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JUSTICE GINSBURG’S FOOTNOTES

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I don’t think I will be giving away any state secrets if I reveal that one of the most memorable tasks I performed during my clerkship with Justice Ginsburg in the 1998-1999 term of the Supreme Court involved working on an opera-based footnote skirmish that broke out between her and Justice Scalia during the penning of an opinion in the Fourth Amendment case of *Minnesota v. Carter*. That case raised the question of whether the Fourth Amendment protects people who are social guests in someone else's house from unreasonable searches there. Defendants Carter and Johns had been in Thompson's house for a total of 2½ hours when a police officer, acting on a tip from an informant, peered through a gap in some closed window blinds and observed Carter and Johns bagging cocaine. Searches of the defendants' car and the apartment turned up forty-seven grams of coke. The Minnesota Supreme Court held that the officer had violated Carter and Johns' Fourth Amendment rights by peering through Thompson's window without a warrant, and it reversed their convictions.

The U.S. Supreme Court took the case and reinstated the convictions. In an opinion written by Chief Justice Rehnquist, the Court held that the two defendants did not have legitimate expectations of privacy in Thompson's house, distinguishing the facts from those in *Minnesota v. Olson*, in which the Court had held that overnight guests in someone

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1 Professor of Law, Boston University School of Law. I would like to thank Mark Dahl for tremendous research assistance that was essential to the preparation of this article.
2 *Id.* at 471-72.
3 *Id.* at 472.
else's house do have such expectations. Justice Scalia wrote a concurrence, and Justice Ginsburg wrote a dissent. It's been ten years, so I'm not sure I can recreate the sequence of events entirely, but the footnote skirmish broke out sort of like this. First, Justice Ginsburg circulated a dissent in which she claimed that United States v. Katz, which had held that the government violated a defendant's Fourth Amendment rights by surreptitiously recording his conversations on a public telephone and which stated that "the Fourth Amendment protects people, not places," was "key to [her] view of the case." Justice Scalia then drafted a concurrence in which he argued that the text of the amendment pretty much protects people only when they are in their own houses; in the midst of this, he criticized Justice Ginsburg's reliance on the Katz test, which Justice Scalia noted "has come to mean the test enunciated by Justice Harlan's separate concurrence."

It was at this point, I believe, when the action moved to the footnotes. Justice Ginsburg drafted a note addressing what she called "Justice Scalia's lively concurring opinion." She argued that "[i]n suggesting that we have elevated Justice Harlan's concurring opinion in Katz to first place . . . Justice Scalia undervalues the clear opinion of the Court that 'the Fourth Amendment protects people, not places.' . . . That core understanding is the leitmotif of Justice Harlan's concurring opinion. One cannot avoid a strong sense of déjà vu on reading Justice Scalia's elaboration. It so vividly recalls the opinion of Justice Black in dissent in Black." This reference to leitmotifs was impossible for Justice

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4 Id. at 471-74.
5 Id. at 474-78.
6 Id. at 481-84.
7 Dear lord, I feel old.
9 Id. at 351.
10 Carter, 525 U.S. at 483.
11 Id. at 477.
12 Id. at 483 n.2.
13 Id.
Scalia to ignore. Both Scalia and Ginsburg are opera fans—Scalia, for instance, always goes with clerks to a pizza place in the District where opera is played on the jukebox—and they are also good friends, so it is not surprising that Scalia picked up on the reference to take some light-hearted stabs at the dissent. In his own footnote responding to Justice Ginsburg's footnote, Justice Scalia wrote:

That the Fourth Amendment does not protect places is simply unresponsive to the question whether the Fourth Amendment protects people in other people's homes. In saying this, I do not, as the dissent claims, clash with "the leitmotif" of Justice Harlan's concurring opinion" in Katz . . . ; au contraire (or, to be more Wagnerian, im Gegenteil), in this regard I am entirely in harmony with that opinion, and it is the dissent that sings from another opera.\(^\text{14}\)

I think I was in the study of my tiny, rat-infested apartment two blocks from the Court when Justice Ginsburg first told me about Justice Scalia's footnote while we were on the phone talking about some last minute details in the opinion. If I remember right, she seemed to be quite amused by the opera references, and while I might just be totally making this up, I think there was at least a little talk about perhaps firing back a couple of opera-based retorts in Scalia's direction. Whether or not this possibility was ever in fact raised outside of my own head, no further opera references were ever made, and the footnote skirmish came to an end as quickly as it had started.

At first glance (and, admittedly, at second and maybe even third glances), footnotes may seem like dull things to discuss, but think about them just a little harder and perhaps you'll come to agree with me that they are actually pretty interesting. To an expert, for example, even the most straightforward kind of footnote—one that simply cites one or more sources to support a proposition in the text—can turn out to be remarkable for what it cites, or more intriguingly, what it fails to cite. But when the footnotes go beyond mere citation to

\(^{14}\text{Id. at 477 n.3.}\)
extend an argument or respond to an argument or to engage in some attenuated speculation about a related point or make a joke, they can become downright entertaining, even fascinating. Footnotes allow the writer to break away from the main text, to use a different tone, to consider tangents—basically to carry on two conversations with the reader at once, or at least one-and-a-half. No wonder that writers throughout the ages have used footnotes to great effect. The eighteenth century historian Edward Gibbon, for instance, used notes extensively in his classic *History of the Decline and Fall of the Roman Empire*, about which footnote historian (yes, there exists at least one) Anthony Grafton has written: "[N]othing in that work did more than its footnotes to amuse his friends or enrage his enemies."15 And the late, great David Foster Wallace used notes in his fiction to—as he explained in a priceless television interview with Charlie Rose—break out of the linearity of the text and mirror the fractured nature of reality in his work.16

At the time I was starting to think about what I might write and talk about at this symposium, I was thinking about footnotes quite a bit as they related to my own work. I had written a book in which I used footnotes extensively, mostly for comic effect and in large part to pay homage to Wallace, but my editors were very wary of them and kept urging me to cut them out or at least cut them down, claiming over and over that they would look "lame sitting there at the bottom of the page." I was forced to articulate why I wanted to keep the footnotes in, which may have convinced the editors to let me keep a few of them, although in the end I would say probably 2/3 ended up getting cut.

All this thinking about footnotes led me to decide to write a short piece on Justice Ginsburg's footnotes, which is what this piece is. I was curious about how often she used

them and why. I also thought that perhaps I could spark a new field of study in the legal academy. Goodness knows there are enough footnotes in the legal documents out there to keep researchers busy for decades. This may seem a bit far-fetched, and of course it is, but at least some study of footnotes is, I think, worthwhile. As the aforementioned footnote historian has argued, although "the production of footnotes sometimes resembles less the skilled work of a professional carrying out a precise function to a higher end than the offhand production and disposal of waste products," nonetheless, "historians . . . cannot afford to ignore waste products and their disposal. The exploration of toilets and sewers has proved endlessly rewarding to historians of population, city planning, and smells."

So, anyway, there's that.

My original plan when preparing to write this paper had been to read, study, and analyze every single footnote ever written by Justice Ginsburg as a Supreme Court Justice. I had this idea that I would come up with a complicated functional taxonomy of Supreme Court footnote usage and categorize Justice Ginsburg's footnotes according to this taxonomy and report my findings here, complete with charts and tables and data regression analysis and fancy multi-colored pie-shaped-diagrams. I asked my research assistant to prepare a chart with every footnote from every case, along with the case citation and year and the sentence from the opinion that went along with the footnote, along with a brief notation of what he thought the footnote's purpose was in the opinion. This was last summer. Throughout the fall I looked forward eagerly to tackling this ambitious project sometime after the leaves fell from the trees.

Well, it turns out that what I ended up doing was somewhat more modest than I had planned. The biggest problem with fulfilling my original vision was that the chart that my
terrific research assistant Mark put together ended up being something like two million pages long. Justice Ginsburg, it turns out, has written a lot of footnotes. I don't know exactly how many, but extrapolating from the number of notes that I did end up looking at, it's probably somewhere in the area of 1,500. I quickly decided to limit the study. Instead of reading and analyzing all of Justice Ginsburg's footnotes, I decided instead to look only at the notes she wrote during three terms of her tenure at the Court: one of her first, her last, and one somewhere in the middle. I figured this would give me a good enough idea of the different ways that Justice Ginsburg has utilized footnotes over the course of her career. I would also be able to see roughly if her use of footnotes—how many, how she uses them—has changed over time.

Of course, limiting my study in this way necessarily reduces somewhat the accuracy and value of my conclusions. I don't think, however, that this matters much given the context. For some studies—say those that have the potential to affect public policy in profound ways and could prove to be extremely controversial, like the ones purporting to link abortion and crime rates or greenhouse gas emissions to melting ice caps—an attention to detail and painstaking accuracy are essential. For a study like this one, however, I figure I can probably get by with something short of these things. This is also one of the reasons (the other one being that I don't really know how to use Excel) that I decided to forego the fancy charts and regression analysis (though if you read far enough, you will indeed find one table).

Coming up with even a fairly simple taxonomy of Supreme Court footnotage still required some work. To prepare my study, I read all of the footnotes that Justice Ginsburg penned during the following terms: 1994-1995 (her second term on the bench); 2007-2008
(her most recent completed term); and 2000-2001 (roughly in the middle). She wrote ninety-five footnotes in the 2007-2008 term; about the same number in the 1994-1995 term; and only about sixty during the 2000-2001 term. I read through the footnotes and played around with different ways to categorize them. I created provisional taxonomies and then dispensed with them as they turned out to be inadequate. In the end, I settled on a nine-category system that seemed to work pretty well. I developed it while reading through the first term I was considering, and it turned out to then work perfectly well for the other two years, which gives me some confidence that it is a fairly adequate way of categorizing the notes.

I doubt that the categories I have come up with will be surprising to anyone familiar with reading judicial opinions. Though it's not impossible for someone so inclined to find a funny bit or two here and there;¹⁷ Justice Ginsburg does not generally use her footnotes in a Christopher Buckley-Chuck Klosterman¹⁸ "ha ha" manner. Furthermore, very few, if any, of her notes echo Wallace's attempt to break out of the linearity of the text and mirror the fractured nature of reality through her judicial opinions.¹⁹ Instead, the nine different types of footnotes I was able to identify in Justice Ginsburg's work are those that (1) cite authority or quote directly from a source; (2) provide further detail about the case history of the case under review; (3) describe the position of lower courts on some issue; (4) explain why the Court is taking some action; (5) indicate that the Court will not take a position on or will not decide some question or issue; (6) mention or explain a point of law established by the Court; (7) provide additional background information about the case; (8) respond to an argument advanced by a party

¹⁷ There's one footnote where the Justice brings up Dickens' *Bleak House* to make a point; this one made me smile. *See* Hess v. Port Authority, 513 U.S. 30, 49 n. 19 ("The dissent questions whether the driving concern of the Eleventh Amendment is the protection of state treasuries, emphasizing that the Amendment covers 'any suit in law or equity.' Post, at 410. The suggestion that suits in equity do not drain money as frightfully as actions at law, however, is belied by the paradigm case. *See* Jarndyce and Jarndyce (Charles Dickens, Bleak House (1852)).")

¹⁸ See generally CHRISTOPHER BUCKLEY, LITTLE GREEN MEN (1997); CHUCK KLOSTERMAN, FARGO ROCK CITY (2000).

¹⁹ See text accompanying note __, supra.
in the case; and (9) reply to a point made by another Justice in some other opinion in the case.

In what follows, I say a little more about each of these categories and offer an example or two for each.

Some of the categories are fairly obvious. The first category, for instance, includes those notes where the Justice simply cites a source for the proposition in the text or quotes something directly that she has referred to in the text. The second category of notes—those that provide case history—include those that explain what the parties or lower courts or agencies did in the particular litigation giving rise to the case at the Supreme Court. I also included in this second category notes regarding the positions taken by the parties in front of the Court itself, though arguably these could have been peeled off into a separate category. Thus, for example, I included here a note from the *Oklahoma Tax Commission v. Chickasaw Nation*—a 1995 case in which an Indian tribe challenged the state's taxation of income earned on tribal lands by tribal members living off of those lands—where Justice Ginsburg wrote: "The Tribe's claim, as presented in this case, is a narrow one. The Tribe does not assert here its authority to tax the income of these tribal members." Other examples within this category are more straightforward—notes about the arguments raised by the parties in the lower courts, the sentences handed out by trial judges, or where to find the report of the Special Master in a case involving the Court's original jurisdiction, for instance. A third, and somewhat related category, include those notes where the Justice characterizes the positions taken on an issue by the courts of appeals. These fairly uncommon notes are usually

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22 Id. at 464, n. 13.
found in majority opinions where Justice Ginsburg is explaining that the Court took the case
to resolve a split in the lower courts.26

Two of the categories concern actions the Court has decided to take in the particular
case under review. Category number four, then, includes footnotes where Justice Ginsburg
self-referentially explains why the Court is taking some action or using some language the way
it is. So, for example, in a case from the 2007-2008 term, the Justice describes why using the
term "privity" in a particular context would be confusing, and then explains that "[t]o ward
off confusion, we avoid using the term 'privity' in this opinion."27 Elsewhere, the Justice
uses a footnote to explain why a particular lawyer was arguing the case—pointing out that
the Court had appointed a lawyer to argue the case for a pro se defendant who had filed a
motion for appointment of counsel.28 I should probably note that by using the term
"explains" to describe this category of footnotes, I am not including those notes in which the
Justice further explains the basis or rationale of the opinion itself but instead just trying to
capture the notes in which she explains why something surprising is happening, generally
something procedural or linguistic. Category five, for its part, might be described as a subset
of category four, though important enough in its own right to justify a separate category—
namely, those notes where the Justice explains that the Court will not take a position on some
issue for whatever reason. Thus in one case, Justice Ginsburg explains that the Court will
not reach an issue urged upon it by one of the parties,29 while elsewhere she mentions that,

26 See, e.g., Taylor v. Sturgell, 128 S.Ct. 2161, 2163 n. 3 (2008) ("We granted certiorari . . . to resolve the
disagreement among the Circuits over the permissibility and scope of preclusion based on 'virtual
representation'").
27 Id. at 2165 n. 8.
29 Tazani, 533 U.S. at 498 n.8.
like the lower courts in the case, the Supreme Court will also not decide whether a city's zoning law violates the anti-discrimination provisions of the Federal Housing Authority.\(^{30}\)

Two of the most important and prevalent categories—category #6: point of law; and category #7: background—can be easily confused and therefore justify being treated together. I define as a "point of law" footnote one in which the Justice explains the law of the Supreme Court on a point related to the case at hand; a "background" footnote, on the other hand, refers to a note that provides additional information about the factual context of the case or the legal context, to the extent that the legal context is set by a source of law other than the Supreme Court itself (like a state court or state statute or federal regulation). So, for example, I count as "point of law" footnotes those that indicate "[a]n appellee or respondent may defend the judgment below on a ground not earlier aired [citing Supreme Court authority]";\(^{31}\) explain why a previous Supreme Court decision had severed part of a statute that was relevant to the opinion at hand;\(^{32}\) and quote John Marshall to elucidate the original meaning of the Eleventh Amendment.\(^{33}\) I count as "background" footnotes, however, those that explain a federal rule of appellate procedure;\(^{34}\) illustrate which baseball teams might owe what amounts of social security tax using hypothetical figures;\(^{35}\) or discuss the reasons behind why Congress might have passed some law.\(^{36}\) These categories importantly say nothing about the function of any of these footnotes—why the Justice might have used them—but are instead drawn simply on the content of the notes. A more sophisticated functional account of the Justices' footnotes will have to wait for further study.

\(^{32}\) Kimbrough v. US., 128 SCT 558, 570 n. 12 (2007).
\(^{33}\) Hess, 513 U.S., at 39 n. 9.
The final two categories of footnotes, then, are ones in which the Justice reacts to somebody else. The less prevalent of the two categories is #8, where Justice Ginsburg explicitly responds to an argument raised by one of the parties, as she did in the Court's most recently completed term—for example, in *New Jersey v. Delaware*, where she "found unconvincing New Jersey's contention that its officials were ignorant of the State's own statutes,"37 and in *Preston v. Ferrer*, where she refused to "take up Ferrer's invitation to overrule" a case contrary to his position.38 More prevalent and interesting is category #9, where the Justice—like in the opera-based footnote skirmish that I began with—responds to the argument of another Justice. Over the three terms studied, Justice Ginsburg replied to another Justice almost twice as often as she responded to a party. Though she certainly never shies away from answering the arguments of other Justices, Justice Ginsburg's replies are always civil and respectful; one finds in her opinions no invectives or linguistic versions of jumping up and down or stomping her feet as we occasionally see from some other members of the Court. On the contrary, Justice Ginsburg might suggest only that the dissent's argument is "hardly an answer"39 to some point, or that the dissent has employed "curious reasoning,"40 or raised something "not relevant."41

These, then, are the nine categories of Justice Ginsburg's footnotes. The following chart summarizes the number of times she used each type of footnote per term that I studied, as well as the percentage of all notes in any given term that fell into each category. I'm not sure if anything in the chart can be said to be particularly fascinating. I do think it's somewhat interesting that in each term, footnotes used to provide background information

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37 *New Jersey*, 128 S.Ct., at 1426 n. 20.
39 *Gutierrez de Martinez*, 515 U.S., at 431 n.6
40 City of Edmonds, 514 U.S., at 737 n. 11.
were by far the most prevalent. In two of the three terms, case history footnotes made up
the second largest group of notes, while citations and quotations were also fairly numerous
in two of the three terms. As to trends over time, perhaps the most interesting result of the
study relates to the relative prevalence of the Justice's responses to the other Justices as
opposed to the parties. With respect to percentages, category #9 (Reply to Justice) rose each
term, from 10% in 1994-1995 to 11% in 2000-2001 to 15% in 2007-2008, while category #8
(Respond to Party) fell from 7% in 1994-1995 to 4% in 2007-2008 (though with a result of
11% in between). Perhaps this reflects a greater comfort level over time with responding to
other members of the bench and a feeling of lesser need to respond to arguments made by
the parties themselves, although the result could also certainly be explained by factors having
nothing at all to do with this rationale (I told you the results wouldn't be precise).
Justice Ginsburg's Footnotes by Type and Year

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<td>4 (4%)</td>
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<tr>
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<td>7 (11%)</td>
<td>15 (15%)</td>
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<tr>
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<td>61</td>
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The final thing I did in connection with this first-ever I-think-study-of-Justice-Ginsburg's-footnotes is to review the notes she wrote in the cases during the 1998-1999 term that I happened to work on. There were twenty-two of them, and apart perhaps from the footnote that cited the fifteenth edition of the Encyclopedia Britannica for the proposition that "the photocopy machine was not yet on the scene" in 1949, they were all pretty standard stuff.42 About a third of the notes provided background information;

42 Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 353 n. 5 (1999). The question in the case was when the thirty-day period for removal of a case from state to federal court under 28 U.S.C. § 1446(b) begins running; is it the day that the defendant is served, or might it begin running earlier, upon receipt of a faxed "courtesy copy" of the complaint? Fascinating stuff, this. In pointing out that the 1949 Congress that passed the relevant statutory amendment could not have had the situation posed by the case in mind, Justice
another third or so related case history. There were four citation/quotation notes, a couple of responses to the parties (one actually to an amicus, which perhaps suggests broadening category #8 slightly), and two replies to other Justices. I suppose that I was in a unique position that year to somehow convince the Justice to throw in a footnote that would have highlighted the fractured nature of reality, but probably such a suggestion would have simply earned me a pink slip. That's OK, though, because I still have the memory of the opera footnote skirmish. I assure you: It is not one I will soon forget.

Ginsburg observed in the footnote that there were no fax machines in 1949. The point about the photocopy machine appears to be simply an additional piece of background information to provide further context regarding the history of print-related technology.