Book Review

Richard A. Posner, *Divergent Paths: The Academy and the Judiciary*, Cambridge, Mass., London: Harvard University Press, 2016: pp. 414, $29.95

Reviewed by Michael C. Dorf

With Learned Hand and Henry Friendly, Richard Posner is one of the three greatest lower federal court judges in American history. Hand and Friendly occasionally wrote important extrajudicial texts,[1] but they made their marks chiefly through their work on the bench. By contrast, Posner's reputation rests at least as much on his early academic writings in what was then the nascent law-and-economics movement and his role as a public intellectual since becoming a judge. Posner's extracurricular work over the last quarter-century has addressed diverse subjects—including sex,[2] literature,[3] and national security[4]—but the dominant leitmotif of his recent writing is legal realism.[5] Judges cannot, should not, and do not decide appellate cases by applying formal legal materials to concrete disputes, Posner argues. He insists that judges quite properly seek pragmatic, sensible resolutions to legal disputes.

Posner's latest book—*Divergent Paths: The Academy and the Judiciary*[6]—wraps Posner's pragmatic view of judging in the shell of a diagnosis and prescription. First he tells the reader what he thinks are the main challenges facing federal courts: Posner thinks that too many judges either believe or pretend to believe in formalism, and that they passively rely on the adversary system to provide information it does not reliably supply. He also thinks that the courts are managed poorly. Then Posner suggests ways in which legal scholarship and

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1. *See*, *e.g.*, Learned Hand, The Bill of Rights (1958); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970); Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964).
2. Richard A. Posner, Sex and Reason (1994).
3. Richard A. Posner, Law & Literature (3d ed. 2009).
4. Richard A. Posner, Not a Suicide Pact (2006).
5. *See* Lee Epstein, William M. Landes, and Richard A. Posner, The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice (2013); Richard A. Posner, Reflections on Judging (2013); Richard A. Posner, How Judges Think (2008).
6. Richard A. Posner, Divergent Paths: The Academy and the Judiciary (2016).

education could be reformed to help address these problems: More legal scholars should study how courts and judges actually conduct their business, while collaborating on research projects with judges; legal education should give students a clear-eyed view of how law is made and applied, and it should be more practical.

That's merely a summary of a summary. Posner himself summarizes his diagnosis and prescription in a bullet-point list that covers seven pages.[7] The book itself contains still more. It rewards reading. *Divergent Paths* is enormously entertaining and contains numerous nuggets of sound, practical wisdom.

The book also displays Posner's basic decency. Although he was best known early in his career for coldly endorsing the impersonal logic of the market as a means of solving nearly all social problems,[8] during his time on the bench Posner has rounded into a compassionate judge. For example, a twenty-five-page appendix titled "The Tragedy of Supervised Release" very effectively criticizes the federal practice of sentencing convicted defendants to terms and conditions of supervised release before they serve their prison time. Posner highlights the hardships and injustices this approach visits on offenders upon their release.[9] In addition, an epilogue dissecting three recent Supreme Court cases decries the dissenting opinion of Chief Justice John Roberts in *Obergefell v. Hodges*[10] as "heartless."[11] The judge who, more than almost anyone, brought the dismal science into law[12] has come around to the view of Justice Harry Blackmun that "compassion need not be exiled from the province of judging."[13]

Yet for all of its strengths, *Divergent Paths* is a problematic book. Some of its difficulties are stylistic. Posner repeatedly criticizes various judges and academics for poor writing, but, even as the book reads beautifully from paragraph to paragraph, it does not hang together. As Paul Horwitz observed in an insightful online review, "the book needed more ruthless editing and greater self-restraint."[14]

7. *Id.* at 362-68.

8. Most controversially, Posner applied market logic to address the "baby shortage." *See* Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. Rev. 59 (1987); Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. Legal Stud. 323 (1978).

9. *See* Posner Divergent Paths, *supra* note 6, at 197-221.

10. 135 S. Ct. 2584 (2015).

11. Posner, Divergent Paths, *supra* note 6, at 394.

12. Honorable mention goes to Learned Hand, United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (offering a cost-benefit formula for determining negligence), and to Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 Harv. L. Rev. 713 (1965) (assessing accident law in economic terms).

13. DeShaney v. Winnebago Dep't of Soc. Servs., 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting).

14. Paul Horwitz, *The Roads Not Taken*, New Rambler (Jan. 18, 2016), http://newramblerreview.

Divergent Paths also has a cranky feel, with Posner taking potshots based on his pet peeves. These include long opinions and articles, the *Bluebook*, student-edited law journals, the pretentiousness of much legal writing (such as unnecessary uses of Latin), and even spelling errors.[15] Despite Posner's praiseworthy generosity toward the relatively powerless litigants whose cases come before him, he can be petty toward his peers on the bench and in the academy.

So far as the substance of Posner's diagnosis and prescription is concerned, *Divergent Paths* knocks on an open door. Posner offers the academy advice on how to combat formalism, but he does not recognize the extent to which his own views—legal realism and pragmatism—are already widely accepted in legal scholarship and pedagogy. Posner's goal appears to be to banish all vestiges of formalism, but he does not offer reasons to think that his efforts along these lines will succeed when over a century of legal realism has failed. Moreover, as I explain below, his key proposals for the reform of legal scholarship and legal education are inconsistent with one another.

I

Posner places great faith in frankness. For example, he insists that his law clerks call him by first name and treat him as a peer.[16] This approach leads to uninhibited constructive criticism of Posner's work product of the sort that a judge who surrounds himself with sycophants does not receive. By bluntly criticizing the work of other judges and scholars, Posner likewise aims to improve *their* output.

I doubt that Posner's frank criticism of his colleagues on the bench will make them better judges or bring them over to Posner's way of thinking. Certainly Posner's pointed criticisms of Justice Antonin Scalia during the last years of Scalia's life[17] did nothing to turn Scalia into a Posner-style legal realist. On the contrary, they predictably led to counterattacks by Scalia's defenders.[18]

com/book-reviews/law/the-roads-not-taken (review of Posner, Divergent Paths, *supra* note 6).

15. Posner laments the frequent misspelling of "minimis" as "minimus" in the Latin phrase *de minimis non curat lex*. Posner, Divergent Paths, *supra* note 6, at 123. Yet on the same page on which appears this petty criticism regarding spelling in a mostly dead language, Posner himself makes an error regarding a language that hundreds of millions of people still speak in their daily lives. He uses the word "Hindu" (a religion) where he ought to have used the word "Hindi" (a language). *Id.* No one is perfect, and Posner's peevishness undermines his more serious points.

16. *Id.* at 372-73.

17. *See*, *e.g.*, Richard A. Posner, *The Incoherence of Antonin Scalia*, New Republic (Aug. 24, 2012), http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism (reviewing Antonin Scalia & Bryan A. Garner, Reading Law (2012)).

18. For example, Edward Whelan authored a series of blog posts on the *National Review Online* vigorously defending Scalia and Garner against Posner's charges. The first post, with links to the subsequent posts and to some of Posner's replies,

That is not to say that Posner's arguments against other judges are wrong. Even if they ultimately prove unpersuasive, Posner's criticisms of formalist judging rest on a solid foundation of legal realism and political science.[19] Selection bias makes ideology and values—what Posner calls "priors"[20]—especially important in Supreme Court adjudication, but even at the federal appeals courts, the costs of litigation (except for *pro se* litigants proceeding *in forma pauperis*) will ensure that, in most cases presented for decision, respectable arguments can be made for either side.

Posner says that in such cases he first attempts to ascertain what the best resolution of the dispute should be, all things considered, and then looks to see whether the formal legal materials block that result.[21] He thinks that other judges often tacitly do something similar and that everyone would be better off if judges frankly employed the same procedure he uses, instead of pretending (sometimes even to themselves) that they derive an answer from the precedents and other legal texts as such.

Posner offers candor as the chief virtue of his legal realist approach.[22] Yet candor has its limits. Consider Scott Altman's response to similar calls for candor by the critical legal studies heirs to legal realism. Altman accepted that judges should not consciously lie about the grounds for their decisions, but he worried that too much introspection into the grounds for their decisions would loosen useful inhibitions that constrain them, and thus serve important rule-of-law values.[23]

Posner does not address Altman's argument, but if he did, he would almost certainly reject it, because Posner does not place much value on constraining judges *per se*. Constraints get in the way of the judge's all-things-considered best judgment about how to resolve disputes. Moreover, Posner views most supposed sources of constraint as mere mystification. He uses the term *legal realism* in both a descriptive and a prescriptive sense, and the prescription follows from the description. For Posner, because judges cannot help but decide reasonably close cases according to their priors, they should simply be honest about doing so.

No doubt these claims will be contested by judges and scholars more sympathetic to formalism than Posner is, but there is less at stake in this contest than meets the eye. Posner's preferred method for deciding cases reverses the usual order of operations, but it preserves the customary elements. He does

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is Edward Whelan, *Richard A. Posner's Badly Confused Attack on Scalia/Garner*, ETHICS & PUB. POL'Y CTR. (Sept. 7, 2012), http://eppc.org/publications/richard-a-posnera%C2%80%C2%99s-badly-confused-attack-on-scaliagarner/#PosnerPart1.

19. *See infra* notes 45-47.

20. POSNER, DIVERGENT PATHS, *supra* note 6, at 17.

21. *Id.* at 78, 81, 85.

22. *Id.* at 182 n.150 (citing David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987)).

23. *See* Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 297 (1990).

not say that judges can or should disregard authoritative texts, and while he expresses general disdain for precedent as a guide to adjudication on the ground that it looks to the past rather than to future consequences, he invokes only the conventional grounds for thinking a precedent should be overruled: if it "is demonstrably erroneous[] and has not generated substantial reliance interests . . . ."[24]

Posner's views about statutes are also conventional. He says a judge facing a difficult statutory question completes the "statutory project that the legislature began"[25] by plugging holes; thus, he pictures "judges not as interpreters of legislation but as partners of the legislators."[26] This too is old hat. As Posner acknowledges, his approach to statutory cases is "a version of purposivism,"[27] which is more or less what he learned as a law student over five decades ago.[28]

Posner's account of the nonmanagerial problems in the federal courts makes up more than a third of *Divergent Paths*. Although he titles the long chapter setting out these problems "Process Deficiencies," it is a *substantive* critique of conventional judging. At the end of the day, however, Posner's own pragmatic legal realism is more conventional than he appears to realize. Posner is a sheep in wolf's clothing.

II

By contrast with Posner's seemingly fierce but ultimately mild critique of how other judges decide cases, his attack on legal scholarship really is ferocious. To be sure, a prominent federal judge lamenting the state of legal scholarship would be appropriately greeted by a yawn or a sigh, were the complainant almost anyone other than Posner, who is, after all, still very much "one of us." Yet Posner recounts and seemingly adopts the now-familiar complaints lodged by other judges, especially Harry Edwards,[29] that legal scholars mostly write theoretical esoterica for one another rather than grounded articles to

24. Posner, Divergent Paths, *supra* note 6, at 401. *Cf.* Payne v. Tennessee, 501 U.S. 808, 827-28 (1991) (listing occasions justifying departures from precedent, including "when governing decisions are unworkable or badly reasoned" and when reliance interests are not involved.).

25. Posner, Divergent Paths, *supra* note 6, at 113.

26. *Id.* at 112.

27. *Id.* at 289.

28. *See* Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1111-1380 (William N. Eskridge, Jr. & Philip P. Frickey eds. 1994) (elaborating purposivist approach to statutory cases in materials that were used to teach Harvard Law School students in the late 1950s and early 1960s, when Posner was enrolled).

29. *See* Harry T. Edwards, *Another Look at Professor Rodell's* Goodbye to Law Reviews, 100 Va. L. Rev. 1483 (2014); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992). In my view, Judge Edwards does not offer persuasive evidence in support of his claims. *See* Michael Dorf, *Judge Harry Edwards is Still Unimpressed with Legal Scholarship*, Dorf on Law (Dec. 15, 2014), http://www.dorfonlaw.org/2014/12/judge-harry-edwards-is-still.html.

aid the bench. Chief Justice John Roberts encapsulated what has become the conventional wisdom among judges disaffected with legal scholarship when he said this in 2011: "Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something."[30]

Posner is not the same kind of anti-intellectual as most of the other judges who disdain legal scholarship, but he is an anti-intellectual nonetheless. Posner is an intellectual's anti-intellectual, reminiscent of the late nineteenth-/early twentieth-century pragmatists—especially Oliver Wendell Holmes, Jr., whom Posner so admires. With William James, Posner is impatient with abstract questions that have no practical cash value.[31]

To state the obvious rejoinder, legal scholarship can have value even if judges find it unhelpful in deciding concrete cases. Academic writing has many audiences, depending on the topic, methodology, and author. We write for legislators, regulatory agencies, practicing lawyers, students, scholars in other fields, the general public, and yes, one another. Some of the writing for each of these audiences focuses on narrow questions, some on broader questions; some uses conventional doctrinal tools, some uses various empirical methods, and some uses theory; some scholarship is good, some bad.

Posner provides very weak evidence for even his narrow contention. The claim that legal scholarship is too theoretical to be helpful to the judiciary cannot be proved by showing that there is some or even a great deal of legal scholarship that judges find too abstract to be helpful. Given the enormous volume of legal scholarship—a website that ranks law journals lists over 850 of them[32]—it is possible for there to be far too much of just about any imaginable kind of legal scholarship without any complementary shortage of any other kind of legal scholarship. Despite his admiration for quantitative empirical work, Posner makes no effort to quantify the volume of existing legal scholarship that is valuable to the judiciary.

30. Orin Kerr quotes the Chief Justice in his tongue-in-cheek effort to determine the answer to the question the latter thought might interest the professoriate. *See* Orin S. Kerr, *The Influence of Kant on Evidentiary Approaches in 18th-Century Bulgaria*, 18 Green Bag 2d 251, 251 n.1 (2015). For a more biting response, see David Pozen, *The Influence of Juridical Cant on Edificatory Approaches in 21st-Century America*, 19 Green Bag 2d 111 (2015).

31. James tells a charming story about a question regarding a squirrel. Trying to get a good look at a squirrel on a tree, the man walks around the tree, but the squirrel meanwhile changes positions on the tree. Does the man go around the squirrel? James says the answer depends on why one wants to know. *See* William James, *What Pragmatism Means* (originally published in 1907), *in* Pragmatism 93, 93-94 (Louis Menand ed. 1997). Generalizing, James contends that one ought to resolve questions by asking "[w]hat difference would it practically make to anyone if this notion rather than that notion were true?" *Id.* at 94.

32. *Law Journals: Submissions and Ranking, 2008-2015*, Wash. & Lee Univ. Sch. L., L. Library, http://lawlib.wlu.edu/LJ/ (last visited Aug. 6, 2016). The website allows the user to filter by various methods. Searching for only English-language U.S. law journals that appear in print produces a list of 840 journals. *Id.* Adding online journals brings the tally to 931. *Id.* Adding foreign English-language law journals produces a list with more than 1500 entries. *Id.*

Posner's method is instead anecdotal, but even then he chooses odd targets. He especially disdains constitutional theory, singling out Laurence Tribe and Akhil Amar for special ridicule.[33] Yet Tribe is not chiefly a theorist. He built his reputation as a first-class constitutional scholar by writing a treatise,[34] the kind of work that Posner describes as most valued by judges.[35] Further, although Tribe takes doctrine more seriously than Posner does, he is no formalist. Amar, meanwhile, is essentially a historian of the Constitution, whose chief interest is its history *outside* the courts. One can see why such work might not interest a judge looking for guidance in deciding concrete cases, but that hardly warrants Posner's harsh evaluation of Amar's oeuvre. Furthermore, many judges call themselves originalists, and are thus intensely interested in Amar's (sometimes surprising) historical discoveries. Even judges and scholars who eschew originalism typically think that pre- and post-enactment history of a constitutional provision has some relevance to its contemporary application.[36] If Amar's work is unhelpful to Posner, that does not mean it is unhelpful to all or even most judges.

Posner complains about the work of Amar and Tribe the way that someone who went to a Bruno Mars concert might complain that Mars and his band performed funk rather than opera. What did he expect? *Divergent Paths* gives no indication that Posner grappled at all with how audiences other than judges—or even audiences of judges not named Richard Posner—might find Tribe's and Amar's work useful or interesting.

Posner's drive-by criticisms of Tribe and Amar are unwarranted, but his treatment of Richard Fallon is inexcusable. Posner's chief examples of the

33. Posner, Divergent Paths, *supra* note 6, at 277 (deriding "the flights of fancy of such constitutional gurus as Laurence Tribe and Akhil Amar"); *id.* at 284 & n.32 (describing a recent book by Amar as chiefly intended "to demonstrate the ingenuity of the author") (citing Akhil Reed Amar, America's Unwritten Constitution (2012)); *id.* at 33 n.32 (asserting that some of the "scholarship"—which Posner places in scare quotes—of Tribe "would strike most judges as frivolous, even narcissistic") (citing Laurence H. Tribe, The Invisible Constitution (2008)).

34. Laurence H. Tribe, American Constitutional Law (1978). A widely used second edition was published in 1988, and a volume of a projected two-volume third edition was published in 1999. In 2005, Tribe decided to forgo work on the second volume and has been out of the treatise-writing business since. *See* Laurence H. Tribe, *The Treatise Power*, 8 Green Bag 2d 291 (2005). He has not, however, stopped writing about the work of the federal courts, *see, e.g.*, Laurence H. Tribe and Joshua Matz, Uncertain Justice (2014), and his treatise continues to be widely cited by federal appeals courts. *See, e.g.*, Kerr v. Hickenlooper, 759 F.3d 1186, 1188 (10th Cir. 2014) (Hartz, J., dissenting from the denial of en banc review) (citing third edition of Tribe's treatise); United States v. Park, 758 F.3d 193 (2d Cir. 2014) (citing second edition); Connelly v. Steel Valley School Dist., 706 F.3d 209, 213 (3d Cir. 2013) (citing first and second editions).

35. Posner, Divergent Paths, *supra* note 6, at 32.

36. *See* Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 15 Geo. L.J. 1765, 1766 (1997) ("virtually all practitioners of and commentators on constitutional law accept that original meaning has some relevance to constitutional interpretation.").

supposed worthlessness of theory are two articles by Fallon,[37] whom Posner calls his "whipping boy."[38] Singling out Fallon is grossly unfair. His books and articles have been cited by federal courts on numerous occasions. Indeed, in less than the five years before the publication of *Divergent Paths*, three of Posner's own opinions cited various works by Fallon.[39] True, Posner thinks citations of academic writings in judicial opinions are typically inserted by law clerks for their ornamental value, without playing a causal role in the judge's decision,[40] but he levels this criticism at *other judges*. Presumably Posner himself, who drafts his own opinions, cites only legal scholarship that he deems actually helpful.

Perhaps Posner is right that the two Fallon articles he ridicules will lack influence on courts, but again, so what? The Fallon excerpts that Posner quotes are not even typical of Fallon's influence on Posner, much less of the influence of legal scholarship in general on the federal judiciary overall, to say nothing of the relation between legal scholarship and the legal system as a whole.

III

In place of the supposedly too-theoretical scholarship the academy now produces, Posner would like to see more work that focuses on the practical operations of the (federal) judiciary. He provides twenty-one bullet points[41] that can be summarized as aiming at two goals: First, he wants academics to show that legal realism is correct, thus nudging his fellow judges away from formalism; and second, he wants academics to study judicial management deficiencies, thus providing grounds for managerial reforms. The first goal

37. Posner first ridicules Richard H. Fallon, *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—And the Irreducible Roles of Values and Judgment Within Both*, 99 Cornell L. Rev. 685 (2014). *See* Posner, Divergent Paths, *supra* note 6, at 42-43. Although Posner says he does "not mean to criticize Professor Fallon," *id.* at 43, it is difficult to read him any other way. *See id.* (describing Fallon's article as evidence that "academic law is becoming esoteric."). Later, Posner dismisses another Fallon article. *See id.* at 319-20 (quoting Richard A. Fallon, *The Meaning of Legal "Meaning" and its Implications for Theories of Legal Interpretation*, 82 U. Chi. L. Rev. 1235 (2015)). Once again, Posner purports to draw the sting, this time by calling him "a distinguished scholar."

38. Posner, Divergent Paths, *supra* note 6, at 278.

39. *See* Planned Parenthood of Wisc., Inc. v. Schimel, 806 F.3d 908, 910 (7th Cir. 2015) (Posner, J.) (citing Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1359-61 (2000)); Thomas v. Illinois, 697 F.3d 612, 613 (7th Cir. 2012) (Posner, J.) (citing Richard H. Fallon, Jr. et al., Hart & Wechsler's The Federal Courts and the Federal System (5th ed. 2003); American Bottom Conservancy v. U.S. Army Corps of Eng'rs, 650 F.3d 652, 656 (7th Cir. 2011) (Posner, J.) (citing Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 Va. L. Rev. 633 (2006); Richard H. Fallon, Jr. et al., *supra*).

40. Posner, Divergent Paths, *supra* note 6, at 28, 380.

41. *Id.* at 364-66.

is naïve, whereas the second goal is in tension with Posner's chief reform proposal for law school curricula.

"Legal realism as a distinct school of judges and law professors," Posner correctly notes, "flourished most outspokenly in the 1920s and 1930s, but there were realists before and realists after, and there are realists today."[42] In American law, one can find precursors of legal realism in Justice Iredell's concurrence in *Calder v. Bull*,[43] a century later in the academic writings of Holmes,[44] and in the more recent developments to which Posner adverts. Legal realist scholarship within the legal academy has tended to point to the gaps, contradictions, and ambiguities in formal legal materials. Karl Llewellyn's pairing of canons of construction with their supposed opposites[45] is emblematic of this form of scholarship, as is Felix Cohen's characterization of conceptual rather than functional analysis as "transcendental nonsense."[46] In recent decades, political scientists have added econometric analyses of data on judges and justices, case characteristics, and outcomes, all of which tend to confirm Posner's view that a judge's priors play a very important role in the decision of contested appellate cases.[47]

Posner does not address, much less answer, the question why, if this mountain of scholarship has not yet persuaded judges of the truth of legal realism, some more articles will. My view, as noted above, is that Posner understates the

42. *Id.* at 78-79.

43. 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J., concurring in the judgment) (rejecting "natural justice" as too indeterminate a basis for grounding constitutional law).

44. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 460-61 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

45. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons of About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395 (1950).

46. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809 (1935).

47. Just how important those priors are appears to be an open question. Lawrence Solum's review of one of Posner's recent co-authored books includes a useful summary of the development of the "attitudinal model," which claims, based on regressions of databases of Supreme Court cases coded for legal and ideological inputs, that Supreme Court judging is essentially all ideology. *See* Lawrence B. Solum, *The Positive Foundations of Formalism: False Necessity and American Legal Realism*, 127 Harv. L. Rev. 2464, 2473 (2014) (reviewing Epstein et al., *supra* note 5). Solum goes on to argue that the evidence adduced by Epstein, Landes, and Posner undermines the hypothesis that ideology alone drives judicial outcomes, even at the Supreme Court, *see* Solum, *supra* at 2487-88, because that evidence shows that distinctly *legal* preferences of judges also play a substantial role. *Id.* at 2489. Whether the empirical evidence proves that legal realism is correct thus depends on what legal realism (as a descriptive account of judging) is. If legal realism is the claim that judging is all ideology, it is clearly false. If legal realism is the claim that judging is not all formalism, then legal realism is clearly true. Solum concludes that the jury is out on where the activity of judging falls in between these two extremes, and on what normative implications follow from the answer to that empirical question. *See id.* at 2491-97.

degree to which judges currently are legal realists. Almost two decades ago, Brian Leiter deemed it already a cliché that "we are all realists now."[48]

Posner does suggest that perhaps a different methodology would work: Legal scholars should study how individual judges and courts as a whole actually go about their business. He offers his own collaborations with other scholars as a model, identifying three projects: one with Lee Epstein and William Landes; a second with Mitu Gulati; and a third with Abbe Gluck.[49] All four are fine scholars, but, as Posner notes,[50] both Epstein and Landes have doctorates in other fields (political science and economics, respectively), which tends to undermine Posner's complaint elsewhere in the book that the population of law faculties with "refugees from other disciplines" drives the academy further from the bench.[51] To be sure, Gulati and Gluck are (like Posner and me) just lawyers, but the work he is doing with them is more in the nature of sociology than of law. It is a tribute to their talents that they can do good work using methodologies for which they lack formal training,[52] but to the extent that Posner thinks that the most useful work to be done by legal scholars is empirical study of the judiciary, that argues for more rather than fewer law professors with advanced degrees in other fields—especially econometrics, sociology, and management science.

We should therefore assume that, despite Posner's contention that most law professors with doctorates in other fields are simply failures in those other fields,[53] he really would like to see a multiplication of dual-degree faculty. But that logical implication of Posner's proposed reforms in the scholarship law faculty produce is at odds with his proposed reforms of the law school curriculum.

Echoing calls from the bar, Posner advocates more practical education. Based partly on his own experience, he would like to see civil procedure and evidence taught as "clinical"[54] or, more accurately, what he calls "mock clinical"

48. Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 Tex. L. Rev. 267, 267 (1997). *See also* Laura Kalman, Legal Realism at Yale, 1927-1960, at 229 (1986).

49. Posner, Divergent Paths, *supra* note 6, at 286.

50. *See id*.

51. *Id.* at 9.

52. I have also dabbled in social science using the sort of methodology Posner uses in the studies to which he refers, albeit in collaboration with scholars who are trained in such methods. *See* Michael C. Dorf and Sidney Tarrow, *Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena*, 39 L. & Soc. Inquiry 449 (2014) (reporting results of interviews with LGBT rights lawyers); Michael C. Dorf and Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 Vand. L. Rev. 831 (2000) (reporting observations of drug treatment courts and results of interviews with drug treatment court personnel).

53. Posner, Divergent Paths, *supra* note 6, at 9 (describing the modern legal academy as "the safe berth for the philosopher manqué, the historian manqué, and so on.").

54. *Id.* at 323, 344, 347.

or "quasi-clinical"[55] courses, by which he means what is usually conveyed by the term "simulation" courses. Posner also would like to see the clinical faculty given tenure and more closely integrated into the rest of the faculty.[56]

These are hardly radical ideas, and they have been successfully implemented to varying degrees at many law schools. But they do raise cost questions. Clinical and simulation courses are more labor-intensive than Socratic or lecture courses, typically requiring higher faculty-student ratios. Even if the faculty members teaching the added skills are not also pursuing research into how judges decide cases and otherwise trying to provide useful information to the federal judiciary—as Posner wants—the shift in teaching method would lead to an increase in faculty size. Yet Posner disapproves of the recent "essentially mindless expansion in the size of the legal professoriate . . . ."[57] Perhaps he thinks the expansion to which his proposal would lead would be "mindful," but it would still be costly.

Posner does have some good ideas about legal education, but even these seem half-baked. For example, he persuasively argues that a good lawyer should be literate in both the humanities and the sciences. Thus, he proposes that law students who arrive with a humanities background take undergraduate courses in technical subjects, while those who arrive with a technical background be required to take humanities courses in law school.[58] The goal is sensible, but the means are odd. Law schools are already under pressure to add more skills courses, leaving little room to require (admittedly vital) courses outside the law entirely. Requiring undergraduate prerequisites for law school, in the way that medical schools do, might better serve Posner's aims.

In some respects, Posner is badly out of touch with how legal education actually proceeds. His views about legal writing instruction are especially misinformed. Posner asserts that first-year required legal writing courses teach students to use jargon,[59] which is a calumny. Any survey of legal writing instructors will verify that they teach students *not* to use jargon,[60] as the title

55. *Id.* at 324.

56. *See id.* at 325 ("A further problem is that many, perhaps most, clinical law professors do not receive tenure, are not expected to publish, and do not do much teaching in the conventional sense.").

57. *Id.* at 13-14.

58. *Id.* at 325-26.

59. *Id.* at 336.

60. I asked my Cornell Law School colleagues who teach first-year Lawyering (our legal writing course) whether they instruct students to use jargon. They all said no; they teach students to avoid jargon. I also asked whether they know of any reputable legal writing program anywhere that teaches students to use jargon. Again, they all said no. Posner has also taken issue with judges using legal jargon. See United States v. Dessart, 823 F.3d 395, 407-08 (7th Cir., 2016) (Posner, J., concurring) ("Judicial opinions are littered with stale, opaque, confusing jargon. There is no need for jargon, stale or fresh. Everything judges do can be explained in straightforward language—and should be.").

of a textbook used in many such courses confirms.[61] Posner also dislikes such "mechanical" systems for brief or memorandum writing as "IRAC" (Issue, Rule, Application, Conclusion) and "CRAC" (Conclusion, Rule, Application, Conclusion).[62] He is right that student writing that rigidly uses either of these formats lacks elegance, but he misunderstands their purpose. Many students arrive in law school unfamiliar with the logical structure of analytical and persuasive writing. Systems like IRAC and CRAC provide them with a means of compiling the necessary elements of an argument. Once students master these basics, they learn to use the outlining systems implicitly. As they gain confidence, they take poetic license, and their writing begins to flow. Posner is correct that many students and lawyers never become great or even competent writers, but that is not because they have been straitjacketed by IRAC, CRAC, or, more generally, the instruction they receive in legal writing courses.

IV

Posner's most basic proposal for reforming legal education resonates with his view of judging and scholarship: He wants law schools to teach students to be legal realists.[63] He states that "[l]aw students are natural formalists,"[64] and that they remain so even though "a great many law professors" are legal realists.[65] For generations, professors have used the Socratic method to demonstrate to students that the seemingly determinate law is largely indeterminate, at least at the margins, which is where appellate cases fall. Yet students remain attached to formalism.[66] Just as Posner does not explain how, after over a century of legal scholarship, more such scholarship will persuade judges to embrace legal realism (to a greater extent than they already do), he does not explain how more legal realist teaching will persuade law students (and the lawyers they become) to embrace legal realism.

To solve the puzzle would require an account of the attraction of formalism. For students in particular, part of the answer may be careerism. Students understandably seek good grades as a pathway to good jobs, and they think that the path to good grades runs through correct answers. The satellite industry of hornbooks and commercial outlines reinforces this quest for certainty.

But careerism is at best an incomplete explanation. Many students come to law school after undergraduate studies in the humanities and social sciences, where they have grown comfortable with the idea that hard questions do not

61. Bryan A. Garner, Legal Writing in Plain English (2d ed. 2013).

62. Posner, Divergent Pathways, *supra* note 6, at 336.

63. *Id.* at 366.

64. *Id.* at 302.

65. *Id.* at 300.

66. *See* Michael C. Dorf, *Indeterminacy and Institutional Design*, 78 N.Y.U. L. Rev. 875, 930 n.210 (2003) ("In my experience, students arrive at law school as naïve formalists. Much of their legal education aims to convert them into cynical legal realists, but the process does not take.").

yield clear answers. The formalism that most law students bring to their legal studies resembles the formalism of the broader public. Where does *that* come from?

Maybe the answer is politics. As Posner notes, neoformalism in federal constitutional and statutory cases is largely a product of the Federalist Society and the judges and justices appointed to the bench by Republican presidents beginning with Ronald Reagan.[67] With the recent death of Justice Antonin Scalia and the possibility that a Democratic president will name his successor, perhaps originalism and formalism more generally will fade away.[68]

Posner's own analysis suggests, however, that formalism will not disappear entirely. He thinks formalism is not simply a project of the political right but a product of the legal profession's failings. He says the belief that authoritative rules filtered through legal jargon and the "*faux* rigor" of lawyers' "obsession with citation format" will yield determinate results answers an "anxiety" created by the fact "that law really is not a rigorous field."[69] More insidiously, by mystifying the law, lawyers perpetuate a "guild" that is able to extract undeserved rents from the nonlawyer population.[70]

Posner's idea that lawyers generate needless complexity to con the public is not new. Jerome Frank's 1930 classic legal realist book, *Law and the Modern Mind*, made the same point, but Frank, unlike Posner, attributed the view that legal complexity is a scam to the naïveté of most nonlawyers, who believe that were it not for lawyers' "craftiness and guile, the law could be clear, exact and certain."[71] Like Frank and other legal realists who preceded him, Posner thinks the law is almost never clear, exact, and certain. But Frank exculpated lawyers. They are not deliberately deceiving the public to extract rents. Even lawyers themselves, Frank explained, "fail to recognize fully the essentially plastic and mutable character of law."[72]

Posner, by contrast, holds the negative view about lawyers that Frank attributed to naïve formalists—that lawyers are scammers. In order for that charge to be true, however, lawyers would have to know better. They would have to be closet legal realists who only feign formalism. Posner does think some of his fellow judges are indeed closet legal realists; yet he does not think this about most practicing lawyers. He thinks most lawyers, like most law students, are actually formalists. But if so, they should at least be acquitted of the charge of lying to the public.

67. Posner, Divergent Pathways, *supra* note 6, at 87.

68. *See* Eric Posner, *Why Originalism Will Fade,* Eric Posner (Feb. 18, 2016), http://ericposner.com/why-originalism-will-fade/.

69. Posner, Divergent Paths, *supra* note 6, at 128

70. *Id.* at 301. *See also* Richard A. Posner, Overcoming Law 39-70 (1995) (comparing the evolution since the 1960s of the modern legal profession's "cartel" to the transformation from medieval guilds to mass production).

71. Jerome Frank, Law and the Modern Mind 5 (Transaction Publishers 2009) (1930).

72. *Id.* at 10.

The conclusion that lawyers are naïfs but not con artists is admittedly faint praise for the legal profession; but if Posner were to draw it, he would leave room for his project of educating law students, lawyers, and judges in the truth of legal realism—at least in theory. But probably not in practice. Given the failure of other efforts in that direction, Posner too will almost surely fail to vanquish formalism completely. What should we make of that failure?

The answer depends on why even people who know better believe in formalism despite the evidence against it. The simplest answer is that they don't. Even if we are not all legal realists to the extent that Posner is, maybe nearly everybody with any real knowledge of how the legal system operates understands that the formal legal materials frequently leave gaps for appellate courts to fill. If so, then the question is narrower. It is not *why are lawyers formalists?* but *why are lawyers more formalist than seems warranted?* Seen in this way, the legal profession's failure to join Posner as full-on legal realists is only partial. We are now asking why formalism has even the residual hold that it does.

Perhaps belief in formalism is like religious belief. We have been indoctrinated in it, and it serves important psychological needs. If belief in formalism has this character, then, by Posner's own reasoning, it will remain stubbornly impervious to being dislodged by rational argument. Posner says in *Divergent Paths* that rational arguments about abortion go nowhere "because the antagonists argue not from shared premises but from incommensurable political, moral, or (in the abortion case) religious beliefs (or lack thereof). . . ."[73] Elsewhere, Posner has tried to cabin his claims about the limitations of reason for resolving moral propositions,[74] but belief in formalism probably should count as a moral belief in the sense that Posner uses the term.

And rightly so. Everyone is a formalist at least to the extent that he or she thinks that in a great many circumstances, the combination of authoritative text and social convention provides reasonably clear answers to a great many questions that, absent clear law, would lead to conflict. How old must one be in the state of Illinois to purchase alcohol? What is the statute of limitations for the federal crime of mail fraud? When does a president's term start? *Et cetera*. Formalism—understood in this minimal sense—is a moral principle roughly synonymous with belief in the rule of law.

Posner does not deny that easy cases exist. On the contrary, he attacks critical legal studies for extending the legal realist critique of the determinacy of formal legal materials beyond the domain wher e that critique has real force—in appellate cases.[75] Yet Posner does not explore the implications of his tacit acceptance of the fact that there is a domain of formalism and a domain of legal realism. Posner's dismissal of all philosophizing leaves him uninterested in an important puzzle: What happens at the boundary between easy cases and hard cases?

73. Posner, Divergent Paths, *supra* note 6, at 29.

74. *See generally* Richard A. Posner, The Problematics of Moral and Legal Theory (1999).

75. Posner, Divergent Paths, *supra* note 6, at 263-64.

That is arguably the central question of modern jurisprudence. To oversimplify greatly, Ronald Dworkin argued that there is no boundary—that in hard cases judges properly employ the same methodology as they employ in easy cases. Dworkin thought that in hard cases a judge seeks to synthesize the existing legal materials by reference to principles of political morality. Although Dworkin thought that there are right answers to moral questions,[76] he was not a formalist, because he recognized that in a pluralistic society, judges with different values will reach different conclusions about what those right answers are.[77] H.L.A. Hart thought that Dworkin's view was still too formalist. Hart thought that hard cases arise in areas where the law has an "open texture," and that judges exercise discretion in deciding such cases.[78]

Posner blithely dismisses both Dworkin and Hart as irrelevant to judges.[79] Yet his own view is quite close to Hart's, even echoing Hart's language. When Posner refers to the law's "open area"[80] he means just what Hart meant by "open texture."[81] By failing to see the similarity between Hart's views and his own, Posner misses an opportunity to exploit his main competitive advantage—his ability to describe judging from the inside.

Posner uses a number of different terms to describe how a judge decides a case in the open area of the law. The judge falls back on his "priors";[82] he focuses on "practical consequences";[83] he relies on "the personal, the emotional, and the intuitive," terms he that he equates with "moral intuition."[84] These various formulations are not synonyms, and they are at best vague. A recently discovered previously unpublished manuscript on discretion by Hart shows that it is possible to say something informative about discretionary decisions.[85] To say that a judge exercises discretion should not be a showstopper.

76. *See* Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996) (defending the concept of moral truth).

77. *See* RONALD DWORKIN, FREEDOM'S LAW 37 (1996) ("the moral reading encourages lawyers and judges to read an abstract constitution in the light of what they take to be justice.").

78. In the postscript to his best-known work, Hart remarked that Dworkin's account of the role of law, rather than discretion, in deciding appellate cases took too seriously "the ritual language used by judges and lawyers." H.L.A. HART, THE CONCEPT OF LAW 274 (2d ed. 1994).

79. POSNER, DIVERGENT PATHS, *supra* note 6, at 277 (judges "do not read H. L. A. Hart or Ronald Dworkin"); *id.* at 221 n.26 ("Hart's book is revered; I wish I knew why.").

80. *Id.* at 22, 176-180, 352.

81. HART, *supra* note 78, at 128.

82. *Id.* at 22.

83. *Id.* at 176.

84. *Id.* at 180.

85. *See* H.L.A. Hart, *Discretion*, 127 HARV. L. REV. 652 (2013). The essay was written and distributed among Harvard Law School faculty when Hart was a visiting professor there in 1956, but was not published during his lifetime and was thought to be lost. *See* Geoffrey C. Shaw, H.L.A. *Hart's Lost Essay:* Discretion *and the Legal Process School*, 127 HARV. L. REV. 666, 666-70 (2013).

What we need are a good normative account of what judges should do when filling in the open spaces of the law and a good descriptive account of what they actually do when faced with that task. The best parts of *Divergent Paths* aim at these goals, but too much of the book, indeed, too much of Posner's recent academic work overall, either simply insists or attempts to establish that large open spaces exist—that is, that legal realism is correct.

That is not helpful. The people who stubbornly remain residual formalists or (more rarely) complete formalists after over a century of realist writing from some of the greatest legal minds are not amenable to persuasion. The rest of us agree with Posner that appellate judging mostly involves the filling in of the law's open areas. The collaborative project Posner has undertaken to survey his fellow judges suggests that Posner himself recognizes the need for a thicker description of judging. I hope Posner's next book will say less about the existence of law's open areas and more about how judges can and should fill them in.

V

Given Posner's prolificity, we will not need to wait long for that next book, but perhaps we should not wait at all. Posner is, after all, not just a public intellectual. He is also a judge, and in that capacity he makes the best argument for his view of the judicial role. Posner's opinions color within the lines of the law, even while they accomplish what he complains that a CRAC-addicted student cannot: They persuasively resolve hard questions by focusing on the real stakes.

His opinion striking down the same-sex marriage bans of Indiana and Wisconsin[86] showed Posner at his best. The opinion fit the existing Supreme Court precedent, even as it quickly moved to ask, in good pragmatic fashion, what the point of these laws was. By 2014, when the case was argued and decided, both the culture and equal protection doctrine forbade the laws' proponents from invoking their real reason for support: religiously motivated homophobia. Thus, the state was left to argue that the bans were somehow designed to protect the children born as the accidental product of heterosexual sex. Posner wryly responded: "Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry. Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure."[87] Posner calmly explained that the state's argument was backward, because married same-sex couples provide stable homes for the accidentally produced children they adopt.[88] His opinion striking down Wisconsin's law requiring doctors performing abortions to have admitting privileges in nearby hospitals was equally forthright in surveying the background circumstances of the law's adoption to reach the unassailable

86. Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014).

87. *Id.* at 662.

88. *See id.* at 662-64.

conclusion that the law's purpose was to make abortions more difficult to obtain, not to make them safer.[89]

Posner's opinions make for refreshing reading. They show that it is possible to be a pragmatic judge—and an entertaining one at that—even while operating within the law's conventions.

Divergent Paths exemplifies its own thesis. It is a work of legal scholarship that does not provide the judiciary with the help that Posner thinks it needs. Fortunately, his own work on the bench largely does. The best hope for further erosion of formalism and movement toward Posner-style pragmatic jurisprudence may come from the example Posner himself sets as a judge.

89. *See* Planned Parenthood of Wisc. v. Schimel, 806 F.3d 908 (2015).