

Michael C. Dorf's "Review" of Richard A. Posner, *Divergent Paths: The Academy and the Judiciary*¹

A Response by the Book's Author

The editor of this journal has invited me to write a rejoinder to Professor Dorf's review—which I am happy to do although “rejoinder” is more antagonistic than I am inclined to be in commenting on his review. Much of it I either agree with or can't see much profit in disagreeing with. And I am flattered by his references to my judicial opinions dealing with supervised release and same-sex marriage. But I don't think that his piece is accurately characterized as a book review, because a book review is expected to give the reader of the review an idea of the scope and contents of the book, and Dorf doesn't do that. You would not guess from the review that Appendix D of my book² lists 75 problems of the federal judiciary and 48 possible academic solutions, all touched on in the book. Dorf mentions few of either the problems or the solutions. I would not expect any reviewer of my book to discuss 123 problems and suggested solutions. But Dorf's “review” fails to convey an accurate picture of the book to his readers. Nor are all his criticisms on the mark, as I shall now try to show.

In footnote 15 of his piece Dorf describes as “petty” my criticizing the frequent misspelling by lawyers and judges of the Latin phrase *de minimis non curat lex* (the law doesn't concern itself with trifles) as *de minimus non curat lex*. If *minimis* were the only, or one of a handful, of words that lawyers and judges frequently misspell, my drawing attention to the misspelling would indeed be petty. But as Dorf fails to mention, that word is only one of a number of words and phrases that I criticize on pages 123 and 124 of my book, all being words and phrases that appear frequently in briefs, judicial opinions, and law review articles. I do not consider these criticisms of what amounts to systematic bad legal writing “cranky,” as he contends, or my criticisms of the

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1. Richard A. Posner, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY*, Cambridge, Mass., London: Harvard University Press, 2016, pp. 414, \$29.95.
2. *Id.* at 361-68.

Bluebook and of much else regarding legal composition as “cranky.” I would like to see him defend the *Bluebook*—its length (560 pages),³ its cost (-\$36),⁴ its unintelligible abbreviations (guess what words “Auth.” “Auto.,” “Broad.,” “Bhd.,” “Ent.,” “Prot.,” “Res.,” and “Unif.” are *Bluebook* abbreviations of), its opacity, its superfluity. The handbook that I give my law clerks contains five pages on citation format; that’s enough.

Very strangely—quite mischaracterizing my book—Dorf implies that I tried but failed through “pointed criticisms” of Justice Scalia “during the last years of Scalia’s life” (does Dorf think I was trying to hasten his death?) “to turn Scalia into a Posner-style legal realist.” That’s absurd. I could no more have done that, and so would have wasted my time trying, than I could turn my cat into a dog. I would like my book to have some impact on the profession. But I know its impact will be slight, in part because of the complacency of some judges and more professors, in part because of certain immovable barriers to reform, such as the election of most state judges and the selection of federal judges by politicians (the President and Senators), and above all because of the stodginess of the profession. The profession marches forward, but with its head screwed on backward—transfixed by an eighteenth-century Constitution of limited relevance to the twenty-first century, by an antiquated vocabulary, by opaque verbal formulas (“actual innocence,” “rational basis,” “intermediate scrutiny,” “arbitrary and capricious,” “abuse of discretion,” and so on ad infinitum), and by countless obsolete precedents.

I am surprised to find Dorf saying that my describing “judges not as interpreters of legislation but as partners of the legislators” is “old hat.” The quoted passage has a context that he ignores. I say that “judges have been given the thankless task of ‘interpreting’ statutes that can’t be interpreted in many of the cases to which the statutes apply. Often there is no discernible legislative intent regarding potential cases within the statute’s semantic reach If the legislators did not foresee an issue arising under their statute that has become a subject of litigation, there isn’t anything to interpret Interpretation is recovery of meaning, and there is no meaning to recover in such cases.”⁵ The result is to make judges legislators. Old hat? Dorf’s known it forever? Or heresy? What would Scalia have said?

When Dorf discusses my criticisms of academic legal scholarship he turns defensive—he is after all himself a legal scholar. Yet I am surprised to find him defending two very questionable books on constitutional law, by Professor Laurence Tribe (*The Invisible Constitution*) and Professor Akhil Amar (*America’s Unwritten Constitution*), respectively—both of which I have criticized sharply

3. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass’n et al. eds, 20th ed. 2015).

4. *Purchase Bluebook Products*, THE BLUEBOOK, <https://www.legalbluebook.com/Purchase/Products.aspx?op=Book> (last visited August 6, 2016). Costs vary ranging from \$38.50 for a print copy obtained from the Bluebook’s official website which states that bookstores charge \$29. A one-year subscription to the online version is \$36.

5. *Id.* at 112.

in a book that Dorf does not mention⁶ and thus fails to rebut. Although he suggests implausibly that the Tribe and Amar books are read by judges, he doesn't name any, and I'd be surprised if there were any except me—the unfriendly reader.

Dorf waxes particularly wroth at criticisms I level at two articles by Harvard Law Professor Richard Fallon. I quoted from the articles passages that I claimed and claim would be unintelligible to judges—and I now add, to lawyers and law students and many law professors as well. I quoted at length from the articles, and now I refer the readers of this response to my quotations for confirmation of my criticisms.⁷ I imagine Dorf would respond that a select circle of law professors could understand Fallon's articles, but I can't see how the articles (which I do not mean to suggest are characteristic of the entire corpus of Fallon's scholarly writing⁸) could be useful to the judiciary, or for that matter to legal education.

I never say, as Dorf supposes, that legal scholarship has no value for legal education, the judiciary, or the practice of law. But I do argue that its value for these enterprises is diminishing as legal scholarship, especially at the elite law schools, becomes ever more esoteric, as the faculties of those schools become ever more crowded with scholars whose first loyalty is to other scholarly fields. Often those are fields in which they obtained advanced degrees yet realized that the chances of landing secure, well-paying academic jobs in those fields were slight—a development to which Dorf, in defending legal scholarship, does not allude.

He claims that I “want[s] academics to show that legal realism is correct,” an aim he deems “naïve.” No, I want academics to be realistic about judicial behavior—to grasp for example the degree to which judicial behavior deviates from the formalism that continues to be the official ideology of the judiciary, encapsulated in John Roberts's absurd claim in his Senate confirmation hearing that a Supreme Court Justice is the equivalent of an umpire or referee, who does not make rules but merely enforces the rules given to him. The critical fallacy in the remark is that an umpire or referee may influence but does not decide the outcome of the game (the side with more fouls may nevertheless win), but judges do decide the outcome of cases.

Dorf discusses legal realism at length in his “review,” describing me as a legal realist—a label I'm happy to wear—and, less accurately, as wishing to enlist academics to spread the realist gospel and “banish all vestiges of formalism”—a crusade I have never thought to embark on. His thoughts on legal realism do not appear to be coherent. On the one hand he quotes approvingly an article in which Brian Leiter, a prominent professor at the University of Chicago Law

6. RICHARD A. POSNER, REFLECTIONS ON JUDGING 219-33 (2013).

7. POSNER, DIVERGENT PATHS, *supra* note 1, at 43, 319-20.

8. As Dorf points out, I have cited several of Fallon's articles—intelligible articles—in my opinions, and I admire Fallon's very clearly written book, THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICA CONSTITUTIONAL LAW AND PRACTICE (2d ed. 2013).

School, declares that “we are all realists now,” and on the other hand he regards as quixotic what he imagines to be my crusade against—formalists, which if they don’t exist could not be the target of a crusade. A certain tendency to self-contradiction is illustrated by his unintentionally amusing statement that “Posner does have some good ideas about legal education, but even these seem half-baked.” Half-baked ideas are not good ideas.

One of my suggestions in *Divergent Paths* for reforming law school teaching was that civil procedure and evidence be treated as clinical courses—that instead of being taught as bodies of rules they be play-acted. The students, rather than immersing themselves in the rules of civil procedure or of evidence, would draft complaints and conduct depositions in their civil procedure course and conduct mock trials in their evidence course. (I taught such evidence courses at the University of Chicago Law School, using the superb case files of the Institute of Trial Advocacy, for several years in the early 1990s.) Dorf objects that such curricular changes would “raise cost questions” because “clinical and simulation course are more labor-intensive than Socratic or lecture courses” and would therefore require larger law school faculties and so greater expense. But he is wrong, because such teaching can be done better by adjuncts—practicing lawyers or judges (me for example)—who receive slight and often no compensation, than by law professors who have no practical experience.

As for his suggestion that my criticisms of current legal-writing courses are “misinformed” because actually they enable students to “take poetic license, and their writing begins to flow,” I haven’t seen poetry in student writing or in judicial opinions, most of which are drafted by law clerks, most of whom are recent law school graduates. In fact, most law schools place little emphasis on writing skills; often a first-year course in legal writing is the only such course. And although Dorf claims that legal-writing instructors discourage their students from resorting to legal jargon, it would be more accurate to say that some of the instructors *try* to discourage use of jargon, but judging from the number of jargon-ridden student law-review comments and judicial opinions, the instructors are rarely successful. I am appalled by his endorsement of the writing “systems,” taught in some law schools, called IRAC (Issue, Rule, Application, Conclusion) and CRAC (Conclusion, Rule, Application, Conclusion). Those are straitjackets. I am reminded of Holmes’s crack that “to rest upon a formula is a slumber that, prolonged, means death.”⁹

The crowning peculiarity of Dorf’s “review” is that it has very little to say about the judiciary. The subtitle of my book is “the academy and the judiciary,” and the judiciary (that is, the federal judiciary—I do not discuss state judiciaries, about which I know little) gets a good deal more attention in the book than the academy does. Yet apart from Judge Harry Edwards of the D.C. Circuit, I am the only living judge mentioned in Dorf’s article, and even his references to dead ones (mainly Holmes, Hand, and Friendly) are few. In a book of more than 400 pages I make a large number of specific

9. Oliver Wendell Holmes, Jr., *Ideals and Doubts*, 10 ILL. L. REV. 1, 3 (1915).

criticisms (75, remember) of judicial practices and specific recommendations (48) for academic solutions; the vast majority both of the criticisms and of the suggested solutions Dorf ignores entirely. The reason I surmise is that as an academic his priority is to defend the academy from my barbs; he seems not very interested in the judiciary, in the quality of judicial appointments and judicial opinions, in the failures of judicial management and the lack of relevant diversity on the Supreme Court, and the numerous other criticisms of that and other courts that I deploy. His lack of interest in the judiciary confirms my concern about the growing gap between the academy and the judiciary.

Enough; let me end with a flourish—an effusive, *very* hard-to-believe, recent statement by Justice Kagan that illustrates the lack of realism that is one of the abetting sins of American law. After expressing her “boundless admiration and affection for Justice Scalia—‘I just loved Justice Scalia, and I miss him every day’” (could that be tongue in cheek?)—she remarks that she “would put this court as a whole up there with any court that the country has ever had in terms of the kind of legal skills, proficiency and lawyerly aptitude that this court has Our court is in general a very, very, very lawyerly place It’s natural to have people who have spent lots of years of their lives thinking about legal analysis.”¹⁰ I would say rather that the current Court is a very political place, and that the Justices are deficient in career diversity, deficient in understanding science and technology, virtually bereft of trial experience, and underworked.

10. Adam Liptak, *Supreme Court Is Working Hard to Avoid Deadlocks, Kagan Says*, N.Y. TIMES (Apr. 4, 2016), www.nytimes.com/2016/04/05/us/politics/supreme-court-is-working-hard-to-avoid-deadlocks-elena-kagan-says.html?_r=2. I can’t make sense of the last sentence of her statement.