
Richard Posner confession to being "outspoken for a judge." His career - as a Judge of the United States Court of Appeals for the Seventh Circuit; a senior lecturer at the University of Chicago Law School; a leader in the field of law and economics; and the author of more than three dozen books (addressing, among other topics, moral and legal theory; the decline of public intellectuals; the impeachment of Bill Clinton; the Supreme Court decision in Bush v. Gore; and the failures of capitalism in "The Great Recession" that began in 2008) - leave no doubt about his willingness to address controversial issues in controversial ways.

In Divergent Paths, Posner declares that the emperor (i.e. the modern judiciary) has no clothes. Faced with complex cases, often grounded in scientific and technological advances (like wiretapping), federal judges continue to exhibit "a rearview mirror syndrome," relying on antiquated, vague, contestable, internally conflicted blunt instruments and on the not so noble lie that they are rule and text bound "umpires" and not legislators (operating in the interstices left by statutes). For these reasons, Posner finds the self-congratulatory tone of Chief Justice John Roberts and many of his colleagues "sickening."

Posner claims as well that law schools and legal scholarship are of little or no help to judges. Obsessed with abstract, jargon-filled legal theory and constitutional interpretation, academics (more and more of whom have disciplinary training in subjects other than law) ignore the systemic and institutional deficiencies of the courts. Despite its pervasive and toxic impact on hundreds of thousands of persons prosecuted for federal criminal violations, for example, law school professors have paid little attention to judges' imposition of conditions for "supervised release" (which was substituted for parole in 1987).

Divergent Paths contains a laundry list of recommendations. Some of them - referring law students to MOOCs to fill in gaps in their knowledge and forbidding them to use citation-format manuals; offering continuing education classes to judges on writing style and grammar; persuading professors to write shorter and simpler articles - seem rather trivial. Others, such as the lack of diversity among federal judges with respect to a background in science and technology; politics; business; management; and, for that matter, to legal training outside of the Ivy League, are far more interesting and provocative.

The great strength of Divergent Paths - and the principal reason it should command the attention of readers - is Posner's candid, compelling and accessible assault on legal formalism (and its kissing cousins, originalism, textualism, literalism, and canons of construction), the dominant method used by federal judges. Formalism's principal premise, Posner reminds us, is that objective meaning can be extracted from statutes, constitutional provisions and precedents in resolving legal disputes, and that ideology, experience, and policy consequences need not and should not play a substantive role in the process.

A legal "realist," Posner insists that an interest in continuity, planning and investment must be balanced by an interest in creativity, a fact-based assessment of current realities, and the practical implications of decisions. Judges, he suggests, cannot plausibly project the intent of the framers and ratifiers of the Constitution into the twenty-first century; doing so yields absurdities such as the notion that flogging does not constitute "cruel and unusual punishment." Facing "hieroglyphs without a Rosetta Stone," judicial realists derive meaning from incomplete texts and plug holes. Ambiguity and uncertainty are even more the norm these days, with, for example, an Affordable Care Act that is 2,700 pages long (and may not have been read in its entirety by any of the politicians who voted for or against it). Posner has good reason to brand Justice Antonin Scalia's claim that judges make law "as though they were finding it," an "explicit endorsement of judicial hypocrisy."
Posner (who was appointed to the bench by Ronald Reagan) exhibits his pragmatic judicial philosophy with a withering critique of recent Supreme Court decisions. Acknowledging that it is not a crime for wealthy donors to buy access to politicians with campaign contributions, Posner chastises the majority in *Citizens United v. Federal Election Commission* for not recognizing that nothing in the First Amendment places such conduct beyond the power of government to regulate. He dismisses Scalia's literal reading of the Affordable Care Act (and its clearly inadvertent omission of "federal exchanges" in the section authorizing federal tax subsidies) in *King v. Burwell* "as a ridiculous proposition." And he is scornful of the minority opinions in *Obergefell v. Hodges*, the recent same sex marriage case (which he claims is virtually identical to *Loving v. Virginia*, which declared laws prohibiting inter-racial marriage unconstitutional). Gratuitous interference in other people's lives, Posner writes, is bigotry; "that it is often religiously motivated does not make it less offensive." Nor does Justice Alito's assertion that same sex marriage will undermine traditional marriage make any sense. In *Obergefell* as in *Loving*, "there is palpable harm to a group long discriminated against and no harm to other people - at least no tangible harm."

Legal realism is, of course, rife with risks. Justice Holmes used it to justify state laws sterilizing "imbeciles." Some realists, including Judge Posner, produced a defense of *Bush v. Gore*, making the dubious and highly partisan claim that by resolving the election of 2000 the Supreme Court averted a potentially catastrophic political crisis. Most important, in my judgment, realists have not adequately clarified the appropriate relationship between decisions based on current realities and practical consequences and the fundamental principles embedded in the Constitution.

Posner is certainly right, however, to take note of "a certain staleness in the current judicial culture" - and to try to stimulate a root and branch re-evaluation of our legal institutions (courts and law schools) and the assumptions and precepts that undergird American jurisprudence.

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Conversations