Fussnotes and other Annotational Engines

Part III

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Objections to Footnotes

Generally

As we have seen, the use of footnotes goes back a long time and extends to a wide variety of publications. Yet it has aroused opposition. This comes down to the present day, as indicated by a recent comment on the Society of Antiquaries: 'A passion for obsessively meticulous footnotes robbed their publications of a wide readership.'[80] Noel Coward is reputed to have said that encountering a footnote is like suddenly having to answer the doorbell just as you are reaching an amorous climax.[81]

Critics say that concentration on the inclusion of footnotes robs a scholar of objectivity and a wider view of his subject. G. M. Trevelyan, it is said[82], had little time for historians who failed to rise above the footnote. At the same time footnotes may inconvenience the reader. According to Roger C. Cramton '[t]he tendency to provide a citation for every proposition distracts the reader and may contribute more to form than substance'.[83] Pierre Schlag alleges that footnotes are part of 'fancy scholarship' that is 'bereft of any useful guides as to what judges or legislators or any other legal actors should do'.[84]

In what follows I confine a description of this opposition to footnotes to its manifestations in relation to (1) law reviews, and (2) judicial opinions or judgments.

(1) Opposition to footnotes in law reviews

I have already mentioned opposition by the Australian Justice Keith Mason.[85] However the attacks have mostly been levelled by United States academics. As we have seen, an early if crude attack on footnotes in law journals came from Professor Fred Rodell of Yale Law School.[86] In a later article Rodell called them 'phoney excrescences'.[87] Scott M. Martin

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[80] *The Sunday Times* Culture, 28 March 2004, p. 42.

[81] Or something like that: see n. 12 above at 1012 n. 20.

[82] By Tristram Hunt, *Times Review* 17 January 2004, p. 6.

[83] Cited Arthur D. Austin, n. 57 above at 1133 n. 9.

[84] Pierre Schlag, 'The Brilliant, the Curious and the Wrong' (1987) 39 *Stanford Law Review* p. 917 at 925.

[85] See above, p. 634.

[86] See n. 5 above. Surprisingly Judge Mikva called this a 'classic piece': see n. 43 above at 647.

[87] Fred Rodell, 'Goodbye to Law Reviews - Revisited' (1962) 48 *Virginia Law Review,* p. 279 at 289. Here Rodell described (at pp. 289-90) how since the earlier article he had included no footnotes in a

riposted that far from being a weakness of law reviews, as Rodell maintained, footnotes are one of their greatest strengths.[88] Other American academics have attacked the use of footnotes.[89]

Blame for excessive footnoting has attached to the fact that in the United States law reviews have for long been edited largely by students.[90] Professor Arthur Goodhart explained why British universities have no equivalent of the American student-edited law review (now also found in Australia and elsewhere). Law is taught in Britain primarily

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as an undergraduate subject to students who enter university at the age of eighteen. 'It would not be reasonable to expect such youthful students, even in their third year, to do the advanced and original work that is accomplished by the editors of the American university law journals'.[91]

Scott M. Martin says that aside from their usefulness to the reader, footnotes also are 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.'[92]

(2) Opposition to footnotes in judgments

Use of footnotes in judgments is little known in Britain.[93] It is widespread in the United States, where the first Supreme Court opinion to be given numbered footnotes was in 1887.[94] It is now common in the Australian High Court.[95]

American opponents have identified the desire that some judges have to use footnotes in pathological terms. As we have seen, Judge Mikva called it 'footnote toxin' and said he was still full of it.[96] He said that this poison has 'spread like a fungus' and that its use in judicial opinions is 'an abomination'.[97] He added 'I hate to read footnotes. I always lose my place in the text and miss the train of thought the author was trying to get me on'.[98] He also complained that American judges use footnotes to deal with the advocate who, rather than relying on his or her best shot in argument, 'throws in everything but the kitchen sink in the hope that some judge will bite on one or other of the throwaways'. He said that rather than do this the judge 'should bite the bullet by saying 'We have considered the other points raised and they need no discussion''.[99]

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legal article except once, when he had a solitary footnote stating that all other footnotes in the article were supplied by the editor. This might be called a cop-out.

[88] See n. 55 above at 1096.

[89] See *e.g.* nn. 43, 46 and 57 above. For an exhaustive list of articles supporting or opposing Rodell see Scott M. Martin, n. 55 above at 1093 n. 3.

[90] The first student-edited law review is said to have been the *Albany Law School Journal*, published in 1875: see n. 12 above, at 1014 n. 33.

[91] A. L. Goodhart, 'The Jubilee of the Iowa Law Review', 50 *Iowa Law Review* (1964) p. 1 at 3.

[92] See n. 55 above, at 1097.

[93] Lord Rodger of Earlsferry, 'The form and language of judicial opinions' 118 LQR (2002) 226 at 234.

[94] *Viterbo v Friedlander* 120 US 707 at 714.

[95] See Liz Fisher, n. 45 above at 247.

[96] See n. 43 above at 652.

[97] *ibid* p. 647.

[98] *ibid* p. 653.

[99] *ibid.* at 651.

Arthur J. Goldberg, an associate justice of the US Supreme Court 1962-65, also expressed dislike of footnotes in judicial opinions.[100] He said that if an issue is important it should be incorporated in the opinion and not relegated to footnotes, 'which can be troublesome and diverting [and interfere with] judicial economy and the readability of opinions'. He added that 'it is even possible to refer to statutes in the body of an opinion'.[101]

A complaint against the use of footnotes in judgments is that in some cases the footnote has come to be regarded as more important than the text. Judge Mikva identified the following examples: footnote 4 in *United States v Carolene Products*,[102] footnote 59 in *United States v Socony Vacuum Oil Co*,[103] footnote 37 in *Crane v Commission*,[104] footnote 16 in *Terry v Ohio*,[105] and footnote 12 in *Ernst & Ernst v Hochfelder*,[106]

Conclusion

The fact is that, among the various types of what I have called annotational engines, footnotes have an important part to play in relation to a text. The unadorned text may be likened to a newly-erected house, finished but not yet decorated or furnished - and with its garden not marked out or planted. To fulfil its purpose adequately, it needs more than just itself. But all such aids to understanding should be deployed by authors and editors with discretion. The old motto applies: if in doubt leave it out.

Note This article is referred to in 'Writing Judgments' by Lord Hope of Craighead: see http://www.jsboard.co.uk/downloads/annuallecture_2005_proof_220305.pdf In footnote 29 Lord Hope quotes the conclusion of the article and applies it to judgments.

[100] Arthur J Goldberg, 'The Rise and Fall (We Hope) of Footnotes' (1983) 69 *American Bar Association Journal* 255. For a contrary view see Edward R. Becker, 'In Praise of Footnotes' (1996) 74 *Washington University Law Review* 1.
[101] *ibid.*
[102] 304 US 144, 152 (1938). For a citation of twelve articles on footnote 4 see J.M. Balkin, n. 53 above at 281 note 16. Balkin's entire 45-page article is a deconstruction of the *Carolene* opinions. Its title refers only to footnote 4.
[103] 310 US 150 (1940).
[104] 332 US 1 (1947).
[105] 392 US 1 (1967).
[106] 425 US 185, 193-4 (1976).

Annex A[107]

Selected Items in the index to *Miscellany-at- Law* by R. E. Megarry

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[107] See n. 19 above.

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Annex B[108]

Abbreviations used in Footnotes etc.

Note Where an abbreviation is not italicised this indicates that it is so common as to be treated as an ordinary word.

Abbreviation	**Full term**	**Explanation**
ante	[not abbreviated]	before, above
c., ca.	*circa*	around the date of
cf.	confer	compare
e.g.	*exempli gratia*	for the sake of example
et al.	*et alia*	and others
etc.	*et cetera*	and so on
fl.	*floruit*	flourished (around the time of)
ibid.	*ibidem*	in the same place
id., ead.	*idem* (*eadem*)	the same man (woman)
i.e.	*id est*	that is
inf.	*infra*	below
loc. cit.	*loco citato*	in the place cited

[108] See n. 76 above.

N.B.	*nota bene*	note well
op. cit.	*opera citato*	in the work cited
passim	[not abbreviated]	here and there in the cited passage
post	[not abbreviated]	after, below
q.v.	*quod vide*	which see
sc.	*scilicet* [*scire licet*]	namely (that is to say)
sic	[not abbreviated]	so (it really is so)
sup.	*supra*	above
s.v.	*sub voce* (*verbo*)	under that heading (word) [plural *s.vv.*]
ut	[not abbreviated]	as [e.g. *ut supra*, as cited above]
v.	*vide*	see [e.g. *v. post*, see below]
viz.	*videlicet*	it is permitted to see (namely, to wit)