RICHARD A. POSNER

LAW, PRAGMATISM, AND DEMOCRACY

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HARVARD UNIVERSITY PRESS
CAMBRIDGE, MASSACHUSETTS
LONDON, ENGLAND

Printed in the United States of America

First Harvard University Press paperback edition, 2005

Library of Congress Cataloging-in-Publication Data

Posner, Richard A.
Law, pragmatism, and democracy / Richard A. Posner
p. cm.
Includes bibliographical references and index.
ISBN 0-674-01081-7 (cloth)
ISBN 0-674-01849-4 (pbk.)
1. Justice, Administration of—United States.
2. Rule of law—United States. 3. Democracy.
4. Pragmatism. I. Title.

KF384 .P67 2003
340'.11—dc21 2002031877

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Preface

Law and democracy are the twin pillars of the liberal state—representative democracy constrained by legality is what "liberal state" *means*. This book argues for a theory of pragmatic liberalism the twin halves of which are a pragmatic theory of democracy and a pragmatic theory of law. Pragmatic liberalism stands in contrast to what might be called deliberative liberalism, which is the joinder of deliberative democracy and rulebound or principle-bound adjudication. Deliberative liberalism models voting and the action of elected officials as guided by reason rather than by interest, and adjudication as guided by either rules (in the most formalistic versions of deliberative adjudication) or principles (in the legal-process and moral-philosophy versions, which are less formalistic). Pragmatic liberalism, with its unillusioned understanding of human nature and its skepticism about the constraining effect of legal, moral, and political theories on the actions of officials, emphasizes instead the institutional and material constraints on decisionmaking by officials in a democracy.[1]

The book's principal contribution to democratic theory is the revival, elaboration, and application of the theory of "elite" democracy first sketched by Joseph Schumpeter and in recent years rather thoroughly neglected. Although Schumpeter is not usually thought of as a pragmatist, his theory of democracy is pragmatic; and I argue that it provides a supe-

1. The approach is somewhat parallel to that of Russell Hardin in his recent book *Liberalism, Constitutionalism, and Democracy* (1999). See, for example, id. at 38–39.

rior normative as well as positive theory of American democracy to the political theorists' concept of deliberative democracy, on the left, and the economists' public-choice theory, on the right. On the law side of the book, the principal contributions are the distinction between philosophical and everyday pragmatism, an insistence on distinguishing between the case-specific and the systemic consequences of judicial decisions, a further insistence on distinguishing between pragmatism and consequentialism, and an attempt at a reconciliation of legal pragmatism with legal positivism. I do not present a complete theory of pragmatic liberalism, however; my focus is on concepts of democracy and legality rather than on the scope and limits of government as such, though they are also crucial issues for liberal theory.

The book builds on my earlier work but contains very little previously published material (and that material has been extensively revised for the book), as a sketch of its provenance will show. I presented a version of Chapters 1 and 2 in a lecture sponsored by the George A. Miller Committee, the law school, and the philosophy department of the University of Illinois at Urbana-Champaign. I am grateful to my hosts on that occasion, Richard Schacht and Thomas Ulen, and to the lecture audience, for helpful questions and comments. The discussion of John Marshall in the middle section of Chapter 2 is a revised version of my review of R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (2001), which appears in the *New Republic*, Dec. 17, 2001, p. 36 ("The Accidental Jurist").

Chapter 3 draws on an address that I gave at the First Annual Symposium on the Foundation of the Behavioral Sciences: John Dewey: Modernism, Postmodernism and Beyond, held at Simon's Rock College of Bard under the auspices of the Behavioral Research Council of the American Institute for Economic Research. I thank Elias Khalil, the council's director, for organizing the symposium and inviting me to give one of the keynote addresses. I also thank Eric Posner and Cass Sunstein for their comments on an early draft and the participants in the symposium for their comments.

Chapters 4 through 6 draw on the Wesson Lectures in Democratic Theory and Practice that I gave under the auspices of the Ethics in Society Program of the philosophy department of Stanford University, as well as on presentations at the Political Theory Workshop of the University of Chicago, at the Harvard Law School Faculty Workshop, and in the

Political Economy Lecture Series (PELS) at Harvard. Lucian Bebchuk, Eamonn Callan, Kirk Greer, Thomas Grey, Jacob Levy, the audiences at my Wesson and PELS lectures, and the participants in the two workshops, as well as Jonathan Hall, made many helpful comments.

Chapter 7 is based on a draft of a lecture that I was to give at the Eighteenth Annual Meeting of the European Association for Law and Economics in Vienna on September 14, 2001. (The lecture was not delivered because the disruption of airline traffic incident to the September 11, 2001 terrorist attack on the United States prevented me from attending the conference.) I thank Wolfgang Weigel for inviting me to give the lecture and for discussion of the topic, and Albert Alschuler, Neil Duxbury, Michael Green, and Eric Posner for comments on an early draft. In a slightly different form the lecture was given at the University of Texas Law School as a Tom Sealy Law and Free Society Lecture. I thank Brian Leiter for the invitation and for a most helpful discussion of the subject of the lecture, as well as of other topics touched on in this book. Another version was given at a Stanford Law School faculty workshop, and I thank the participants in that workshop for their helpful comments; and still another at the Sorbonne—I thank Horatia Muir Watt for inviting me and for her helpful comments and those of others who attended my talk.

I tried out some of the ideas in Chapter 8 at the International Conference on the Legal Aftermath of September 11, sponsored by the New York University and Columbia Law Schools. I thank George Fletcher and Stephen Holmes, the organizers of the conference, and the participants, for helpful comments, and Anthony Arato for helpful bibliographical suggestions.

Chapter 9 originated in a paper entitled "*Bush v. Gore* as Pragmatic Adjudication," which appears in *A Badly Flawed Election: Debating* Bush v. Gore, *the Supreme Court and American Democracy* 187 (Ronald Dworkin ed. 2002). I am grateful to Ronald Dworkin for suggesting that I emphasize the pragmatic aspects of my take on the case and for his criticisms of the paper; and also to Brian Leiter for his extensive comments on the paper (which includes, incidentally, some material that appears in other chapters of the present book). I presented a version of Chapter 9, and also of Chapters 1 and 2, at the Legal Theory Workshop of Columbia Law School. Larry Kramer and the other participants in that workshop made a number of helpful comments. I presented the same trio of chapters at the Colloquium on Legal, Moral, and Political Philosophy of University College,

London. On that occasion Ronald Dworkin, Stephen Guest, Christopher Hookway, Jonathan Wolff, and other participants in the colloquium made many stimulating criticisms and suggestions.

Chapter 10 is based on "Pragmatism versus Purposivism in First Amendment Analysis," 54 *Stanford Law Review* 737 (2002), my reply to Jed Rubenfeld, "The First Amendment's Purpose," 53 *Stanford Law Review* 767 (2001). I am grateful to Michael Boudin, Frank Easterbrook, Lawrence Lessig, David Strauss, Cass Sunstein, and Adrian Vermeule for their comments on a previous draft of the reply, as well as to Professor Rubenfeld, with whom I debated our disagreements in a joint appearance in the Stanford Law Review Lecture Series. Finally, I gave lectures and workshops based on several of the chapters at Haverford College under the auspices of the William Pyle Philips Fund, and received a number of helpful comments from my host, Mark Gould, and other faculty, and student, participants.

I am indebted for very helpful research assistance to William Baude, Philip Bridwell, Tun-Yen Chiang, Bryan Dayton, Adele Grignon, Brian Grill, and Benjamin Traster; and for helpful comments on the manuscript to Michael Aronson, Peter Berkowitz, Christopher Berry, David Cohen, Neil Duxbury, Eldon Eisenach, David Estlund, Edward Glaeser, Michael Green, Thomas Grey, Stephen Guest, Russell Hardin, Mark Lilla, Larissa MacFarquhar, Eric MacGilvray, Frank Michelman, Martha Nussbaum, Richard Pildes, Charlene Posner, Eric Posner, Richard Rorty, Andrei Shleifer, Cass Sunstein, Dennis Thompson, and Donald Wittman.

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Contents

INTRODUCTION

Pragmatic Liberalism and the Plan of the Book

First there was the investigation and impeachment of President Clinton, and people said, yes, he's a crook but he's been an effective President and we should be pragmatic and offset his effectiveness against his misbehavior. Then came *Bush v. Gore*, where the Supreme Court handed George W. Bush the Presidency, and people said—or at least the critics of the decision, who were many, said—that the Court had acted out of an excess of pragmatism, wishing to spare the country the spectacle of a botched Presidential succession. Finally there were the September 11, 2001 terrorist attacks and in their wake people began to say that civil liberties would have to bend to pragmatic concerns about public safety. These disparate episodes (all discussed in this book) focus sharply the question of the proper role of pragmatism in law, and in government generally.

For some years now—since well before the three episodes noted in the preceding paragraph—I have been arguing that pragmatism is the best description of the American judicial ethos and also the best guide to the improvement of judicial performance—and thus the best normative as well as positive theory of the judicial role.[1] I think I've made some good points

1. See the following books of mine: *The Problems of Jurisprudence* (1990); *Cardozo: A Study in Reputation* (1990); *Overcoming Law* (1995); *The Problematics of Moral and Legal Theory*, ch. 4 (1999); *Frontiers of Legal Theory*, chs. 2–4 (2001); *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts*, ch. 4 (2001). I am not alone in urging a pragmatic approach to

and offered some telling illustrations. But I have not adequately explained the sense in which I use "pragmatism" when discussing law, which differs from the sense in which philosophers use the word, or met all the objections to my concept of pragmatic adjudication. Nor have I related legal pragmatism to legal positivism or to democracy, even though the relation between legal pragmatism and legal positivism is intimate, while that between law and democracy is inescapable for any legal theory—and democratic theory, like legal positivism, comes in pragmatic and nonpragmatic versions. Furthermore, since the pragmatic judge disclaims being a mere mouthpiece for decisions made or values declared by the electorally responsible branches of government, pragmatic adjudication raises a question of democratic legitimacy.

The neglect of democracy is a particularly striking feature not only of previous discussions of pragmatic legal theory, including my own, but of legal theory in general. Legal professionals tend either to take democracy for granted or to regard it as something that gets in the way of law, since many of the most celebrated legal rights are rights against the democratic majority. The legal professionals' neglect of, even disdain for, democracy is abetted by the remarkable fact that there is at present no influential body of academic thought that makes the case for American democracy as it is actually practiced. Ian Shapiro remarks "democratic theory's apparently moribund condition."[2] The most influential bodies of contemporary academic reflection on democracy—deliberative democracy on the left and public choice on the right—are overwhelmingly critical of our actual democratic system. A major aim of this book is simply to make the case for contemporary American democracy. The making of that case will in turn assist in the construction of a theory of adjudication.

The democratic theory for which the book argues is pragmatic. We should not be afraid of pragmatism or confuse it with cynicism or with dis-

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law, even if one excludes the distinguished dead, such as Oliver Wendell Holmes, Jr. and John Dewey. Notable recent contributions include Daniel A. Farber, "Legal Pragmatism and the Constitution," 72 *Minnesota Law Review* 1331 (1988); Brian Z. Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (1997); Thomas C. Grey, "Freestanding Legal Pragmatism," in *The Revival of Pragmatism: New Essays on Social Thought, Law, and Culture* 254 (Morris Dickstein ed. 1998); Robert Justin Lipkin, *Constitutional Revolutions: Pragmatism and the Role of Judicial Review in American Constitutionalism* (2000); Ward Farnsworth, "'To Do a Great Right, Do a Little Wrong': A User's Guide to Judicial Lawlessness," 86 *Minnesota Law Review* 227 (2001); David D. Meyer, "*Lochner* Redeemed: Family Privacy after *Troxel* and *Carhart*," 48 *UCLA Law Review* 1125, 1182–1190 (2001).

2. Ian Shapiro, *Democratic Justice* 4 (1999).

dain for legality or democracy. Its core is merely a disposition to base action on facts and consequences rather than on conceptualisms, generalities, pieties, and slogans. Among the pieties rejected is the idea of human perfectibility; the pragmatist's conception of human nature is unillusioned. Among the conceptualisms rejected are moral, legal, and political theory when offered to guide legal and other official decisionmaking.

Readers not captivated by pragmatism but interested in intellectual history may find some value in the unexpected links that I forge between John Dewey and Friedrich Hayek, between Hans Kelsen and Dewey (and other pragmatists), and between Joseph Schumpeter and—James Madison. Kelsen and Schumpeter, famous in their time as theorists of law and of democracy respectively, have been neglected in recent years.[3] One aim of this book is to remedy that neglect. Another is to encourage a different kind of scholarly research on issues of law and politics from the dominant mode today, which is discursive, normative, and abstract. Scholars in the fields touched on in this book tend to create theoretical models of adjudication and democracy and to judge specific institutions, decisions, policies, and proposals by their conformity to the model. It would be more constructive to focus on the practical consequences of such things, with theorization used only to illuminate the consequences—which is where economic theory and the empirical methods of economics come in. The theoretical uplands, where democratic and judicial ideals are debated, tend to be arid and overgrazed; the empirical lowlands are fertile but rarely cul-

3. Kelsen, once the leading figure in legal positivism, doesn't even rate an index entry in an excellent recent book on the subject, Anthony J. Sebok, *Legal Positivism in American Jurisprudence* (1998), or in Neil Duxbury's fine comprehensive work, *Patterns of American Jurisprudence* (1995). He receives passing mention in some of the essays in *The Autonomy of Law: Essays on Legal Positivism* (Robert P. George ed. 1996). And he retains a considerable following on the Continent. He was not an American but neither was H. L. A. Hart, who figures largely in both Sebok's and Duxbury's books, especially Sebok's; and unlike Hart, Kelsen lived and taught in the United States for many years. Schumpeter's *economic* theories, in particular his emphasis on innovation as the essential engine of economic progress, have a renewed following in economics. See, for example, Richard R. Nelson and Sidney G. Winter, "Evolutionary Theorizing in Economics," *Journal of Economic Perspectives*, Spring 2002, pp. 23, 33–34, 37; William J. Baumol, *The Free-Market Innovation Machine: Analyzing the Growth Miracle of Capitalism* (2002); Johannes M. Bauer, "Market Power, Innovation, and Efficiency in Telecommunications: Schumpeter Reconsidered," 31 *Journal of Economic Issues* 557 (1997). We shall see in Chapter 7 that Schumpeter's theories of democracy and of innovation overlap. A conspicuous exception to the neglect of Schumpeter's democratic theory by recent political theorists and political scientists is Bernard Manin's fine book *The Principles of Representative Government* (1997), which is Schumpeterian in spirit although Manin is critical of important aspects of Schumpeter's theory.

tivated. Granted, this book is not itself a work of empirical scholarship. The focus is on concepts (positivism, democracy, and so forth). But I try throughout to keep the discussion as concrete, practical, and straightforward as possible.

The first chapter examines the meanings of "pragmatism" and introduces the term "everyday pragmatism," which I distinguish from philosophical pragmatism and which plays a central role in the book. I argue that appeals to pragmatism to guide adjudication and other governmental action should largely be cut loose from philosophy. The cutting-loose thesis is not intended, however, to reject the many arresting propositions that the philosophical discourse on pragmatism has generated and that I set forth below. These are listed rather than defended; the book defends everyday rather than philosophical pragmatism. The two pragmatisms are related, however; the philosophical may create a receptive mood for the everyday and it does have some direct applications to law and policy.

The first and perhaps most fundamental thesis of philosophical pragmatism, at least of the brand of philosophical pragmatism that I find most congenial (an important qualification, given pragmatism's diversity), is that Darwin and his successors in evolutionary biology were correct that human beings are merely clever animals.[4] Mind is not something a benevolent deity added to the clay. Body is not a drag on mind, as Plato thought. (Inverting Plato is a generally reliable method of generating the main propositions of pragmatism.) Body and mind coevolved. Being thus adaptive to the ancestral human environment,[5] human intelligence is better at coping with practical problems, the only thing that preoccupied our ancestors 50,000 years ago, than at handling metaphysical entities and other abstractions. That is, our intelligence is primarily instrumental rather than contemplative. Theoretical reasoning is continuous with practical reasoning rather than a separate human faculty.

Since we are just clever animals, with intellectual capabilities oriented toward manipulating our local physical and social environment, we cannot be optimistic about our ability to discover metaphysical entities, if there

4. It would be more precise to say that pragmatic philosophers *believe* that Darwin and his successors were correct. Pragmatism makes no claims to ultimate truth or, specifically, to being able to arbitrate between scientific and religious worldviews.

5. The term that evolutionary biologists use to describe the environment in which human beings evolved to approximately their present biological state.

are any (which we cannot know),[6] whether through philosophy or any other mode of inquiry. We cannot hope to know the universe as it really is, the metaphysical universe, because to do so would require us to be able to step outside ourselves and compare the universe as it really is with our descriptions of it. Renouncing the quest for metaphysical knowledge need not be cause for disappointment, however, because it means "that appearances do not deceive, that the world is as it seems to be, and that there is no deep mystery at the heart of existence."[7] Or at least no deep mystery worth trying to dispel and thus worth troubling our minds about.

Not only is our knowledge local; it is also perspectival, being shaped by the historical and other conditions in which it is produced. Our minds race ahead of themselves, however, inclining us to universalize our local, limited insights. Influential writers on jurisprudence, such as H. L. A. Hart, Ronald Dworkin, and Jürgen Habermas, all purport to be describing law in the abstract, but Hart is really talking about the English legal system, Dworkin about the American, Habermas about the German.[8]

Not that racing ahead is a bad thing. Scientific theorizing is often far ahead of the facts; think only of non-Euclidean geometry, which was discovered in the nineteenth century yet had no empirical significance until Einstein—whose theory of relativity was itself developed before empirical testing of it became possible. And metaphysical theorizing, from Plato to Spinoza to Kant, while in one sense the product of mind on holiday, the clutch depressed and the engine revving up to a higher and higher pitch without turning any wheels, has insight and even charm, just as literature and art do. But unlike science, metaphysics lacks agreed-upon criteria for the evaluation of its theories. As a result, in an open, diverse, competitive culture, the kind a pragmatist, being a Darwinian, tends to prefer, metaphysical disputation is interminable. This does not mean that the pragmatist "rejects" metaphysics. He rejects the possibility of establishing the truth of metaphysical propositions a priori; and it is in the nature of metaphysics that its propositions cannot be established empirically. Metaphysical propositions may have value of a psychological or aesthetic character,

6. Concepts and numbers, as I'll note in the next chapter, are plausible candidates for real metaphysical entities. (That is, they are real but not physical.) But generally when I speak of "metaphysics" in this book I shall be referring to more ambitious forms of metaphysical realism than mathematical or other conceptual realism.

7. Alan Ryan, *John Dewey and the High Tide of American Liberalism* 344 (1995).

8. See *The Problematics of Moral and Legal Theory*, note 1 above, at 91–107.