DON'T* CRY** OVER FILLED MILK: THE NEGLECTED FOOTNOTE THREE TO CAROLENE PRODUCTS***

Membership on the Law Review is an invaluable learning experience both in substantive law and in the skills of research, analysis and expression. Recognition of the value of this experience by the legal profession generally makes membership on the Law Review a goal for most students.¹

The famous footnote four to United States v. Carolene Products Co.² has generated significant and plentiful scholarly discussion.³ The

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² 304 U.S. 144, 154 n.4 (1938).

equally important footnote three in Justice Stone's opinion, however, has not attracted as much attention from the academic community. This is an unfortunate oversight. Footnote three illustrates in microcosm many of the issues on the forefront of modern legal debate. It provides a starting point for an examination of the importance of foot-

notes in general to the world in which we live; for a study of the vital importance of dairy jurisprudence to the general field of bovine law, and by extension to American law; and for speculation that cozy assumptions as to the legal system’s human origins may be sadly mistaken.

Part I of this Aside describes footnote three’s contribution to the development of citation overkill in American law and the impending triumph of form over vulgar functionalism. Part II does not exist. Part III discusses footnote three’s influence on legal interpretation as exemplified in the law of dairy products, and of barnyard animals in general. Part IV examines footnote three’s origins and concludes that it was drafted by authorities hitherto ignored by “respectable” legal scholars.

I. TOWARD A THEORY OF DEONTOLOGICAL CITATIONAL DIALECTICISM: FOOTNOTE THREE AND DECONSTRUCTIVE FOOTNOTE TELEOLOGY

A. Citation: The Sincerest Form of Flattery

Footnote three is divided into two parts. The first paragraph contains a discrete and independent branch of the footnote’s constitutional theory. It reads:


Thus, paragraph one is the source of the doctrine that scientists and dieticians recognize the importance of butter fat and whole milk to the public health. It is significant for its modest ratio of four lines of text to

7 Cf. 7 I. CAESARIS, BELLO GALLICO 1 (1972) ("Gallia est omnis divisa in partis tris").
8 Carolene Prods., 304 U.S. at 150 n.3.
six lines of citations. Paragraph two, on the other hand, is the Court’s pinnacle of citation overkill:


Footnote three is an extraordinary display of raw citation power.10 Al-

9 Id.
10 One observer of the federal judiciary notes that the average number of citations in a Supreme Court opinion only reached 61.9 in 1983, from an average in 1960 of
though the statutory citations in paragraph two serve some function by telling the reader which states have controlled the sale of filled milk, the sheer volume of citations, unnecessary to support or clarify any argument in the opinion's text, represents a breathtaking dominance of form over function.

Analysis of footnote three demonstrates why it, or any footnote, matters. Legal citations, especially in the form of footnotes, deserve scholarly attention for several reasons. But in order to engage in such study, one must distinguish between academic and judicial footnotes.

In legal periodicals, footnotes differentiate one piece of work from the mass of other available literature: "Footnoting has evolved from primitive origins and use as a 'pure' reference into an artistic and abstract discipline that functions as a subtle, but critical, influence in the determination of promotion, tenure, and professional status."\(^1\) A footnote can also contain information useful in understanding the body of the work.\(^2\) Or it can suggest the absence of useful information in the text.\(^3\)

In a judicial opinion, a footnote can provide doctrinal guidance for future courts,\(^4\) or, like Carolene Products' famous footnote four,\(^5\) it can cause confusion in the lower courts and spawn a new jurisprudence.\(^6\) Or it can simply cause parties a lot of trouble.\(^7\)

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\(13\) See, e.g., Chused, Married Women's Property Law, 71 GEO. L.J. 1359, 1365 n.19 (1983) ("The men's wills were sampled by turning the microfilm crank 10 times and reading the first male will to appear thereafter.").


\(15\) See Carolene Prods., 304 U.S. at 154 n.4.

\(16\) See, e.g., Sedima S.P.R.L. Inc. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985) (discussing elements of “pattern of racketeering activity” for purposes of Racketeer In-
One court opined that a judicial footnote "is as important a part of an opinion as a matter contained in the body of the opinion and has like binding force and effect." Courts have been less respectful of academic footnotes. Witness the First Circuit’s audacious suggestion that Professor Laurence Tribe’s billing of $5,500 for twenty hours’ work preparing an eighteen-line footnote for a brief was excessive.

B. How Life Imitates the Bluebook

In the final analysis, footnotes are important mainly when they guide the reader to authority for a stated proposition. Citation is the highest form of legal discourse. It has a history as long and rich as that of the law itself. The first codification of rules for legal citation occurred as early as the late fifteenth century. It is no coincidence that Europe’s Renaissance was contemporaneous with the rise of legal citation manuals.

The civilizing influence of citation systems reached its highest point with the development of A Uniform System of Citation (“the Bluebook”). The Bluebook was first published in 1926, during a period of unprecedented national prosperity. Again, it cannot be mere...
coincidence that the ultimate citation manual originated at such a salu-
rious moment in history.

The Bluebook did not gain widespread acceptance immediately, of
course. It "was not widely adopted [by academic journals] until the
1930s," and it did not provide citation forms for statutes until the
twelfth edition in 1976. Therefore, the Court did not write *Carolene
Products*, including footnote three, under the Bluebook's auspices. This
is a pity, because footnote three, unnecessarily long as it is, could have
been even longer had the Court used modern bluebooking techniques.
Stronger formalistic scrutiny would have allowed the footnote to ob-
scure further the residual functionalism of the second paragraph.

For, while misguided commentators may scoff, one must cite
each unofficial state statutory compilation with the prescribed abbrevi-
ation and give the name of its publisher in parentheses. Adherence to
this rule would have enhanced the length and massiveness of footnote
three. Similarly, inclusion of the date of each statutory compilation
and relevant supplement would have lengthened the footnote without
adulterating it with particularly useful information. For example, if
modern bluebooking techniques were used, the statement "Md. Ann.
Code, Art. 27, § 281" would read "MD. ANN. CODE art. 27, § 281
(1924)." And if footnote three were written today, the same statute
would be cited "MD. HEALTH-GEN. CODE ANN. § 21-1210 (1987)."

The addition of different typefaces within the same citation lends
an element of welcome unreadability to modern footnotes. Although
some argue that *LARGE AND SMALL CAPITALS* are unnecessary when
citing statutes or books in law review footnotes, such arguments re-
reflect the type of permissiveness that leads us down the road to barba-

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25 Id.
26 See id. at 21 n.143.
27 See Axel-Lute, *Legal Citation Form: Theory and Practice*, 75 L. LIBR. J. 148, 152 (1982) ("[I]t may make sense to specify West or Deering in California and Mc-
Kinney or Consol. in New York, but no one in New Jersey should bother to add West
to an N.J.S.A. citation—nor should they, or do they, bother to write it as N.J. Stat.
Ann. And there is not much point anywhere in the United States in adding West to a
28 See *BLUEBOOK*, supra note 23, Rule 12.3(d) at 59.
29 See infra note 66.
30 See *BLUEBOOK*, supra note 23, at 191.
31 See id. at 191-92. Moreover, "Burns Ind. Stat., 1933, § 35-1203" would now
be IND. CODE ANN. § 16-6-6-2 (Burns 1984). See id. at 187.
32 See, e.g., *BIEBER'S CURRENT AMERICAN LEGAL CITATIONS* 22 (M. Prince 2d ed. 1986) (Maryland statute should be cited "Md. Health-Gen. Code § 21-1210
Ever since Gutenberg printed the Bible, hard-to-produce typefaces have represented advances in Western civilization.

C. If We Will Not Cite Ourselves, Who Will Cite Us?

As demonstrated, footnote three is a fine model for studying the triumph of form over mere function in footnotes. But it is also a good example of how to pad the amount of support for an assertion. Footnote three contains voluminous citations in support of two factual statements. This highlights the critical importance of providing support for as many assertions as possible, no matter how self-evident many of them may seem. Respected federal judges have scoffed at the modern habit of documenting the most innocuous assertions. But they fail to recognize that the more propositions that need documentation, the more sources that can be cited. Decreasing the number of footnotes would rob many legal publications of their *raison d'être*—being cited.

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33 See 4 THE BABYLONIAN TALMUD (Seder Nezikhin), Aboth, ch. I, 14 (I. Epstein ed. 1961) ("If I am not for myself, who is for me, but if I am for my own self [only], what am I, and if not now, when?" (footnotes omitted)).

34 See infra note 39.

35 See Mikva, Goodbye to Footnotes, 56 U. COLO. L. REV. 647, 653 (1985); Posner, supra note *, at 1350.

III. DAIRY PRODUCTS AND DISTRUST: FOOTNOTE THREE AND MEANING

The statutes cited in footnote three all deal in some way with the question "What is filled milk," and by extension, "What is milk." Footnote three symbolizes the key to understanding "law": interpreting terms. Unless there is common understanding, there can be no communication. And without communication, there can be no informed debate or adversarial process. Defining the operative words is crucial to legal analysis. As one legal scholar put it, "[a]ll words are different. That's why we have different words."

Footnote three is a fitting starting point for a study of legal interpretation, because United States v. Carolene Products was part of a

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39 See supra note 6.

40 Statement of Professor Gary Francione to first year Torts class, University of Pennsylvania Law School (September 1985).

41 304 U.S. 144 (1938).
most esteemed body of law: dairy jurisprudence, or those judicial decisions dealing with milk and its byproducts.42 Before Carolene Products,43 the most intriguing American dairy case was the 1912 decision, United States v. 11,150 Pounds of Butter.44 There, the Eighth Circuit held that the presence of an abnormal amount of moisture in butter did not make it "adulterated butter" according to a Minnesota health statute.45 Since then, dairy cases have contributed to the development of constitutional law,46 commercial law,47 "slip-and-fall" torts,48 securities regulation,49 and family law.50

Although dairy jurisprudence is vitally significant in its own right, one should treat it as a distinct subset of the wider field of cow law.51

42 Cf. G. Chapman, J. Cleese, T. Gilliam, E. Idle, T. Jones & M. Palin, Monty Python's The Life of Brian 9 (Methuen ed. 1979) (arguing that Christ's remark in the Sermon on the Mount, "Blessed are the cheesemakers," was not meant literally, but rather "refers to any manufacturers of dairy products.").
43 Cf. Ackerman, Beyond Carolene Products, supra note 3.
44 195 F. 657 (8th Cir. 1912).
45 See id. at 659.
46 See, e.g., Carolene Prods., 304 U.S. at 154 n.4; Setzer v. Mayo, 150 Fla. 734, 740 9 So. 2d 280, 282-83 (Fla. 1942) (upholding constitutionality of Florida filled milk statute on grounds similar to those used in Carolene Products); see also Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 372 (1976) (per curiam) (noting that "[a]djudication of Commerce Clause challenges to the validity of local milk regulations burdening interstate milk is not a novel experience for this Court," and citing five leading cases without which American federalism might have been utterly different).
47 See, e.g., Neu Cheese Co. v. FDIC, 825 F.2d 1270, 1272 (8th Cir. 1987) (dealing with waiver of security interest in milk and its proceeds under U.C.C. § 9-306(2) (1977)).
49 See, e.g., Activator Supply Co. v. Wurth, 239 Kan. 610, 620, 722 P.2d 1081, 1089 (1986) (promise of "from Milk to Profit with Lactic Cultures" gave rise to expectation of profit for purpose of applicability of state securities laws); Review of Supreme Court's Term, 56 U.S.L.W. 3119, 3121 (1987) ("While it may be appropriate for dairy farmers to boast that they make butter the old fashioned way—'we churn it'—such claims should be avoided by stockbrokers in the handling of customer accounts.").
51 Cf. 2 The Babylonian Talmud (Seder Khodashim), Chullin, ch. VII, at 576-647 (1 Epstein ed. 1961) (discussing separation of milk and meat on grounds that consuming them together would be unholy because they are distinct proceeds of the same animal). There is some confusion in the Bankruptcy Courts as to the relationship between milk and cows. Compare In re Jackels, 55 Bankr. 67, 69 (Bankr. D. Minn. 1985) ("When there can be no doubt that in agricultural parlance milk is a product of a cow, that is not the meaning of the word product in the context of security interests"); Pigeon v. Production Credit Ass'n of Minot (In re Pigeon), 49 Bankr. 657, 660 (Bankr. D.N.D. 1985) (holding that milk is not a "product" of a cow within the meaning of 11 U.S.C. §+552(b) (1982)); In re Serbus, 48 Bankr. 5, 8 (Bankr. D. Minn. 1984) (same) with Smith v. Dairymen, Inc., 790 F.2d 1107, 1112 (4th Cir. 1986) (holding that milk is, in fact, the product of a cow); In re Delbridge, 61 Bankr. 484,
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Cattle have affected our legal tradition through a broader range of cases than those decided under dairy jurisprudence. Cow law has been on the cutting edge of legal development since Sherwood v. Walker. It has entered into judicial analysis of such doctrines as the insanity defense and cautionary jury instructions.

Having placed dairy jurisprudence in its proper context under the rubric of bovine jurisprudence, this Aside can now proceed with its inquiry into legal interpretation. The difficulty in determining what falls under filled milk statutes reflects the main problem in any attempt to define legal concepts: all interpretation is subjective. How can one say objectively what is or is not milk when such an intellect as Judge Friendly had such trouble determining "what is chicken?"

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Compare the traditional filled milk scenario as illustrated in Carolene Products (in which a dairy product is held out for sale when a part of it does not exist as claimed) with the facts of Wheeler v. Commissioner, T.C. Memo 1983-385, 46 T.C.M. (CCH) 642 (1983), in which dairy cattle were claimed as a tax loss when they "were nothing more than a 'rent-a-herd' staged to lead [IRS inspectors] into believing they were owned by respondents."

66 Mich. 568, 33 N.W. 919 (1887); see also A. Herbert, Uncommon Law 201, 205-06 (new ed. 1969) (discussing an English common law case holding that a cow could be a negotiable instrument).

See United States v. Chapman, 5 M.J. 901, 903 (A.C.M.R. 1977) (Mitchell, J., concurring in part and dissenting in part) (for determining defendant's "substantial capacity" to appreciate criminality of his act, "substantial means something more than slight or not just a little. But how much more? The age old puzzler: 'When does a calf become a cow?'").

See United States v. Schatz, 40 C.M.R. 934, 936 (N.B.R. 1969) (instructing factfinder to ignore certain evidence "is like telling a person to stare into the corner for three minutes without at anytime [sic] thinking of a purple cow. It simply cannot be done!").

Some of the principles herein discussed may be found in the law of other barnyard animals. See infra notes 58-59 and accompanying text. This should not be surprising; after all, cows are not the only animals on a farm. See In re Maike, 77 Bankr. 832, 839 (Bankr. D. Kan. 1987) (holding that the "laundry list" of animals in the song "Old McDonald's Farm" is not all-inclusive); Lecture of Margaret Baldwin to Three-Year-Old Class, First Congregational Church Nursery School, Eugene, Oregon (1966) ("Old McDonald had a farm . . . And on that farm he had some cows . . . . And on that farm he had some ducks . . . . And on that farm he had some pigs . . . ."); cf. In re Delbridge, 61 Bankr. 484, 488 n.7 (Bankr. E.D. Mich. 1986) (citing the judge's kindergarten teacher on the point that "a cow's offspring, i.e., a baby cow, is called a calf—not milk").


Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 117 (S.D.N.Y. 1960); see C. Reitz, Contracts as Basic Commercial Law 7 (1975) ("What does Judge Friendly mean when he says that 'the word 'chicken' standing
terminating the plain meanings of words has always been difficult. In the end, legislatures' attempts, as illustrated in footnote three, to pin down a definition of milk leaves a mystery that presently limited modes of legal thought cannot solve.

IV. Citation Manual of the Gods?

The reason we are unable to unlock the mysteries of footnote three is that we are bound by received wisdom as to its origins. This is true partly because the origin of footnote four is so well documented. Justice Stone's biographer, Alpheus Thomas Mason, revealed that Louis Lusky, Justice Stone's clerk at the time and later a Columbia Law School professor, wrote, in the first draft of the United States v. Carolene Products, what became the second and third paragraphs of footnote four. Lusky admitted to Mason that he wrote the first draft of footnote four, exclusive of the first paragraph, and that Justice Stone adopted it "almost as drafted." In a published article, Lusky did not state outright who wrote the last two paragraphs of footnote four, but explained how the first paragraph was added to the footnote after a suggestion from Chief Justice Hughes.

So we know that footnote four was a team effort among Chief Justice Hughes (or his clerk), Lusky, and Justice Stone. The sources that discuss the origins of footnote four, however, are suspiciously silent about the genesis of footnote three. What accounts for this conspiracy of silence? Who wrote footnote three? Was it Justice Stone? Chief Justice Hughes? Louis Lusky? A combination of the three? Or superintelligent astronauts from another world?

alone is ambiguous? Doesn't everyone know what a 'chicken' is?'). But see R. Dworkin, Taking Reitz Seriously (1977).

The link between Frigaliment and cow law is evident in the First Circuit's opinion in A.J. Cunningham Packing Corp. v. Florence Beef Co., 785 F.2d 348, 348 (1st Cir. 1986) ("A quarter century ago Judge Friendly confronted the question of 'what is a chicken'. [sic] Today we are asked to review a case in which the jury had to confront the meatier issue of 'what's the beef?' [sic] (citation omitted)).

For a description of another chicken case with far-reaching consequences for American jurisprudence, see B. Flanagan, Last of the Moe Haircuts, 74-75 (1986).
Footnote three is an orgy of legal citation. Accordingly, for evidence about its origins we should look at the original authors of the Bluebook. Only one so impressed with citation and ponderous documentation could have produced such a footnote. Legal literature is fortunately rife with clues as to the Bluebook’s true origin.

Judge Richard Posner has written that “[t]he pyramids in Egypt are the hypertrophy of burial. The hypertrophy of law is [the Bluebook].” Judge Posner may, for once, be on to something. The same entities responsible for the pyramids are probably responsible for the advent of the Bluebook. The Egyptian pyramids were, according to strong evidence, actually built by extraterrestrials as navigational aids. Experts in the subject agree that many phenomena, mysterious to the ancients, were caused by the arrival on Earth of an advanced race with technology beyond human understanding.

The Bluebook almost certainly came from such a source. Like the technology of the ancient astronauts, the Bluebook is puzzling to all but an anointed few—who are probably not entirely human—to whom its mysteries are revealed. Who but a truly advanced race would have taken for granted that the title of the Journal of College and University Law would be abbreviated “J.C. & U.L.?” Only a population with an intelligence far greater than our own would have produced a citation manual that requires its own instructional guide.

Evidence of the extraterrestrials’ presence permeates the annals of

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64 See supra note 29.
65 Posner, supra note *, at 1343.
66 See supra note 36.
67 See E. Von Đäniken, Chariots of the Gods? 74-79 (Bantam ed. 1974) (explaining that pyramids could not have been built by humans and are perfectly placed as guides to aerial navigation); A. Landsburg & S. Landsburg, In Search of Ancient Mysteries 118-19 (1974) (in examining Egyptian, as well as Mayan, Aztec and Toltec pyramids, authors found “nothing that could demolish any of the various speculations about helpful beings from another planet.”).
68 See E. Von Đäniken, supra note 67, at 7-12.
69 In ancient Greece, these beings were known as “demigods” and “oracles.” Anthropologists categorize them as “shamans” or “medicine men.” Nowadays, they are often referred to as “Production Editors.”
70 See Bluebook, supra note 23, Rule 16.2 at 94 (“If the periodical you wish to cite is not given in full on this list, you may determine the proper abbreviation by looking up each word in the periodical’s title on this list and on the list of geographical abbreviations found on the inside back cover. Put together the abbreviations for each word to form the full abbreviated title.”); id. at 99 (abbreviation for “Journal” is J.); id. at 96 (abbreviation for “College” is C.); id. at 104 (abbreviation for “University” is U.); id. at 100 (abbreviation for “Law” is L.). Following the Bluebook’s abbreviation rules, the name of the University of Southern North Dakota at Hoople Quarterly Forum of Eastern Law, if it existed, would be abbreviated “U.S.N.D. (Hoop.) Q.F.E.L.”
71 See generally E. Maier, How to Prepare a Legal Citation (1986) (cover blurb: “Your complete guide to . . . Using A Uniform System of Citation (Bluebook)”).
legal history. For example, what was Justice Holmes' "brooding omnipresence in the sky"? Could it have been the Bluebook authors, watching over us? And what was Justice Stewart talking about when he mentioned the "orbit of the common law?"

Although some Justices might try to cover up their knowledge of the cosmos by pretending, for example, that the "substance of the Milky Way" is "unknown," the truth is visible to those who have the courage to look for it.

The fact that the Bluebook is "the universally accepted standard for citations" reveals its extraterrestrial origin. The Bluebook has yet to conquer the entire world of law, and its rules still leave uncertain the citation of particular sources. Only recognition of the special origins of the Bluebook and of footnote three will cause such a conquest and remedy such ambiguities. Only then can we live up to the imprecation of the ancient philosophers: Verba tene, res sequetur.

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76 Compare Bluebook, supra note 23, Rule 2.2 at 8 (definition of see as signal in footnotes) with 26 U.S.C. § 7806(a) (1982) (definition of "see" as having no legal effect in Internal Revenue Code).
78 Loosely translated, "Form over substance." But see Caius Julius Victor, Ars Rhetorica, I (4th century A.D.) (quoting Marcus Porcius Cato (Cato the Elder)), quoted in J. Bartlett, Familiar Quotations 95 (15th ed. 1980) ("Rem tene, verba sequentur," or, "Grasp the subject, the words will follow.").