

FOOTNOTES: A STORY OF SEDUCTION

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I. INTRODUCTION

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¹ When I first started writing legal scholarship about lesbians, law review editors wanted an explanatory footnote of the term “lesbian.” I balked. I argued. I capitulated. And then I found some favorites:

The use of the word “lesbian” to name us is a quadrifold evasion, a laminated euphemism. To name us, one goes by way of a reference to the Island of Lesbos, which in turn is an indirect reference to the poet Sappho (who used to live there, they say), which in turn is an indirect reference to what fragments of her poetry have survived a few millennia of patriarchy, and this in turn (if we have not lost you by now) is a prophylactic avoidance of direct mention of the sort of creature who would write such poems or to whom such poems would be written . . . assuming you happen to know what is in those poems written in a dialect of Greek over two thousand five hundred years ago on a small island somewhere in the wine dark Aegean Sea.

MARILYN FRYE, *THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY* 160 (1983) (ellipses in original).

In naming this work “lesbian,” I invoke a lesbian context. And for this reason I choose not to define the term. To define “lesbian” is, in my opinion, to succumb to a context of heterosexuality.

SARAH HOAGLAND, *LESBIAN ETHICS: TOWARD NEW VALUE* 8 (1988).

The lesbian is a woman ablaze who is reborn from the essential of what she knows (she) is. The lesbian is an initiator, an instigator. . . . The lesbian is a threatening reality for reality. She is the impossible reality realized which reincarnates all fiction, chanting and enchanting what we are or would like to be.

NICOLE BROSSARD, *THE AERIAL LETTER* 121 (1988) (translation by Marlene Wildeman).

II. THEORETICAL BACKGROUND

² I would like to “chant and enchant,” to “reincarnate all fiction.” I mean, who wouldn’t? Discrimination would seem rather irrelevant if one is a “threatening reality for reality.” Although perhaps that’s the motivation for the discrimination? There must be a theory of discrimination as retaliation.

³ There are theories of everything. I have been seduced by theory, I am not ashamed to tell you. And I like to think I have seduced it in return, although that may be brash on my part.

⁴ Here is a theory of footnotes:

Like the high whine of the dentist’s drill, the low rumble of the footnote on the . . . page reassures: the tedium it inflicts, like the pain inflicted by the drill, is not random but directed, part of the cost that the benefits of modern science and technology exact.

As this analogy suggests, the footnote is bound up, in modern life, with the ideology and practices of a profession.

ANTHONY GRAFTON, *THE FOOTNOTE: A CURIOUS HISTORY* 5 (1997) (specifically discussing the theory of footnotes in the profession of history).

⁵ My practice of footnotes started out as a physical rather than theoretical attraction. I’m in law school, in the ages before the advent of the personal computer. I have a white legal pad and a yellow legal pad, side-by-side: a couple, a dyad, a pairing. On the white legal pad, I write, in pencil, the text of the draft of my first law review article. On the yellow legal pad—as you’ve already guessed—I write, in pencil, the footnotes of the draft of my first law review article. There is something seductive in this, and not only because there is a lesbian chanting and enchanting in those penciled pages. Most people don’t notice her. But I do. *See People v. Lovercamp*, 118 Cal. Rptr. 110 (Cal. Ct. App. 1974).

To see her. Her. See!

The confusion about the “see” signal was resolved by the seventeenth edition of *The Bluebook*, which provided that [no signal] is used when the “[c]ited authority (i) directly states the proposition” (ii) identifies the source of a quotation, or (iii) identifies an authority referred to in the text,” while the signal “see” should be used when the cited authority “clearly supports the proposition” as when the “proposition is not directly stated by the cited authority but obviously follows from it; there is an inferential step between the authority cited and the proposition it supports.” Rule 1.2, *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* 22-23 (Columbia Law Review Ass’n et al. eds, 17th ed. 2000). The sixteenth edition, published four years earlier had omitted the category of “directly states the proposition” from the [no signal] designation and had provided that “see” should be used when the cited authority “directly states or clearly supports the proposition.” Rule 1.2, *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* 22 (Columbia Law Review Ass’n et al. eds, 16th ed. 1996). This was a departure from previous Bluebook formulations which provided that “see” as a signal was an indication that there was some inference that was required. *E.g.*, Rule 1.2, *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* 6 (Columbia Law Review Ass’n et al. eds, 12th ed. 1976) (“*See*: cited authority constitutes basic source material that supports the proposition. ‘See’ is used instead of ‘[no signal]’ when the proposition is not stated by the cited authority but follows from it.”).

⁶ See! Physical because writing, like seduction, is both mental and physical. Listen to this: Contact between the point of a pen and a sheet of paper is the locus of the realization of a physical relationship that finds its basis in a desire to transmit a message, and in the recognition of the formal conventions of writing as a means of communication. The point of a pen carries out actions which are grounded in the desire to elaborate a visual thought, and it turns itself into an instrument for an initial and theoretical understanding of something which is attempting to take shape in the mind, of something that seeks its structure in the real experience [of] a place, and in various sensations, motivations, and circumstances that necessarily have a bearing on the artist's—the sculptor's—"professional" activities.

MAURO STACCIOLI, *SCULPTURA* 11 (1990).

There's that term "professional" again. Only this time, it's not dentistry or history or even law, but sculpture.

⁷ No. I am not a sculptor. Although I have been a "resident artist" at the Djerassi Resident Artists Program in mountains overlooking the Pacific Ocean, where I first saw the sculptures of Mauro Staccioli embedded in a California live oak grove, next to a redwood grove, next to a meadow. See <http://www.djerassi.org> (last visited Nov. 16, 2006). There are six sculptures, huge concrete-seeming forms in stark shapes that play against the landscape. They impose upon it, like footnotes.

⁸ Footnotes are not supposed to impose. "What footnotes should be used for, however, is citations. If the reader knows this is all they contain, the reader is not even apt to glance at them unless a specific verification need arises." Thomas Haggard, *In Defense of the Lowly Footnote*, 10 S.C. LAW. 12 (Apr. 1999); cf. K.K. DeCivier, *The Footnote: An Interruption*, 26 COLO. LAW. 47 (May 1997) (arguing that footnotes may be helpful to supplement statements in the text with extensive quotes or string cites and may a good way to respond to peripheral points by opposing counsel). *But cf.* J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1989) ("Perhaps the footnote might state the real point of the article in a highly economical way.").

⁹ *Contra* Robert A. Destro, *Federalism, Human Rights, and the Realpolitik of Footnote Four*, 12 WIDENER L.J. 373 (2003); Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote 4*, 6 S. TEX. L. REV. 163 (2004); Peter Linzer, *The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone*, 12 CONST. COMMENT. 277 (1995); Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093 (1982); Matthew Perry, *Justice Stone and Footnote 4*, 6 GEO. MASON U. CIV. RTS. L.J. 35 (1996); L.A. Powe, Jr., *Does Footnote Four Describe?*, 11 CONST. COMMENT. 197 (1994); Elizabeth J. Wallmeyer, *Filled Milk, Footnote Four & The First Amendment: An Analysis of the Preferred Position of Speech After the Carolene Products Decision*, 13 FORD. INTELL. PROP. MEDIA & ENT. L.J. 1019 (2003).

¹⁰ This most famous footnote in American jurisprudence provides:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. [citation omitted].

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see [citations omitted]; on restraints upon the dissemination of information, see [citations omitted]; on interferences with political organizations, see [citations omitted]; as to prohibition of peaceable assembly, see [citation omitted].

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, [citation omitted] or national [citations omitted], or racial minorities [citations omitted]; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare [citations omitted].

United States v. Carolene Prod. Co., 304 U.S. 144, 152-53 n.4 (1938).

¹¹ I am not embarrassed to admit that when I first heard about footnote four, in law school it must have been, when I was drafting my own footnotes on those yellow legal pads, a lesbian chanting and enchanting in the pencil marks, I thought it a mighty fine and perhaps even helpful footnote. Certainly there was lots of “prejudice” and I’d bet my bottom dollar that dykes were a “discrete and insular minority,” though it had recently been mentioned to me that I was not nearly discrete enough. I might add that this was the time of Anita Bryant, both of us living in the Sunshine State. No, we were not former lovers! Though I did think once or twice that she must have been “seduced and abandoned” to be so angry and involved with the “queer” issue. See ANITA BRYANT, *THE ANITA BRYANT STORY: THE SURVIVAL OF OUR NATION’S FAMILIES AND THE THREAT OF MILITANT HOMOSEXUALITY* (1977).

¹² The courts were not kind. Maybe not always as consistently mean-spirited, paranoid, and Bible-quoting as Ms. Bryant (although sometimes, indeed, they were) [citations omitted]. But not kind.

¹³ And I kind of expected better from some legal theorists.

¹⁴ See e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1404 n.141 (2006) (“It is important also to distinguish between prejudices and views held strongly on religious or ethical grounds. We should not regard the views of pro-life advocates as prejudices simply because we do not share the religious convictions that support them. Almost all views about rights—including pro-choice views—are deeply felt and rest in the final analysis on firm and deep-seated convictions of value).

III. THIS IS THE BODY OF THIS “ARTICLE”

¹⁵ So, here’s the thing: When someone is screaming at me that I am a child molester and pervert and freak and should be jailed or burn in hell, I’m not really impressed that the source of their violence is a religious conviction. I’m fifteen or sixteen or eighteen or twenty or twenty-two and already writing footnotes. I’m going into a bar, a women’s coffee house, a fucking bookstore, and they are screaming and throwing bottles and carrying signs. I’m not going to admit to you that I am scared, because I’m going to tell you I never was, not once was I ever scared, not once.

¹⁶ Footnotes are your friends, I tell my students. You can be called names on the street (indulge me in my use of the passive voice, dear editors, dear readers; I have my political reasons for resorting to it), but you can fight back with footnotes.

¹⁷ Each footnote I have ever written is a little shield.

¹⁸ Yes, I am a pacifist. But some things are non-negotiable.

¹⁹ My body.

²⁰ Her body.

²¹ Our bodies together.

²² That is the story I have to tell, to tell over and over and over and over in as many ways as possible. It is the story that seduced me. The story that I seduced out of nothing with only my passion.

²³ Things are different now, they say. Better, don’t you think? I mean, there are lesbians on television for goodness sakes. And the law has “evolved.” I mean, you two could go to Massachusetts and marry each other! Or to South Africa, probably. And there are civil unions and civil partnerships and domestic partnerships and all sorts of things were you can bind yourselves to each other and to the state—a sort of cute little threesome, don’t you think? Do you know the term “ménage à trois”? In *Goodridge v. Department of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), the controversial same-sex marriage opinion by the Massachusetts Supreme Judicial Court, the court articulated it so clearly: marriage is a relationship amongst “three partners”: “two willing spouses and an approving State.” *Id.* at 954. I kind of find that scary. Not that I don’t like Massachusetts. But still. I have never been seduced by a state. I’ve never been passionate about a state. Though of course, I have put many states in many footnotes over the years. And traveled in my body to many states. Including Massachusetts. I’ve a fondness for Massachusetts, actually, for that’s where my life was saved. But that’s another story, although certainly a story about the body, *see* Ruthann Robson, *Notes from a Difficult Case*, 21 CREATIVE NONFICTION 6 (2003), *reprinted in* IN FACT: THE BEST OF CREATIVE NONFICTION (Lee Gutkind ed., 2005).

IV. CONCLUSION

²⁴ I and my lover could now be included in this statement: Pennsylvania Judge (and later Dickinson Law School Dean) Laub once said, “Anyone who reads a footnote in a judicial opinion would answer a knock at his hotel door on his wedding night.” Gerald Lebovits, *The Bottom Line on Footnotes and Endnotes*, 75 N.Y. St. B. J. 64 & n.3 (Jan. 2003) (citing RUGGERO J. ALDISERT, *OPINION WRITING 177* (1990) (quoting Burton S. Laub)).

²⁵ But I had wanted a revolution and thought that it might blossom on a yellow legal pad, with carefully written text, punctuated by numbers, as if it were a sculpture. Art, I thought, had potential. As did law. Dentistry I was not so sure about and never considered it as a profession. History, yes. There was history. But I have always loved the future. A future with her.

²⁶ As Nicole Brossard has written, “a lesbian who does not reinvent the world is a lesbian in the process of disappearing.” BROSSARD, *supra* note 1, at 136. Similarly, Monique Wittig’s famous instruction in *Les Guérillères* is “Make an effort to remember. Or, failing that, invent.” MONIQUE WITTIG, *LES GUÉRILLÈRES* 89 (David LeVay trans., 1969).

²⁷ We must seduce our revolution.