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Afterword

Bryan A. Garner

No one is more surprised about the amount of attention that citational footnotes are getting than I am. In a way, the attention is gratifying. But all in all, I find it rather disappointing. When marked improvement is possible, and so palpably demonstrable, it isn't gratifying to encounter opposition.

Before answering Judge Richard Posner, I should say how much I admire his work. In several of my books, I quote him favorably, and in two of them I hold up his scholarly prose as a model to be emulated. No reasonable person could doubt that he has made important contributions to legal literature.

That said, Judge Posner's response here is off the mark (he doesn't distinguish citational from substantive footnotes, and therefore doesn't address my main thesis), based on an irrelevant standard (our opinions are short enough as it is), self-contradictory (a judge can always use footnotes to shorten the text), and downright quirky (opinions shouldn't have a "spurious air of scholarship"). Although opinions may not be scholarship, their very essence is reasoning, and the citations that judges now throw on the page can obscure the reasoning for both the reader and the writer.

Judge Posner's main complaint is that in so many of my examples, I edited the "after" versions. But this is a key part of my point. Almost any legal writer who strips out citations will at first say, "I hate this! It's bad writing." And that's exactly right. So what's the remedy? "Move the citations back up! Give me some camouflage!" Maybe that's an answer.

But I think the better answer is to start working on the prose: the connections between thoughts, the flow of the material, and more contextual discussion of controlling authority. If I misstated some nuances that Judge Posner intended in the passages from his opinions, the answer is that when you footnote citations in your own prose, you'll never misstate your own point. You, after all, are the opinion's author. More likely, you'll state your points far better than you've been doing with all the citational clots.

In short, I couldn't, in good conscience, give an unedited "after" version. For a professional editor to do that would be like having a doctor remove tumors and then idly watch as the patient bleeds.

Justice Rodney Davis's essay gives a fascinating view of the practical daily challenges for judges who adopt the sleeker, more accessible style. His insights help explain why so many judges sympathetic to the change haven't yet made it. I hope that Judge Davis's words will embolden more judicial writers.