



TO THE BAG

IN PRAISE OF CITATION AND CIRCULATION, AND OF PRONOUN-ANTECEDENT AGREEMENT

To the *Bag*:

Lee Anne Fennell questions the now common practice of authors' posting draft articles on the internet but ordering readers not to cite or to circulate the drafts, at least not without permission.¹ She's absolutely right that "Do Not Cite or Circulate" (DNCC) is an absurd practice.

I have a few comments, all of which may be cited, circulated, and praised.

The command not to circulate the already circulated is preposterous, of course, but the "do not cite" imperative is questionable as well. What's a reader of such an encumbered draft to do? I understand that I shouldn't be publicly trashing an article that isn't in final form; I should send comments to the author or just ignore the piece. But if, in reading a draft, I learn something that I would like to use in my own work, am I supposed to pretend the draft doesn't exist? Surely I should give credit where it's due — that is, I should cite the draft, unless a later version of the piece has been circulated.²

¹ Lee Anne Fennell, *Do Not Cite or Circulate*, 18 GREEN BAG 2D 151 (2015). There's no real enforcement mechanism, of course, except shaming.

² Oh, I suppose the author is likely to give permission for a citation, but, if the draft is readily available, why should I have to ask? And what should I do if the author

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Or am I supposed to stop working on any subject related to a draft article until the draft is finalized (if it ever is)? That would be crazy.

I would add to Professor Fennell's extensive list another possible reason for the use of DNCC: to try to establish priority for a particular idea before development of the idea is complete. In some scientific disciplines long ago (this may still be true, although I'm not sure), there were journals where scientists could put their unfinished ideas into print (remember print?) to do just that. If Throckmorton and Smith were working on the same problem in different labs, Throckmorton might publish preliminary thoughts with the hope that any ultimate discovery would be called the "Throckmorton principle," not the "Smith principle," and lead to a Nobel Prize for Throckmorton, not Smith. It was like a race to the mailbox. Perhaps the circulation of a DNCC article is thought to have the same effect – to get something out there showing that you are the first to find a connection between the Sixteenth Amendment and parking patterns in New Haven,³ say, while recognizing that you still have kinks to work out in the theorizing.⁴

Now, sorry, I need (yes, it's a need) to get nerdy and make a grammatical point.

refuses permission? Professor Fennell suggests that, if no later version of the draft can be found, "the researcher may feel forced to leave out the cite." *Id.* at 155. Is that appropriate if the draft is the source for an important point in my own article? I could state that I am relying on a draft that I am not permitted to cite; doing that should take care of any plagiarism issue. But such a statement would be at best uninformative and at worst silly.

³ For those who think parking in New Haven is not an appropriate subject for legal scholarship, see Underhill Moore & Charles C. Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 *YALE L.J.* 1 (1943). But I'm unaware of anyone's tying parking to the Sixteenth Amendment – until now. This is my idea. Don't step on my scholarly turf (or take my parking place).

⁴ Even so, the DNCC command is wrongheaded. Establishing priority in the scientific arena didn't keep others from making use of the circulated ideas. Indeed, the expectation was that suitable credit would be given to the ideas' originator. The intellectual work of the world didn't stop while the originator turned his work into a finished article.

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In a paragraph titled “The Future Appointee,” Professor Fennell hypothesizes that one reason a law prof might put DNCC on a draft is to protect the prof’s reputation, so as not to endanger the possibility of judicial or other political appointment. Fennell writes, “[T]he appointee might expect her political enemies to brandish snippets that put her intelligence, judgment, views, or *grammatical skills in a poor light*,”⁵ and might hope, probably wrongly, that affixing the label DNCC will provide protection against such attacks. (Authors might hope against hope, that is, that they will get credit if posted drafts survive scrutiny, but be able to disown the drafts if flaws are found.)

I agree with Professor Fennell’s substantive discussion, and, more important, I applaud her use of a singular pronoun (and a politically correct feminine one at that) with a singular antecedent.⁶ I was thinking as I read this passage that Professor Fennell’s grammatical skills were put in a very good light, and that she belongs on the bench (the judicial one, I mean). And farther down the same page, discussing why an “Edgy Empiricist” might insist that a draft article not be cited or circulated, Professor Fennell writes “that data arrive raw.” Hurrah again, Professor Fennell! The word “data” is plural. The data are clear that few folks know that anymore.

But then, . . . oh no! Could this be happening in the *Bag*? In the same paragraph as her praiseworthy use of “data arrive,” Professor Fennell suggests that “the careful empiricist might affix a DNCC warning to unfinished drafts lest anyone rely to their detriment on results that are tentative and in need of further checks or manipulations.” *Anyone* rely to *their* detriment? Say it ain’t so, Professor Fennell! And you too, *Bag* editors.⁷ Pronoun-antecedent agreement should help a reader understand the writer’s meaning. I saw the plural pronoun and looked back, expecting to find a plural noun as the

⁵ Fennell, *supra* note 1, at 154 (emphasis added).

⁶ See also *id.* at 152 (“The nervous writer readies a cover email that explains the situation and prepares to attach the hideously unfinished document. She hesitates.”).

⁷ This isn’t the only offending passage in the article, by the way. See, e.g., *id.* at 152 (“We can start by asking why anyone would ever slap a DNCC label on their work.”); *id.* at 153 (“[T]he label affixed to the paper alerts any chance recipient to the fact that they received the document only by mistake . . .”).

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antecedent. But pretty clearly the “their” doesn’t refer to “drafts,” or, if it does, I’m really confused.

So don’t resign from your present positions until the Senate has voted to confirm your appointments to the bench.

I understand why people talk and write using “they,” “them,” and “their” to refer to a singular antecedent: they want to avoid the awkward “he or she” and the odious “s/he.” But the problem can almost always be solved more elegantly. Change “anyone” to “others” (or something similar) in the quoted passage,⁸ and the pronoun-antecedent disagreement goes away. Or Professor Fennell could have used the singular pronoun “her,” as she had done earlier⁹ (although not in a consistent way), without doing damage to grammatical principles.

I feel much better getting that off my chest. Thank you very much.

Very truly yours,
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⁸ In the passages quoted in *supra* note 7, change “anyone” to “any writers” and make “recipient” plural.

⁹ See *supra* notes 5-6 and accompanying text.