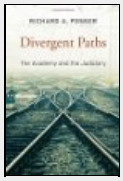
The University Bookman

Winter 2016

Judges and Dons

Divergent Paths: The Academy and the Judiciary
by Richard Posner.
Harvard University Press, 2016.
Hardcover, 432 pages, $30.



ALLEN MENDENHALL

For a still-active judge on the U.S. Court of Appeals for the Seventh Circuit who "moonlights" as a law professor, Richard Posner is oddly and stunningly prolific. He not only contributes to scholarly discourse but also writes his own legal opinions. That places him in a small minority among federal judges. Posner is justifiably proud of his prolificacy and diligence, and he's neither apprehensive nor ashamed about castigating his peers—another quality that sets him apart.

Over the years, Posner has tried to, in his words, "pull back the curtain" on his colleagues, our Oz-like federal judges, exposing their failures and inadequacies—what he calls, channeling Star Wars, the "dark side"—lurking behind the glow and aura and imprimatur of state power. Posner suggests that federal judges are not adept at preventing "hunch" or "ideology" from influencing their decisions. Because of their inadequate knowledge and limited training, he adds, federal judges too often resort to feeling and intuition—their "unconscious priors"—to resolve difficult facts and issues. He believes the legal academy should curb this judicial inadequacy, insofar as scholars could, in their teaching and writing, guide judges with clarifying direction. Yet he sees a troubling gulf between law schools and the bench, one that, he insists, "has been growing."

Hence his latest book—*Divergent Paths*—which seeks to "explain and document" this gulf, "identify the areas in which federal judicial performance is deficient, and explain what the law schools can do to remedy, or more realistically to ameliorate, these deficiencies." Posner is as hard on the professoriate as he is on the federal judiciary, indicting the former for its dislocation from the bench and the latter for its "stale" culture. To his credit, Posner criticizes only the federal judiciary and the elite law schools with which he is familiar. He does not purport

To live with a gnawing grudge against one's own civilization is the way to a personal Hell, not to a Terrestrial Paradise.

Russell Kirk

NEWS

We are pleased to announce the release of *The University Bookman on Edmund Burke*, now available for Kindle. Collecting 21 reviews, essays, and interviews from the Bookman on the life and thought of Edmund Burke, this book is only $2.99, and purchases support our ongoing work to provide an imaginative defense of the Permanent Things. (3 Mar 2015)

Congratulations to *Bookman* contributor Caleb Stegall, who was selected for a seat on the Kansas Supreme Court. We wish him all the best. (28 Dec 2014)

OTHER SITES

- The Imaginative Conservative
- Arts & Letters Daily
- First Things
- Manhattan Institute
- City Journal
- National Review
- The Heritage Foundation
- Ethics and Public Policy Center
- Books & Culture
- The New Atlantis
- The New Criterion (and blog)
- Intercollegiate Studies Institute
- First Principles Journal
- The Acton Institute
- The New Inquiry
- Reconciling Remus and Rome (Andrea Kirk Assaf)
- Image (Image)
- Good Letters Blog
- The American Spectator
- The American Conservative
- Front Porch Republic
- Anamnesis Journal
- The City (from HBU)
- Lapham's Quarterly
- Bookworm from KCRW
- G. K. Chesterton Institute
- The Catholic Thing

to speak for, about, or against the state institutions and non-elite schools to which he has had little exposure, which lends his critique credibility.

Little else in the book, however, is modest. Posner is his typical boisterous (one might say arrogant) self, and his characteristic crankiness is on grand display. Whether it bothers or delights readers depends, I suspect, on the extent to which they agree with him. If you're in accord with Posner on this topic—the institutional and cultural barriers separating federal judges from legal scholars—you'll find his frank attitude and no-holds-barred criticism to be entertaining. In equal measure, someone else might find them off-putting. The same goes for the book: whether you enjoy it will depend on your affinity for Posner.

Like Justice Oliver Wendell Holmes, his hero, Posner sees Darwinism—natural selection in particular—at work in all aspects of human experience. For example, the legal academy is "Darwinian" because "each species of professor must find an academic niche in which he can avoid destructive competition from other professors." As a result, professors gather together in protective communities—an "academic ecology," in Posner's words—based on shared disciplinary interests. "Their need to communicate with persons outside their niche," Posner opines, "like the need of a squirrel to learn to eat dandelions as well as nuts, is minimized." This metaphor supposedly illustrates that the academy has become divorced from the judiciary. Although amusing as figurative language, it's perhaps not borne out by facts or evidence, nor by the data Posner presents in tables in his introduction. At best, then, Posner's complaint is anecdotal, not empirical, and that's disappointing coming from this learned judge who earned his reputation as an empiricist.

"Increasingly law school faculties cultivate knowledge of fields outside of law but pertinent to it," Posner says, "including economics, psychology, statistics, computer science, history, philosophy, biology, and literature." The gradual incorporation of disparate disciplines in law schools has, Posner believes, developed in tandem with the growing academic neglect of judicial activity. Put simply, law schools no longer primarily study the behavior and methodology of judges as they once did. Moreover, as law professors have proliferated and law schools have increased in size and number, legal academicians have found ample audiences among faculty and scholars and thus have not suffered from their dislocation from judicial institutions or from the flesh-and-blood judges who decide concrete cases.

Posner decries, with Trump-like enthusiasm, the "refugees" from other, less lucrative disciplines who've sought asylum in law schools. He claims, with apparent disgust, that "many of these refugees have a natural inclination to base their legal teaching and writing on insights gleaned by them in the disciplines that were their first choice." Yet he never adequately

demonstrates that interdisciplinarity—and the concomitant diversification of perspectives and backgrounds among legal faculty—damages or thwarts legal education. In fact, what he seems to decry is the current curriculum of legal education, which, to his mind, should focus on judicial behavior and opinions rather than on other areas of the law. He stops short of proposing that administrators build a wall around law schools and make other departments pay for it, but he would, I sense, favor a moratorium on faculty immigration to law schools, and possibly mass deportations for the faculty he deems unworthy or unqualified.

But what Posner dubs "the Ph.Deification" of law faculties is not necessarily bad. Posner himself reveals the disadvantages of being a generalist, which is what law school prepare their students to be. His own understanding of pragmatism, or rather misunderstanding, is itself evidence that he would have benefited from deeper learning in that subject (say, more reading of Peirce and James and less of Dewey and Holmes) before adopting it as his personal methodology and proclaiming its virtues to the world. His literary criticism in *Law and Literature* betrays a sometimes embarrassing unfamiliarity with the trends and history of that discipline, and his early forays into the economic analysis of law have failed to influence the economics profession or to contribute anything of lasting value to professional economists. Indeed, it is perhaps because he knew more than untutored lawyers about economics—though substantially less than actual economists—that his "economic analysis of the law" for which he became famous was as influential as it was.

The legal community, and legal scholarship in particular, would benefit from welcoming qualified specialists and, in so doing, broaden the parameters of legal study and force lawyers out of their insularity. Professors of legal writing ought to be equipped with academic training in writing and the English language. Isn't the systemic problem of bad legal writing self-perpetuating when legal writing professors are drawn, not from professional writers and teachers, but from lawyers? Moreover, professors of corporate law or finance ought to have academic training in those subjects—training that goes beyond the rudimentary glosses that find their way into judicial opinions written by non-expert judges. To read judicial opinions on a particular subject is not a fruitful way of learning that subject. A judge may have no experience in the insurance industry, for instance, when a difficult subrogation case arrives on his docket, yet he or she must handle the case and likely write an opinion on the facts and issues involved. The judge must rely on the evidence and briefing proffered by the parties to the case, not on personal expertise, which he or she lacks. Accordingly, the resulting opinion—inherently and intentionally limited to what it can accomplish—will not likely be sufficiently edifying or insightful to have staying power, that is, to teach future students and practitioners about the fundamentals of insurance.

Yet Posner is right to grumble about how the legal academy is populated by professors with little practical experience in law. In fact, law is the one discipline in which, counterintuitively, the more practical experience you have, the less marketable you are as a professor. He's probably right, too, that there are too many law schools and too many law professors—and, hence, too many lawyers for the saturated legal market.

Targets of Posner's ire include jargon, esoterica, obscurantism, and wordiness ("the fetishism of words"); the so-called Bluebook, which is a standard reference tool for lawyers concerning forms of citation to authorities (which is "maddening," "superfluous," "cancerous," and "time-consuming"); student editing of law reviews (for which "neophytes" rather than peer reviewers make the critical editorial decisions); excessive, obtrusive, and needless footnoting in legal scholarship (due in part to the aforementioned neophytes); the culture of secrecy and mystery among federal judges; the decline in legal treatises; hyperspecialization among professors; the political nature of judicial appointments and confirmations (including an emphasis on biological diversity rather than diversity of backgrounds and experience); lifetime tenure for federal judges; legal formalism; the unintelligibility of legal opinions to non-lawyers—the list goes on. If you're familiar with Posner and follow his writings, you've probably heard these grievances already. But they're worth repeating if, in book form, they can reach larger audiences.

Still, one gets the sense that Posner rushed this book into his editors' hands. A chunk of a paragraph on pages 225–26 reappears, verbatim, on page 271, thus undermining one of Posner's central points: the importance of brevity in writing. Some of his accusations can't be supported by evidence, such as "academic critics of judicial opinions feel superior to the opinions' authors" (how could Posner divine this psychological insight?) or "the average law professor was a better law student than the average judge had been" (possibly true, but how does Posner know this?). Posner's citations to Wikipedia, moreover, will raise eyebrows. Finally, it's either dishonest or imperceptive for this one time opponent of same-sex marriage to now claim that bigotry alone explains the conservative and Christian position on that issue, which is barely relevant to Posner's book and for which he offers little argument.

Posner is willing to depart from judicial norms and conventions. He believes that case precedent should not govern causes of action that entail novel issues and circumstances. Controversially, he encourages judges to look beyond the briefing and the record to ferret out the truth and context of matters inadequately illuminated by the parties to the case. Some of his suggestions will seem remote to the average reader and aimed at an elite (if not aloof) audience of politicians and

federal judges. Whether federal judicial salaries account for regional cost-of-living differentials, for instance, matters little to most Americans. Nor do we care, quite frankly, whether judges lack collegiality; we just want them to rule the right way. One would hope personality conflicts wouldn't influence the operative rules that shape human experience, but it turns out that judges can be petty.

Posner fittingly includes a question mark in the title to the final section of his book: "The Academy to the Rescue?" That punctuation mark reveals how skeptical—or at least tentative—Posner remains about the likelihood that his subjects will institute proper and constructive change. Most of his proposed solutions are sensibly plain: if student editing of law reviews is bad, do away with student editing of law reviews; if the law school curriculum is bad, change it; if judges write poorly, offer them training in writing through continuing legal education courses; if litigants and lawyers travel too far and at too great expense, allow them to videoconference.

Divergent Paths succeeds in demonstrating the need to refocus the legal curriculum on judicial behavior, if only by exposing judges' decision-making to scrutiny (and ridicule) and demystifying the glorified processes of judicial deliberation. "Most judges evaluate cases in a holistic, intuitive manner," Posner submits, "reaching a tentative conclusion that they then subject to technical legal analysis." Their goal is to arrive at decisions that comport with prevailing notions of morality, justice, and common sense. Statutory idiosyncrasies or awkward case precedents will not, in Posner's view, prevent these judges from reaching the result that people untrained in the law would likewise reach because of their ethical predispositions and basic sense of right and wrong. Judges are people too, and for the most part, they want to do what's reasonable.

Humility has few friends among judges and law professors, so it is fun, one must admit, to watch Posner serve these cognoscenti a still-steaming pan of humble pie. But even sympathetic readers will grow weary of the relentless complaining after hundreds of pages of it. Perhaps Posner should have minded his own dictum: "If you want a flawless institution go visit a beehive or an anthill." Then again, if Posner—who inhabits both the judiciary and the academy—doesn't speak up, who will? Answers to these questions could determine how important *Divergent Paths* really is.

Allen Mendenhall is a lawyer in Alabama and an adjunct professor at Faulkner University and Huntingdon College. He holds a Ph.D. in English from Auburn University. He is the author of *Literature and Liberty* (2014) and has two books forthcoming with university presses: an edition of the collected essays of John William Corrington and a study of Emerson's influence on the dissents of Oliver Wendell Holmes, Jr. Visit his website at AllenMendenhall.com.

Posted: March 20, 2016