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## The Problems of Jurisprudence by Richard A. Posner

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## BOOK REVIEW

The Problems of Jurisprudence By Richard A. Posner.\*  
Harvard University Press, 1990. Pp. 485, including index.

*Reviewed by Raymond B. Marcin\*\**

Dust off those old copies of William James.<sup>1</sup> Pragmatism is “in.”<sup>2</sup> Richard A. Posner’s newest book, *THE PROBLEMS OF JURISPRUDENCE*, may well signal the vocabulary of Pragmatism as the *lingua franca* of jurisprudence in the 1990’s. Those who are looking for a “unified field theory” to encompass all of the insights of the great jurisprudential movements of today will find something to chew on in Posner’s new book. He does not announce such a theory; in fact, he all but discounts it in his treatment of literary, feminist, and criticalist jurisprudence. In his endorsement of philosophical pragmatism, however, he provides a vocabulary and a set of concepts that render communication among the various contemporary schools, especially the law-and-economics and so-called new-legal-process schools, possible and even efficient.

There is a surprise or two in the book for doctrinaire law-and-economics disciples. Posner actually modifies some of his previously published views on wealth maximization, which he now sees as playing only a “limited role” in his theory.<sup>3</sup> Indeed, he spends a goodly portion of the book recasting the wealth-maximization approach to law in pragmatic terms.<sup>4</sup> In reading the

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1. W. JAMES, *PRAGMATISM* (1907).

2. See, e.g., S. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* (1985); R. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990); Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, 42 *STAN. L. REV.* 321 (1990); Patterson, *Law’s Pragmatism: Law as Practice and Narrative*, 76 *VA. L. REV.* 937 (1990); Posner, *What Has Pragmatism to Offer Law?*, 63 *SO. CAL. L. REV.* 1653 (1990). See generally *Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 *S. CALIF. L. REV.* 1753 (1990) (examining and discussing pragmatism from various social perspectives).

3. R. POSNER, *supra* note 2, at 31.

4. *Id.* at 314-92.

book, one gets the impression that Posner is on the move. He has, in pragmatic fashion, opened his mind to new insights, and while not abandoning law-and-economics perspectives, he has ceased to be dogmatic or even defensive about them. Moreover, the pragmatism that Posner endorses is not simply the popular notion of the down-to-earth, get-things-done type of thinking. It is the full-blown philosophical pragmatism of that earlier "Chicago School" of Charles Peirce, William James, George H. Mead, Addison W. Moore, and John Dewey.<sup>5</sup> It may be accurate to suggest that Posner's broadened perspective actually places him outside law-and-economics doctrine proper. He is not a law-and-economics theorist who endorses philosophical pragmatism. He is a philosophical pragmatist who now gives a somewhat limited endorsement to law-and-economics thought.

The hero of Posner's Introduction is undoubtedly Jeremy Bentham, whom he credits as "the originator of the pragmatic concept of law advocated in this book,"<sup>6</sup> in that Bentham "sought to place law on a scientific footing—to make it a practical human instrument for the achievement of definite social ends."<sup>7</sup> Bentham's great insight, utilitarian theory, is seen by Posner as a way of transcending the age-old debates between natural law and positivism, and between formalism and realism. But Posner is no Benthamite. True, "Bentham's is the most comprehensive scheme for making law a true and complete expression of popular sovereignty,"<sup>8</sup> but Bentham, according to Posner, was mistaken in at least two fundamental respects. He believed, incorrectly, that a popular sovereign would adopt the greatest-happiness principle, and he thought that language was purely referential and transparent to reality.<sup>9</sup>

Holmes comes off as something less than a hero, an imperfect pragmatist—perhaps too "pragmatic" a pragmatist. In Holmesian thought, "the meaning of an idea lies not in its definition, its Form, its relation to other ideas, but rather in its consequences in the world of fact."<sup>10</sup> But that, in Posner's view, seems to do away with legal principles "in an interesting

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5. See C. MORRIS, *THE PRAGMATIC MOVEMENT IN AMERICAN PHILOSOPHY* 174-91 (1970); R. POSNER, *supra* note 2, at 27.

6. R. POSNER, *supra* note 2, at 14.

7. *Id.*

8. *Id.* at 13.

9. *Id.* Posner sees the "greatest-happiness" principle as being something akin to a natural-law-type sovereign imperative and, therefore, suspect. As to Bentham's other error, the pure referentiality of language, Posner sees that viewpoint resulting in Bentham's overly sanguine faith in the codification movement.

10. *Id.* at 16. Posner does, however, acknowledge Holmes as possibly "the founder and greatest exemplar of pragmatic jurisprudence." *Id.* at 244.

sense."<sup>11</sup> Here, we get a sense of Posner's own brand of pragmatism. It is not *mere* consequentialism. It leaves room for principle, for the relation of idea to idea. Holmes, moreover, seemed to place "power" or "dominant public opinion" at the base of his superstructure, that is, as the justification for a law.<sup>12</sup> Posner, however, opines that the base could just as easily be some social or ethical objective, like maximizing social wealth or utility. Holmes, along with Cardozo and the other realists, in the final analysis, had their intellectual descendants in the critical legal studies movement.<sup>13</sup> Realism, of course, has its affinities with American Pragmatism, but Posner sees the realist movement as having reached a dead end in critical legal studies.

According to Posner, the great conflict in jurisprudence—the one that really underlies and is more basic than the conflicts between the naturalists and the positivists and the realists and the formalists—is the one between the legalists and the skeptics. Legalists hold that law is "an objective entity and autonomous discipline."<sup>14</sup> Among the legalists, Posner places Coke, Blackstone, Langdell, Hart & Sacks, and Dworkin. The skeptics, on the other hand, hold that law is "politics through and through and that judges exercise broad discretionary authority".<sup>15</sup> Among the skeptics, Posner places Hobbes, Bentham, Holmes, and H.L.A. Hart. Posner finds some aspects of skepticism "a bit scary,"<sup>16</sup> but forced to choose between legalism and skepticism, he would side with the skeptics, who have "a better grip on the realities of law."<sup>17</sup> Posner, however, would clearly prefer not to have to side with either faction, because he views the pragmatic approach as a possible way of enabling the conflict between legalist and skeptics to be transcended.<sup>18</sup> Posner's pragmatic approach:

I . . . argue for an "activity" theory of law—the theory that underlies Holmes's prediction theory; for behaviorism and therefore against "rich" conceptions of mentalism, intentionality, and free will; for critical as distinct from constructive use of logic; for the idea that the judge's proper aim in difficult cases is a reasonable result rather than a demonstrably right one; and for a concept of the judge as a responsible agent rather than as a conduit of decisions made elsewhere in the political system. More, I . . . argue for

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11. *Id.* at 16.

12. *Id.* at 19.

13. *Id.* at 20.

14. *Id.* at 25.

15. *Id.*

16. *Id.* at 26.

17. *Id.* One suspects that Posner might fit the critical legal studies movement in the "scary" category. He acknowledges the movement's skepticism, but prescinds from listing it among his primary examples of skepticism. *Id.* at 25.

18. *Id.* at 26.

objectivity as a cultural and political rather than epistemic attribute of legal decisions, for balancing rule-of-law virtues against equitable and discretionary case-specific considerations, for making law more receptive to science—but with due awareness of the irremediably authoritarian character of law, which limits the scope for a scientific ethos in law—and for a consequentialist theory of interpretation. I . . . argue in short for a functional, policy-saturated, nonlegalistic, naturalistic, and skeptical, but decidedly not cynical, conception of the legal process; in a word (although, I fear, an inadequate word), for a *pragmatic* jurisprudence.<sup>19</sup>

Posner divides the body proper of the book into five parts. Part I he calls “The Epistemology of Law.” The word “epistemology” refers to theories of knowledge. It is a term that is not much favored by pragmatists.<sup>20</sup> Posner uses it, nonetheless, and defines it as “the branch of philosophy concerned with establishing (or disestablishing) foundations or warrants for knowledge.”<sup>21</sup> In that sense, the question becomes “whether and to what degree law is objective, impersonal, determinate: whether, in other words, it is an external . . . constraint on judges.”<sup>22</sup> Very roughly, this question approximates the distinction between formalism and realism, and Posner sees it in terms of the distinction between rules and standards, a standard being a rule that requires a relatively broad factual inquiry. Rules are problematic, in tension with social policy. Standards are not, they rest discretion in courts and agencies. The trend in law today is toward standards. In that sense, formalism is on the decline. A standards orientation, however, makes the law less predictable. A rules orientation, on the other hand, masks the role of the subjective and the political in the judicial formation of legal rights and duties. Posner does write kindly of judges who “see law as exploration and dialogue rather than as governance and hierarchy,”<sup>23</sup> but goes on to caution that such an attitude may be insufficiently sensitive to the costs of legal uncertainty. It is desirable to minimize judicial discretion, in Posner’s view, but it is not desirable to eliminate it.

Although Posner seems to claim a middle ground between judicial activism and judicial restraint, his position, in reality, is fairly far along in the direction of activism, and this may surprise some readers. He advocates a quest for legal “truth” parallel to that used in the scientific method, but not really close to it. He calls the method “practical reasoning,” and describes it

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19. *Id.* at 26 (footnote omitted) (emphasis in original).

20. *See, e.g.*, C. MORRIS, *supra* note 5, at 48. Morris says that pragmatists usually prefer the term “theory of inquiry.” *Id.*

21. R. POSNER, *supra* note 2, at 161.

22. *Id.* at 37.

23. *Id.* at 49.

as "a grab bag that includes anecdote, introspection, imagination, common sense, empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent, custom, memory, 'experience,' intuition, and induction . . . ." <sup>24</sup> Much of Posner's chapter on "Legitimacy in Adjudication" is a brief for judicial activism, especially in the area of constitutional law. <sup>25</sup> He writes of the "faithful agent" concept of the judge as the underpinning of a "pedigree" understanding of the law, that is, "one that regards the judge as an agent of legislators, of constitutional framers, or of earlier judges and thus insists that every judicial decision be fairly referable to a command by a principal—in other words, that decisions be pedigreed." <sup>26</sup> The "faithful agent" model is a fairly easy target, and Posner's demolition of it is unremarkable. Of more interest is his positive notion of the role of the activists' non-faithful-agent judge. In true pragmatist fashion, Posner downplays truth itself. There are no logically correct interpretations of law. "There is never a correct legal solution that is other than the correct ethical or, if you please, political solution . . . ." <sup>27</sup> At this point, Posner seems perilously close to the position of the criticalists: law is politics, nothing but politics. He goes on, however. Judges are more than politicians or ethicists. They have to be concerned "not only with doing substantive justice in the case at hand but also with maintaining a legal fabric that includes considerations of precedent, of legislative authority, of the framing of issues by counsel, of the facts of record, and so forth." <sup>28</sup>

If Part I of his book is a brief for judicial activism, Part II, entitled "The Ontology of Law," is a brief for a behaviorist brand of judicial activism: "Behaviorism is the only practical working assumption for law, and its dangers have been exaggerated." <sup>29</sup> This endorsement of behaviorism may seem curious in today's era when it seems to be somewhat on the wane among psychologists, and more than somewhat inconsistent with the basic premise of Kantian ethics that people ought never to be treated as objects. Posner, however, is sensitive to all that. Nevertheless, his response seems to create a dualism: "Confining governmental regulation to external behavior leaves the realm of thought and feeling as one of personal autonomy." <sup>30</sup> The main arena for the behaviorist attitude is, of course, criminal law, and Posner's attitude is nothing if not blunt: "The behaviorist approach seems to leave no

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24. *Id.* at 73.

25. *Id.* at 124-57.

26. *Id.* at 135.

27. *Id.* at 156.

28. *Id.* at 157.

29. *Id.* at 178.

30. *Id.* at 178-79.

room for appeals to conscience, for a sense of guilt, of remorse; it seems to strip the moral as well as the distinctively human content from the criminal law. The pragmatist reply is, So what?"<sup>31</sup>

In a chapter entitled "Are There Right Answers to Legal Questions?," Posner's bottom line answer is "No." Posner critiques Ronald Dworkin's so-called right-answer thesis. Dworkin has argued that correctness in law is similar to correctness in literary interpretation. Posner, however, has already critiqued that viewpoint in his earlier book, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION*,<sup>32</sup> and one wishes that he might have taken on others who have given an affirmative answer to the question, especially Rawls and Kant.

If there are no right answers to legal questions, at least in a narrow sense, then what is law itself? Posner acknowledges that Holmes's "prediction" theory comes close to an accurate definition. Law is ultimately a prediction of what the highest judges will *do*. The stress is on the word "do," and in that sense law is an activity. It is more than a prediction. It is more than a thing, more than a set of concepts. It is a "practice," and as a "practice," law's practical consequences are more important than any broad or narrow definitions of law itself. As a "practice," law is more than a technique of simply applying rules. Applying rules is what judges "do," but law goes beyond that; law is also a criterion for evaluating what judges "do," and to that extent, Posner endorses a "weak sense of natural law."<sup>33</sup> The judging activity or practice or process involves "a complex interweaving of positive and natural law or, if one prefers, of law and morality."<sup>34</sup> Natural law, however, in the sense in that Posner would accept it, is not a set of concepts used to resolve legal issues; it is something like the form of law itself, the essence of a legal system, the rule of law as opposed to the rule of lawlessness.

Part III, entitled "Interpretation Revisited," presents a major revision of Posner's version of the imaginative-reconstruction approach. Posner is far less sanguine about the utility of the approach to interpreting legislation that all but bears his name and indeed acknowledges that it is frequently doomed to failure.<sup>35</sup> Building upon his earlier endorsement of judicial activism, Posner suggests that "[i]t might be better to discard the word 'interpretation' altogether and speak instead in pragmatist fashion of the consequences of competing approaches to the judicial function in statutory and constitutional

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31. *Id.* at 177-78.

32. R. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988).

33. R. POSNER, *supra* note 2, at 228.

34. *Id.* at 233.

35. *Id.* at 273.

cases . . . ."<sup>36</sup> Where imaginative reconstruction and the purpose approach and other more conventional methods fail, some degree of judicial policy-making must be tolerated. Interpretation itself thus "sits uneasily on shifting political foundations."<sup>37</sup> Posner's suggestion is a consequentialist approach, taking into account the several differing goals that interpretation may serve: "Maybe the best thing to do when a statute is invoked is to examine the consequences of giving the invoker what he wants and then estimate whether those consequences will on the whole be good ones."<sup>38</sup> Part IV, entitled "Substantive Justice," deals with the quest for an overarching principle of justice. Posner doesn't really find one—no one would expect a philosophical pragmatist to announce one. He does, however, argue in favor of justice as a restorative, corrective activity, but in an objective, impersonal sense. "Personal" justice, justice tied to the personal characteristics of the disputants rather than to the impersonal merits of their claims, was rejected by Aristotle and is similarly rejected by Posner as cumbersome and generative of unpredictability. Corrective justice, the kind that looks to the character of the injury and not the person, is a sensible constraint on judicial discretion.

One might have expected Posner to find an overarching principle of justice in the law-and-economics principle of wealth maximization, and he almost does—but not quite. Wealth maximization "may be the most direct route to a variety of moral ends,"<sup>39</sup> and it may offer "the Third World (and the First and the Second) a lot more than socialism."<sup>40</sup> Wealth maximization can be a useful "guiding principle in common law adjudication,"<sup>41</sup> and to some extent, "an ethic of productivity and social cooperation."<sup>42</sup> It is not, however, the grail of the justice-seekers. Wealth maximization serves the values of the dominant groups, and it is not a pure ethic of productivity and social cooperation, largely because it often makes some other people worse off and luck plays a big role in it.<sup>43</sup>

If Posner does not find the overarching principle of justice in the dogmas of the law-and-economics movement, he is not likely to find it in the dogmas of the law-and-literature movement, the feminist movement, the other "communitarian" movements (the civic republicans and the critical legal studies

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36. *Id.* at 271-72.

37. *Id.* at 292.

38. *Id.* at 300 (citing and endorsing Max Radin's view in Radin, *Statutory Interpretation*,

43 HARV. L. REV. 863, 844 (1930)).

39. *Id.* at 382.

40. *Id.* at 386.

41. *Id.* at 387.

42. *Id.* at 391.

43. *Id.* at 391-92.

people), or the "neotraditionalist" movement (which seems to be Posner's word for the "new legal process" movement). And, of course, he does not.

Basically, Posner is an interdisciplinarian, and that is what sets him apart from those whom he refers to as "neotraditionalists." To be sure, he has much in common with the neotraditionalists, or new legal process scholars. Posner and the neotraditionalists seem to agree on the lawyer's role as being "a humble one—not that of a social architect or even a social engineer but of a social janitor, tidying up in the wake of the policy sciences and the policy makers (the legislators and the constitution makers)."<sup>44</sup> Posner and the neotraditionalists also agree on the notion of law as "practical reason," but Posner's practical reason is a more open, more inclusive brand. The neotraditionalists tend to be somewhat insulated in their "interpretive communities,"<sup>45</sup> comprising mostly, if not exclusively, legal professionals. Posner, however, lets the insights of a broader group into his interpretive arena: "[L]aw as practical reason, far from putting up defenses against the inroads of other disciplines into law, implies openness to all methods by which justified true beliefs can be induced, including the methods of economic reasoning and political philosophy."<sup>46</sup> Posner sees his own type of "pragmatist" judge as being "more innovative, more venturesome, and thus more inclined to be forward-looking where the neotraditionalist is backward-looking."<sup>47</sup>

Posner concludes the book with "A Pragmatist Manifesto," which serves as a useful summary of the positive viewpoints expressed or implied throughout the book. Those who are accustomed to thinking of Posner as a doctrinaire law-and-economics apologist will find much to ponder over in Posner's manifesto:

Pragmatism in the sense that I find congenial means looking at problems concretely, experimentally, without illusions, with full awareness of the limitations of human reason, with a sense of the "localness" of human knowledge, the difficulty of translations between cultures, the unattainability of "truth," the consequent importance of keeping diverse paths of inquiry open, the dependence of inquiry on culture and social institutions, and above all the insistence that social thought and action be evaluated as instruments to valued human goals rather than as ends in themselves.<sup>48</sup>

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44. *Id.* at 435 (footnote omitted).

45. *Id.* at 436 (citing S. FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1989); S. FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980)).

46. *Id.* at 446.

47. *Id.* at 453.

48. *Id.* at 465.

There is a refreshing humility in the philosophy of pragmatism. It is a humility that not all who call themselves pragmatists have succeeded in achieving. William James captured it in fitting words:

Hands off: neither the whole of truth nor the whole of good is revealed to any observer, although each observer gains a partial superiority of insight from the peculiar position in which he stands. Even prisons and sick-rooms have their special revelations. It is enough to ask of each of us that he should be faithful to his own opportunities and make [the] most of his own blessings, without presuming to regulate the rest of the vast field.<sup>49</sup>

Posner seems to have captured the spirit of that humility in *The Problems of Jurisprudence*. With some, humility is a sign of shallowness and limitation. With Posner, it is a sign of openness and growth; he wears it well. People will speak of "the new Posner" as a result of *The Problems of Jurisprudence*, and differences in Posnerian views will be seen and mulled over. There is a larger point to be made, however. In his book, Posner has opened a genuine dialogue and given the doctrinaire apologists for the other movements of today a lesson in humility, openness, and growth. Whether the dialogue continues will depend on whether the lesson takes hold.

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49. W. JAMES, *On a Certain Blindness in Human Beings*, in *ON SOME OF LIFE'S IDEALS* 46 (1912).

