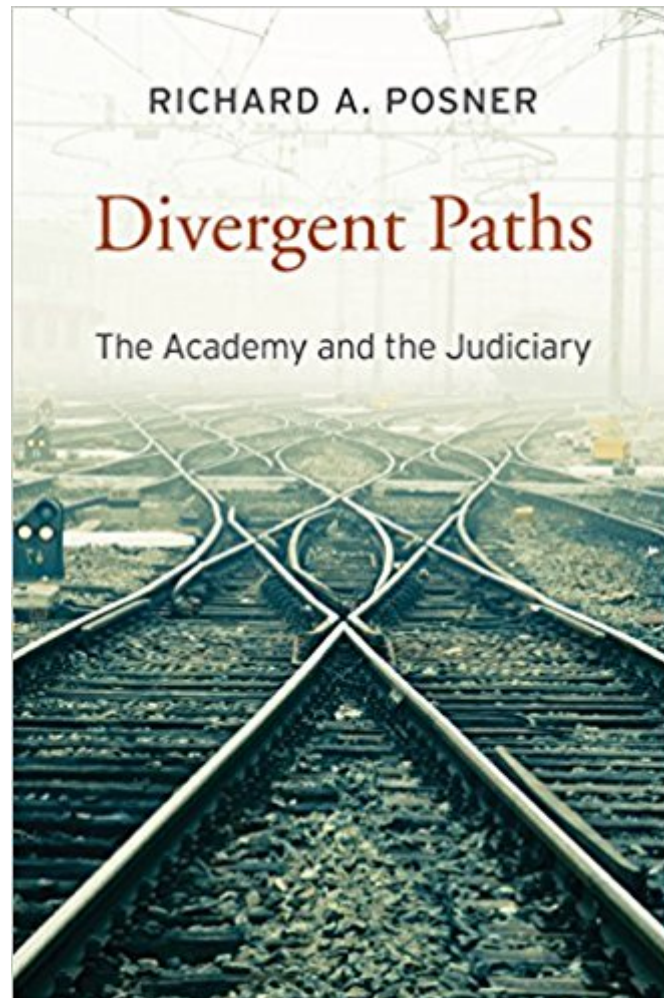


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# Divergent Paths: The Academy And The Judiciary



## Synopsis

Judges and legal scholars talk past one another, if they have any conversation at all. Academics criticize judicial decisions in theoretical terms, which leads many judges to dismiss academic discourse as divorced from reality. Richard Posner reflects on the causes and consequences of this widening gap and what can be done to close it.

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## Customer Reviews

Judge Posner's insights into the federal judiciary are always welcomed. I've become quite the follower of Judge Posner's works, and would recommend reading "How Judges Think" and "Reflections on Judging" before tackling this book. Although the learning curve is not steep, those books would give the reader a deeper understanding into what Judge Posner considers the flaws in the federal judiciary. I should start by making clear that I am not a federal judge, nor a federal practitioner – at least I do not practice in federal court, but I found Judge Posner's insights to be invaluable as they are still relatable to state courts as well (at least in my state). Also, I do not believe I am the target audience of this book, which is specifically geared towards law

schools and their faculty. Although I do not specifically agree with all of Judge Posner's suggested changes, I did enjoy being able to critically think about the problems he attempts to provide solutions for. One example I would like to illustrate is Judge Posner's suggestion that more law clerkable students attend courses in judicial opinion writing. The specific problem he is attempting to fix relates to the poor writing seen in opinions, which he attributes to the vast majority of federal judges having first drafts written by their clerks. Although this solution would benefit the quality of judicial opinions, it all but precludes the idea of fixing the problem by encouraging federal judges to write their own opinions. Even the thought of these students (being more likely to be appointed to the bench) will in 30 years or so be judges themselves will somehow then continue writing the first drafts of their own opinions misplaces the thought that in the intervening 29 years after the clerkship that they won't pick up the bad habits of letting others do their work (perhaps the non-law-clerkable kids that are working for them). Judge Posner seems to gloss over the possibility of selecting law clerks that have the style of writing that the judge is looking for, perhaps from a student that is not a top 25% student attending a top-tier law school. In other words, a greater fix to the problems seen in the academy would be to favor different academies... probably a solution that will not be any time coming soon. Mainly because I am assuming that being able to attract the best law students from the best law schools is just as prestigious as being one of those students working for a federal judge. I do agree that the academy can help out the judiciary (at all levels). I also think that more of the academic writings would be used to better the law, but one problem I think is the accessibility of the law review articles. Judge Posner makes excellent points that the concepts used in the academy are no longer "relatable" to real world situations, but for me (and I would assume a lot of the "small time" practitioners) do not have access to them. They're available on Westlaw and Lexis, but only when you pay more (The HBO of Westlaw if you will). Instead, I think Judge Posner should have placed more emphasis on the actual practitioners in front of the court at any given time. That is something that law schools can directly affect. Although a small percentage of students will become judges, only a small percentage of students will become something other than lawyers. Although the troubles with the adversarial system are laid out quite well in *Divergent Paths*, there is nothing in the system that prevents a judge from still conducting her own research and coming to a decision outside of the attorneys positions. I loved the book, although I am a bit biased towards Judge Posner. I would recommend it, even though it has a small audience. The advantages from critically thinking about the issues raised I would propose will benefit all levels of the law.

Great book. Inspired.

The occasion of a new book by Judge Posner is something to be welcomed--especially when the topic is the deficiencies of the federal judiciary and whether law school academics can help remedy some of these shortcomings. Posner is uniquely qualified to address this topic, having sat on the Seventh Circuit Court of Appeals for some 34 years, and prior to that having been an academic at the law school of the University of Chicago, where he continues as a senior lecturer. This 406 page work is jammed full of dozens of criticisms, proposed remedies, and details regarding both the federal judiciary and current legal education. It is the distillation of decades of examination and analysis by Posner, supported by an incomparable familiarity with the literature on all these topics. While Posner's views are somewhat inflexible, this is probably the most stimulating and incisive recent book on the federal judiciary I have read. Posner begins with a brief preface and more extensive 50-page introduction in which he lays out many of the themes he later addresses in detail. The wisdom of his dual focus on courts and legal academics soon becomes obvious as he sees the two as linked together yet incapable of helping reform the other. By the time the reader has finished the intro, he is well primed for the vast number of more detailed arguments to come. One unique feature of this book is that Posner has inserted into the text several appendices, where he addresses individual topics (e.g., the changing face of the legal academy) in more expansive detail. This approach turns out to be more effective than placing the appendices at the end of the book. The book thereafter is divided into two sections, one dealing with problems of the federal judiciary, the second devoted to the deficiencies of the legal academy. I found Posner's criticisms of his fellow federal judges not only precisely on target from my own experience, but reflective of his long involvement in and familiarity with the third branch. There are structural deformities including judicial confirmation hearings, lack of familiarity with legislative processes, lifetime tenure, and low salaries. There are process deficiencies, such as undue reliance upon formalistic legal arguments, failure to use internet research, invocation of unsatisfactory theories of interpretation like originalism, textualism and dictionary guidance, lack of comfort with statistical arguments and legislative history, and undue reliance upon clerks by appellate judges. Posner argues for simple judging, guided by pragmatic common sense, not precedents. I found this argument to be somewhat discomforting but in Posner's hands quite challenging. Posner also addresses "management deficiencies," which ought to be required reading for every federal judge with chambers to oversee. I found the second section of the book dealing with current legal education to present contentions I was less familiar with, having graduated in 1977, but which made a great deal of sense. Legal academics are

pictured as writing jargon-laced massive articles which judges cannot understand and deal with topics of little or no interest or utility to the judiciary. Posner sees the legal academy being infused with professors whose first disciplinary interest and training was in the social sciences and not law. They maintain these interests when they join law faculties and begin to publish. Few of them have ever actually practiced law. Excessive footnotes and reliance upon Blue Book citation forms (long a Posner bugaboo) should be avoided. Coursework should include legislative history, how to author opinions, abolition of casebooks and student-run law reviews, more emphasis on legal writing and rhetoric, and enhanced clinical courses. Likewise, judges would benefit from continuing judicial education while on the bench. The key solution to this "divergent path" situation, which will join the courts to law schools, is collaborative research, the kind Posner increasingly has been engaged in with political scientists and legal faculty. Overlapping interests and multiple skill sets will produce research of value to both institutions. A book for every federal judge and law professor, as well as the rest of us interested in the judiciary and legal education. The arguments come fast and furious and in much detail--so the book is best digested in small bites and not as bedtime reading. While Posner sometimes sounds like the voice of God ('this is the way it is!'), there is no more stimulating, informative and interesting critic on these issues. I regret greatly never having argued in front of him; it must be quite an experience.

This book reads as if someone with a very prodigious intellect, work ethic and typing speed sat down over say six months of Sundays, knocked out a book, then sent it to his colleagues for comments, made a few edits and then sent it to the publisher. The book contains a lot of intellectual substance but also is repetitive, digressive, and quarrelsome. It is perhaps worth reading for those with an interest in the workings of the federal judiciary or for those willing to ignore some flaws in return for some deep insights into the US legal system.

Though it reads as if dictated, with a few episodes of repeated discussions, the book is filled with trenchant observations on the judiciary and on legal academia. Judge Posner is at his most entertaining and enlightening when pulling apart a case or a law review article and looking for meaning in it guts. Those familiar with Judge Posner's work will not be surprised by his sharp wit and analysis. Few books on this topic could make me laugh out loud. This can be read by non-specialists, though it might be scary to ponder for the average person.

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