point – that a serious work of history must have notes. Both evidently agreed that these notes must lead the reader to the original sources and represent them accurately. And both implicitly accepted that the apparatus [of notes] provided the diagnostic test of a historian's critical expertise.<sup>42</sup>

The present-day American Judge Mikva, attempting to give up putting footnotes in his judgments, said:

**Start of page 677**

The biggest question has to do with citations of authority. If I thought I was fully cured and that my crusade [against footnotes] was catching on, I would use footnotes just for authority citations . . . As it is, because I am still full of footnote toxin, I put my authority citations right in the text. The result is hardly conducive to a flowing style of writing.<sup>43</sup>

Even the great modern critic of footnotes Fred Rodell did not really think they could be given up:

Once in a while a Thurman Arnold forgets his footnotes as though to say that if people do not believe or understand him that is their worry and not his. But even such mild breaches of etiquette as these are tolerated gingerly and seldom, and are likely to be looked at a little askance by the writers' more pious brethren.<sup>44</sup>

---

<sup>38</sup> Grafton, p. 179.

<sup>39</sup> Strickland Gibson, 'Brian Twyne', *Oxoniensia* V (1940), pp. 98-99.

<sup>40</sup> *Dictionnaire Historique et Critique* (1697), Epicure, footnote D, I, pt.2, p. 1046; cited Grafton, p. 199.

<sup>41</sup> Cited Grafton, pp. 208-9.

<sup>42</sup> Cited Grafton, p. 101.

<sup>43</sup> Abner J. Mikva, 'Goodbye to Footnotes', (1985) 56 *University of Colorado Law Review*, p. 647 at 652.

<sup>44</sup> See n. 5 above, at p. 41.

The Australian Liz Fisher said:

The use of footnotes is tied in with far larger questions about what is the nature of legal authority. Law, unlike other disciplines, is directly concerned with authority. It is against a lawyer's better instincts to state a legal proposition without citing the cases or textbooks on which it is based.<sup>45</sup>

*(2) To shorten the text*

If the author of a text feels that it is necessary to pass a given mass of information to the reader, it may be helpful to consign the most important elements to the text and put the remainder in footnotes. The slimline text can then be read as a summary of the overall message. The reader who is in a hurry, or anxious to imbibe only the essence, can ignore the footnotes and read the text alone. Charles A. Meyer said, 'When you've got too much junk to fit in the house, the cellar may be about the only place to put it.'<sup>46</sup> He cited John E. Simonett's remark that tea need not be served in a cup with a saucer, but the saucer does add a touch of elegance and catches the spillage.<sup>47</sup> Judge Mikva observed that there are numerous examples of judges using footnotes to fight battles among themselves: 'not battles of style, but battles about the very warp and woof of the law (even if it is not the law central to the case) – all relegated to the footnote category in order to keep the opinion itself uncluttered'.<sup>48</sup>

*(3) To make an aside, or other comment*

An important function of the footnote is to make an aside, that is an observation which remarks on a point made in the text and would break the thread of the argument if inserted in the text itself. Judge Mikva notes that Justice Stone of the US Supreme Court liked to use footnotes in his opinions in order to generate debate over ideas he had not developed fully.<sup>49</sup> He said that when this type of footnote came into use '[m]eat began to fall from the text and into the footnotes'.<sup>50</sup>

A footnote comment may be serious, satirical<sup>51</sup> or humorous. Judge Mikva ended an article titled 'Goodbye to Footnotes', which had of course contained no footnotes, with a footnote reference<sup>4</sup>. At the foot of the page he wrote: 'Just what did you expect to find?'<sup>52</sup> Another example of humour in a footnote was provided by J.M. Balkin, who at the end of a 45-page law review article put as footnote<sup>4</sup> the following:

[Note to the editors of the Law Review – place the entire text of this Article (including this footnote with these instructions) in this footnote. If this causes a problem of infinite regress, improvise].<sup>53</sup>

*(4) To explain what is said in the text*

This is what Fred Rodell called 'the explanatory or if-you-didn't-understand-what-I-say-in-the-text-this-may-help-you' type of footnote.<sup>54</sup> Scott M. Martin rejoined that explanatory

---

<sup>45</sup> Liz Fisher, 'Some notes on footnotes', 71 *The Australian Law Journal* (April 1997), p. 245 at 247.

<sup>46</sup> Charles A. Maher, 'The<sup>1</sup>\*1 Infernal Footnote<sup>2</sup>', *American Bar Association Journal*, April 1984, p. 92.

<sup>47</sup> John E. Simonett, *American Bar Association Journal*, December 1969. Charles A. Maher adds 'Which spillage is poured down the sink, where it belongs' (ibid.).

<sup>48</sup> See n. 43 above, at 650. For the controversy over footnotes in judgments see below.

<sup>49</sup> See n. 43 above, at 649.

<sup>50</sup> See n. 43 above, at 648.

<sup>51</sup> See e.g. F. Palmeri, 'The Satiric Footnotes of Swift and Gibbon', *The Eighteenth Century*, 31 (1990) pp. 245-262.

<sup>52</sup> See n. 43 above, at 653. The significance of 'footnote<sup>4</sup>' will appear later.

<sup>53</sup> J.M. Balkin, 'The Footnote' (1989) 83 *Northwestern University Law Review* 275 at 320.

footnotes enable authors to address two audiences simultaneously: ‘to a sophisticated audience in the text, while filling in the more basic elements for the neophyte in the footnotes, or the reverse, with basic text and elaborating footnotes’.<sup>55</sup> The difficulty with this suggestion is that the reader might not be readily able to determine which of these two alternatives was employed in the document in question.

*(5) To indicate revisions of the text*

Richard Bentley published a corrected edition of Milton’s *Paradise Lost*, claiming that the author’s blindness had precluded him from adequate proof-reading so that the original text embodied all the errors of his amanuensis. Furthermore ‘a later “editor” had added further mistakes and interpolated foolish verses of his own composition’.<sup>56</sup>

There are other types of footnote. Arthur D. Austin identifies lead-in quotes as ‘a special form of footnote’.<sup>57</sup> He also castigates the Author’s Note, which ‘provides the opportunity to consummate a cluster of self-serving

**Start of page 678**

goals’.<sup>58</sup> A third target of Austin is what he calls the titillating footnote, the object of which is ‘to embellish the text with sources that add flair, pique interest, and convey the impression that the author’s scholarship has gone beyond the mundane’.<sup>59</sup> Austin also mentions the ideological footnote (e.g. ‘I am indebted to . . . for . . . sharing my outrages . . .’).<sup>60</sup>

**Footnote Rules**

There are generally-agreed rule about the use of footnotes. I will now set out what I see as the main ones.

*(1) Check against the primary source, not a secondhand source*

The Archangel Gabriel, when inditing the footnotes to the Book of Life, invariably goes to his/her source in order to check that everything is correct. Lesser mortals occasionally copy a footnote reference from another book or article without doing this indispensable checking. The result is that they may carry forward an error made by the previous author (who had probably done the same thing). In this way mistakes can be perpetuated, but the comfort is that they are rarely spotted.

*(2) Do not cite material inaccurately*

If you put material within quotes there is a strict duty to reproduce it accurately, even though there is said to be an art to misquotation.<sup>61</sup> If a source is cited for a proposition that

---

<sup>54</sup> See n. 5 above, at 40.

<sup>55</sup> Scott M. Martin, ‘The Law Review Citadel: Rodell Revisited’ (1986) 71 Iowa Law Review p. 1093 at 1097.

<sup>56</sup> Grafton, p. 112.

<sup>57</sup>: ‘Footnotes as Product Differentiation’ (1987) 40 Vanderbilt Law Review, p. 1131 at 1144 n. 57. Lead-in quotes are a ‘pretentious form of first-page differentiation . . . 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’ (ibid.).

<sup>58</sup> *Loc. cit.*, p. 1145. Here Austin attacks in particular Robert S. Summers, well-known as co-author with P.S. Atiyah of *Form and Substance in Anglo-American Law* (Oxford, 1987): *loc. cit.*, p. 1144 n. 67. On the Author’s Note see further Arthur D. Austin, n. 12 above, at 1009.

<sup>59</sup> See n. 12 above, at 1018-20.

<sup>60</sup> See n. 12 above, at 1024-6.

<sup>61</sup> See J. Whittaker, ‘The Value of Indirect Tradition in the Establishment of Greek Philosophical

is not put within quotation marks, more leeway is allowed. Of Gibbon, Grafton says: 'Many of the texts he cited, as he pointed out with an honesty that deserves respect, had to be "softened" if they were to be made to agree far enough to yield a coherent narrative or a plausible analysis of a political institution or a social development'.<sup>62</sup>

*(3) Do not cite material for improper reasons*

Editors of books and journals are constantly striving to discourage their authors from inserting footnotes that are not strictly necessary. If a work is lengthened by unnecessary footnotes it costs more to print and publish. If it is an article in a journal, other writers may be crowded out. It may be arguable whether a particular footnote is 'necessary': it is a matter of judgment on which opinions may legitimately differ. In the long run, it is the author's judgment that should win the day (I speak of course as an author).

What does come to the editor's aid is the proposition that a footnote should not be included for an improper reason, though here again opinions may differ. Dean Swift mocked the ways of scholarship by putting a row of asterisks *in his own material* and noting in the margin: 'hiatus in MS'.<sup>63</sup> In this way, as Grafton says of Pope's similar writings, 'the footnote came, not for the last time, to play a comic role, and at the heart of a major writer'. Was this improper? Hardly, when the culprits were of the stature of Swift and Pope. Grafton notes that systematic use of documentation in historical works was often due to scholarly controversy, and that the texts were often polemical.<sup>64</sup> Again, this can scarcely be called improper.

We get nearer the mark when the object is personal vanity of one kind or another. One improper motive was identified by Grafton when he said 'Citations are heaped up, without much regard to their origins or compatibility, in order to make the text above them seem to rest on solid pilings'.<sup>65</sup> Another was indicated when Grafton quoted 'a recent, intelligent essay' in German which points out that in modern American classical scholarship footnotes often serve to prove the author's membership in a guild rather than to illuminate or support a particular point.<sup>66</sup> Another failing is to return a citation of your work by a colleague, or favour a superior's work in the hope of promotion.<sup>67</sup>

*(4) Do not steal other people's work*

It is dangerous, as well as improper, to use another scholar's material without acknowledgment. It is called plagiarism. Even to acknowledge the source may lead to trouble if it goes beyond what is allowed by the Copyright Acts.

*(5) Remember you are a scholar*

Do not cite inappropriate material, such as personal trivia.<sup>68</sup>

---

Texts, or the Art of Misquotation' in *Editing Greek and Latin Texts*, ed. J. Grant (New York, 1989), pp. 63-95; cited Grafton p. 29 n. 56.

<sup>62</sup> Grafton, p. 101. This is why narrative history, though lay readers clamour for it, is frowned on by modern purist historians.

<sup>63</sup> Grafton, p. 113.

<sup>64</sup> Grafton, p. 189 n. 82.

<sup>65</sup> Grafton, p. 108.

<sup>66</sup> *ibid.* Arthur D. Austin says 'footnoting is now the law professor's most effective method of differentiating his work from that of his rivals': see n. 57 above, at 1135.

<sup>67</sup> Arthur D. Austin quotes Frederick C. Thorne as stating '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 other's work and thus both secure increased personal and research exposure': Arthur D. Austin, 'Political Correctness is a Footnote' (1992) 71 *Oregon Law Review* 543. For an elaborate treatment of what he calls 'cite motives' see Arthur D. Austin, n. 57 above.

<sup>68</sup> Arthur D. Austin questioned the relevance or good taste of a writer expressing 'appreciation to her

*(6) Be restrained in citing your own work*

There is a natural temptation to cite one's own work, but this tends to be frowned upon as due to overweening vanity. The fact that there may be a sound reason for doing this will cut no ice. You may be stout-hearted enough to ignore the chorus of disapproval, and if so good luck to you. I have often cited my own work in books and articles for the simple reason that to do this in effect extends the current effort without taking up any space. It seems to me better to let the reader see another extended text relevant to the current argument rather than extending the present text with what would inevitably be an inadequate restatement of something I have said before elsewhere.

**Start of page 679**

A draft of my article referred to above<sup>69</sup> was put before an anonymous referee who commented that it might gain in authority if more other authors than myself were cited. I rejoined-

My answer to the rather snide final sentence is that, as those familiar with the subject are aware, I have for many years been a pioneer in the field of statute law. I regret that it is not possible to supplement the references to my own work as suggested, because to my knowledge additional sources simply do not exist on the points I refer to. I do not think that weakens what I say, since the appeal is to the reader's own mental processes rather than to supposed 'authority'. I cite my own work not out of vainglory but as a method of extending my detailed arguments beyond what there is space to do in the article itself.

It seems to me that the referee's reference to the desirability that my article should 'gain in authority' was misconceived. Like most articles in law journals, mine did not aim to be an authoritative statement possessing the nature of a papal bull or Act of Parliament. Instead it aimed to persuade solely by the clarity and effectiveness of its reasoning. This reasoning process depended to some extent on the citing of authorities such as Acts of Parliament and judicial decisions, which needed to be correctly described and sensibly employed. It also referred to arguments set out in books and articles by other legal scholars, but these could scarcely add to its 'authority'. In fact it had no 'authority'. Its success or otherwise entirely depended on its author's own clarity of reasoning and originality of thought. This being the case with most products of legal scholarship, I suggest that any inhibitions felt by authors over citing their own work, and criticisms of them for doing so, are misplaced.<sup>70</sup>

I turn now to some technical points on the use of footnotes.

*(7) What to use as a footnote indicator*

It is convenient to use numbers, so as to accommodate an unlimited number of footnotes. However Judge Mikva, when he was trying to cut down on the footnotes inserted in his judgments or opinions, adopted a different course:

To resist temptation, I have ordained an 'asterisk' policy in my chambers. I tell my clerks and myself that if something must be discussed that is really ill-suited to the text, I will use asterisks rather than numbers, cumulating them for each successive

---

lover': see n. 12 above at 1026 n. 121. Elsewhere Austin cited a law review footnote which began 'The author is an open lesbian, in a monogamous and committed relationship; she likes sex': see n. 67 above at 551.

<sup>69</sup> See n. 8 above.

<sup>70</sup> On self-citation see further Arthur D. Austin, n. 12 above at 1026-8.

note. I hope that the embarrassment of an opinion full of asterisks will control my willingness to succumb to footnotes.<sup>71</sup>

For texts which authors and publishers wish to keep free of superscript symbols, their endnotes or chapter notes are keyed to such points of reference as page numbers or else they repeat identifying phrases from the text.<sup>72</sup> Where the text is to be published in a law journal the house style of the journal may constrain the author. The equivalent may also happen where the subject-matter is a book.

*(8) Where to put the footnote indicator*

A footnote should be a comment on a sentence or longer passage, so the footnote indicator should not be placed in the middle of a sentence. A person who infringes this rule is called by Charles A. Maher a Midsentence Dislocationist, ‘who expects the reader to resume reading the text at midsentence as though not the slightest distraction had intervened’.<sup>73</sup> The rule does not apply where the footnote is intended to apply to a particular word or phrase within the sentence.<sup>74</sup>

*(9) Do not place a comment on a footnote within the text*

Writing disapprovingly of footnotes used in judicial opinions, Judge Mikva said: ‘Point-counterpoint, countered-counter-point – the majority and dissenters hurl footnotes at each other, sometimes becoming so provocative as to require answers in the body of the opinion itself’.<sup>75</sup>

*(10) Use the accepted abbreviations*

To save space, but also as a legacy from the days when Latin was the language of pan-European scholarship, authors and editors have tended to use, in text and notes, Latin terms of reference, usually in abbreviated form and often printed in italic.<sup>76</sup>

*(11) Include aids to citation*

A work may need to contain aids to its citation. A reference tool such as a learned journal or law report should always indicate how it should be cited. Grafton notes that early printed books in large formats often used capital letters in the margins to aid citation of particular passages.<sup>77</sup> Modern law reports still use this method. A valuable aid to citation is the 391-page *Bluebook* compiled by the editors of the *Columbia Law Review*, the *Harvard Law Review*, the *University of Pennsylvania Law Review*, and *The Yale Law Journal*.<sup>78</sup> I am an admirer of the *Bluebook* despite the notorious attack on it by Judge Posner, who said-

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.<sup>79</sup>

---

<sup>71</sup> See n. 43 above, at 652.

<sup>72</sup> See n. 25 above, p. 709.

<sup>73</sup> See n. 46 above, at 92-3. I can only say why not? I expect my readers to be of tough fibre.

<sup>74</sup> See e.g. n. 69 above.

<sup>75</sup> See n. 43 above, at 651.

<sup>76</sup> See n. 25 above, p. 709. For a list of such abbreviations see Annex B to this article.

<sup>77</sup> Grafton, p. 219 n. 58.

<sup>78</sup> *The Bluebook: A Uniform System of Citation* (17<sup>th</sup> edn., 2000), published and distributed by The Harvard Law Review Association.

<sup>79</sup> Judge Richard A. Posner, ‘Good-bye To The *Bluebook*’, 53 *University of Chicago Law Review* (1986), p. 1343 at 1349.

**Start of page 680**

The *Bluebook* does not teach that uniformity is one of the most important things in law; that would be absurd. It is a low-level tool but nevertheless a useful one. It is helpful to have a ready guide to citation wording so that one can concentrate on the wording that matters, that of one's original composition. It does not detract from any writer's style to employ a uniform system of citation; on the contrary. The essence of style lies elsewhere.

© F. A. R. Bennion 2004