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In Defense of Footnotes: A Response to Justice Michael B. Hyman

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66. The Scribes Journal of Legal Writing recently published the short opinion piece *Down with Footnotes*, written by Justice Michael B. Hyman of the First Appellate District of Illinois. As you can infer from the title alone, Justice Hyman posits that footnotes are unhelpful, awkward, and distract the reader from the narrative. His unalloyed disdain is matched only by his unequivocal message: "whenever you fancy a footnote, banish it from your mind." The piece (at only a few pages in length) is not meant to be a fully-developed analysis. It is cheeky yet informative, peppered with witty, self-aware footnotes to underscore their redundancy.[2]

67. Truth be told, I never gave any thought to the topic prior to reading Justice Hyman's piece, probably due to the ubiquity of footnotes in my life. Law students learn the ropes of legal citation through the Bluebook's emphasis on footnotes in journals; bar review courses stress the importance of reading footnotes where examiners like to hide important information; just about every brief I reviewed as an appellate clerk called for me to read footnotes of varying length and value; and most judicial opinions contain footnotes throughout the decision, some of which can be incredibly consequential.[3]

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2 Michael B. Hyman, *Down with Footnotes*, 19 SCRIBES J. LEG. WRITING 139 (2020).

3 See, e.g., *Virginia Pharmacy Bd. v. Virginia Consumer Council, Inc.*,425 U.S. 748, 771 (1976); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964); *National Carbide Corp. v. Commissioner*, 336 U.S. 422, 439 (1949); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938); *Interstate Commerce Comm'n v. AAA Con Drivers Exch., Inc.*, 340 F.2d 820, 826 (2d Cir. 1965).

Outside of legal writing, footnotes abound. Bibles and other holy texts contain them; David Foster Wallace's seminal novel *Infinite Jest* sports 388 endnotes; and footnotes are an integral component of financial statements I read daily as a practicing attorney. Nevertheless, Justice Hyman's antipathy toward footnotes is apparently not unique, and there are not many publications rushing to their defense. Bankruptcy Judge Helen S. Balick admonished a deluge of footnotes in *Matter of Peter J. Schmitt Co., Inc.,* stating "equally unhelpful were the string of footnotes strewn throughout the opening brief (15 footnotes), the answering brief (17), and the memorandum in support of the estimation motion (19) . . . The numerous footnotes in the briefs, some of which were quite extensive, served only to disrupt the flow of the text, repeat matters discussed in the text, or discuss matters that should have been included in the text or not at all."[4] Appellate Judge Kuehn in Oklahoma took a similar stance in *White v. State*: "setting forth the law in footnotes leads to confusion as to what is controlling precedent. Such confusion can be extinguished by properly placing the holding of the Court in the body of the opinion where it belongs."[5] By my lights, there is some practical utility to the footnote. This brief essay memorializes my reflections on that utility.

I. Questioning The Qualms

68. Justice Hyman raises a bevy of grievances, some general and some more specific. I will address these various qualms and separate them by quotes taken from his piece.

A. "Never use footnotes for legal analysis or citation to legal authority."[6]

69. I will assume this applies to any type of citation because, as Judge Posner once noted, "anything can be cited as a source of information bearing on an adjudication."[7] I will also assume that Justice Hyman is particularly irked by this type of footnote — he has already categorically renounced all footnotes, yet he is carving out space in his piece for this specific disavowal. Regardless, there are two bases warranting such a footnote. First, footnotes can be a strong vehicle for certain points that are perhaps weaker than others set forth in the body of the brief. I am not endorsing weaker *arguments* in a footnote, merely weaker *points* that contribute to an overall argument. The distinction is pivotal. By no means should a footnote be a vehicle for advancing a particular argument on its own — a perilous choice in light of the number of jurisdictions that construe

4 *In re Peter J. Schmitt Co., Inc.*, 154 B.R. 632, 636 (Bankr. D. Del. 1993).

5 *White v. State*, 437 P.3d 1061, 1070 (Ok. Crim. App. Ct. 2019).

6 Michael B. Hyman, *Down with Footnotes*, 19 SCRIBES J. LEG. WRITING 140 (2020).

7 *Rowe v. Gibson*, 798 F.3d 622, 628 (7th Cir. 2015).

this as waiving an argument altogether.[8] Developing any argument means weeding out less-persuasive points. You of course want your strongest contentions on the front line; but sometimes calling attention to other ancillary points might buttress your overall position. These footnotes "can explicate subtleties in an argument, while leaving its core unobstructed."[9] In this sense, they are analogous to ornaments in classical music — trills, mordents, and other flourishes meant to embellish the principal notes in a melody. The supportive footnote (i.e., the musical ornament) is not the argument made to the court (i.e., the melody), but rather is solely present to add a new angle or consideration for the reader. Another non-melodic analogy for those experienced with the Bluebook might be to consider a supportive footnote as if it were a "see also" or "cf." in a string citation; those adminicular citations are used to accentuate a supportive (though by definition less direct) point.

70. Second, placing citations in footnotes can prevent clutter. I agree with Justice Hyman's examples of using "Id." repeatedly throughout his piece to show that such citations can be gratuitous.[10] But longer citations can make digesting the prose harder because the reader must find where the citation ends and the prose begin again.[11] The problem is exacerbated where there are explanatory parentheticals, *see* Explanatory Parentheticals[12] https://www.monmouth.edu/resources-for-writers/documents/bluebook-explanatory-parentheticals.pdf/ (providing an overview of when it is appropriate to use an explanatory parenthetical in legal writing), string citations used to bolster an argument with explanatory parentheticals, *see* K.K. DuVivier, *String Citations—Part I,* 29 THE SCRIVENER: MODERN LEGAL WRITING 83,[13] https://www.law.du.edu/documents (cautioning against the use of string citations, but acknowledging that they "are beneficial in some circumstances"); *see also* Celia C. Ellwell, *String Citations—God or Bad Legal Writing Tool?*[14] https://researchingparalegal.com/2014/06/29/string-citations-good-or-bad-legal-writing-tool/ ("Lengthy string citations, like long single-spaced block quotations, are never a good idea. Readers tend to skim or skip a big block of text.") and citations to authority placed in the middle of the sentence rather than after the punctuation. *See id*.

71. Do you see how obnoxious the previous paragraph is? Do you not wish those citations were relegated to a footnote? (In case you missed it, the narrative portion of the

8 See, e.g., *Bakalis v. Golembeski*, 35 F.3d 318, 326 (7th Cir. 1994); *Roberts v. Worcester Redev. Auth.*, 759 N.E.2d 1220, 1227 (Mass Ct. App. 2001).

9 Paul F. McAloon, *Defending the Lowly Footnote*, N.Y. ST. BAR. J. 64, 66 (2001).

10 Michael B. Hyman, *Down with Footnotes*, 19 SCRIBES J. LEG. WRITING 140 (2020).

11 See eHowEducation, *How to Use Footnotes*, YOUTUBE (May 21, 2015).

12 See *Explanatory Parentheticals*, Monmouth University Writing Center (2015).

13 See K.K. DuVivier, *String Citations—Part I,* 29 THE SCRIVENER: MODERN LEGAL WRITING (2020).

14 See also Celia C. Ellwell, *String Citations—God or Bad Legal Writing Tool?*, THE RESEARCHING PARALEGAL (June 29, 2014).

paragraph only contains 87 words; with the added citations that word count increases to 183.) If you recoiled at the sight of various website URLs, you are not alone. Unlike spiders and other creepy-crawlies, URLs are not more afraid of us than we are of them. Our eyes glaze over and we do our best to glean some information from the morass. The same is true for journals and law review articles with wordy, grandiloquent titles. Footnotes can be invaluable for these situations to reduce the extra work required of a reader.

72. All this might beg the question as to why bother citing websites or law reviews in the first place. Though it is beyond the purview of this Essay, I can think of three reasons right away. First, some cases are so novel that they require internet sources for guidance. In *In re E.J.S.*, a case of first impression, the Washington Court of Appeals relied on various treatises and law review articles in concluding that one parent's vested and delivered restricted stock units were income for purposes of calculating child support, whether or not liquidated.[15] A second reason might have to do with establishing some type of quasi-judicial notice. Third, you never know what may sway a court's view on a subject — consider for instance those judges who have been criticized for citing Wikipedia in their opinions.[16]

B. "Footnotes nag the reader, pulling at his or her attention and distract from the text's narrative."[17]

73. Justice Hyman states that "the more the eyes (and head) bounce between the text and tomb, the more intrusive and irksome it is, and the more potential there is for the mind to wander."[18] This effectively relates to one's ability to synthesize the information on the page. No doubt finding the exact place in the text where the reader left off can become more difficult as one's energy and attention declines. But those in the legal profession are well versed in regularly bouncing from one text to another. Cross-references are plainly part of life for an attorney. How is this different from one of the myriad statutes that begin a provision with language akin to: "Except as provided in Subsection (X) of Paragraph Y," which requires the reader to go make sure the present provision does not fall into this exception. The same can be true of any legal contract longer than a couple pages in length. Anyone who has glanced at the Internal Revenue Code knows all too well that many of those exceptions contain exceptions — as Judge Learned Hand put it,

15 *In re E.J.S.*, 483 P.3d 110, 112–13 (Wash. Ct. App. 2018).

16 See Euguene Volokh, *Opinion: When Should Courts Rely on Wikipedia?*, THE WASHINGTON POST (March 17, 2017).

17 Michael B. Hyman, *Down with Footnotes*, 19 SCRIBES J. LEG. WRITING 140 (2020).

18 Michael B. Hyman, *Down with Footnotes*, 19 SCRIBES J. LEG. WRITING 139-140 (2020).

> the words of such an act as the Income Tax, for example, merely dance before my eyes in a meaningless procession; cross-reference to cross-reference, exception upon exception — couched in abstract terms that offer no handle to seize hold of — leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time.[19]

74. So, are footnotes a form of cross-reference? Conceptually, yes. Can cross-references be tedious for even the most acute reader? Also yes. But can anyone legitimately equate cross-reference to footnotes with those found the Internal Revenue Code? Surely not. If anything, having a footnote on the same page as the text referencing it is easier than going back and forth between multiple documents. Presumably this is not such a nuisance that it detracts from the reader's analysis. Even if it is, something as simple as placing one's thumb where the text references a footnote would easily alleviate this concern. All in all, this is (at worst) an accepted inconvenience to a lawyer, not a distraction.

C. "I have yet to come across something 'footnoteable' that could not be incorporated into the text, possibly set off by parentheses."[20]

75. This statement aligns with another introductory remark from the piece: "Any information important enough to communicate to a judge belongs in the body of the document, not in a subterranean reservoir."[21] On one hand, these statements have undeniable value — the content of a footnote is there for the judge's review, and the litigant understandably wants it to be read by the judge. On the other hand, Justice Hyman presupposes that everyone writing a brief is on equal footing with regard to time and skill. Compare the writing process for the average trial attorney with an appellate judge. While the litigant always operates within the strictures of statutory timelines, the appellate courts are under no such constraints. An appellate court will generally have the benefit of time to research issues presented and meticulously delve into the record at whatever speed it chooses. One judge on the United States Court of Appeals for the First Circuit noted that "circuit judges have more time to reflect and the advantage of more thorough briefing" as compared to trial judges.[22] Many appellate judges also have law clerks to help ghost write the opinions, and those law clerks were likely hired because of their ability to analyze issues and communicate a response through writing. I

19 Learned Hand, *Eulogy of Thomas Walter Swan*, 57 YALE L.J. 167, 169 (1947).

20 Michael B. Hyman, *Down with Footnotes*, 19 SCRIBES J. LEG. WRITING 139 (2020).

21 Michael B. Hyman, *Down with Footnotes*, 19 SCRIBES J. LEG. WRITING 139 (2020).

22 See United States v. Padilla, 415 F.3d 211, 224 (1st Cir. 2005) (Boudin, J., concurring).

say all of this because Justice Hyman's statements work when the litigant can expend the time necessary to carefully craft prose — without any footnotes — that incorporate all facts cohesively and clearly. The feasibility of distilling all pertinent facts in the prose of a narrative will obviously depend on the complexity of the case. Sometimes devoting extra minutes or hours is simply not possible, either due to workload or because the client's ability to pay for the additional work creates a ceiling. This ties into the unavoidable reality that some attorneys are just better writers than others. Even the best of writers will struggle. William Jay acknowledged this in his tribute to the late Justice Scalia: "'I hate writing,' Justice Scalia often said; 'I love having written.' He meant that writing is hard when you won't settle for anything less than perfection . . . ."[23] Faster and more skilled writers will be able to deftly set out a complicated narrative much more efficiently than, say, the attorney whose practice (for whatever reason) places less emphasis on drafting. Footnotes offer a certain level of explanation available for those attorneys struggling to ascertain the best way to convey "footnoteable" information to the court. And besides, those footnotes will likely be left to the law clerk assigned to the case (rather than the judge) for further research.[24]

II. David Mellinkoff's Justifications

76. Justice Hyman does not idly resign himself to mere protestation; rather, he also objects to four instances in which footnotes may be justified. These justifications, set forth by Professor David Mellinkoff in his book Legal Writing: Sense & Nonsense, concern: (A) emergency situations; (B) adding details about an assertion's source; (C) providing context; and (D) "special effects" such as humor.[25] Like Justice Hyman, I address each in turn.

A. Emergencies

77. Justice Hyman spends a single sentence dispatching with the idea that an emergency situation could give rise to a footnote: "As to emergencies (Mellinkoff gave the example of newly discovery authority), computers have ended the need to use footnotes for last-minute edits."[26] The notion that there are no longer any "last-minute edits" is wishful thinking. Every litigator will inevitably feel the crunch of an impending deadline. We all experience those chaotic filings where we are hurriedly working to finalize

23 See William Jay, *Tribute: The Justice who said he hated writing*, SCOTUSblog (March 4, 2016).

24 See William Jay, *Tribute: The Justice who said he hated writing*, SCOTUSblog (March 4, 2016).

25 Michael B. Hyman, *Down with Footnotes*, 19 SCRIBES J. LEG. WRITING 140 (2020).

26 Michael B. Hyman, *Down with Footnotes*, 19 SCRIBES J. LEG. WRITING 140 (2020).

something all the way until the very last minute. Sometimes the end product is laudable, other times not so much. As discussed above, some attorneys are more capable of quickly penning quality work. This is especially so when the clock is ticking. Where time is not on your side, the aim of carefully crafting the perfect prose must give way to the most pragmatic method of getting your point across given the time constraints. The footnote's content may well be sloppy as compared to the rest of the prose; however, it should go without saying that footnotes utilized in an emergency situation are not intended to advance rhetorical strategy, but instead deployed out of a desperate need to fit a fact (that the litigator deems important enough to warrant inclusion) into the brief for the court's review. Justice Hyman's appeal to the computer's speed discards such a reality.

B. Added Details

78. Justice Hyman's antepenultimate criticism relates back to the distractive — i.e., inconvenient — nature of footnotes. He posits that "an assertion's source belongs near the assertion rather than hidden out of eyesight in the bowels of the document."[27] One of the sources cited by Justice Hyman comes from another distinguished jurist, Judge Abner Mikva, who shares his contempt for footnotes. Judge Mikva notes that "when [he] stopped using footnotes, [he] was forced to discard some marginally relevant thought," and "it is like having a trash can for such semi-relevant material."[28] At bottom, this speaks to efficiency on the part of the reader and the writer. In this context, efficiency and conciseness are closely intertwined. Maximizing Judge Mikva's argument for efficiency and conciseness might therefore go even further: perhaps we should return to handwriting every brief or opinion, that way writers do not feel the temptation to frenziedly type away at their keyboards and throw in more details than necessary. Humor me. Virtually every law school graduate by this time is far faster at typing than writing by hand, having likely been taught to touch-type for well over a decade. Drafting by hand would be an inordinately slower process. Writers would have to think carefully about each and every word penned. In all likelihood, the average length of any legal document would be cut in half. The whole profession would accordingly benefit from substantially more succinct prose. Now return to reality where the ideal brief is concise, thematic, and drives the reader toward an overarching view of the case. Is there no prospect of a footnote contributing to these aims? The writer struggling to optimize a transition between thoughts may well need to simply drop a footnote in order to avoid a clunky and long-winded narrative. The reader's inconvenience in looking down at the footnote might, in such a situation, be well received where the alternative is a muddled, verbose string of thoughts.

27 Michael B. Hyman, *Down with Footnotes*, 19 SCRIBES J. LEG. WRITING 140 (2020).

28 Michael B. Hyman, *Down with Footnotes*, 19 SCRIBES J. LEG. WRITING 140 (2020).

C. Context

79. Next, Justice Hyman takes aim at footnotes storing "expanded portions of statutes, regulations, transcripts, and similar material."[29] It is hard to deny footnotes "can convey information that is dense and dull, but essential" to establishing context.[30] The sentiment is magnified in cases too complex to brief bereft of contextual footnotes.[31] Even Justice Hyman seems to agree that this may be a necessary part of brief writing, though he advocates for "putting the material in an appendix or an attachment."[32] This is a curious thought. I am not sure why it is more tolerable to flip to an appendix rather than glance down at a footnote on the same page of text you were already reading from. Does this signify that endnotes are more appropriate than footnotes? Like an appendix, the endnotes come (predictably) at the end of the document, so we run into the same problem of breaking up the reader's flow — the difference of course being that it is more time consuming to bounce between the narrative and an appendix. In other words, the footnote is the lesser evil.

D. Special Effects

80. I largely agree with Justice Hyman's position that lawyers should not try to inject humor or drama into a brief.[33] His point that "something you find funny, a judge may find offensive, condescending, or callous," is a verity.[34] It is good practice to leave creative liberties for judges. However, humor and wit can take many forms. When implemented effectively, they can cut through to an audience in ways other communications cannot. Recall George Carlin's social commentary masquerading as stand-up comedy, how he surgically attacked topics like the "American dream" and capitalism. Carlin's humor and wit molded the overall points he wanted the audience to leave with. So it is here. Cases are often won based on who can tell the better story. To that end, there is room for some level of theater in a footnote to emphasize a point; if the goal is to tell the best story (in accordance with the law), and if a fragment of wit can drive home a point, consideration should be paid to the possible benefit of using said wit in a footnote. This category of footnote will often be most effective when writing a reply brief or memorandum used to pluck away at the other party's argument. Cheap shots have no

29 Michael B. Hyman, *Down with Footnotes*, 19 SCRIBES J. LEG. WRITING 141 (2020).

30 Paul F. McAloon, *Defending the Lowly Footnote*, N.Y. ST. BAR. J. 66 (2001).

31 See *The Third Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 108 F.R.D. 465, 566 (1986).

32 Michael B. Hyman, *Down with Footnotes*, 19 SCRIBES J. LEG. WRITING 141 (2020).

33 Michael B. Hyman, *Down with Footnotes*, 19 SCRIBES J. LEG. WRITING 141 (2020).

34 Michael B. Hyman, *Down with Footnotes*, 19 SCRIBES J. LEG. WRITING 141 (2020).

place here,[35] but dropping a footnote to use the other party's language against them is always a rhetorical strategy on the table. Another strategy might be to criticize a claim through tempered jabs. In one reply brief, I called attention to the fact that the other party (mis)cited outdated law from when William Howard Taft was still president. Was it inappropriate to invoke Taft? Quite possibly, but it felt good to chip away at the other party's credibility in what I believed to be measured éclat. Even still, I was cognizant not to linger on such a point. We should all heed Mark Twain's observation — in this case an admonishment — that "humor is only a fragrance, a decoration."[36] So, while I am not joining Justice Hyman's outright condemnation of this type of footnote, it seems axiomatic not to overindulge in snarky annotations.

III. Conclusion

81. Footnotes are, by and large, a product of our lack of time and ability to meticulously craft the most cogent and cohesive legal writing possible. They may not be ideal, but I am hopeful that this essay demonstrates they are not grammatical abominations devoid of merit. And while I assume Justice Hyman could flesh out his thoughts on the subject and excoriate some of my reasoning, my initial impression upon reading his piece has remained unchanged: in order for our system of justice to work, we should presume that each lawyer is doing their level best to zealously advocate as best as he or she can; it follows that, as readers, we should also presume that sometimes a footnote is an acceptable arrow given that lawyer's quiver.

35 See Paul D. Fogel & David J. de Jesus, *Don't Put Your Footnote in Your Mouth: Avoiding the Pitfalls of Using Footnotes in Briefs*, 48 No. 12 D.R.I. 76 (Dec. 2006).

36 Caroline Thomas Harnsberger, *Mark Twain At Your Fingertips,* 190 (2012).