

# Review

## ***Divergent Paths: The Academy and the Judiciary***

Richard A. Posner. Cambridge, MA: Harvard University Press, 2016. 432pp.

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In *Divergent Paths: The Academy and the Judiciary*, Judge Richard Posner proposes a partnership between the federal judiciary and law schools.<sup>1</sup> He provides a sweeping critique of the federal judiciary and suggests ways in which law schools can address these failings. His critiques fall under the headings of structural deformations (e.g., method of appointment, lifetime tenure), process deficiencies, (e.g., legal formalism in judicial opinion writing, lack of curiosity), and management deficiencies (e.g., poor staff management, lack of collegiality). The corresponding solutions include law schools providing continuing education for federal judges and changing their curricula to include new knowledge and skills. It is an ambitious and comprehensive volume on improving the federal judiciary.

Judge Posner's full catalogue of failings and prescriptions will surely receive treatment in multiple forums, as it should. In this review, I focus on a single criticism of judicial behavior: that a judge's decision is often affected by what Judge Posner calls

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“priors.” He suggests a course of continuing judicial education as a remedy for this problem, which surely has merit. I provide brief commentary on his suggested approach.

Judge Posner criticizes federal judges for lacking self-knowledge of the “priors” that inappropriately affect their written opinions and decisions (165). As he uses the term, a “prior is a belief or inclination, conscious or (frequently) unconscious, that one brings to an issue before obtaining any evidence concerning it” (17).<sup>2</sup> He observes that “[j]udges, like most people, tend to not know themselves very well” (350), and he warns that this lack of self-awareness leaves judges “excessively self-confident” in a way that inevitably affects the process and outcome of their work. For example, a judge may be disposed against a type of litigant based on their occupation, wealth, or other characteristic, which results in harsh judicial language towards or an unfavorable decision for the litigant.

Because unconscious priors add an irrelevant factor into the decision making process, they implicate the guarantee of fairness that underlies the constitutional requirement of “due process.” These priors do not rise to the level of unconstitutional judicial bias, as the Supreme Court has set a high hurdle for litigants challenging a judicial decision on that ground.<sup>3</sup> Nonetheless, a government committed to the rule of law should seek to minimize these influences on the judicial process. And so it is important to consider how judges might increase awareness of their unconscious priors.

Judge Posner proposes addressing judicial priors through “continuing judicial education [on] the psychology of judicial decision making” (350). For example, “[a] course in the psychology of values, preferences, and personality, focusing on judicial self-deception—bound to be a humbling and eye-opening experience for many of the judge students—would be of value to the judiciary and the nation” (351). He sees this education as something that “judges *need*” regardless of whether they had earlier been exposed to it in law school (351).

I endorse Judge Posner’s proposal of promoting self-awareness among federal judges. Indeed, this competency is one from which all adults would benefit. It is no surprise, then, that some law schools have introduced this competency to their curricula under the headings of “mindfulness”<sup>4</sup> and “emotional intelligence.”<sup>5</sup> The goal is for law students to build a practice of self-reflection that raises self-awareness of their emotions and other influences that shape their decisions and actions, and then to self-regulate their behavior as students and (later) attorneys. If law schools are actively discussing these

competencies, then such continuing judicial education can be developed, if not easily implemented.

My caveat to Judge Posner's proposal for continuing judicial education is to not take a one-size-fits-all approach. I am reminded of the debate over which physical exercise is best for one's health. While various forms of physical activity have differing effects on calories burned, metabolism, and cardiovascular fitness, the most sage advice I have heard is, "The best exercise is one that you will do."<sup>6</sup> So while the proposal to provide continuing judicial education is salutary, the precise path to self-awareness may depend on the person.<sup>7</sup> And this is because self-awareness, to be useful, must be an ongoing practice, and not merely the outcome of a single course or workshop. Just as physical exercise must become a habit or lifestyle to provide ongoing benefit, self-awareness will come from a regular practice of reflection that provides ongoing attentiveness to one's emotions and other influence, understanding of the pushes and pulls of these priors, and then a commitment to act appropriately. If a lawyer develops this practice early in their career, it will follow them to the bench.

#### NOTES

1. Judge Posner specifically notes that his analysis is directed to federal judges and so-called elite law schools. While his discussion is relevant to state court judges and non-elite law schools, he acknowledges that his account will not apply in all respects to other judicial and academic institutions.
2. These priors include "political ideology, religion, and other sources of values including moral values, temperament, personal and professional experiences, ambition, culture, generation, family history, ethnic or racial background, gender, age, education, technical knowledge, cultural breadth, analytical ability, empathy, sympathy, energy, health" (165–66).
3. A judge's decision making has been constitutionally compromised only when the risk of judicial bias "is too high to be constitutionally tolerable." *Caperton v. A. T. Massey Coal Co.*, 556 U. S. 868, 872 (2009).
4. Leonard L. Riskin, "The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients," 7 *Harv. Negot. L. Rev.* 1, (2002).

5. William S. Blatta, "What's Special About Meditation? Contemplative Practice for American Lawyers," 7 *Harv. Nego. L. Rev.* 125 (2002).
6. Freakonomics Podcast, "What's the "Best" Exercise?" Jan. 2, 2014, transcript available at: <http://freakonomics.com/2014/01/02/whats-the-best-exercise-full-transcript/>.
7. Some professionals address unconscious priors through spiritual practices. For example, at Creighton University, which is the Catholic, Jesuit institution where I work, one can engage spiritual practices called The Spiritual Exercises and the daily Examen for ongoing self-awareness. See Chris Lowney, *Heroic Leadership* (2005).