Washington University
Law Quarterly

VOLUME 74 NUMBER 1 1996

ESSAY

IN PRAISE OF FOOTNOTES

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It has become fashionable to deride the use of footnotes in judicial opinions and to call for their elimination. Footnotes, it is alleged, interrupt the flow of the opinion, distract the reader, add to the opinion's length and complexity, and too often diminish the opinion's clarity by qualifying and hedging its holding. The clarion call to dispense with footnotes comes from impressive quarters, including several of America's most respected judges—Justice Stephen Breyer, Chief Judge Richard Posner, and former Chief Judge Abner Mikva.[1] These able and thoughtful jurists have sustained their vows of abstinence and have written footnoteless opinions for a number of years.

I, however, refuse to give up footnoting. In fact, I do not consider it a vice. As a federal judge for a quarter century, I believe in footnotes and am convinced that the judicious use of footnotes allows judges to communicate most effectively with their diverse audiences. I have received much positive feedback about the many footnotes in my opinions. Moreover, a perusal of recent state and federal reporters, including the United States Supreme

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1. *See In Justice Breyer's Opinion, A Footnote Has No Place*, N.Y. TIMES, June 28, 1995, at B18; David Margolick, *The Footnote in Judicial Opinions*, N.Y. TIMES, Jan. 4, 1991, at B14 (quoting Chief Judge Posner); Abner J. Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647 (1985).

Court Reports, reveals no paucity of footnotes, suggesting that the message of the footnote bashers has not taken hold. Yet the anti-footnote crusade, which began with Professor Fred Rodell's seminal 1936 piece, *Goodbye to Law Reviews*,[2] continues, its focus having shifted from law reviews to judicial opinions.[3] But the footnotephobes seem to have missed the essential point that judges are professional writers and that well-conceived and well-crafted footnotes are valuable tools of their trade. Because the time seems ripe for a dissenting statement, I write to praise footnotes, rather than to bury them.[4]

I.

In addressing the footnote controversy, one must first consider why judges write opinions, and for whom they are written.[5] At a minimum, judges write opinions for the litigants and their counsel, explaining the specific decision, and reassuring the parties that their contentions were given full and fair consideration. Opinions are also written for other judges who will subsequently hear the case. Additionally, when opinions are published, they serve the larger function of restating the law and establishing precedent, thereby contributing to the law's predictability and uniformity. Published opinions forge a link with the past while erecting a base upon which the law can grow. By articulating the rationale for decisionmaking, they help to explain and legitimate our legal system. Finally, in interpreting the law, judges often speak to the authors of the statutes they must interpret, explaining legislative ambiguities or sloppiness. These various purposes served by opinions suggest that opinions—even the same opinion—may be written for different audiences.

Trial and appellate judges do not write opinions in every case. Many cases simply are not of sufficient substance to warrant them. The vast majority of cases are thus disposed of either by short summary orders or by brief opinions that are unpublished and do not go "on-line." Additional-

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2. 23 VA. L. REV. 38 (1936). Rodell referred to law review footnotes as "phony excrescences." Fred Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279, 289 (1962).

3. The critics of law review footnote writing have apparently given up. *See, e.g.*, Rodell, *Goodbye to Law Reviews—Revisited*, *supra* note 2.

4. While there have been quite a number of pieces criticizing footnotes, *see supra* note 1, the only one I can find supporting my views is a brief and humorous article by Timothy R. Rice, *In Defense of Footnotes*, NAT'L L.J., June 20, 1988, at 13.

5. *See generally* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writing*, 62 U. CHI. L. REV. 1371 (1995); James B. White, *What's An Opinion For?*, 62 U. CHI. L. REV. 1363 (1995).

ly, because of the huge number of cases—a number which has increased exponentially of late[6]—it is not humanly possible to provide an opinion in every case. The increase in litigation and in the number of judges, however, has nevertheless yielded a large and growing body of judicial opinions in the small percentage of cases disposed of by full-dress opinions. These opinions are more accessible than ever because of the burgeoning availability of computer-assisted legal research. Although the practice of most courts is to designate opinions as either "for publication" or "not for publication,"[7] judges commonly find that opinions styled "not for publication," end up on-line, and sometimes even in print in specialized reporting services.

Despite this growing accessibility, the first audience for an opinion, even one designated "for publication," is and should be—in keeping with the Constitution's case and controversy requirement—the lawyers and litigants involved in the case. So long as time permits, judges, as members of the legal profession, owe lawyers who have presented a good case the respect of addressing their serious contentions in writing. As former Chief Justice Horace Stern of the Pennsylvania Supreme Court has commented, "certainly the defeated party cannot be expected to rest content with the bare conclusions of the court; he will be eager to learn the successive steps, the turns and twists in the pathway by which the terminus was reached."[8] By demonstrating to litigants and lawyers that they have been heard, written opinions reinforce the bar's confidence in the bench and enhance the legitimacy of the judicial process in the eyes of the people.

In addition, opinions are written for other judges who have responsibility for the case. If the opinion is an appellate reversal, the judge rehearing the case is a most important audience. As Professor Leflar has observed: "If a case has to be retried after remand, the trial judge is entitled to fair guidance. The writer of the opinion ought to write with the trial judge in mind, ought to answer the questions that he should know the trial judge is asking."[9] Similarly, another audience is the court that will review the opinion on appeal. The reviewing court will want to know in detail the

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6. For statistics on the growing caseload of the federal courts, see COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS (September 1995).

7. Since all opinions are filed as public records, this really means that opinions may, if styled "for publication," be cited as precedent to the court (and if not so styled, may not be so cited).

8. Horace Stern, *The Writing of Judicial Opinions*, *in* ADVOCACY AND THE KING'S ENGLISH 835 (1960).

9. Robert A. Leflar, *Sources of Judge-Made Law*, 24 OKLA. L. REV. 319, 320 (1971).

arguments, sources, and reasoning of the court below. A thorough opinion will minimize second-guessing by the appellate tribunal.

The final and broadest audience includes individuals and institutions who did not directly participate in the case, but still have something to learn from it. This audience consists of lawyers, litigants, judges, scholars, legislators, and finally, the public at large, which will organize its affairs according to the court's guidance.

In the end, then, an individual opinion will generally be written for, and receive, *multiple* audiences. The footnote critics make the mistake of ignoring the tension between what the opinion needs to deliver to the primary audience—usually the lawyers and litigants involved in the case—and the interests of the other diverse audiences. The critics overlook the crucial role that footnotes play in resolving that tension: The body of the opinion transmits the primary message while footnotes deliver secondary messages.

II.

Given the complex functions and multiple audiences served by judicial opinions, it is clear that writing a coherent, readable opinion is not a simple task. Footnotes enable the opinion to fulfill these disparate, complex functions and thereby respond to multiple audiences while preserving the textual body's coherence and readability. For instance, a footnote is an ideal place to explain the court's resolution of the parties' peripheral contentions.[10] In the typical case, lawyers present many issues: some serious and close, others "defensive" or "for the record." Only the more substantial contentions merit extensive discussion. Nevertheless, the lawyers and litigants want and are arguably entitled to—and judges above and below may need—an opinion to resolve the issues presented, even though some of those issues may not be important enough to tell the world in the body of the opinion.

Not every decision stands (or will be accepted) on the say-so of the opinion-writer. Therefore, footnotes are also useful in elaborating the reasoning stated succinctly in the body of the opinion. Footnotes may include a more complete explanation of a point, citations to additional

10. Addressing all of a litigant's contentions is especially important in a criminal appeal. Because a defendant may initiate multiple attacks on a conviction—both direct and collateral—and in order to prevent the court from having to readdress issues that have been resolved in another proceeding, it is important to record every contention made and disposed of.

authority (including secondary sources),[11] or discussion of arguments or authority raised by the parties. Footnotes of this genre are valuable not only to the litigants and counsel, but are often instructive to scholars, lawyers, and judges in future cases, because they refine and enrich the legal discourse.

Additionally, footnotes can assist in furnishing a fuller understanding of the background and nuances of the case than would ordinarily be consistent with a reasonably concise and linear text. Such footnotes can refine and highlight the import of the text by placing the case in context and thereby qualifying it. Such footnotes will be valuable to the litigants and lawyers, especially to those who need to fully grasp the contours of the opinion to prepare petitions for reconsideration.

Footnotes are vital for scholars and future litigants. Although the lawyer who reads the case simply to ascertain its holding may not demand citations, statutory quotations, or background material, other readers, including scholars and future litigants, will desire them. In the absence of such citations, readers will have to look elsewhere to find them, or may have to guess about the building blocks of the court's reasoning. There is an advantage to one-stop shopping. These citations may, of course, be located in the text, but when they are, they make the opinion harder to read.

Footnotes also serve the demands of members of the opinion audience who want not only a short, clear *ratio decidendi* but also a broad discussion of the wisdom and support for the holding. Footnotes can serve as a repository of scholarship where the opinion-writer sets forth theoretical discourse and citations to cases and secondary sources that buttress the holding, qualify it, or otherwise reflect on its utility. Law reviews need not be the only place where scholarship resides. As Chief Judge Fuld once observed: "[T]o one digging into the bowels of the law, a fat footnote is a

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11. As is well known, Justice Brandeis pioneered this area, frequently buttressing his opinions with secondary sources. *See, e.g.*, Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191, 196 n.2 (1931) (citing THE RADIO INDUSTRY: THE STORY OF ITS DEVELOPMENT 195-208 (1928); *id.* at 200 n.8 (citing JOHN HAROLD MORECROFT, PRINCIPLES OF RADIO COMMUNICATION ch. 4 (1921)); Gonzales v. Roman Catholic Arch Bishop of Manila, 280 U.S. 1, 10 n.1 (1931) (citing, *inter alia*, THE CATHOLIC ENCYCLOPEDIA: AN INTERNATIONAL WORK OF REFERENCE ON THE CONSTITUTION, DOCTRINE, DISCIPLINE, AND HISTORY OF THE CATHOLIC CHURCH 580 (Charles G. Hebermann et al. eds., 1913); Omaechevarria v. Idaho, 246 U.S. 343, 345 n.1, 346 n.1, 347 nn.1-2, 348 n.1, 351 n.1, & 352 n.2 (1918) (citing, *inter alia*, THOMAS DONALDSON, THE PUBLIC DOMAIN: ITS HISTORY, WITH STATISTICS 528, 529, 1190 (1884) and numerous reports from the Department of the Interior, the Public Lands Commission, and the Department of Agriculture); United States v. Ness, 245 U.S. 319, 324 n.1 (1917) (citing Reports from the Special Commission on Immigration and the Commissioner of Naturalization).

mother lode, a vein of purest gold."[12]

Concomitantly, a footnote will often be an appropriate place for the opinion-writer to set forth his or her doubts about the state of the law or the legal precept being announced. While I accept the conventional wisdom that we should strive for predictability and stability in the law, and hence, clarity and certainty in judicial opinions, bright-line rules are not easy to come by. Anyone who has been a judge as long as I knows that many questions are exquisitely close, or at least not free from doubt. Expression of doubt where it exists can be helpful to lawyers and judges who must wrestle with the issues in future cases, and also to scholarly dialogue. Perhaps more importantly, expression (or perhaps I should say confession) of doubt evidences intellectual honesty, which is most important to the judicial process, and hence lends credibility to an opinion.[13]

Of course, footnotes sometimes play an important role in our common law system by planting the seeds for major developments in legal principles. The most famous example is footnote four of *United States v. Carolene Products*.[14] *Carolene Products* suggests that legislation which disadvantages "discrete and insular minorities" might call for "more searching judicial inquiry" in future cases.[15] There are, however, many others. For example, there is footnote fifty-nine of *United States v. Socony Vacuum Oil Co.*, stating that a conspiracy to fix prices is established even if the alleged conspirators lack the power to affect prices;[16] footnote twelve of *Ernst & Ernst v. Hochfelder*, suggesting that recklessness may be sufficient to establish scienter for a 10(b)(5) securities action;[17] footnote fourteen of *Sedima v. Imrex Co., Inc.*, suggesting that the factor of continuity plus relationship is necessary to establish a "pattern of racketeering activity" under RICO;[18] and footnote fourteen of *Dirks v. SEC*, suggesting that certain outsiders of corporations, such as lawyers, consultants and accountants, may become insiders for purposes of insider trading because of their fiduciary relationships.[19]

A useful variation on this theme is the footnote containing a suggestion

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12. Stanley H. Fuld, *A Judge Looks at the Law Review*, 28 N.Y.U. L. REV. 915, 919 (1953).

13. For an interesting discussion of the role of doubt in jurisprudence, see Prakash Mehta, *An Essay on Hamlet: Emblems of Truth In Law and Literature*, 83 GEO. L.J. 165 (1994).

14. 304 U.S. 144, 153 n.4 (1938).

15. *Id.*

16. 310 U.S. 150, 224 n.59 (1940).

17. 425 U.S. 185, 193-94 n.12 (1976).

18. 473 U.S. 479, 496 n.14 (1985).

19. 463 U.S. 646, 655 n.14. *See also* Robert E. Bacharach, Note, Dirks v. SEC's *Footnote Fourteen: Horizontal and Vertical Reach*, 62 WASH. U. L.Q. 477 (1984).

for reform of laws or procedures.[20] Footnotes of this variety are not only of utility to lawyers and judges in future cases, but also to Congress and other legislative bodies charged with the responsibility of making the law.

Footnotes serve a myriad of other useful and convenient functions. They make it possible, without burdening the average reader, to set forth matters of historical interest. The opinion, after all, is a historical record, and historical records should be complete, intact, and accessible. The mass of evidence, argument, and scholarship garnered by the parties sometimes deserves to be shared. Footnotes are also an excellent vehicle for responding to concurring or dissenting opinions, whose contentions may be extraneous to the thrust of the main opinion. Additionally, they provide a convenient place in which to quote from a trial court opinion or from the opinion in another case dealing with a related question.

Footnotes play a heightened role in dissenting and concurring opinions when they call into question the correctness or prudence of a rule of law espoused by the majority opinion, or advocate a new or different rule. Opinions of this genre, if they are to have their intended effect of law reform, must perforce be scholarly and detailed; as suggested above, footnotes often play an important role in scholarly exegesis. Footnotes make it possible to define confusing terms and to explain potentially confusing but extraneous procedural issues that seemed important at one point but later turned out not to be dispositive. They also make it possible to set forth unobtrusively jurisdiction or standard of review (for the record or for the untutored), and to identify analogous but unconnected proceedings (explaining their relevance). These matters are of especial value to the novice reader.[21] Finally, footnotes can even be used to inject some humor into an opinion[22] or to offer an interesting aside. Judges are, as I have

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20. I have often used footnotes in this way. *See, e.g.*, Asplundh Mfg. Div. v. Benton Harbor Eng'g, 57 F.3d 1190, 1201 n.14 (3d Cir. 1995) (making suggestion for rules revision to Judicial Conference of the United States Advisory Committee on Rules of Evidence); Brow v. Farrelly, 994 F.2d 1027, 1036 n.7 (3d Cir. 1993) (making suggestion for legislative change to the Virgin Islands Legislature). When I make such a suggestion, I direct the clerk of court to send the opinion to the appropriate officials.

21. Judge Aldisert, although a critic of footnotes, has accepted as "proper" many of these suggested uses of footnotes. He also counsels that footnotes can be used to incorporate contributions of other members of the court whose ideas interfere with organization of the text or whose writing styles do not conform with the writer's. *See* RUGGERO J. ALDISERT, OPINION WRITING 178 (1990).

22. For instance, in Flood v. Kuhn, 407 U.S. 258 (1972), the baseball antitrust case, Justice Blackmun used a clever poem to illustrate this nation's love of baseball. Citing author Grantland Rice, Blackmun wrote, "I knew a cove who'd never heard of Washington and Lee, Of Caesar and Napoleon from the ancient jamboree, But bli'me, there are queerer things than anything like that, For here's a cove who never heard of Casey at the Bat!" *Id.* at 263 n.4 (internal quotation marks omitted).

observed, professional writers, and there is no reason why their work product should not be interesting and enjoyable.

The beauty of the footnote is that it serves all of the functions I have identified while preserving the opinion's readability. Contrary to conventional wisdom, the footnote improves judicial style. By relegating to footnotes matters that interrupt the flow of the text, footnotes enhance rather than detract from the opinion's readability. The footnote provides a rhetorical hierarchy that streamlines a text which compactly resolves the case. Citations, statutory text, details from legislative history, references to the appendix or record, and factual background, including trial testimony, are all made readily available without getting in the way.

Footnotes are not distracting if they address appropriate subjects and are well-crafted and if the body of the text reads persuasively on its own. Footnote critics overlook the fact that a properly constructed opinion, drafted with intelligent attention to what belongs in the text and what does not, allows the reader to read the opinion sans footnotes. If judges write this way and readers are trained to skip over footnotes that are not of interest, we will achieve the goal of the footnote "reformers" without jettisoning the additional useful material to which I have referred.

To achieve this result, however, the opinion-writer must take the lead, exercising restraint and including in the footnotes only those matters not necessary to disposition (needless to say such matters should not be included in the text). But "it takes two to tango," and I suggest a concomitant obligation on the reader to trust the writer and not feel obliged to abandon a flowing text to read the accompanying footnote unless it is of particular interest. Judges can help if, at key points in the body of the text, they alert the reader about the content of the footnote. The capacity of footnotes to enable the opinion-writer to address multiple audiences simultaneously works in two directions. Drawing on the seminal Rodell piece, Professor Martin put it well:

> Rodell defines two distinct types of footnotes: "the explanatory or if-you-don't-understand-what-I-said-in-the-text-this-may-help-you-type" and "the probative or if-you're-from-Missouri-just-take-a-look-at-all-this-type." Both of these types, despite Rodell's disparaging descriptions, are valuable. The explanatory footnotes enable authors to write to 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.[23]

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23. Scott M. Martin, *The Law Review Citadel: Rodell Revisited*, 71 IOWA L. REV. 1093, 1096-97 (1986) (emphasis added).

The ultimate problem with the "one-size-fits-all" posture of the anti-footnote camp is that the style is too constricting. Judicial opinions are as variegated as the life and the law from which they draw their material. As the foregoing discussion suggests, readers' needs vary from requiring no footnotes, to some, to many. This essay therefore advocates and extols necessary and useful footnotes. Certainly I agree that *unnecessary* footnotes are taboo. In this respect my view here represents a "concurrence" as well as a "dissent."

III.

Having identified the virtues of footnotes, and in the course thereof refuted many of the objections, it is time to deal with the critics more directly.

Despite the flowery rhetoric, the criticism really boils down to a few points, all of which have been set forth by the standard-bearer, former Judge Mikva, who deems footnotes "an abomination."[24] Mikva complains that the constant vertical shifting between text and footnote distracts the reader and wastes time.[25] He decries the length and complexity of footnotes and scores their complicity in the litigators' "kitchen sink" syndrome by addressing frivolous contentions.[26] Mikva bemoans the phenomenon of majority and dissenters hurling footnotes at each other.[27] In essence, Mikva views footnotes as bad writing and poor scholarship.

Mikva's sharpest claim is that footnotes have become substantive and are used often to distinguish cited authority. In Mikva's view, "[d]istinguishing a case can be a subtle way of undercutting it or overruling it. [In this way] the footnote . . . acquired its full capacity for mischief. Meat began to fall from the text and into the footnotes."[28] Mikva does not suggest, however, that this phenomenon occurs frequently. Nor does he explain why substantive case distinctions in footnotes are so mischievous.

Obiter dictum footnotes, Mikva says, are used with reckless abandon and frequently overwhelm the text. "All too often, yesterday's *obiter dictum* becomes tomorrow's law of the land."[29] Citing *Carolene Products*, he expresses skepticism that Justice Stone's colleagues paid careful attention to footnote four or believed that the Court was enunciating an important

24. *See* Mikva, *supra* note 1, at 647.
25. *Id.* at 648.
26. *Id.* at 651.
27. *Id.* at 650.
28. *Id.* at 648.
29. *See* Mikva, *supra* note 1, at 649.

general rule.[30] Mikva also objects to another "variation" on the *obiter dictum* footnote. As he puts it: "Sometimes the judges cannot agree on the *ratio decidendi* of a case. Rather than ventilate or, better yet, resolve the dispute, the judges bury it in some footnotes, and put a merely 'provisional' explanation of the holding in the text."[31] On this assertion as well, "I'm from Missouri," and Mikva needs to "show me" that this occurs often.

Finally, Mikva laments that judges are often reluctant to "excise some beautiful prose or sage advice that colleagues or clerks have challenged as superfluous to the decision," and end up putting in a footnote.[32] Consistent with earlier comments, I don't see why this is so bad. In appellate cases, members of the panel, other than the opinion-writer, may demand the deletion of such material if it is beyond the pale.

Professor Balkin reiterates Mikva's criticism of the "head-bobbing" problem, though with greater rhetorical flourish.[33] Referring to Justice White's footnote two in *Bowers v. Hardwick*,[34] Balkin states:

> Here the footnote performs the crucial task of holding the logic of the opinion together, by putting off the evil day when these questions will have to be answered. The footnote is the red cape dangled in front of the charging bull, and then removed at the last second, preserving the life of the matador. . . . Does it surprise us, then, that this footnote may be as important as anything else that Justice White said in his opinions?[35]

Like Mikva, however, Balkin does not explain the mechanism of the supposed mischief. It may be that substantive footnotes are a frequent

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30. *Id.*

31. *Id.* at 651.

32. *Id.*

33. J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1989). Balkin writes:

> The footnote lives a life of exclusion and marginalization. It is named after the foot, that lowly organ which spends its life near the ground, in the dirt. We remark upon the triviality of the footnote in the very metaphors we use to described the act of footnoting: one "drops" a footnote, as one might drop a piece of garbage, or anything unpleasant or of little value. . . . . There is nothing more tedious than bobbing one's head like a pogo stick only to discover that the footnote contains nothing of substantive worth, except perhaps for a citation, an irrelevant bibliographic excursion, or the ubiquitous "*Id.*" Moreover, when there is something substantive in the footnote, it is more often than not a digression from the argument of the text, and tends to break the train of thought of the reader.

Id. at 276.

34. 478 U.S. 186, 188 n.2 (1986). That footnote explains that the Court will express no opinion on the constitutionality of the Georgia sodomy statute as applied to heterosexuals. *Id.*

35. Balkin, *supra* note 33, at 281. Decrying the "victory of the footnote over the text and the always *in*complete marginalization," Balkin adds: "Will not the 'insignificant' and 'unremarkable' opinion in *Carolene Products* (now relegated by history to the status of a footnote) haunt our discussions of the footnote (now understood as the real 'holding' of the case)?" *Id.* at 282.

occurrence; however, it is not self-evident that substantive footnotes are bad.

There are still other critics, but their criticism is "more of the same." Professor Mellinkoff claims that "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."[36] Former U.S. Supreme Court Justice Arthur J. Goldberg has concluded: "Footnotes, in my experience, cause more problems than they solve."[37] Judge Posner arguably administers the *coup de grace* (and, in so doing, casts aspersions upon the character or at least the judgment of the footnote-writer): "The principal appeal [of the footnote] is to the author . . . . it spares him the pain of having to discard anything he considers to have some value or interest, and it enables him to show, or at least pretend, that he is hard-working, learned and scrupulous."[38]

IV.

Has this arsenal of criticism overcome my paeans of praise for footnotes therefor? No indeed. The criticism is misdirected. By and large, footnote prohibitionists do not criticize footnotes *simpliciter*; rather, their wrath is aimed at those who use footnotes improperly or excessively, and at those who draft poorly in general. The criticisms of Mikva and Balkin, and their colleagues, do not apply to *most* footnotes, for many of the footnotes to which their criticisms do apply should never have been written in any form. What makes the footnote-baiters, who excoriate long, pointless, distracting footnotes, think that opinion authors who write that way will have any greater self-control if they eliminate the footnote genre?

As for the criticism of footnotes that plant the seeds for major developments in legal principles, I say, hogwash. When a judge shares a complex thought about the law, he or she initiates a percolation process that may inform other judges and shape legal development. Such rumination is not law when it is made, though it may become doctrine in an appropriate case after independent consideration. To the extent that the rumination falls flat, the reader is at least assured that the judge was thinking long and hard about the case, something of which many folks, in this age of mistrust of the judicial system, need to be convinced.

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36. DAVID MELLINKOFF, LEGAL WRITING: SENSE AND NONSENSE 94 (1982).
37. Arthur J. Goldberg, *The Rise and Fall (We Hope) of Footnotes*, 69 A.B.A. J. 255 (1983).
38. Margolick, *supra* note 1, at B14 (quoting Chief Judge Posner).

Finally, I level a counter criticism: Opinions sans footnotes tend to be laden with parentheticals. Such crowding of the text disrupts the narrative flow and makes opinions cumbersome to read. Moreover, to the extent that judges share footnote-like material with us in the form of an appendix, as some judges are now doing, they make perhaps the best case for using footnotes.[39] Footnotes that appear in an appendix render opinions extremely difficult to read. They are, in essence, endnotes.[40] Reading endnotes involves fingers, mouth and neck—fingers for turning pages, mouth for licking fingers, and neck for head-twisting—an effort much more cumbersome than the head-bobbing that footnotes require. In this most ungraceful maneuver, endnotes require readers to keep one hand locked on the text while using the other hand to flip to the appropriate endnote. Once the endnote is located, the unhappy reader must peer around the intervening pages to reconcile note and text. Given the annoyance and physical strain, the reader is apt to avoid the endnotes all together.

V.

Judicial footnotes, which have many important and disparate uses, thus survive the attack. The primary reason for survival also reflects their central beauty: They enable the writer to address multiple audiences simultaneously. Footnotes allow the judge-writer to engage in a legal conversation: with the lawyer or litigant in the case; with the reader who wants to drink deep, at least on a particular issue, and draw all possible instruction from the opinion; and with the neophyte who wants to understand an area of law. Footnotes also contribute to efficiency and cost-saving by collecting and preserving valuable research for future use. Finally, if the opinion-writer adheres to the precepts I have proposed about what belongs in footnotes, footnotes will *shorten* opinions and enhance readability: The reader who wants essence and not refinement or detail need only read the lucid, uncluttered text.

I do not deny that the footnotephobes make some good points. Like most dogmatists, however, those opposed to footnotes go too far. Insisting that judicial opinions contain no footnotes is like demanding that houses have only one floor. True, the architect should take care not to put important rooms in the basement. It would be inconvenient to have to traipse

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39. *See, e.g.*, United States v. Lopez, 115 S. Ct. 1624, 1665 (1995) (Breyer, J., dissenting) (seven-page appendix of materials).

40. *Id.* at 1659 (Breyer, J., dissenting) ("See Appendix, *infra* at 1665, for a sample of the documentation, as well as for *complete citations* to the sources referenced below.") (emphasis added).

downstairs every time one wanted a glass of milk. On the other hand, some rooms might disrupt the flow and elegance of the main floor. A laundry room or tool room, for instance, is seldom found abutting the fine china in the dining room. But this does not mean that houses should not have them. Most visitors will not need access to the tool room at all—and indeed, the owner will need to make use of it only occasionally—but the facilities this extra level offers will be welcome, if not critical, when it comes time to get down to work.

This harks back to the multiple audience theme. Many readers will not need any footnotes; most will need some footnotes, but not all the footnotes. Others will want to read all the footnotes. But if footnotes are not available, deciding on what to put into the text becomes a nightmare for the judge, and because of the unnecessary material in the text, reading the opinion becomes a chore. It is easier to decry footnotes than it is to draw the line between valuable contribution to the opinion and unnecessary verbiage; the footnotephobes have thrown the baby out with the bath water.

Since, at bottom, the criticism of footnotes is directed at their improper and excessive use, I advocate moderation. The opinion-writer should heed the caveat that he or she must exercise restraint and omit from the text material that is peripheral to the essential reasoning of the case. The opinion should also, at key points, flag for the reader in the text what is to come in the footnote. Properly used, footnotes enhance an opinion's usefulness for its multiple audiences, and hence, we should not eliminate them altogether. Instead, we should strive for the golden mean. In reality, the debate over footnotes raises a red herring, for what we really care about and what we should care about is crafting careful, concise, and well-written opinions. Footnotes are, and, I submit, should remain, one part of that demanding enterprise.