OVERCOMING LAW

RICHARD A. POSNER

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Preface

"LEGAL THEORY" is the body of systematic thinking about (or bearing closely on) law to which nonlawyers can and do make important contributions, and which lawyers ignore at their peril. My conception of legal theory is broad, sweeping within it matters that might be thought to belong to political or social theory rather than to legal theory. This breadth reflects the broadening of interests that is characteristic of contemporary legal scholarship. We live at a time when economists, like Ronald Coase and Gary Becker, philosophers, like John Rawls and Richard Rorty, and literary critics, like Stanley Fish, are real presences in legal scholarship. So the reader of this book will find, along with chapters on judges, the legal profession, legal scholarship, the Constitution, and the regulation of employment contracts, chapters that deal with sexuality, social constructionism, feminism, rhetoric, institutional economics, political theory, and the depiction of law in literature. Even my forays into topics as remote from the conventional domain of legal theory as the ancestry of Beethoven, feuds in medieval Iceland, child care in ancient Greece, and the education of deaf children have grown out of my professional interests as a judge and legal scholar.

This is a book both *of* and *about* legal theory; the prepositions denote the constructive and the critical aspects of the book, respectively. The Introduction and the chapters in Part One and Part Six are primarily constructive. Through an examination of such topics as the behavior of judges, the effect of the structure of the legal profession on legal thought, the interrelation of law and literature, the economic and philosophical character of legal advocacy and reasoning, the protection of privacy, and the social response to homosexual behavior, these chap-

ters illustrate how I think legal theory should be done. The intermediate parts of the book are primarily critical. Examining representative figures drawn from all points of the ideological and methodological compass—Coase, Rorty, and Rawls, but also Patricia Williams, James Fitzjames Stephen, Robert Bork, John Hart Ely, Morton Horwitz, Catharine MacKinnon, Walter Berns, Martha Minow, and others—these chapters illustrate how I think legal theory, including some forms of pragmatic legal theory, should not be done. Law is rather lacking in a critical tradition, so I offer no apology for devoting so much attention to the criticism of other theorists; and readers of the manuscript of the book have told me (and I believe them) that the critical chapters are the liveliest. It is easier to find the holes in other people's work than to build a durable structure of one's own. But a merely critical approach lacks staying power; and even devastating criticisms fail to devastate when the critic has nothing to offer in the place of the ruins that he wishes to make. I do not attempt a complete work of reconstruction; but even in areas such as constitutional law that are not the subject of a "constructive" chapter, my criticisms have a constructive aspect: they point the way to an alternative approach.

That approach, which I claim has both critical and constructive power, is not, as the reader may be primed to expect, an exclusively economic one. I do not believe that the economist holds all the keys to legal theory. Rather I believe that economics is one of three keys. The others are pragmatism, shorn however of postmodernist excesses, and liberalism, especially that of the classical tradition, of which John Stuart Mill remains the preeminent spokesman. Pragmatism and liberalism, so understood, make a comfortable fit with economics, the three approaches joining to form a powerful beam with which to illuminate theoretical issues in law. My argument is that a taste for fact, a respect for social science, an eclectic curiosity, a desire to be practical, a belief in individualism, and an openness to new perspectives—all interrelated characteristics of a certain kind of pragmatism, alternatively of a certain kind of economics and a certain kind of liberalism—can make legal theory an effective instrument for understanding and improving law, and social institutions generally; for demonstrating the inadequacies of existing legal thought and for putting something better in its place.

Although most of the chapters originated in articles or book reviews, five are published here for the first time (Chapter 18 plus the four chapters in Part Six), as well as the Introduction, which contains the

fullest articulation to date of my overall theoretical stance; these six new essays account for more than a quarter of the length of the book. And all the chapters that did begin life in journals have been revised, many of them very extensively, for this book. There is not only much new material in most of them but also much rearranging, rewording, and pruning of old material, and several chapters combine materials from separately published papers. The book is not a potpourri or an encyclopedia. It is meant to be read consecutively.

I have received a great deal of help. For excellent research assistance I thank Benjamin Aller, John Fee, Wesley Kelman, Harry Lind, Richard Madris, Jeffrey Richards, Susan Steinthal, John Wright, and Douglas Y'Barbo. I am indebted to Andrew Abbott, Terence Halliday, and Donald Levine for a stimulating discussion of the sociology of the professions that helped me formulate the thesis of Chapter 1. For major comments on one or more of the chapters in their original form as essays or reviews, I thank Gary Becker, Harold Demsetz, Frank Easterbrook, David Friedman, Donald Gjerdingen, Henry Hansmann, Lynne Henderson, Stephen Holmes, Daniel Klerman, William Landes, Lawrence Lessig, Geoffrey Miller, Martha Nussbaum, Eric Rasmusen, Eva Saks, Pierre Schlag, Jeffrey Stake, and Cass Sunstein. Lessig, Nussbaum, and Sunstein, along with Michael Aronson, Neil Duxbury, William Eskridge, Mary Ann Glendon, Thomas Grey, Sanford Levinson, Frank Michelman, Charlene Posner, and Eric Posner, read the entire manuscript and made many helpful suggestions. Friedman, as well as Paul Campos, Gerhard Casper, David Cohen, Drucilla Cornell, Donald Davidson, Markus Dubber, Ronald Dworkin, Eldon Eisenach, Daniel Farber, Henry Louis Gates Jr., Julius Kirschner, Jane Larson, Donald McCloskey, Bernard Meltzer, Thomas Nagel, Richard Rorty, Brian Simpson, and David Strauss, read and made helpful comments on parts of the manuscript.

Earlier versions of Chapter 1 were given as the 1993 Addison C. Harris Lecture at Indiana University School of Law and at the faculty workshop of Chicago-Kent College of Law. A part of Chapter 2 began as a contribution to a symposium on Civic and Legal Education at Stanford Law School, and other parts as talks at an annual meeting of the Association of American Law Schools. Earlier versions of Chapter 3 were given at a conference at George Mason University School of Law, at an annual meeting of the American Law and Economics Association, and as a Political Economy Lecture at Harvard University.

A version of Chapter 5 was delivered as a talk at the Bill of Rights Bicentennial Conference at the University of Chicago Law School. Chapter 13 originated as a paper delivered at a conference on Hegel and the Law at Cardozo Law School, Chapter 19 as a paper for a symposium on Pragmatism in Law and Society at the University of Southern California Law School, Chapter 21 as a paper for a conference on the new institutional economics held at the Universität des Saarlandes, and Chapter 26 as a paper for a conference at Brown University on Law and Nature. Several chapters, finally, were subjected to the intensive critical scrutiny of the Colloquium in Law, Philosophy, and Political Theory at New York University Law School, organized by Ronald Dworkin and Thomas Nagel. I am indebted to participants in all these sessions for many helpful comments.

Contents

Introduction: Pragmatism, Economics, Liberalism

THERE is a story about law, told mainly but not only by adherents of the critical legal studies movement, that goes as follows. Legal thinking in the late nineteenth century in England and the United States was formalistic: law, like mathematics, was understood to be about the relations among concepts rather than about the relations between concepts and reality. The student of geometry does not establish the relation between the square of the hypotenuse of a right-angle triangle and the squares of the two sides by measuring triangular objects. Similarly, to the legal formalist the issue in a contract case involving a reward offered for the return of lost property and claimed by a finder who hadn't known about the offer was not whether enforcing an entitlement to the reward would advance some social goal at an acceptable cost; it was whether unconscious acceptance of an offer was consistent with the concept of a legally enforceable contract. This reifying approach (as distinct from an instrumental one) to legal concepts was, the story continues, overthrown in the 1920s and 1930s by legal realism, the first antiformalist school of academic legal thought. The formalists fought back, in the 1950s with the jurisprudence of "legal process" and, in the following decade and continuing right up to the

present, with "law and economics," that is, the application of economics to law. According to the story that I am recounting, law and economics replaces legal conceptualism with economic conceptualism, evaluating legal outcomes by their conformity to economic theory but still keeping well away from facts. The antidote to this conceptualism is pragmatism, the theory (or antitheory) that debunks all pretenses to having constructed a pipeline to the truth and that, along with its twin, postmodernism, underwrites (thus illustrating the antifoundational as foundational) the radical critique of law by feminist jurisprudence, critical legal studies, and critical race theory.

I like the beginning of this story, although I think it exaggerates the formalism of late nineteenth century law. But it jumps the tracks when it reaches legal realism, a much-overblown movement. What is true is that ever since Socrates there have been influential thinkers who were skeptical about the capacity of legal reasoning to deliver something that could reasonably be called "truth." The leading American figure is Oliver Wendell Holmes. Almost everything of merit that the realists said can be found in essays by Holmes or books by Benjamin Cardozo, only more elegantly and incisively expressed than by any of the realists.[1] What the realists added, and bequeathed to the critical legal studies movement, were for the most part crude extensions of Holmes's and Cardozo's thought. To legal realism we owe the worst book ever written by a professor at a major law school—*Woe Unto You, Lawyers!*—in which Fred Rodell of the Yale Law School proposed to make the practice of law a crime and to replace courts by commissions of technical experts whose decisions would be final, including a "Killing Com-

1. Holmes's most important essay is "The Path of the Law," 10 *Harvard Law Review* 457 (1897), reprinted in (among other places) *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr.* 160 (Richard A. Posner ed. 1992). Cardozo's most important book is *The Nature of the Judicial Process* (1921). "The Path of the Law" is one of several works cited again and again in this book, so to save some space I give the full citations to these frequently cited works in this note only. Besides "The Path of the Law," these works are: Holmes's book *The Common Law* (1881); several of my books—*Law and Literature: A Misunderstood Relation* (1988), *The Problems of Jurisprudence* (1990), *Economic Analysis of Law* (4th ed. 1992), and *Sex and Reason* (1992); and the following judicial decisions: Lochner v. New York, 198 U.S. 45 (1905); Brown v. Board of Education, 347 U.S. 483 (1954); Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973); Bowers v. Hardwick, 478 U.S. 186 (1986). To minimize footnotes—that bane of legal writing—I place page references in the text whenever I am making frequent reference to a particular book or article.

mission to apply its laws about what are now called murder and manslaughter."[2]

The "crits" worry that the practitioners of law and economics will contest with them the mantle of legal realism. They needn't worry. We economic types have no desire to be pronounced the intellectual heirs of Fred Rodell, or for that matter of William Douglas, Jerome Frank, or Karl Llewellyn. The law and economics movement owes little to legal realism—perhaps nothing beyond the fact that Donald Turner and Guido Calabresi, pioneering figures in the application of economics to law, graduated from the Yale Law School and may have been influenced by the school's legal-realist tradition to examine law from the perspective of another discipline.[3] Although the legal realist Robert Hale anticipated some of the discoveries (inventions?) of law and economics, most modern law and economics scholars were unaware of his work until recently. It is difficult to measure and therefore treacherous to disclaim influence, but, speaking as one who received his legal education at the Harvard Law School between 1959 and 1962, I can attest that to a student the school seemed untouched by legal realism. And none of the legal and economic thinkers who since law school have most shaped my own academic and judicial thinking—Holmes, Coase, Stigler, Becker, Director, and others—was himself a product in whole or part of legal realism.

While disclaiming the bequest of realism, economic analysts of law refuse to go to the other extreme and anoint law and economics the new formalism. Formalism and realism do not divide up the jurisprudential universe between them. One can be skeptical about the claims of traditional lawyers that law is an autonomous discipline deploying cogent tools of inquiry without concluding that law is just politics, that legal rules and doctrines are just smokescreens, that lawyers should be got rid of and legal justice replaced by popular justice. The idea that

2. Rodell, *Woe Unto You, Lawyers!* 176, 182 (1939). The book was reissued in 1957 with a "Foreword to New Edition" in which Rodell stated that he stood by every word in the first edition.

3. Another linkage is conjectured in "The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932–1970" (Edmund W. Kitch ed.), 26 *Journal of Law and Economics* 163, 166–167 (1983) (introductory remarks by Professor Kitch). The fullest study of the relation between legal realism and modern law and economics is Neil Duxbury, "Law and Economics in America" (unpublished, University of Manchester Faculty of Law, n.d.). His conclusion about the relation coincides with mine.

law stands or falls by its proximity to mathematics is the fallacy shared by Langdellians and many crits. The middle way is pragmatism.

The Pragmatic Approach

I will discuss the relation of pragmatism to legal realism and other movements in legal scholarship later in the book (Chapter 19). For now the important thing is that the reader understand what I mean by the term—which is not what everyone means by it; there is no canonical concept of pragmatism. I mean, to begin with, an approach that is practical and instrumental rather than essentialist—interested in what works and what is useful rather than in what "really" is. It is therefore *forward-looking,* valuing continuity with the past only so far as such continuity can help us cope with the problems of the present and of the future. "We create the past from a sense of what can be done in the present."[4] The pragmatist remembers Santayana's dictum that those who forget the past are condemned to repeat it; but he also remembers T. S. Eliot's admonition (in "The Dry Salvages") "Not fare well, / But fare forward, voyagers," and Ezra Pound's slogan, "Make it new!" and Talleyrand's quip about the Bourbon kings—that they had learned nothing and forgotten nothing. The pragmatist is not afraid to say that a little forgetting is a good thing. Forgetting emancipates us from the sense, which can be paralyzing, of belatedness.[5] Conservative pragmatists must not be confused with reactionary nostalgists.

Applied to law, pragmatism would treat decision according to precedent (the doctrine known as "stare decisis") as a policy rather than as a duty. But an anterior question is whether pragmatism should be applied to law in the sense of being used as a guide for legal decision-making. Stanley Fish would say not, would say that pragmatism is a part of theory talk, not of practice—including legal and judicial practice—talk.[6] That question is examined later.

The pragmatic attitude is *activist*—progressive, "can do"—rejecting both the conservative counsel that whatever is is best and the fatalist

4. John Casey, "The Comprehensive Ideal," in *The Modern Movement: A TLS Companion* 93, 95 (John Gross ed. 1993), describing T. S. Eliot's antihistorical view of tradition.

5. Friedrich Nietzsche, "On the Uses and Disadvantage of History for Life," in Nietzsche, *Untimely Meditations* 57, 120–122 (R. J. Hollingdale trans. 1983).

6. Fish, "Almost Pragmatism: Richard Posner's Jurisprudence," 57 *University of Chicago Law Review* 1447 (1990).

counsel that all consequences are unintended. The pragmatist believes in progress without pretending to be able to define it, and believes that it can be effected by deliberate human action. These beliefs are connected with the instrumental character of pragmatism. It is a philosophy of action and of betterment—which is not to say that the pragmatist *judge* is necessarily an activist. Judicial activism properly so-called is a view of the capacity and responsibility of courts relative to other agencies of government. A pragmatist might have good pragmatic reasons for thinking that courts should maintain a low profile.

Emphasizing the practical, the forward-looking, and the consequential, the pragmatist, or at least my kind of pragmatist (for we shall see that pragmatism comes in an anti-empirical, antiscientific version), is *empirical.* The pragmatist is interested in "the facts," and thus wants to be well informed about the operation, properties, and probable effects of alternative courses of action. At the same time he is *skeptical* about claims that we can have justified confidence in having arrived at the final truth about anything. Most of our certitudes are simply the beliefs current in whatever community we happen to belong to, beliefs that may be the uncritical reflection of our upbringing, education, professional training, or social milieu. Even our most tenaciously held "truths" are not those that can be proved, probed, discussed, investigated, but those so integral to our frame of reference that to doubt them would, by undermining our other deeply held beliefs, throw us into a state of hopeless disorientation. A proof is no stronger than its premises, and at the bottom of a chain of premises are unshakable intuitions, our indubitables, Holmes's "can't helps." That we are of a certain age, that we have a body, that no human being born in the eighteenth century is alive today, that objects do not cease to exist when they are out of our sight, that other people besides ourself have conscious mental states, and that the earth preexisted us are all beliefs of this character. Imagine, if we doubted any of these things, what else we would be forced to doubt.

These things are "common sense," the lay term for what I am calling the frame of reference. Pragmatism is both for and against common sense. The pragmatist knows that the frame of reference in which certain propositions have the status of common sense can change, sometimes rapidly, as happened in recent decades with regard to views of women's preferences and capabilities. But if he is sensible he also knows that the fact that something cannot be proved doesn't mean that

it can be dislodged. The first point is overlooked by many conservatives, the second by many social constructionists (see Chapter 26).

The beliefs that are universally shared within a culture—the dictates of common sense—do not exhaust the contents of an individual's frame of reference in a complex and heterogeneous society such as that of the United States. Americans do not share an overarching frame of reference with which to resolve disputes between individuals whose personal frames of reference do not overlap completely. A claim that every human being has had a human father except Jesus Christ belongs to one frame of reference, the Christian; the denial of the claim to another, the scientific; both are found in our society. Conversion from one to another is common enough but it is not brought about by proof, by deduction and induction and other logical or scientific methods. Canons of logic and proof are elements of a frame of reference rather than means of dislodging one frame in favor of another.

While skeptical and relativistic, the pragmatist rejects skepticism and relativism when embraced as dogmas, as "philosophical" positions. Belief that the world exists independently of ourselves (the belief challenged by skepticism) and belief that some propositions are sounder than others (the belief self-contradictorily challenged by relativism) are part of the frame of reference shared by all readers of this book. One can only pretend to doubt them. Yet while unable to doubt them in the sense of being willing to act on our doubts, we can accept intellectually the possibility that they will someday be supplanted by fundamental beliefs equally unshakable—and transient.

Doubting that we will ever know that we have arrived at the ultimate truth(s), the pragmatist is ***antidogmatic.*** He wants to keep debate going and inquiry open. Recognizing that progress comes not merely through the patient accretion of knowledge within a given frame of reference but also through changes in the frame of reference—the replacement of one perspective or world view by another—that open new paths to knowledge and insight, the pragmatist values freedom of inquiry, a diversity of inquirers, and experimentation. He sees the scientist not as the discoverer of the ultimate truths about the universe—truths that once discovered by the experts should be forced on the rest of us—but as the exposer of falsehoods, who seeks to narrow the area of human uncertainty by generating falsifiable hypotheses and confronting them with data. From this standpoint what is most distinc-

tive about science is that it epitomizes a rare and valuable human quality: the courage to risk being wrong. Pragmatists don't think that scientists have characters superior to those of other people, only that science has institutional characteristics which create a high probability that errors will be detected.

Being antimetaphysical and antidogmatic, the pragmatist views scientific theories as tools for helping human beings to explain and predict and, through explanation, prediction, and technology, to understand and control our physical and social environment. Theories of great beauty but little power leave him cold. He is drawn to the *experimental* scientist, whom he urges us to emulate by asking, whenever a disagreement arises: What practical, palpable, observable difference does it make to us? What, for example, are the stakes when lawyers debate whether some theory of judicial action comports with "democratic legitimacy"? How do we recognize "democracy" anyway? What difference does it make whether one thinks that judges found the current doctrines of constitutional law in the Constitution or put them there? These questions, all examined in this book, differ from those asked by traditional jurisprudential thinkers. They illustrate the possibility of thinking scientifically outside the domain of science as ordinarily understood.

Pragmatism emphasizes the *primacy of the social over the natural.* When Cardinal Bellarmine refused to look through Galileo's telescope at the moons of Jupiter, whose existence seemed to refute the orthodox view that the planets were fixed to the surface of crystalline spheres, he was not being irrational. He was just refusing to play the science game, in which theories are required to conform to observations, to "the facts," rather than the other way around. Bellarmine's game was faith. It is a common game in our society as well, taking many forms, the cosmological one being astrology. Another game of faith today is "political correctness." If you show a player in that game a sheaf of scientific reports purporting to show that the races or the sexes differ in their potential for doing mathematics, the player will refuse to read them; the empirical investigation of racial and sexual differences is rejected in that game, just as the empirical investigation of planetary motion was rejected by Bellarmine. (We shall encounter the p.c. game in Chapters 16 and 18.) A similar game on the other side of the ideological divide is the monocultural Western civ game, the players in which, if you show