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## Book Review: Divergent Paths: The Academy and the Judiciary

S. I. Strong

*University of Missouri School of Law*, [strongsi@missouri.edu](mailto:strongsi@missouri.edu)

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# Book Review

Richard A. Posner, *Divergent Paths: The Academy and the Judiciary*, Cambridge, Mass.: Harvard University Press, 2016, pp. 406, \$29.95.

Reviewed by S.I. Strong

How Legal Academics Can Participate in Judicial Education:  
A How-To Guide by Richard Posner

## Introduction

The U.S. legal system has long been characterized as reflecting judicial rather than legislative supremacy.<sup>1</sup> While this approach may seem paradoxical given the United States' deep-seated commitment to democracy, most judges have traditionally been considered worthy of their role in society as a result of "[t]heir independence in office, and manner of appointment."<sup>2</sup> However, contemporary commentators now question whether these qualities are sufficient, given claims that "no selection method can guarantee the continued fitness of the judiciary."<sup>3</sup> Indeed, many judges "turn out to be ill-suited for the job," despite having survived rigorous selection procedures.<sup>4</sup> As a result, confidence in the judicial branch is on the decline.<sup>5</sup>

**S.I. Strong** holds a Ph.D. in law, University of Cambridge (U.K.); D.Phil., University of Oxford (U.K.); J.D., Duke University; and M.P.W., University of Southern California. The author, who is admitted to practice as an attorney in New York and Illinois and as a solicitor in England and Wales, is an adjunct professor at Georgetown University Law Center and the Manley O. Hudson Professor of Law at the University of Missouri. Much of this review was informed by the author's experiences as a U.S. Supreme Court Fellow, which included extensive work with the Federal Judicial Center, although the opinions reflected herein are those of the author alone. The author would also like to thank the late Judge Judith Kaye for her insights and inspiration on subjects related to this analysis. This review is dedicated to her memory.

1. See Abram Chayes, *How Does the Constitution Establish Justice?*, 101 HARV. L. REV. 1026, 1041 (1988); Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1138-39 (2011); Martin H. Redish, *Political Consensus, Constitutional Formulae, and the Rationale for Judicial Review*, 88 MICH. L. REV. 1340, 1346 (1990) (book review).
2. JOHN MARSHALL, VIRGINIA RATIFYING CONVENTION (1788), reprinted in THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner ed., 1989), [http://press-pubs.uchicago.edu/founders/documents/a3\\_2\\_1s26.html](http://press-pubs.uchicago.edu/founders/documents/a3_2_1s26.html).
3. Wayne Doane, *The Membership of Judges in Gender Discriminatory Clubs*, 12 VT. L. REV. 459, 461 (1987).
4. Keith R. Fisher, *Education for Judicial Aspirants*, 43 AKRON L. REV. 163, 164 (2010). Studies have also shown that unconstrained judicial independence can be disastrous. See Frank B. Cross, *Thoughts on Goldilocks and Judicial Independence*, 64 OHIO ST. L.J. 195, 199-202 (2003).
5. See Paul D. Carrington & Roger C. Cramton, *Original Sin and Judicial Independence: Providing*

The most common means of improving both professional performance and public perception of a particular group is through continuing education initiatives.<sup>6</sup> However, significant questions arise as to whether a judge can or should be required to engage in any form of judicial education. At this point, most U.S. state and all federal judges<sup>7</sup> are not currently under any obligation to engage in any particular form of judicial education before or after their elevation to the bench, despite the acknowledged severity of the learning curve for new judges<sup>8</sup> and the significant changes to the nature of judging over the past few decades.<sup>9</sup>

At this point, very little is known about how someone learns to become a judge. Not only are judges often hesitant to discuss such matters, perhaps

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*Accountability for Justices*, 50 WM. & MARY L. REV. 1105, 1107 (2009). While commentators often claim that the judiciary has the highest confidence level of all three branches of government, when viewed in absolute terms, the actual numbers are actually not very encouraging. See, e.g., GBA Strategies, Analysis of National Survey of Registered Voters for the National Center for State Courts (Dec. 4, 2014), <http://www.ncsc.org/-/media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/2014-State-of-State-Courts-Survey-12042014.ashx> (noting that in November 2014, only fifty-seven percent of the public thought that courts were unbiased). Political bias was the biggest concern of the survey population. See *id.*; see also GBA Strategies, Analysis of National Survey of Registered Voters for the National Center for State Courts (Nov. 17, 2015), [http://www.ncsc.org/-/media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSC\\_2015\\_Survey%20Analysis.ashx](http://www.ncsc.org/-/media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSC_2015_Survey%20Analysis.ashx) (noting that a majority of respondents saw courts as the venue of last resort and preferred alternative means of dispute resolution).

6. See LIVINGSTON ARMYTAGE, EDUCATING JUDGES: TOWARDS IMPROVING JUSTICE—A SURVEY OF GLOBAL PRACTICE 189, 217-27 (2d ed., 2015); ABA Commission on the 21st Century Judiciary, *Preserving the Judiciary's Institutional Legitimacy*, 37 BRIEF 54, 55 (2008); Neil Hamilton, *Fostering Professional Formation (Professionalism): Lessons From the Carnegie Foundation's Five Studies on Educating Professionals*, 45 CREIGHTON L. REV. 763, 766 (2012).
7. See CATHARINE M. WHITE & MAUREEN E. CONNER, ISSUES AND TRENDS IN JUDICIAL BRANCH EDUCATION 2005 App. 3D (2005) (reflecting information generated through the Judicial Education Reference Information & Technical Transfer Project (JERITT), which suggests that only forty percent of states require any form of judicial education); S.I. Strong, *Judicial Education and Regulatory Capture: Does the Current System of Educating Judges Promote a Well-Functioning Judiciary and Adequately Serve the Public Interest?* 2015 J. DISP. RESOL. 1, 3-4, 7, 19-21 (2015) [hereinafter Strong, *Judicial Education*]. Traditionally, most if not all incoming federal judges attend new judge orientation sessions offered by the Federal Judicial Center (FJC), even though participation is purely voluntary. See The Hon. Jeremy Fogel & S.I. Strong, *Judicial Education, Dispute Resolution and the Life of a Judge: A Conversation with Judge Jeremy Fogel, Director of the Federal Judicial Center*, 2017 J. DISP. RESOL. (forthcoming) (reflecting the views of the current director of the FJC). Supreme Court justices do not participate in any of these programs.
8. See WILLIAM DOMNARSKI, IN THE OPINION OF THE COURT 36 (1996); Emily Kadens, *The Puzzle of Judicial Education: The Case of Chief Justice William de Grey*, 75 BROOK. L. REV. 143, 143-44 (2009).
9. Not only are disputes becoming more complex, but judges are also taking on additional duties, ranging from case management (leading to the rise of the "managerial" judge rather than the professional adjudicator) to alternative dispute resolution (as a result of the increased emphasis on settlement). See Fisher, *supra* note 4, at 164, 182-85; Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982).

believing that reticence helps protect the mystique of the judiciary,<sup>10</sup> but scholars of the judiciary have also neglected judicial education in favor of research on other issues such as judicial independence and appointment mechanisms.<sup>11</sup> However, this situation may change as a result of Judge Richard Posner's most recent book, *Divergent Paths: The Academy and the Judiciary*.<sup>12</sup>

The book touches on a number of important issues, but the most revolutionary element involves Judge Posner's discussion of how the legal academy can assist with the education of current and future judges (2).<sup>13</sup> As Section I of this review illustrates, matters relating to academic participation in judicial education are both contentious and underdeveloped as a matter of practice and scholarly inquiry, which makes *Divergent Paths* a welcome addition to the literature. However, simply raising an issue is often not enough to trigger change; instead, reformers must identify tangible and realistic plans to improve a particular field of endeavor. Section II therefore presents and analyzes Judge Posner's proposals regarding the academy's role in judicial education by comparing his ideas with best practices in the field. In so doing, this Review, I hope to promote increased debate about the nature and scope of judicial education in the United States and the ways that legal scholars can assist both the state and federal judiciaries. Section III concludes by tying the various strands of discussion together and identifying additional issues that need to be considered in the coming years.

### I. Judicial Education in the United States

For centuries, the concept of judicial education was somewhat paradoxical in the common-law world. Unlike civil law judges, who were (and continue to be) given specialized instruction from the very earliest days of their legal studies, common-law judges, including those in the United States, came to the bench only after distinguished careers at the bar and essentially "took the oath, stepped onto the bench, and proceeded to fill the judicial role as if born in the robe."<sup>14</sup> This approach, which is rooted in medieval English practice,

10. See Kadens, *supra* note 8, at 143.

11. See *id.* at 145-46; Strong, *Judicial Education*, *supra* note 7, at 6-11. This situation may be changing as a result of several recent initiatives relating to the study of judicial education. See, e.g., ARMYTAGE, *supra* note 6, at xxvi (outlining recent developments); CHERYL THOMAS, REVIEW OF JUDICIAL TRAINING AND EDUCATION IN OTHER JURISDICTIONS 32-33 (May 2006) (constituting a worldwide report prepared for the British Judicial Studies Board), [http://www.ucl.ac.uk/laws/socio-legal/docs/Review\\_of\\_Judicial\\_Train.pdf](http://www.ucl.ac.uk/laws/socio-legal/docs/Review_of_Judicial_Train.pdf); Symposium, *Judicial Education and the Art of Judging: From Myth to Methodology*, 2015 J. DISP. RESOL. 1 (2015) (discussing a variety of recent initiatives).

12. RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* (2016).

13. See also Michael C. Dorf, 65 J. LEGAL EDUC. 186 (2016) (book review); Richard Posner, *Michael C. Dorf's 'Review' of Richard A. Posner, Divergent Paths: The Academy and the Judiciary—A Response by the Book's Author*, 65 J. LEGAL EDUC. 203 (2016). Judge Posner has discussed judicial education in the past, but only in passing. See RICHARD A. POSNER, REFLECTIONS ON JUDGING 335-37, 347 (2013) [hereinafter POSNER, REFLECTIONS].

14. Kadens, *supra* note 8, at 143-45; Charles H. Koch, Jr., *The Advantages of the Civil Law Judicial*

was based on the assumption that anyone who has become a senior litigator is sufficiently well-prepared to serve as a judge.<sup>15</sup>

The traditional approach began to change in the 1960s and 1970s, when many common-law countries began to appreciate the difficulties judges face when transitioning from the bar to the bench.<sup>16</sup> Some form of judicial education was deemed to be useful, and the United States revolutionized the field by creating an independent entity—the Federal Judicial Center (FJC)—with a statutory mission to provide research on and education to the U.S. federal judiciary.<sup>17</sup> Over the years, a number of similar programs have developed around the world.<sup>18</sup>

As momentous as these changes may be, the current system reflects a number of problems.<sup>19</sup> Perhaps the most concerning issue involves the almost total control exerted by the judiciary over the scope, content, and method of judicial education in the United States.<sup>20</sup> This approach has traditionally been justified on the twin claims of expertise (i.e., the belief that only judges can appreciate the particular pressures and demands of acting as judges and thus are the only persons qualified to act as instructors) and judicial independence.<sup>21</sup> However, commentators now question whether the existing approach provides judges with too much control and operates as a type of regulatory capture.<sup>22</sup>

Several common-law countries (most notably Australia, Canada and England) have attempted to counter the problems associated with excessive judicial control over judicial education by increasing the role that legal academics play in the development and delivery of educational programs for judges.<sup>23</sup> In particular, these countries have noted the need for academics to be

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*Design as the Model for Emerging Legal Systems*, 11 IND. J. GLOBAL LEGAL STUD. 139, 143 (2004).

15. See Kadens, *supra* note 8, at 144.
16. See Strong, *Judicial Education*, *supra* note 7, at 3.
17. See 28 U.S.C. §§ 620-29 (2016); FEDERAL JUDICIAL CENTER, <http://www.fjc.gov> [hereinafter FJC website].
18. See ARMYTAGE, *supra* note 6, at 13-15. One well-known program is the National Judicial College, which provides educational programming to U.S. state court judges. See NATIONAL JUDICIAL COLLEGE, <http://www.judges.org/>. The field has further diversified to include private, for-profit programs for state, federal, and foreign judges. See ARMYTAGE, *supra* note 6, at 13-15.
19. See ARMYTAGE, *supra* note 6, at 15; THOMAS, *supra* note 11, at 108-14; Strong, *Judicial Education*, *supra* note 7, at 3.
20. See ARMYTAGE, *supra* note 6, at xxx, xlix; Strong, *Judicial Education*, *supra* note 7, at 4.
21. See THOMAS, *supra* note 11, at 32-33; ABA Commission on the 21st Century Judiciary, *supra* note 6, at 56; J. Clifford Wallace, *Judicial Education and Training in Asia and the Pacific*, 21 MICH. J. INT'L L. 849, 858-59 (2000).
22. See Livingston Armytage, *Educating Judges: Where to from Here?* 2015 J. DISP. RESOL. 167 (2015), 172-73; Strong, *Judicial Education*, *supra* note 7, at 4.
23. See Armytage, *supra* note 22, at 172-73. For example, Canada, one of the rising stars of the field, has adopted a “three pillar” approach to judicial education that considers input from

involved not only in developing materials relating to the substantive law but also in creating content relating to what has been referred to as “judge craft” (i.e., the skills specifically associated with judging).<sup>24</sup>

In many ways, the proposals made by Judge Posner in *Divergent Paths* concerning possible ways that the U.S. legal academy can assist the judiciary mirror best practices in the field of judicial education (2). However, a number of issues merit further attention and development.

## II. Judge Posner and Judicial Education

Judge Posner claims that the modern judiciary faces three types of problems. First are structural concerns relating to “the uneven quality of federal judicial appointments at all levels, excessive delay in filling federal judicial vacancies . . . , the poor draftsmanship of so many federal statutes, the indeterminacy of much American law . . . , certain salary anomalies, and excessive expenditures on federal courthouses” (59-60).<sup>25</sup> While many of these matters are beyond the direct influence of the legal academy, scholars can nonetheless assist with them. For example, Judge Posner says that academics can do a better job in helping judges appreciate how uncertain U.S. law is, since judges appear unaware of that issue (350).

Second are process-oriented concerns involving “how federal judges decide cases and justify their decisions in judicial opinions” (76). Judge Posner lists seventeen different items that would benefit from academic attention: legal formalism, the “rearview mirror syndrome,” a naïveté regarding statutory interpretation and precedents, excessive use of multifactor tests, the “fetishism of words,” lack of appreciation for context, passivity (i.e., the tendency to act merely as an umpire), lack of willingness to change (i.e., professional conservatism), “complacency and overconfidence,” formulaic decision-making, informational challenges, the inability to conduct independent judicial research, absence of self-knowledge, “a loose attitude toward truth,” a dedication to “the noble lie,” the restrictions of a generalist judiciary, and a shortage of diversity (76-192).

Third are managerial concerns (222). Here, Judge Posner lists ten different issues: management of judicial staff, the absence of collegiality, problems in macromanagement, managing the system as a whole, judicial work ethic,

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judges, academics, and the community. See NATIONAL JUDICIAL INSTITUTE (CAN.), <https://www.nji-inm.ca/index.cfm/judicial-education/the-nji-s-judicial-education-portfolio/>; see also THOMAS, *supra* note 11, at 50.

24. See THOMAS, *supra* note 11, at 13-17 (noting such skills include matters such as opinion writing, sentencing and dealing with particular types of litigants and evidence); NATIONAL JUDICIAL INSTITUTE (CAN.), *supra* note 23 (including a course calendar that discusses the “craft of judging,” including judge craft, court craft and professional craft). The FJC has also begun to develop this type of programming. See Fogel & Strong, *supra* note 7.
25. See also James B. Eaglin & Matthew Alex Ward, *Enhancing the Administration of Justice and Strengthening Judicial Independence Through Independent, Judicial-Based Applied Research Centers*, 7 J. LEGAL TECH. RISK MGMT. 77, 78-79 (2014).

foot-dragging, aging on the bench, excessive travel, workload issues, and congressional oversight (222-58).

Although these challenges are extremely wide-ranging, Judge Posner has identified a variety of ways in which the academy can help the judiciary improve its performance. His plan includes three separate types of initiatives: those involving legal scholarship (261-96), those involving the law school curriculum (297-344), and those involving academic participation in continuing judicial education (345-60).

#### *A. Improvements Involving Legal Scholarship*

Judge Posner has criticized contemporary legal scholarship on a number of previous occasions, claiming that much of the jargon-filled, interdisciplinary research that is currently in vogue provides little help to judges, even if that style of writing reflects the fastest route to academic publication and promotion (291).<sup>26</sup> In *Divergent Paths*, he provides a more nuanced discussion of why that type of scholarship is so unhelpful, despite the apparent focus on matters of deep doctrinal importance. First, Judge Posner says that many academics offer patently unworkable solutions to various legal challenges (266, 284). As a result, the professoriate should not be surprised when their work is ignored by the judiciary. Second, he says that academics focus nearly exclusively on issues relating to “the Supreme Court—the court least likely to pay attention to academic critique” —even though other courts have in many ways a much greater effect on both law and society (2).

Judge Posner’s solution is relatively simple: He would “like to see a shift in academic emphasis from critique of particular decisions and doctrines to critique of particular judges, and of judging, below the level of the Supreme Court” (266).<sup>27</sup> He also suggests increasing the frequency and diversity of empirical studies, using data that is readily available from the FJC or the Administrative Office of the U.S. Courts (275).<sup>28</sup>

Given his longstanding interest in judicial reasoning, it is not surprising that Judge Posner makes particular mention of the need for more robust analysis of the “structure of judicial opinions (as distinct from their content)” on both an individual and systemic level (269). He would also like to see increased academic discussion of how to write a good judicial opinion (270)<sup>29</sup> and the

26. See also Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1320 (2002); Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921, 1927 (1993). Similar complaints have been voiced by other judges, most notably Chief Justice Roberts. See Debra Cassens Weiss, *Law Prof Responds After Chief Justice Disses Legal Scholarship*, ABA J. (July 7, 2011), [http://www.abajournal.com/news/article/law\\_prof\\_responds\\_after\\_chief\\_justice\\_roberts\\_disses\\_legal\\_scholarship/](http://www.abajournal.com/news/article/law_prof_responds_after_chief_justice_roberts_disses_legal_scholarship/).

27. Posner notes that this analysis would need to be systemic to be effective.

28. The FJC routinely provides assistance to academics working on judicial research. See Fogel & Strong, *supra* note 7.

29. Some work has been done in this regard. See S.I. Strong, *Writing Reasoned Decisions and Opinions: A Guide for Novice, Experienced and Foreign Judges*, 2015 J. DISP. RESOL. 93 (2015) [hereinafter

effect of certain psychological or sociological phenomenon (such as implicit, hindsight or status quo bias) on judicial decision-making (273).<sup>30</sup>

Perhaps the most provocative of Judge Posner's proposals involves a call for an increase in "collaborative research between law professors and judges" (262), which he says would produce scholarship that is more responsive to judges' needs and concerns (285). *Divergent Paths* provides several tangible examples of how Judge Posner has himself facilitated such research, which may give academics some ideas on how to proceed in this regard (286-95).

Though useful in its way, Judge Posner's advice has its limits, particularly for scholars who do not personally know any like-minded judges.<sup>31</sup> Fortunately, there are a number of existing initiatives that would facilitate increased collaboration between the academy and the judiciary, although Judge Posner does not mention them by name.<sup>32</sup> The most notable of these programs is the U.S. Supreme Court Fellowship, which provides midcareer and junior professionals with a unique opportunity to study the workings of the federal judiciary at the highest level.<sup>33</sup> Supreme Court Fellows work closely with the FJC, the Administrative Office, the U.S. Sentencing Commission and the Office of the Counselor to the Chief Justice of the Supreme Court and develop precisely the type of collaborative relationships that Judge Posner says are critical to the production of useful legal scholarship (275).<sup>34</sup> Chief Justice John Roberts recently adopted a number of innovations meant to increase the scholarly nature of the program and lay the groundwork for more practical scholarship concerning the judiciary,<sup>35</sup> and those efforts have already met with success.<sup>36</sup>

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Strong, *Judicial Opinions*].

30. Some work has been done in this regard. See JUDGE JEREMY D. FOGEL, *MINDFULNESS AND JUDGING* (2016), <http://www.fjc.gov>; Kathleen Mahoney, *Judicial Bias: The Ongoing Challenge*, 2015 J. DISP. RESOL. 43, 62 (2015) (discussing concerns about implicit or unconscious bias).
31. Judge Posner admits that it can be difficult to establish the necessary relationships. See *id.* at 287-88.
32. See, e.g., JUDICIAL BRANCH OF CALIFORNIA, *Judicial Administration Fellowship*, <http://www.courts.ca.gov/judicialfellowship.htm>; NATIONAL CENTER FOR STATE COURTS, *ICM Fellows*, <http://www.ncsc.org/Education-and-Careers/ICM-Fellows/Fellow-Speech.aspx>.
33. See Jon B. Gould et al., *Courting Success: The Supreme Court Fellows Program* at 35, 41 PS: POL. SCI. & POLS. 839 (2008); S.I. Strong, *The U.S. Supreme Court Fellows Program: The Opportunity of a Lifetime*, 53 JUDGES' J. 27, 27-31 (2014) [hereinafter Strong, *Supreme Court Fellows*].
34. See also Strong, *Supreme Court Fellows*, *supra* note 33, at 30-31.
35. See Strong, *Supreme Court Fellows*, *supra* note 33, at 30-31.
36. See, e.g., IRA P. ROBBINS, *JUDICIAL SABBATICALS* (1987), <http://www.fjc.gov> (written while the author was a Supreme Court Fellow based at the FJC); Eaglin & Ward, *supra* note 25, at 77 (reflecting an article co-authored by the director of the FJC's Research Division and a former Supreme Court Fellow); Jennifer A. Segal, *The Role of Family Ties Departures in Federal Sentencing*, 13 FED. SENTENCING REP. 258 (2001) (written while the author was Supreme Court Fellow based at the Sentencing Commission); Strong, *Supreme Court Fellows*, *supra* note 33, at 30 (discussing a symposium on judicial education undertaken by a former Supreme Court



Another means of facilitating cooperative research between judges and academics is through the creation of independent applied research centers focusing on matters relating to the judiciary.<sup>37</sup> A recent study identified 478 such entities around the world.<sup>38</sup> Scholars interested in conducting collaborative research of the type proposed by Judge Posner could easily contact one or more of these organizations to propose projects of mutual interest (275).<sup>39</sup>

### B. Improvements Involving the Law School Curriculum

After discussing various improvements to legal scholarship, *Divergent Paths* considers how to enhance the law school curriculum (297-344). Although Judge Posner recognizes that only a very small number of law students will ever find themselves sitting on the bench, he nevertheless says that law schools can provide a distinct service to the judiciary by better preparing future advocates (333) and law clerks.<sup>40</sup> Unsurprisingly, given his earlier writings, Judge Posner says the best way to do so is to reduce the role of legal formalism in law school and increase the emphasis on legal pragmatism (305, 322).<sup>41</sup>

*Divergent Paths* contains four major proposals in this regard. The first focuses on how substantive courses are taught and suggests that professors alter both their lecture style and the type of materials used in class (305-07).<sup>42</sup> For example, rather than relying on heavily edited casebooks, Judge Posner advises professors to circulate cases in their original, unedited form along with a series of questions that are to be considered by the students before coming to class (306-07). As radical as this proposal may seem, this method has been used with great success at two of the world's most renowned universities, the University of Oxford and the University of Cambridge in the United Kingdom.<sup>43</sup> Not only

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Fellow based at the FJC); see also SUPREME COURT FELLOWS ALUMNI ASSOCIATION, <http://scfellowsalumni.squarespace.com/> (including a full list of alumni publications).

37. See Eaglin & Ward, *supra* note 25, at 77.

38. See *id.* at Appx.

39. Both U.S. and foreign entities are listed.

40. As Judge Posner notes, many law clerks write the first draft of various legal decisions and opinions, which has an enormous effect on the style and content of those rulings. See *id.* at 334, 351; Strong, *Judicial Opinions*, *supra* note 29, at 98, 111-12.

41. Formalism requires readers to "fit legal doctrine . . . to every new case." *Id.* at 305; see also *id.* at 317 (discussing the problems of formalism). Judge Posner has long considered legal formalism to be problematic. See POSNER, REFLECTIONS, *supra* note 13, at 110-11; Richard Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 179-217 (1986).

42. The rationale is that the heavy editing of contemporary casebooks emphasizes doctrine over facts, thereby giving students an unrealistic view of the judicial process and judicial decision-making. See *id.* at 307.

43. See TIMES HIGHER EDUCATION, *World Reputation Rankings*, <https://www.timeshighereducation.com/world-university-rankings/2015/reputation-ranking#!/page/0/length/25> (listing Cambridge as number two and Oxford as number three in the world);

has this approach proved capable of producing exemplary legal thinkers,<sup>44</sup> it also reduces the cost of legal education by eliminating the need for expensive casebooks (306). Furthermore, the basic methodology can be easily adapted for use in U.S. law schools.<sup>45</sup>

Judge Posner's second proposal concerns the type of courses offered in the standard law school curriculum and includes a desire to see an increased emphasis on how judicial decisions and opinions are written (305, 334-35). Although such courses provide an immediate and obvious benefit to students who work as judicial clerks after graduation, these types of classes also offer non-clerks important insights into how chambers operate (307-11).

Several of Judge Posner's suggestions on how to conduct such courses contradict conventional wisdom about best practices in legal and judicial writing and should be considered carefully before they are adopted.<sup>46</sup> However, other ideas, particularly the suggestion that law students be deliberately exposed to excellence in judicial and other types of writing, hold great merit (307-11).<sup>47</sup> While *Divergent Paths* lists some of Judge Posner's favorite judicial authors (337), other resources are available. For example, the *Green Bag Almanac & Reader* provides a list of the best legal writing produced in the United States each year.<sup>48</sup>

Another curricular proposal involves reducing "the headlock that adversary procedure has on the American legal profession," which Judge Posner says produces judges who are unnecessarily bound by formalist concerns and practices (318).<sup>49</sup> Instead, he says that the academy should adopt teaching techniques that seek "to persuade judges to broaden their intellectual horizons, to innovate, to understand the breadth of their discretion and exercise it

44. See Joe Hall, *The World's Best Universities for Law*, CITY A.M. (May 21, 2015), <http://www.cityam.com/216197/worlds-best-universities-law-cambridge-and-oxford-trump-uk-competition> (noting the law program at Cambridge is ranked number two in the world and Oxford is number three).

45. See UNIVERSITY OF OXFORD, *Oxford Learning Institute*, <https://www.learning.ox.ac.uk/support/teaching/resources/teaching/> (describing the tutorial system); see also WILLIAMS COLLEGE, *Tutorials*, <http://www.williams.edu/academics/tutorials/> (noting the adaptation of the Oxbridge system for U.S. undergraduates at one of the country's top colleges). The current author taught law at both the University of Oxford and the University of Cambridge and has adapted many of those teaching techniques for use in U.S. law schools.

46. For example, Judge Posner is adamantly against the use of headers, although numerous experts on writing believe that headers improve readers' comprehension. Compare *id.* at 315 with Strong, *Judicial Opinions*, *supra* note 29, at 117.

47. Interestingly, the students did not agree with Judge Posner about what constituted a model opinion. See POSNER, *supra* note 12, at 307-11.

48. THE GREEN BAG ALMANAC & READER, *Exemplary Legal Writing*, [http://www.greenbag.org/green\\_bag\\_press/almanacs/almanacs.html](http://www.greenbag.org/green_bag_press/almanacs/almanacs.html); see also DOMNARSKI, *supra* note 8, at 97-98.

49. The director of the FJC has also criticized this phenomenon and discussed ways of addressing the issue. See Fogel & Strong, *supra* note 7 (suggesting increased exposure to alternative means of dispute resolution early in the law school curriculum).

imaginatively” (282).<sup>50</sup> As an example of this type of imaginative discretion, Judge Posner suggests that judges be encouraged to conduct their own legal or factual research in appropriate cases (318). While some observers may oppose independent judicial research,<sup>51</sup> Judge Posner defends his position on the grounds that (1) civil law legal systems grant judges significant discretion in directing and participating in the development of relevant evidence (318), and (2) “the adversary system is not enthroned in the Constitution and is riddled with exceptions” (369). Interestingly, this discussion could be read as suggesting that Judge Posner would support an increased emphasis on comparative law in the law school curriculum, both as a standalone course and as an element of other substantive courses. Other courses that he supports include those “in finance, accounting, business management, computer science . . . , statistics . . . , economics, psychology, political science, medicine and biology, fingerprint and DNA evidence, electronic surveillance, and the patent system” (325).<sup>52</sup>

The third major proposal in this section of *Divergent Paths* involves a call to increase the number of clinical professors on law school faculties (323, 342). Although other experts have made similar suggestions in the past,<sup>53</sup> Judge Posner goes further, suggesting that “[c]linical education deserves emphasis not merely as a supplement to conventional law courses but also as a substitute for some of them” (323). In making this recommendation, Judge Posner is speaking from experience, having taught various simulation courses at the University of Chicago Law School, including an innovative class that used students as judges in mock trial simulations (323, 330). This latter approach is extremely educational, says Judge Posner, since “lawyers don’t learn a great deal about judges from appearing before them” (324).

In many ways, this aspect of *Divergent Paths* correlates directly to certain reforms recently adopted by the American Bar Association (ABA) regarding the U.S. law school curriculum (383-84).<sup>54</sup> According to the new ABA protocols,

50. See also FOGEL, *supra* note 30; Chad M. Oldfather, *Of Judges, Law, and the River: Tacit Knowledge and the Judicial Role*, 2015 J. DISP. RESOL. 155, 158 (2015) (noting that “good judging necessarily entails drawing on another sort of unconscious influence—in this case, one that we want to celebrate and cultivate”).
51. See Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 DUKE L.J. 1263, 1267 (2007) (stating the rules governing independent [factual] research are astonishingly unclear” and noting the bench is sharply divided as to what the best course of action is); see also *United States v. Bari*, 599 F.3d 176 (2d Cir. 2010) (discussing independent judicial research on the Internet). Independent legal research is considered less problematic. See *Hampton v. Wyant*, 296 F.3d 560, 564-65 (7th Cir. 2002); *Camacho v. Trimble Irrevocable Trust*, 756 N.W.2d 596, 298-99 (Wis. Ct. App. 2008); Strong, *Judicial Opinions*, *supra* note 29, at 108.
52. Posner notes that such courses could be offered at the undergraduate level or through massive open online courses (MOOCs).
53. See, e.g., Robert R. Kuehn, *Pricing Clinical Legal Education*, 92 DENV. U. L. REV. 1, 13-18 (2014) (discussing the 1992 MacCrate Report and the 2007 Carnegie Foundation report).
54. See ABA, Accreditation Overview, [http://www.americanbar.org/groups/legal\\_education/resources/accreditation.html](http://www.americanbar.org/groups/legal_education/resources/accreditation.html); Report and Recommendations, American Bar Association,

students must now take six credit hours of clinical, experiential, or skills-related courses before graduation.<sup>55</sup> This requirement not only conforms to Judge Posner's views about how to educate law students, it also corresponds to best practices in judicial and adult education, which advocate experiential learning whenever possible.<sup>56</sup> Interestingly, Judge Posner's students were somewhat disappointed in his simulation course on the grounds that it "slighted legal doctrine," which raises questions about how students will respond to the new ABA requirement about experiential coursework (323).<sup>57</sup>

The ABA also now requires law schools to formalize the process of identifying and developing learning outcomes and assessment methods on both individual and institutional levels.<sup>58</sup> Judge Posner strongly favors this process, claiming that it would be "highly desirable" for law schools "to decide what every student should know about judges by the time of graduation and how they should acquire that knowledge" (343). Not only would this approach increase the number of advocates who truly understand what judges need (343), it would also help the faculty who teach these types of courses learn more about judges, thereby helping to narrow the separation between the judiciary and the academy (343-44).

The book's final recommendation for law schools involves the relationship between the faculty and the bastions of student autonomy: law review and moot court (340). While some of Judge Posner's proposals (such as the suggestion that law students sit as moot court judges) may be well-received as a means of empowering students (340), other suggestions (such as the notion that faculty, rather than students, should administer law reviews and moot court programs) may be more controversial, even though the proposals are premised on the notion that increasing the role of the faculty in law reviews and moot court will improve the educational value of both endeavors (340-41).<sup>59</sup>

### *C. Improvements Involving Continuing Judicial Education*

The final section of *Divergent Paths* focuses on how academics can become involved with continuing judicial education for sitting judges (345-85).

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Task Force on the Future of Legal Education (Jan. 23, 2014), [http://www.americanbar.org/groups/professional\\_responsibility/taskforceonthefuturelegaleducation.html](http://www.americanbar.org/groups/professional_responsibility/taskforceonthefuturelegaleducation.html).

55. See AM. BAR ASS'N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2015-2016, Standards 301-05 [hereinafter ABA Standards].
56. See ARMYTAGE, *supra* note 6, at 152-62; S. Brettel Dawson, *Judicial Education: Pedagogy for Change*, 2015 J. DISP. RESOL. 175, 175 (2015); Fogel & Strong, *supra* note 7 (discussing courses at the FJC).
57. Notably, this confirms Judge Posner's belief that law students are natural formalists. See *id.* at 307, 316.
58. See ABA Standards, *supra* note 55, Standards 301-02, 314-15.
59. Students would still participate in both programs, but under increased faculty oversight. See *id.*

Although other experts have also raised this issue,<sup>60</sup> the tangible nature of Judge Posner's proposals and the esteem with which he is held in both judicial and academic circles could generate real change in this regard.

Perhaps the most useful aspect of Judge Posner's discussion involves the way in which he distinguishes between courses relating to the substance of the law and courses relating to judging and the judicial process (346). As important and prevalent as the former type of instruction is, Judge Posner says that such courses are often unnecessary, given that judges usually receive sufficient briefing from the parties on relevant points of procedural and substantive law (346). As a result, Judge Posner says that the primary need for judicial education is "in judging rather than doctrine" (351). Experts in judicial education often use the term "judge craft" to describe the skills specifically associated with judging.<sup>61</sup>

*Divergent Paths* is therefore consistent with a number of best practices in the area of judicial education, particularly with respect to the way in which the text calls for educational programming on matters ranging from the natural and social sciences (which would help judges apply legal doctrine in an appropriate manner) (351)<sup>62</sup> to criminology (which would lead to an improved understanding of matters relating to recidivism) (348) and judicial writing (350-51).<sup>63</sup> However, the book is somewhat more polemical when it calls for courses concerning the details of the legislative process (which Judge Posner says would help with statutory interpretation) and psychological factors (such as implicit, hindsight and cognitive bias) that can affect decision-making or that involve judicial "self-deception" (350).<sup>64</sup> Some of the types of self-deception that bother Judge Posner the most involve the idea that the law is clearly ascertainable and that judges can and do apply the law to the facts free of any external or preexisting influences (351). He also claims that many judges exaggerate their ability to maintain control of decision-making when opinions are initially drafted by law clerks (351).

The difficulty here is not with the content of the proposed coursework, since experts in judicial education have supported this type of programming

60. See, e.g., THOMAS, *supra* note 11, at 50; Strong, *Judicial Education*, *supra* note 7, at 17; NATIONAL JUDICIAL INSTITUTE (CAN.), *supra* note 23 (discussing the "three-pillar" approach).
61. See THOMAS, *supra* note 11, at 13-17 (noting such skills include matters such as opinion-writing, sentencing and dealing with particular types of litigants and evidence); NATIONAL JUDICIAL INSTITUTE (CAN.), *supra* note 23 (including a course calendar that discusses the "craft of judging," including judge craft, court craft and professional craft).
62. This suggestion has been echoed by other judges. See Fogel & Strong, *supra* note 7; Chief Justice Mary R. Russell, *Toward a New Paradigm of Judicial Education*, 2015 J. DISP. RESOL. 79, 80-86 (2015).
63. There is some recent scholarship on this issue. See Strong, *Judicial Opinions*, *supra* note 29, at 93-128.
64. The FJC has sought to address this issue. See FOGEL, *supra* note 30.

for years.<sup>65</sup> Instead, the primary problem is that most judges cannot currently be compelled to attend any form of continuing judicial education, let alone programs on a particular subject.<sup>66</sup> Judges are also extremely sensitive to any suggestion that they are affected by “priors,” despite overwhelming psychological and sociological evidence that every human being is subject to such influences (352).<sup>67</sup> As a result, Judge Posner correctly notes that those judges who are most in need of this type of programming will not enroll in the necessary courses of their own accord (359).<sup>68</sup> Furthermore, this kind of coursework is especially necessary because judges were not exposed to these issues while in law school (351).

Although he admits that the inability to compel attendance is problematic, Judge Posner concludes that that he has no answer to that particular issue (359). To some extent, this type of reticence is understandable, since it allows him to avoid the “vexed question” of mandatory judicial education.<sup>69</sup> Numerous judges oppose such measures as “insulting,” and it may be that Judge Posner counts himself among that number.<sup>70</sup> However, given the extensive research regarding the effectiveness and importance of judicial education<sup>71</sup> and Judge Posner’s own views about the problems with judicial performance and preparation,<sup>72</sup> the absence of any detailed discussion about the possibility of mandatory judicial education is disappointing. Such a discussion could have proceeded on pragmatic grounds (Judge Posner’s preferred methodology) and focused on whether mandatory judicial education would be likely to resolve the problems currently facing the U.S. judiciary;<sup>73</sup> Judge Posner also could have taken a more theoretical turn and considered whether the current

65. See ARMYTAGE, *supra* note 6, at 166-73.

66. See *supra* notes 7-8 and accompanying text.

67. See also RICHARD A. POSNER, HOW JUDGES THINK 65-66 (2008) (defining the term “prior” as “prior probability,” meaning a judge’s predisposition to view a set of facts in a particular manner); Oldfather, *supra* note 50, at 157 (noting the challenge for judges “stems from the need to give play to some unconscious influences but not others, and . . . is complicated by the fact that the line between legitimate and illegitimate influences is both blurry and contestable”).

68. See also Strong, *Judicial Education*, *supra* note 7, at 15 (describing the likelihood of such an outcome).

69. See LYNN HECHT SCHAFFRAN, DIRECTOR OF THE NATIONAL JUDICIAL EDUCATION PROGRAM, TESTIMONY TO THE ABA JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT 15 (Apr. 2004), [http://www.americanbar.org/content/dam/aba/migrated/judicialethics/resources/Comm\\_Code\\_HechtSchafran\\_0504ddt.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/judicialethics/resources/Comm_Code_HechtSchafran_0504ddt.authcheckdam.pdf).

70. *Id.*

71. See ARMYTAGE, *supra* note 6, at 24-41; ABA Commission on the 21st Century Judiciary, *supra* note 6, at 55; Hamilton, *supra* note 6, at 766.

72. See *supra* notes 26-31 and accompanying text.

73. See *supra* notes 26-31 and accompanying text.

system of judicial education constitutes a form of regulatory capture.<sup>74</sup> Either approach would have provided important insights into what is becoming an increasingly contentious issue.<sup>75</sup>

Concerns about judicial self-regulation have become so pressing that some people have called for the appointment of an Inspector General with powers over the judiciary.<sup>76</sup> Compared with that initiative, reshaping the U.S. approach to judicial education appears far less problematic from both theoretical and doctrinal perspectives.<sup>77</sup> However, both propositions have been opposed by the judiciary on similar grounds, namely that such measures hinder judicial independence.<sup>78</sup> While a detailed discussion of this issue is beyond the scope of this Review, concerns about judicial independence appear unwarranted in cases involving judicial education, given that judges are supposed to be eminently capable of distinguishing between relevant and irrelevant material.<sup>79</sup> Furthermore, nothing appears objectionable about educational measures that provide judges with information necessary to make decisions.<sup>80</sup> As a result, it would be very illuminating to hear Judge Posner's perspective on this debate, particularly given his views on judicial discretion (318)<sup>81</sup> and his respect for civil law legal traditions, which feature a much more rigorous approach to judicial education (318).<sup>82</sup>

Although *Divergent Paths* fails to address questions relating to mandatory forms of judicial education, Judge Posner nevertheless offers a variety of useful ideas on how law schools can help provide the judiciary with appropriate educational offerings, should judges wish to partake in such courses. For

74. See Lara A. Bazelon, *Putting the Mice in Charge of the Cheese: Why Federal Judges Cannot Always Be Entrusted to Police Themselves and What Congress Can Do About It*, 97 KY. L. J. 439, 443 (2008-2009); Strong, *Judicial Education*, *supra* note 7, at 5-6; see also In re Opinion of the Judicial Conference Committee to Review Circuit Council Conduct & Disability Orders, 449 F.3d 106, 117 (U.S. Jud. Conference Comm. 2006) (Winter, J., dissenting) ("A self-regulatory procedure suffers from the weaknesses that many observers will be suspicious that complainants against judges will be disfavored. The Committee's decision in this case can only fuel such suspicion.").
75. See *In re Opinion of the Judicial Conference Committee*, 449 F.3d at 117 (Winter, J., dissenting); The Judicial Conduct and Disability Act Study Comm., *Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice*, 239 F.R.D. 116, 178 (2006); Bazelon, *supra* note 74, at 443; Carrington & Cramton, *supra* note 5, at 1139-40; Strong, *Judicial Education*, *supra* note 7, at 5-6.
76. See Bazelon, *supra* note 74, at 443.
77. See *id.* (discussing constitutional concerns); Strong, *Judicial Education*, *supra* note 7, at 10-11.
78. See The Hon. Anthony J. Scirica, *Judicial Governance and Judicial Independence*, 90 N.Y.U. L. REV. 779, 789-97 (2015); Strong, *Judicial Education*, *supra* note 7, at 10-11.
79. See Strong, *Judicial Education*, *supra* note 7, at 11.
80. See Dawson, *supra* note 56, at 179; Eaglin & Ward, *supra* note 25, at 107; Fogel & Strong, *supra* note 7; Judge R.L. Young, *Worldwide Common Law Judiciary Conference*, 45 FED. LAW. 40, 44 (Nov./Dec. 1998).
81. See also *supra* notes 71-72 and accompanying text.
82. See also Kadens, *supra* note 8, at 143-45; Koch, *supra* note 14, at 143.

example, he suggests that law schools can help judges overcome problems relating to self-management, management of staff members and management of the courtroom through narrowly tailored coursework on these issues (350, 356-57).<sup>83</sup> He says he considers these types of classes particularly important given the scarcity of scholarship on such matters (277, 287).<sup>84</sup>

*Divergent Paths* also provides helpful advice regarding the form of judicial programming.<sup>85</sup> Thus, Judge Posner suggests offering short, intensive courses to respect the demands of judicial dockets and advocates reliance on faculty from other fields, such as management, psychology or sociology, to provide information on matters falling outside the competence of law professors (351-52). A number of these recommendations conform to best practices in the field.<sup>86</sup> However, Judge Posner does not address a number of important considerations, such as those relating to budget shortfalls, even though those measures are having a significant effect on judicial education throughout the country.<sup>87</sup>

Some critics might suggest that law schools need not become involved in continuing judicial education because the field is already saturated.<sup>88</sup> However, Judge Posner recognizes that many existing programs are limited in scope or operate under certain restrictions that make educational innovation difficult (357-59).<sup>89</sup> Consequently, law schools may be able to fill a gap left by some of the more well-established institutions (358).<sup>90</sup>

### III. Conclusion

*Divergent Paths* is a remarkable book that provides a welcome introduction to the important and often overlooked issue of judicial education.<sup>91</sup> The text

83. Notably, judicial education centers such as the FJC are already offering a number of management and process-type issues, although Judge Posner discounts these courses (357-59); Fogel & Strong, *supra* note 7; FJC Website, *supra* note 17.

84. Judge Posner generally supports self-education, but notes that such efforts may be unavailing if there are insufficient materials (360).

85. See Strong, *Judicial Education*, *supra* note 7, at 21.

86. Experts in judicial education draw on research in adult education to identify the best means of delivering educational content to judges. See ARMYTAGE, *supra* note 6, at 111-38 (discussing how andragogy differs from pedagogy); Dawson, *supra* note 56, at 189; Fogel & Strong, *supra* note 7. For example, judges are known to benefit more from experiential coursework than lectures. See SCHAFFRAN, *supra* note 69, at 1072 n. 52.

87. See ARMYTAGE, *supra* note 6, at xxix; Fogel & Strong, *supra* note 7.

88. See *supra* notes 14-21 and accompanying text (describing federal, state, and private forms of judicial education).

89. The FJC has adopted a number of innovations in recent years that address some of Judge Posner's concerns. See *id.*; Fogel & Strong, *supra* note 7.

90. Fogel & Strong, *supra* note 7.

91. See Kadens, *supra* note 8, at 143-44.



not only identifies topics on which more judicial education is needed,<sup>92</sup> it also offers a wide range of ideas on how legal academics can help judges overcome certain ongoing challenges (36r-68). However, some areas could be improved upon.<sup>93</sup>

The first issue involves the way Judge Posner limits his analysis to those institutions with which he is most familiar (i.e., the federal judiciary and elite law schools) (xii). Although this technique demonstrates a laudable humility, many of the issues discussed in *Divergent Paths* are as relevant to state court judges and the law schools from which those judges come as they are to federal judges and elite law schools.<sup>94</sup> Furthermore, *Divergent Paths* contains important implications for the significant number of U.S. judges who have no legal training whatsoever.<sup>95</sup>

Second, significant questions have been raised about the propriety of judicial education programs offered by certain private interest groups, including programs based at various law schools.<sup>96</sup> Commentators have suggested that these types of programs may become more popular given the funding problems faced by many judicial systems,<sup>97</sup> and it would be helpful to have Judge Posner's views on this particular practice. Indeed, this is an issue that could be usefully subjected to an economic analysis considering hidden costs, negative externalities, and public goods associated with public versus private forms of judicial education.

92. Needs assessments are critical in judicial education. See ARMYTAGE, *supra* note 6, at 69-107 (discussing pros and cons of needs assessments as well as various methodologies); see also EUROPEAN JUDICIAL TRAINING NETWORK, *Good Judicial Training Practices*, <http://www.ejtn.eu/Resources/Good-judicial-training-practices/> (containing various types of needs assessments). However, one cannot rely exclusively on self-assessment to determine educational needs and goals. See Shirley A. Dobbin et al., *Surveying Difficult Populations: Lessons Learned from a National Survey of State Trial Court Judges*, 22 JUST. SYSTEM J. 287, 288 (2001).
93. Recent scholarship in this area of law has identified a number of critical concerns that were not addressed by Judge Posner. See THOMAS, *supra* note 11, at 108-14; Strong, *Judicial Education*, *supra* note 7, at 8-21.
94. Many state court judges attend public or so-called non-elite law schools. For example, of the seven current Missouri State Supreme Court judges, four graduated from law school at the University of Missouri, one from Howard, one from Georgetown and one from Washington University in St. Louis. See MISSOURI COURTS, *Supreme Court Judges*, <https://www.courts.mo.gov/page.jsp?id=133>.
95. See *North v. Russell*, 427 U.S. 328, 339 (1976); Strong, *Judicial Education*, *supra* note 7, at 3 (noting that in many states, lower-court judges have not attended law school and may not have completed college).
96. See Chris Young, Reity O'Brien & Andrea Fuller, *Corporations, Pro-Business Nonprofits Foot Bill for Judicial Seminars*, CENTER FOR PUBLIC INTEGRITY (May 27, 2014, 6:00AM), <http://www.publicintegrity.org/2013/03/28/12368/corporations-pro-business-nonprofits-foot-bill-judicial-seminars>; Bruce A. Green, *May Judges Attend Privately Funded Educational Programs? Should Judicial Education Be Privatized?: Questions of Judicial Ethics and Policy*, 29 FORDHAM URB. L.J. 941, 941-44 (2002); Strong, *Judicial Education*, *supra* note 7, at 11.
97. See Strong, *Judicial Education*, *supra* note 7, at 11.

Another issue that might benefit from an economic or similar analysis involves the question of whether judicial selection procedures can or do result in a well-functioning and well-informed judiciary. Judicial selection has long been considered a proxy for judicial competence, but the rationality of that assumption has never been established, empirically or theoretically.<sup>98</sup>

Finally, more discussion is needed regarding the proper role and function of judges.<sup>99</sup> Judge Posner considers this issue to some extent in his discussion of legal formalism (305, 317, 322) and his analysis of Chief Justice Roberts' claim that a judge is meant to act solely as an "umpire" (318).<sup>100</sup> However, Judge Posner does not discuss how differing views of what it means to be a judge can or should be taken into account by providers of judicial education.<sup>101</sup> While he may believe that questions of the judicial role should not be addressed in educational programming because of concerns about judicial independence, it is difficult if not impossible to construct an appropriate curriculum without at least some appreciation of what it is that judges are meant to do.<sup>102</sup>

These are just a few of the issues that Judge Posner and other scholars of the judiciary will hopefully address in the future. However, scholarship is not the only way to advance the discussion regarding judicial education (361-68). For example, one of Judge Posner's hopes is for increased interaction among the judiciary, the academy, and the bar (360).<sup>103</sup> Although the American Legal Institute (ALI) was originally created to foster such relationships, Judge Posner says that the ALI's current direction precludes useful collaboration among the different elements of the legal profession (36-40). However, some of those shortcomings could be reversed if the ALI were to initiate a project that focused specifically on judging and the role of judges.<sup>104</sup> Indeed, Judge Posner, as an eminent member of the ALI, would make an excellent Reporter for such a project (39).

As the preceding suggests, judicial education is fundamentally important to a well-functioning society, and *Divergent Paths* does an excellent job in highlighting a number of critical concerns from the U.S. perspective. Francis Bacon once said, "Judges ought to be more learned than witty, more reverend

98. See *id.* at 10.

99. See ARMYTAGE, *supra* note 6, at 164-93; Strong, *Judicial Education*, *supra* note 7, at 19-20.

100. John Roberts, *My Job Is to Call Balls and Strikes and Not to Pitch or Bat*, CNN (Sept. 12, 2005) (reproducing Chief Justice Roberts' opening statement during his confirmation hearings), <http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/>.

101. Individual judges can and do adopt extremely diverse philosophies of judging. See Fogel & Strong, *supra* note 7.

102. See Robert G. Bone, *Judging as Judgment: Tying Judicial Education to Adjudication Theory*, 2015 J. DISP. RESOL. 129, 129 (2015); Dawson, *supra* note 56, at 176-77; Strong, *Judicial Education*, *supra* note 7, at 19.

103. Judge Posner says that the Sedona Conference provides an excellent model for bringing together judges and practicing lawyers.

104. See AMERICAN LAW INSTITUTE, *Project Life Cycle*, <https://www.ali.org/projects/project-life-cycle/>.

than plausible, and more advised than confident.”<sup>105</sup> Fortunately, Judge Posner’s most recent contribution to the legal literature provides an excellent guide on how to achieve these goals.

105. FRANCIS BACON, *THE PHILOSOPHICAL WORKS OF FRANCIS BACON* 802 (John M. Robertson ed., 1905).