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BOOK REVIEW

Not So Cold an Eye: Richard Posner's Pragmatism

THE PROBLEMS OF JURISPRUDENCE. By Richard A. Posner. Harvard University Press, 1990. Pp. xi, 485. \$29.95.

*Reviewed by Jason Scott Johnston**

I. INTRODUCTION

Over the past twenty odd years, Judge Richard Posner has established himself as one of the most creative and influential thinkers in the history of American law. His work divides into two parts: the prejudicial corpus, which is devoted almost entirely to the comprehensive economic analysis of law,¹ and the postjudicial corpus, which treats issues involving what may be called the theory of judging and courts—that is, the normative theory of how judges should decide cases and how courts should be organized.² This division is rough and wavering, for Posner's work prior to his appointment to the federal bench often dealt with topics relevant to the theory of judging,³ and his work in law and eco-

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1. Dozens of Posner's articles that appeared in the *Journal of Legal Studies*, of which Posner was the founding editor, expressed his economic analysis of law. This work can be accessed most efficiently through Posner's encyclopedic *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986).

2. See, e.g., R. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988) [hereinafter R. POSNER, *LAW AND LITERATURE*]; R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985).

3. See, e.g., Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 *J. LEGAL STUD.* 257 (1974); Landes & Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 *J.L. & ECON.* 249 (1976).

nomics has continued since his appointment.⁴ But while such a water-color boundary may fail in cartography, my purpose here is not map making but rather map reading. The map, Judge Posner's recent book *The Problems of Jurisprudence*,⁵ ostensibly covers terrain on the postjudicial side of my imperfect border. The book is a campaign for Pragmatism in the battle against competing general approaches to the theory of judging. And it is a campaign that succeeds brilliantly in demolishing much of the "cant" and "piety"⁶ in contemporary thinking about law. When Posner raises the flag and proclaims his "Pragmatist Manifesto" as a general approach to law and judging, however, it is but a partial proclamation, because he announces it from within the water-color boundary between scholar and judge, between explanation and justification, and between economic theory and judicial practice.

The path to this ambiguous destination begins with Judge Posner listing at least a dozen fundamental jurisprudential questions such as "What is law?" and "Where does law come from?"⁷ Jurisprudence addresses questions which Posner says are the sort that "an intelligent layperson of speculative bent—not a lawyer—might think particularly interesting."⁸ Then, quite rapidly, he discards both the list and the perspective of the intelligent, speculative layperson. Posner picks a new point of view, the view of the enlightened judge, interested not only in deciding cases, but in contemplating how a judge may justify these decisions and his role. This is the judge robeless, not bench proud but library bound, eyes strained and burning to see himself impartially. And from this coign of vantage, the long list of old jurisprudential questions is reduced to three very contemporary queries going to the heart of the judge's vision of himself: "[W]hether, in what sense, and to what extent the law is a source of objective and determinate, rather than merely personal or political, answers to contentious questions."⁹

With the questions posed, the next four hundred pages explore various possibilities for an "objective and determinate" legal answer. Posner concludes that none of these possibilities promises objectivity always: in the tough case, the method of legal reasoning is no "method" at all, but a congeries of reasoning methods that people use "when logic and science run out."¹⁰ Law and fact, the very elements of legal reason-

4. Posner did much of this work in collaboration with economist William Landes. See, e.g., W. LANDES & R. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); Landes & Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

5. R. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990).

6. *Id.* at xii.

7. *Id.* at 1.

8. *Id.*

9. *Id.* at 31.

10. *Id.* at 30.

ing, depend on cultural consensus, and, therefore, they dissolve as meaningful entities whenever a judge must decide a case that presents contesting cultural visions.¹¹ Similarly, no legal text can contain the answer because texts only have meaning within the culture that the case contests. Finally, while some conceptions of substantive justice may help by placing “sensible constraints on legal discretion,”¹² none of these, not even wealth maximization, “can close the open area of judicial decision making all the way.”¹³ But only from this seemingly futile quest for answers does the judge’s vision clear: it is the way you look, and not what you find, that matters. This is Richard Posner’s “new pragmatic jurisprudence,” an “attitude rather than a dogma” that is grounded on “a future-oriented instrumentalism that tries to deploy thought as a weapon to enable more effective action.”¹⁴ Posner’s map, it turns out, really is not a map at all. Rather, it is a guide for traveling where maps run out, one that:

emphasizes the scientific virtues (open-minded, no-nonsense inquiry), elevates the process of inquiry over the results of inquiry, prefers ferment to stasis, dislikes distinctions that make no practical difference—in other words, dislikes “metaphysics”—is doubtful of finding “objective truth” in any area of inquiry, is uninterested in creating an adequate philosophical foundation for its thought and action, likes experimentation, likes to kick sacred cows, and—within the bounds of prudence—prefers shaping the future to maintaining continuity with the past.¹⁵

This makes for quite a story really, a tale of a journey of enlightenment and self-discovery that might resonate for all who reflect on the law and their place within it. But you cannot really see this book if you read it with this storyline. The real book runs in the opposite direction. Posner’s pragmatic vision comes first, and then this vision is brought on the contestants for “objective and determinate” answers to legal questions. This pragmatic vision tests any theory of what judges “should” do or what the law “should” be by its consequences: the question always is how a particular theory, if applied, would make people subject to the law better off. Further, in deciding what is beneficial, Posner situates his vision within the present historical and cultural context of which law is a part. For these reasons, Posner’s pragmatism may be described best as a “situated consequentialism.” Beneath its glare whither not only contemporary folk dogmas, such as “judicial restraint,” but many high-level theories regarding what law is or should be, or what judges do or should do. This demythologizing alone makes

11. *Id.*

12. *Id.* at 334.

13. *Id.* at 31.

14. *Id.* at 28 (quoting C. WEST, *THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM* 5 (1989)).

15. *Id.*

the journey so refreshing that its many difficult and unannounced digressions seem but little annoyance.

In Part II of this Review, I try to condense Posner's pragmatic consequentialism and illustrate its operation on both lowbrow folk wisdom and highbrow theory. Then, in Part III, I present the difficulties with Posner's pragmatism. Not difficulties in the sense that his legal "pragmatism" is not this or that brand of philosophical "Pragmatism," for I am myself both enough a pragmatist and too little a philosopher to have either the desire or capability to judge a philosophy by its resemblance to others. The difficulty with Posner's pragmatism is a pragmatic difficulty, which involves a narrowing of empirical vision and shortening of logical compass. While not failing, Judge Posner's pragmatic vision clouds and looks askance at an issue that the Chicago School economist Posner cannot confront: the law's expressive, value-shaping function. Posner sees the law solely as an instrument that acts upon people with fixed preferences, and which by determining the rewards and sanctions for different behaviors creates incentives for behavioral modification. He rejects the notion that the law can also be a determinant of who those people are, an instrument that both acts on and shapes values and preferences. Posner would deny this value-shaping function, and he would deny it not in the pragmatic spirit, but instead with no logical analysis and little empirical attention. Posner's denial is unnecessary. The possibility that law serves an expressive function is worth discussing further, and most importantly, the expressive function of law is a subject fully within the progressive research program of law and economics.

II. THE SITUATED CONSEQUENTIALIST CRITIQUE

The core of Posner's pragmatism is a relentless consequentialism.¹⁶ For Posner, any clear look at the important difficult cases shows that, at least in these cases,¹⁷ legal reasoning is not special, but it is a variety of

16. I take Hilary Putnam's definition of "consequentialism" as "the doctrine that the good must be what maximizes something." Putnam, *A Reconsideration of Deweyan Democracy*, 63 S. CAL. L. REV. 1671, 1681 (1990).

17. It is some tribute to Frederic Schauer's efforts in this area, *see, e.g.*, Schauer, *Formalism*, 97 YALE L.J. 509 (1988), that Posner takes as clearly established not only the possibility of conceiving of formal rules that yield determinate answers to legal questions in some cases, but also that such cases and rules do exist. *See* R. POSNER, *supra* note 5, at 42-61 (discussing rules and standards). Judge Posner's views on the dynamics of rules and standards have apparently undergone a dynamic. Like Holmes, the Posner of Ehrlich & Posner, *supra* note 3, believed in the evolution of the law toward an increasingly dense set of precise rules. In my own recent—but, it turns out, not recent enough—contribution to the analysis of this issue, I have so characterized Posner's position. *See* Johnston, *Uncertainty, Chaos and the Torts Process: An Economic Analysis of Legal Form*, 76 CORNELL L. REV. 341, 342-43 (1991). This mischaracterizes his current thinking, *see* R. POSNER, *supra* note 5, at 45, which sees "what appears to be a historical shift in the balance between rules

ethical or policy analysis. Moreover, to the extent that it is policy analysis, legal reasoning is an example of what philosophers of practical reason would call means-end rationality or what economists would call cost-benefit analysis.¹⁸ While the consequentialist case is easier to make for common-law decision making, it is clear that Posner also means it to apply to statutory interpretation. The key step for a judge reasoning from common-law precedents is to "extract a goal from the previous cases or from other sources and then determine which decision in the new case will promote that goal most effectively and at least cost."¹⁹ Statutory and constitutional interpretation are not so different from common-law reasoning because all interpretation really means is that a judge's decision must be "related" to an authoritative text.²⁰ In any difficult or interesting case, furthermore, it is hard to discern what is in a text and what is outside of it,²¹ and to do this, the judge must bring to bear broad linguistic and cultural understandings.²² The meaning of a statute depends on what is given emphasis, and this emphasis depends on what question or questions the statute was designed to answer.²³ Posner suggests that when a litigant invokes a statute the judge simply should figure out whether the consequences of acquiescing in the particular invocation would be good or bad.²⁴

This summary of the core of Posner's consequentialism will seem too simple and austere and, inasmuch, untrue to the whole of *The Problems of Jurisprudence*. But this representation is only superficially simple. It relies on several terms that contain considerable complexity. The most important of these terms is the notion of meaning: the consequentialist approach to statutory interpretation, for instance, hinges crucially on identifying the drafters' meaning with the interpretation that has the best consequences.

Some examples clarify further Posner's approach to meaning. In a quote from his book, coauthored by William Landes, on the economics of tort law,²⁵ Posner maintains that legal concepts such as "cause" have meaning only in reference to the purpose one has in using legal concepts.²⁶ For Posner, purposeful use defines a human practice, and to discern a word's meaning, we ask who uses the word, how it is used, and

and standards, in favor of the latter."

18. R. POSNER, *supra* note 5, at 105-08.

19. *Id.* at 108.

20. *Id.* at 299.

21. *Id.* at 296 n.18.

22. *Id.*

23. *Id.* at 294 n.16.

24. *Id.* at 300.

25. W. LANDES & R. POSNER, *supra* note 4, at 229.

26. *Id.*

for what purpose it is used. If, for example, our purpose in calling some action a legal cause of an event is to create an *ex ante* incentive for people to choose efficient levels of an action, such as precaution taking, then we simply will call the failure to take precautions a legal cause of some harm when incentives are improved by increasing the actor's liability. More generally, "cause" means that a legal decisionmaker has decided to assign legal responsibility to an actor because the decisionmaker desires some consequence that is believed to follow from the assignment. Still more generally, when we use the word "law," we mean not some concept or thing, but the practice or activity in which a "permanent cadre of officials . . . resolve disputes in accordance with official norms," with help from legislatures;²⁷ that is, law means the purposeful, norm-guided resolution of disputes by the members of a particular community.

By identifying meaning with the consequences of practice, Posner places himself squarely within the pragmatic tradition beginning with Charles Sanders Peirce.²⁸ Peirce's notion of meaning may not completely eschew idealism—particularly insofar as it relies on "conceivable or possible" consequences to establish meaning²⁹—but it has, in a rough way, weathered the storms of analytic criticism³⁰ and remains a visible part of the genealogy of contemporary pragmatism. For example, in his most recent book, the contemporary pragmatist Richard Rorty says that "we have no prelinguistic consciousness to which language needs to be adequate, no deep sense of how things are which it is the duty of philosophers to spell out in language."³¹ Rorty relies heavily here, as elsewhere,³² on analytic work by Donald Davidson and Daniel Dennett: relying on Davidson for the notion that to speak the same language is simply to have convergent theories predicting the circumstances under

27. *Id.* at 232-33.

28. In a famous passage elaborating his pragmatic conception of meaning, Peirce stated: [T]he whole function of thought is to produce habits of action. . . . To develop its meaning, we have, therefore, simply to determine what habits it produces, for what a thing means is simply what habits it involves. . . . What the habit is depends on *when* and *how* it causes us to act. . . . There is no distinction of meaning so fine as to consist in anything but a possible difference of practice.

Peirce, *How to Make Our Ideas Clear*, in 3 WRITINGS OF CHARLES S. PEIRCE 257, 265 (C. Kloesel ed. 1986).

29. See H. THAYER, MEANING AND ACTION: A CRITICAL HISTORY OF PRAGMATISM 96 (1981).

30. For some of the problems with Peirce's ideas as noted by analytic philosophers such as Carl Hempel, see I. SCHEFFLER, FOUR PRAGMATISTS: A CRITICAL INTRODUCTION TO PEIRCE, JAMES, MEAD, AND DEWEY 80-81 (1974).

31. R. RORTY, CONTINGENCY, IRONY AND SOLIDARITY 21 (1989).

32. See, e.g., R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 206-08 (1979) (discussing Davidson on intentional vocabularies).

which certain utterances will be made;³³ relying on Dennett for the idea that the use of mentalistic terminology such as “belief,” “purpose,” and “desire” is justified only because of its utility in allowing people to predict what certain kinds of organisms are likely to do or say under various circumstances.³⁴

Some direct acquaintance with the ideas of Davidson, Dennett, and Rorty helps understand Posner's views in *The Problems of Jurisprudence*. Posner clearly intends, to paraphrase Rorty, to be a nonreductive behaviorist about law in the same sense that Davidson is a nonreductive behaviorist about language and Dennett a nonreductive behaviorist about mentalism: to apply the common law or interpret a statute in a case “is just to say that, for some purposes” reading the precedents or statute in a particular way will prove useful in light of those purposes.³⁵ Like Rorty, for Posner purpose is and must be immanent within the precedents or statute to be interpreted, because they cannot be interpreted without an awareness of the larger constellation of cultural purposes. More concretely, perhaps, Posner views judges not only as resolving disputes in accordance with preexisting norms, but also as elaborating those norms.³⁶

Through Posner's pen, this situated consequentialism is a laser that disintegrates many of the sliibboleths of contemporary thinking about law. Whether the sliibboleth is of folk or theoretical orthodoxy, or whether the orthodoxy pertains to what judges should do or what law should be is immaterial; Posner demands that any view explain what net benefit would come from its adoption. Judicial restraint—what Posner calls the “pedigree” model of judicial legitimacy—is, he says, “a political theory rather than the outcome of legal reasoning; it cannot be deduced from legal materials or otherwise rigorously (or even very convincingly) derived from them.”³⁷ Moreover, at the purely theoretical or

33. Davidson, *A Nice Derangement of Epitaphs*, in *TRUTH AND INTERPRETATION* 446 (E. LePore ed. 1986), quoted in R. RORTY, *supra* note 31, at 14 (stating, all “two people need, if they are to understand each other through speech, is the ability to converge on passing theories from utterance to utterance”).

34. R. RORTY, *supra* note 31, at 15. For a fuller notion of Dennett's view, see D. DENNETT, *True Believers: The Intentional Strategy and Why It Works*, in *THE INTENTIONAL STANCE* 13-15 (1987).

Additionally, Dennett's choice for the ulterior source of original intentionality—our consciousness of intentionality in the selection of intentional terminology—is natural selection. Dennett says, “What is particularly satisfying about this is that we end the threatened regress of derivation with something of the right metaphysical sort: a *blind* and *unrepresenting* source of our own sightful and insightful powers of representation.” D. DENNETT, *Evolution, Error, and Intentionality*, in *id.* at 318.

35. See R. RORTY, *supra* note 31, at 15.

36. R. POSNER, *supra* note 5, at 355.

37. *Id.* at 132; see also *id.* at 271.

conceptual level, Posner claims that:

[t]he issue of the proper freedom for judges is intractable . . . it ought to be recast in empirical, pragmatic terms. Do we want judges to play a bigger or smaller role in the direction or implementation of government policy? (And who are the "we" in this question?) Which choice would have better consequences (insofar as we can discern them), all things considered? The question whether judges should be passive rather than active, moderate rather than aggressive, ought to be confronted head-on rather than obscured by endless talk about legitimacy.³⁸

Determining whether legislators are "better policymakers" than judges requires not a comparison between real judges and ideal legislators, but between real judges and real legislators. In this comparison, it is far from clear that legislators are superior to judges. Legislators *could* be better, Posner suggests, but only if they could throw off the yoke of interest group pressures, reform the procedures of the legislature, and extend their own policy horizons beyond the next election.³⁹ The vacuity of conventional, stylized arguments for legislative competence is amply demonstrated by their failure even to mention the potential relevance of how legislatures actually work.

As for common law, at least in cases when no earlier decision is squarely on point, the role of precedent ought to be no greater than the soundness of its views warrants.⁴⁰

Why must dicta (that is, nonauthoritative parts of the judicial opinion) be given more weight than the considered views of scholars who may have spent years studying the particular problem involved, or of social scientists who may have spent a professional lifetime in systematic study of the pertinent social realities, merely because the judge is an official?

. . . [W]hen there is no holding, when there are only dicta, their weight ought to be determined by their intrinsic merit rather than by their official source.⁴¹

For Posner, judges exercise no greater discretion in determining the importance of dicta than they inherently have in the use of precedent, because there is no practical distinction between treating a case as one of first impression and subsuming a case under a previous case after using discretion to enable the subsumption.⁴² By debunking what a judge actually can get from old cases,⁴³ Posner demonstrates the necessity—if one is to decide a case based on the consequences of alternative

38. *Id.* at 138.

39. *Id.* at 143.

40. *Id.* at 94-95.

41. *Id.*

42. *Id.* at 95.

43. Posner states that "[t]oo many of our judicial opinions contain unexamined assumptions, conventional and perhaps shallow pieties, and confident assumptions bottomed on prejudice and folklore." *Id.* at 97.

decisions—for looking outside case law, especially to the larger social science literature.⁴⁴

Posner's pragmatic criticism is not limited to the conventional folklore about statutory and constitutional interpretation and common-law decision making. It is equally sharp, and equally revealing, when he focuses on theoretical approaches to law. The positivistic separation of law and morals is inconsistent with the pragmatist's unflagging skepticism and consequentialism because the positivist does not question one moral value: deferring to higher authority. But, Posner asks, "is it not a warped moral stance to be skeptical about all values except obedience? Is it not rather too Prussian for an American judge?"⁴⁵ From Posner's American perspective, the whole point of having judges may be to have them decide the tough, uncertain cases, using their best judgment and full experience as human beings; from this point of view, much of law is moral and political considerations.⁴⁶ Yet while Posner, like Dworkin, allows the judge legitimately to consider "not only . . . distinctively 'legal' materials but also the elements of political morality,"⁴⁷ he points to the arbitrariness of Dworkin's distinction between principle and policy, by which Dworkin means a collective rather than individual goal:⁴⁸ "Many collective goals, ranging from national survival and public order to prosperity and social insurance, are no less deeply woven into the fabric of our political morality than such principles as that equals should be treated equally. . . ."⁴⁹

Posner demands that theories of statutory interpretation be justified by their consequences. For example, Judge Frank Easterbrook's theory of statutory interpretation,⁵⁰ which calls for judges to constrain statutory range tightly to what is delimited clearly by a statute itself, must be justified: If applied, would the theory enhance the desirability of legislation? Would it make statutory interpretation more predictable? And what effect would the theory's application have on communication between the courts and legislature?⁵¹ Even grander, substantive theories of statutory law's proper domain must pass the even tougher

44. On the range of social questions confronting contemporary judges, see the path-breaking work by John Monahan and W. Laurens Walker summarized and extended in J. MONAHAN & W. WALKER, *EMPIRICAL QUESTIONS WITHOUT EMPIRICAL ANSWERS* (University of Virginia School of Law Working Paper No. 90-3 1990).

45. R. POSNER, *supra* note 5, at 139.

46. *Id.* at 243.

47. *Id.* at 239.

48. See R. DWORKIN, *LAW'S EMPIRE* 221-24 (1986).

49. R. POSNER, *supra* note 5, at 239.

50. For a fair indication of Easterbrook's view, see Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 *HARV. J.L. & PUB. POL'Y* 59 (1988); and Easterbrook, *Statutes' Domains*, 50 *U. CHI. L. REV.* 533 (1983).

51. R. POSNER, *supra* note 5, at 289, 292-93, 300.

twin pragmatic hurdles, logic and context. Richard Epstein's theory fails these, for in attempting to maintain a Lockean libertarian commitment to individual autonomy, and yet distinguish between permissible and impermissible government regulation based on the regulation's efficiency,⁵² Epstein misses the logical conflict between libertarianism and efficiency that arises whenever other-regarding preferences are allowed.⁵³ Even without the logical problem, to the extent Epstein's theory relies on a Lockean "state of nature," Epstein chooses precisely the wrong context within which to speak of liberal freedom and autonomy, for the "natural state is not one of . . . independence; it is one of dependence on more powerful men."⁵⁴ Posner is quite clear that liberal economic freedom is not only situated within, but is a product of social organization.⁵⁵

Posner is at times too lithe in his movements, too quick to proclaim victory over both lowbrow and highbrow contestants,⁵⁶ yet the real victory is in the battle itself. Posner's engagements do not leave a battlefield of destruction, but instead open a whole range of new and fascinating questions. For example, in preferring decentralized, ad hoc policymaking by judges in indeterminate statutory cases over Easterbrook's pedigree approach,⁵⁷ Posner analogizes statutory interpretation to the choice of gap filling or default rules in private contract law: just as contract law supplements explicit private agreements with a wide range of implied terms covering everything from the effect of unforeseen contingencies to the measure of consequential damages,⁵⁸ statutory interpretation calls for judges to supplement the explicit terms of stat-

52. Epstein's writings pertinent to this theoretical position include R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) and Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL'Y 713 (1989).

53. R. POSNER, *supra* note 5, at 344. Posner does not make the reference explicitly, but reference must be made to the original source of this insight, which is now known as Sen's paradox. See Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152 (1970).

54. R. POSNER, *supra* note 5, at 346.

55. *Id.*

56. One might think, for instance, that the United States Constitution provides a source from which to derive at least a contestable theory of judicial restraint. Posner, however, finds such a suggestion obviously wrong: "Article III envisaged a judiciary even more independent than the English royal courts. The framers' distrust was of legislatures." *Id.* at 141. Moreover, the Framers were themselves revolutionaries and the southern states had the Civil War Amendments shoved down their throats at gunpoint: "The 'title deeds' of constitutional law are written in blood; the 'pedigree' begins in usurpation." *Id.*

57. *Id.* at 292-93.

58. On the economic theory of contract default rules, see Ayres & Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989); Goetz & Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261 (1985); and Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615 (1990).

utes. This analogy may transform, in a constructive and progressive way, research about statutes and statutory interpretation.⁵⁹ Posner has raised two interesting issues in stating the metaphor. One is the possibility that because interest groups may not permit the passage of public interest statutes without explicit limitations on the statute's range, judges must respect such explicit limitations, or else they will make it more difficult for Congress to pass public interest statutes.⁶⁰ The other issue is the impact of unpredictable statutory interpretation on communication between courts and legislatures.⁶¹ Both of these issues can be fruitfully analyzed within the context of more formal models of court-legislature communication and of the impact of alternative statutory interpretation rules on strategic behavior by legislators.⁶²

III. BETTER THAN WHAT? AN ABBREVIATED CONVERSATION

The character of Lambert Strether in Henry James's novel *The Ambassadors* is sent on a mission to bring a wayward young American in Paris back to the prosaic business of his New England home. Strether succeeds, yet in so doing, changes his mind; he comes to see in Paris not a moral disaster but a complex, exquisitely ambiguous humanity. *The Ambassadors* succeeds also, yet it is a brilliant book because it is really the store of Strether's changing consciousness. Nothing in what Strether sees "has any importance, any value in itself; what Strether sees in it—that is the whole of its meaning."⁶³ But to have so much merely in the story of Strether's changing consciousness, that consciousness must be so rich, so perceptive, that Strether must remain distant and detached from the world whose beauty he has realized.⁶⁴ Like James himself, Strether "projects an image of a consciousness which, as it grows richer and more subtly responsive, is at the same

59. This transformation would not be possible were it not for the path-breaking efforts already made in the area of statutory interpretation. See, e.g., W. ESKRIDGE & P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (1987); D. FARBER & P. FRICKEY, *PUBLIC CHOICE AND THE FUTURE OF PUBLIC LAW* (1991). For an important initial stab at developing the contract analogy, see Farber, *Statutory Deals and Legislative Bequests*, — MINN. L. REV. — (1991) (forthcoming).

60. R. POSNER, *supra* note 5, at 278, 355.

61. *Id.* at 300.

62. For a start, see Johnston & Rasmussen, *White Noise: Statutory Interpretation and Legislative Strategy and Performance* (Feb. 1991) (unpublished mimeo on file with Author).

63. P. LUBBOCK, *THE CRAFT OF FICTION* 161 (1957), excerpted as *The Point of View and reprinted in HENRY JAMES: A COLLECTION OF CRITICAL ESSAYS* 37, 40 (L. Edel ed. 1963).

64. As Percy Lubbock puts it, "in Strether's mind the revolution is complete; there is nothing left for him, no reward and no future. The world of commonplace is no longer *his* world, and he is too late to seize the other; he is old, he has missed the opportunity of youth." *Id.* at 159, reprinted in *HENRY JAMES: A COLLECTION OF CRITICAL ESSAYS*, *supra* note 63, at 39.

time increasingly excluded from direct participation in life."⁶⁵

Such an attitude of coldness, not indifference or hostility, but a passionate, clear-eyed, no-nonsense detachment, is, says Judge Posner, precisely what he wishes to maintain throughout *The Problems of Jurisprudence*.⁶⁶ A fair measure of Judge Posner's courage and steadfastness in maintaining this attitude is that this book is dedicated not only to exposing "the piety and cant that are *de rigueur* in many discussions of law,"⁶⁷ but also to addressing the late Paul Bator's charge that Posner had been "a captive of a thin and unsatisfactory epistemology,"⁶⁸ an "arresting" accusation, Posner says, that he found to have "considerable merit."⁶⁹

Posner addresses Bator's charge by adopting what he calls a pragmatic epistemology and ontology, what I have termed his situated consequentialism. As previously noted, Posner's view does succeed in revealing the "cant" and "piety" in many discussions of law. But Posner is not Strether. Posner is too involved as both judge and scholar to take the "cold eye" of Yeats. *Judge* Posner cannot deny the "truth" about the economic logic of the law, which he discovered as a scholar, but nor can he deny his experience as a judge with the vast, dense disorder of statute and regulation, and the incoherent conversation over constitutional meaning in a society increasingly too fractured and heterogeneous to even converse with understanding. *Professor* Posner wants consequences to predict and then measure so that the law may be reformed to achieve better consequences, but Professor Posner cannot accept that Judge Posner's world of conversation and conversion implies that consequences cannot even be measured, for in conversion we change and, therefore, change our measure—for we are our measure.⁷⁰

Committed as he is to a situated, contextual consequentialism, Pos-

65. Tanner, *The Watcher from the Balcony: The Ambassadors*, 8 *CRITICAL Q.* 35, 35 (1966), reprinted in *HENRY JAMES: MODERN CRITICAL VIEWS* 105, 105 (H. Bloom ed. 1987). While admiring the aesthetic effect, E.M. Forster deplored the sacrifice imposed by the detachment of James's characters. As Forster said, the James novel succeeds, but to do so, "most of human life has to disappear." Forster, *The Ambassadors*, in *HENRY JAMES: A COLLECTION OF CRITICAL ESSAYS*, *supra* note 63, at 72, 76.

66. R. POSNER, *supra* note 5, at xii.

67. *Id.*

68. *Id.* at xiv (quoting Bator, *The Judicial Universe of Judge Richard Posner*, 52 *U. CHI. L. REV.* 1146, 1161 (1985)).

69. *Id.*

70. This creates a dilemma for pragmatic reform. As Robin West has observed:

The practical consequence, in other words, of putting into serious question the authenticity of felt preferences and desires, rather than viewing those preferences and desires as the baseline of our evaluative practices, may well be a form of oppression more dangerous than the sources of oppression the legislation is meant to address.

West, *Relativism, Objectivity, and Law*, 99 *YALE L.J.* 1473, 1495 (1990).

ner sees changes in the law as conversions in world view brought about by conversation and persuasion.⁷¹ As Posner says:

Persuasion and reason tend to merge in a pragmatist view of truth. If what is good or useful to believe or what one just can't help believing is, for all practical purposes, truth, then persuasion as well as proof can establish truth, since persuasion can be a source of tenacious beliefs. But the fusion of reason and persuasion makes the concept of "truth" problematic . . . and by doing so it undermines the law's rational pretensions.⁷²

For this reason, the study of literature has clear relevance to the law.⁷³ Such study helps in understanding the "intensely rhetorical" character of judicial opinions and, therefore, change in the law, which is usually the result of "rhetorical thrusts" producing a "gestalt switch" or "conversion."⁷⁴ Indeed, it is in large part as master judicial rhetorician that Posner both admires and accounts for Cardozo's reputation.⁷⁵

One can gain additional insight into Posner's approach to legal change by examining the similarity between his approach and Richard Rorty's recent discussion of language and metaphor.⁷⁶ In Rorty's account, once we substitute "dialectic for demonstration" and reject the correspondence theory of truth, we cannot see either language or culture as progressing toward the discovery of some foundational, absolute reality.⁷⁷ "Progress" is not the process of attuning our language to an extralinguistic, preexisting reality. According to Rorty, progress is the development of a new language, a new way of doing things, and, therefore, the development of a new reality as long as we continue to use the new language.⁷⁸

While Posner believes that legal change is essentially a rhetorical

71. R. POSNER, *supra* note 5, at 148-53.

72. *Id.* at 151.

73. See R. POSNER, *LAW AND LITERATURE*, *supra* note 2, at 209-11 (1988) (suggesting that the study of literature is relevant to the law even if techniques of literary interpretation do not, because of the great difference between legal and literary texts, assist much in legal interpretation).

74. R. POSNER, *supra* note 5, at 394.

75. See R. POSNER, *CARDOZO: A STUDY IN REPUTATION* 33-57 (1990); see also R. POSNER, *LAW AND LITERATURE*, *supra* note 2, at 281-89 (arguing that although Holmes's dissent in *Lochner* is not even a "good" opinion when read according to "scientific standards," it is a "rhetorical masterpiece"; and because the opinion is so famous, this fame shows that rhetoric counts in law).

76. R. RORTY, *supra* note 31. Rorty relies heavily upon D. DAVIDSON, *What Metaphors Mean*, in *INQUIRIES INTO TRUTH AND INTERPRETATION* 262 (1984).

77. R. RORTY, *supra* note 31, at 20.

78. Rorty says:

Once we realize that the idea of progress, for the community as for the individual, is a matter of using new words as well as of arguing from premises phrased in old words, we realize that a critical vocabulary which revolves around notions like "rational," "criteria," "argument" and "foundation" and "absolute" is badly suited to describe the relation between the old and the new.

Id. at 48-49. For Rorty, progress is "changing the way we talk, and therefore by changing what we want to do and what we think we are." see also *id.* at 20 (emphasis added); see also *id.* at 257-311.

act, the persuasion to a new, not necessarily more rational, way of doing things, but just a different view of them, he cannot accept the transformative vision of "progress" that this model of legal change necessarily entails.⁷⁹ Posner speaks of progress⁸⁰ when inquiring into how we learn that legal decisions are "correct."⁸¹ He carefully considers whether an essentially evolutionary "test of time" can be helpful "as a criterion of truth" in law.⁸² There are arguments on both sides of the question. On the one hand, law is too hierarchical, and legal decisions too likely to be imbedded in interest-group pressures forbidding change to be subject to a competitive selection process. Additionally, what good is such a backward-looking process if it does not guide the judge in prospectively choosing a rule that likely will survive? Maybe law is as bad as art, in which there is *only* the test of time.⁸³ On the other hand, there is a limited competitive process in law, with other countries and our federal system as players, and there are a lot of legal words, law doctrines that were innovations and have survived very well until now.⁸⁴ Indeed, Posner concludes that "it is reasonably certain that law has progressed since the eighteenth century."⁸⁵

Posner's trouble with progress is not in getting to the twentieth century from the eighteenth, but rather with what has happened in the late twentieth century regulatory state. Until very recently, law was mostly judge-made law, and law that exhibited a discernible progression toward the largely unarticulated purpose of wealth maximization. Recent innovations in the law, however, particularly statutory changes, have adopted a dissonant chorus of "purposes," many of which we simply cannot measure, and without some measurement we cannot speak of "progress" in the way Posner wants to.

Here we enter the blurry borderland between scholar and judge. Professor Posner has spent over two decades demonstrating the efficiency of the common law, and his judicial experience has, if anything, strengthened his confidence in the common law's efficiency. He does not really have a well-developed theory of why or how judges did it,⁸⁶ but

79. Posner quite clearly rejects this aspect of Rorty's thinking: "I reject Rorty's Romantic, antiscientific brand of pragmatism." R. POSNER, *supra* note 5, at 27 n.42.

80. *Id.* at 121.

81. *Id.* at 117.

82. *Id.* at 112-23.

83. *Id.* at 115-20.

84. *E.g.*, the trust, the concept of estoppel, recording of titles, and injunctive relief. *Id.* at 120-22.

85. *Id.* at 122.

86. Posner essentially just explains that because judges do not like controversy and are free from interest group pressure in common-law areas—because as Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1980), implies, common-law rules can be easily unbundled in private bargains and therefore can't do much redistribution—there is no reason for them not to choose common-law

he has shown that most common-law doctrines are consistent with a simple wealth maximization model.⁸⁷ For Judge Posner, this wealth maximization theory has a clear and powerful pragmatic implication for judging in common-law cases. The economic approach allows the common law to be conceived in “simple, coherent terms and to be applied more *objectively*.”⁸⁸ A judge can proceed⁸⁹ to reform the common law in accord with the implications of economic theory because in so doing he “cannot be accused of making rather than finding law, for he is merely contributing to the program of realizing the *essential nature* of the common law.”⁹⁰ We could imagine, moreover, statutes that were equally amenable to the economic approach. If statutes would start with the correct type of goals—practical, functional, consequential goals⁹¹—then the judge simply could do policy analysis on the statute—what interpretation of the statute would best accomplish its goals? For Posner, this consequential policy analysis is essentially just cost benefit analysis.⁹² In this statutory world, “[l]aw really would be a method of social engineering, and its structures and designs would be susceptible of objective evaluation, much like the projects of civil engineers. *This would be a triumph of pragmatism.*”⁹³

Posner’s experience as judge, however, has perhaps made it all too clear that we do not have this kind of statutory world. Unlike the common law, statutes in contemporary America do not have an “objective essential nature” of wealth maximization that judges can carry forward and further:

[L]aw is not ready to commit itself to concrete, practical goals across the board. Legal innovations are often defended by reference to intangibles such as the promotion of human dignity, the securing of justice and fairness, and the importance of complying with the ideals or intentions of the framers of the Constitution or of statutes. . . . So even when it is apparent that ballyhooed legal innovations have had costly, unintended, and unforeseen consequences, their defenders may be able to fend off proposals for repeal by invoking unquantifiable benefits, as well as by rallying whatever interest groups have coalesced around the innovation. . . . [M]any recent legal innovations in American law appear to have miscarried. . . . But it cannot be proved that these innovations have miscarried, because their goals are too vague to allow a cost-benefit or means-end evaluation; as a result, the record of apparent failure does not emit a clear signal for change.⁹⁴

rules that are wealth maximizing. R. POSNER, *supra* note 5, at 359-60.

87. His most extensive demonstration of this is in tort law. See W. LANDES & R. POSNER, *supra* note 4, at 28.

88. R. POSNER, *supra* note 5, at 361 (emphasis added).

89. Subject to the equally pragmatic, restraining consideration of stability in the law.

90. R. POSNER, *supra* note 5, at 361 (emphasis added).

91. *Id.* at 122.

92. *Id.* at 105-08.

93. *Id.* at 122 (emphasis added).

94. *Id.* at 123.

Of all the "vague" and "intangible" goals infesting our contemporary legal landscape, none is more "appalling" to Posner than the "lawyer's faith in the expressive, symbolic and norm-reinforcing consequences of law."⁹⁵ He strongly doubts that "law *has* an expressive function," that law creates or reinforces a "set of social norms or an ideology."⁹⁶ Posner believes that law affects behavior directly "by creating rewards and sanctions."⁹⁷ He rejects the notion, however, that law affects behavior indirectly "by altering attitudes and through them behavior."⁹⁸ He attacks the legal profession's faith in law's indirect, norm-shaping function as a consequence of the "lack of scientific curiosity that is so marked a characteristic of legal thought,"⁹⁹ for "the legal profession has for the most part neither participated in conducting nor even paid any attention to (even to the extent of criticizing) studies designed to confirm or refute the existence" of law's expressive, norm-creating function.¹⁰⁰

Oddly, Posner, for whom the process of scientific corroboration begins with our intuitions about which hypotheses are likely true,¹⁰¹ fails to question rigorously and support his own belief that law does have a direct deterrent effect but does not have an indirect norm-shaping function. To an economist, it may seem obvious that legal punishments deter.¹⁰² But this faith in deterrence is simply a reflection of a deeper faith in economic constructs such as downward sloping demand that logically imply a deterrent effect.¹⁰³ The empirical evidence on law's deterrent effect is at best mixed.¹⁰⁴ Indeed, one of the central problems in measuring law's deterrent function is substantial evidence of a strong relationship between the severity of legal punishments and social norms.¹⁰⁵ Reductions in crime that are correlated with increases in the

95. *Id.* at 468.

96. *Id.* at 213 (emphasis added).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 213-14.

101. *Id.* at 116 & n.20.

102. See Tullock, *Does Punishment Deter Crime?*, 36 PUB. INTEREST 103 (1974).

103. As Tullock argued:

Most economists who give serious thought to the problem of crime immediately come to the conclusion that punishment will indeed deter crime. The reason is perfectly simple: Demand curves slope downward. If you increase the cost of something, less will be consumed. Thus, if you increase the cost of committing a crime, there will be fewer crimes.
Id. at 104-05.

104. See Gibbs, *Deterrence Theory and Research*, in *THE LAW AS A BEHAVIORAL INSTRUMENT: NEBRASKA SYMPOSIUM ON MOTIVATION*, 1985, at 87 (G. Melton ed. 1986) (surveying the findings and methodological problems of the empirical literature on deterrence).

105. See Gibbs, *Punishment and Deterrence: Theory, Research, and Penal Policy*, in *LAW AND THE SOCIAL SCIENCES* 319 (L. Lipson & S. Wheeler eds. 1986).

severity of punishment may reflect either deterrence or the indirect effect of changing norms, and a continuing and unsolved problem for deterrence research is how to isolate and separate these effects.

Posner's failure to defend his assertion that legal sanctions deter is matched by his cavalier treatment of law as a preference-shaping instrument. He peremptorily dismisses competing general approaches to jurisprudence that rely on law's expressive or norm-shaping function. Although he says the choice between a legal system that merely "alter[s] incentives" and one that also attempts "to mold character and shape attitudes" is "interesting,"¹⁰⁶ it cannot be that interesting, because civic republicanism,¹⁰⁷ he says, almost patronizingly, has "an unwarranted confidence in law's power to change attitudes, and specifically to inculcate civic virtue."¹⁰⁸

Similarly, Posner says, feminist legal theorists who urge that an ethic of the "caring neighbor"¹⁰⁹ replace the ethic of "reasonable care" are recommending simply that strict liability replace negligence, because the law cannot change human nature and make people actually prefer to take higher care by adopting a higher, "caring neighbor" standard.¹¹⁰ In other words, holding people with fixed preferences to a higher than optimal level of care will be tantamount to strict liability at the optimum. Robin West's¹¹¹ jurisprudence of "empathy" is exactly what the "cold eyed" social engineer does not want. While empathy may be a valuable trait in a judge, a jurisprudence of empathy makes a judge too susceptible to the stories of individual litigants, too prone to bias, too apt to miss the law's big aim in the small story of an individual case.¹¹²

How can these be the views of Posner, the post-Wittgensteinian pragmatist, the advocate of legal change as "gestalt switch" and "conversion" through the persuasive techniques of rhetoric? How can one whose truth is so contingent and accidental a thing find "proved" an "objective essential nature" of wealth maximization within the common law? Why should a judge who decides cases to further this "essential nature" be concerned to defend against charges of judicial law making, when the judge is so confident to declare that judges not only enforce

106. R. POSNER, *supra* note 5, at 418.

107. See *Symposium: The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).

108. R. POSNER, *supra* note 5, at 418.

109. Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 30-32 (1988).

110. R. POSNER, *supra* note 5, at 408-09.

111. See, e.g., West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); West, *Jurisprudence As Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985).

112. R. POSNER, *supra* note 5, at 412-13.

but also articulate new norms? Would not the committed scientific pragmatist judge need more than the anecdotal evidence of recent events in central and eastern Europe¹¹³ before deciding that it is sensible to perpetuate and strengthen the wealth maximization norm in common-law adjudication?¹¹⁴ Why should the pragmatic judge's model statute be a bankruptcy provision with the "practical," quantifiable goal of reducing the number of bankruptcies,¹¹⁵ and anathema to him the legislation said to express a vision and shape our norms? That empirical studies do not confirm strongly the existence of law's norm-shaping function should not surprise the thoroughgoing pragmatist, especially one so skeptical of the reliability of judges' explanations of why judges decide cases as they do.¹¹⁶ If judges are so lacking in self-awareness, how could one expect any survey of the mystified, gullible,¹¹⁷ self-deluded common person to generate any reliable result regarding the source of such a person's beliefs? More philosophically, is it not a consequence of pragmatism that the more law affects our norms and the more our norms come to be expressed in law, the greater will be our difficulty at ever separating, especially for purposes of statistical testing, law and norm?

In failing to even address these questions¹¹⁸ Judge Posner is too skeptical of pragmatism and too little scientific about rationality and norm. The causal relationship between law and norm may run both ways, and, thus, be difficult or even impossible to reliably test and measure. This is illustrated amply by our national debate over the legalization of drugs. As indicated in a recent exchange between Nobel Laureate Milton Friedman and then Drug Czar William Bennett,¹¹⁹ this

113. *Id.* at 383.

114. As Michael Moore has argued insightfully, deeply descriptive theories such as Posner's theory of tort law are not themselves normative recommendations to judges about what tort law should be; rather, to the extent they purport to describe something that is already part of the law that constrains judges, they are recommended normatively as guiding future decisions by the rule-of-law virtues of predictability and equality across like cases. Then, however, a deep descriptive theory such as Posner's economic theory of tort law cannot be value free, for the perpetuation in future decisions of the discovered efficiency norm must be normatively preferable to the perpetuation of other goals that describe tort law as well as does wealth maximization. See M. MOORE, *A Theory of Criminal Law Theories*, in *PLACING BLAME: A THEORY OF THE CRIMINAL LAW* (forthcoming 1991). For a discussion of alternative meanings of "explanation" and "description" within law and economics, see Johnston, *Law, Economics and Post-Realist Explanation*, 24 *LAW & Soc. REV.* 1217 (1990).

115. R. POSNER, *supra* note 5, at 122.

116. *Id.* at 189-90.

117. *Id.* at 209.

118. To the extent, that is, that they are not purely rhetorical.

119. See Friedman, *Bennett Fears Public Policy Disaster—It's Already Here*, *Wall St. J.*, Sept. 29, 1989, at A15, col. 1; Bennett, *A Response to Milton Friedman*, *Wall St. J.*, Sept. 19, 1989, at A30, col. 4; Friedman, *An Open Letter to Bill Bennett*, *Wall St. J.*, Sept. 7, 1989,

debate pits economic evidence that the criminalization of drugs simply does not work¹²⁰—it generates violent crime while having little deterrent effect on drug use—against the ethical appeal that if we believe drug use is wrong, then we simply cannot condone it with our laws. This ethical appeal is typical: individual values and preferences and social norms are a reason for law as well as something that might be shaped by law. As a consequence of this interdependence, in testing for the norm-shaping effect of a law that is itself partly a product and reflection of norms, the subject group tested must consist of individuals who are not members of the community whose norms the law reflects because the causal relationship of law to norm can exist only with respect to a population whose norms differ from those expressed in a law. Moreover, the difficulty with testing and surveying members of this deviant group is that the people within this group often will find it hard to separate the effect of a generally maintained norm of acquiescence with official legal norms from the law's direct norm-transforming effect.

For all these reasons, one should not expect to see unambiguous statistical evidence showing that law affects norms and attitudes. Still, there is some credible empirical evidence of law's norm-shaping effect,¹²¹ and such positive evidence is consistent with several sophisticated theories of how law might shape attitudes and values.¹²² Posner completely neglects this body of empirical and theoretical work. Even more troubling than these omissions in Posner's discussion of law's norm-shaping effect are the inconsistencies within his discussion. After chiding the legal profession for failing to pay any attention to empirical

at A14, col. 4.

120. On the complex economic dynamics of controlling drug supply, see Moore, *Supply Reduction and Drug Law Enforcement*, in *DRUGS AND CRIME* 109, 134-37 (M. Tonry & J. Wilson eds. 1990).

121. See, e.g., Kaufman, *Legality and the Harmfulness of a Bystander's Failure to Intervene As Determinants of Moral Judgment*, in *ALTRUISM AND HELPING* 77 (J. Macaulay & L. Berkowitz eds. 1969); Berkowitz & Walker, *Laws and Moral Judgments*, 30 *SOCIOMETRY* 410 (1967); Colombotos, *Physicians and Medicare: A Before-After Study of the Effects of Legislation on Attitudes*, 34 *AM. SOC. REV.* 318 (1969).

122. One theory posits that by shaping behavior, law shapes habit, and habit is an important determinant of attitude. See D. BEM, *BELIEFS, ATTITUDES AND HUMAN AFFAIRS* 69 (1970). Another theoretical explanation of the law-norm causal relationship stresses the role of cognitive dissonance. See, e.g., L. FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957). This theory posits that a person who believes that a newly passed law represents legitimate authority will conform to the law, and then, to "lessen any cognitive dissonance he may feel, he may interpret the legally forbidden action as 'wrong' or morally bad." L. FRIEDMAN & S. MACAULAY, *LAW AND THE BEHAVIORAL SCIENCES* 197 (2d ed. 1977). After this process of belief revision has been repeated several times, "behaviors disapproved by legitimate authority may perhaps come to be seen as morally improper without the intermediate behavioral compliance." *Id.*; see also Ball & Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 *STAN. L. REV.* 197, 216-17, 220-21 (1965).

studies of law's norm-shaping effect, Posner drops a footnote to some general discussions of such studies.¹²³ Of the four general studies Posner cites, however, two directly contradict the proposition for which Posner argues: that is, half the general studies Posner cites support the idea that law *has* a norm-shaping function.¹²⁴ In the sentence immediately following, Posner says that the legal profession's faith in law's norm-shaping function has not even been shaken by specific empirical evidence that such a function does not exist.¹²⁵ He then cites some of the empirical evidence.¹²⁶ None of the empirical studies cited by Posner at this point, however, supports the proposition for which he cites them. The first,¹²⁷ which reviews empirical evidence from European countries, shows generally that criminals and noncriminals have roughly the same moral attitudes about crimes. But this finding actually may confirm law's norm-shaping function: people commit crimes not because the law has failed to educate them that crime is bad, but because they do not have good alternatives to crime. Posner views the second study¹²⁸ as

123. R. POSNER, *supra* note 5, at 214 n.32.

124. *Id.* (emphasis added) (citing R. KIDDER, *CONNECTING LAW AND SOCIETY: AN INTRODUCTION TO RESEARCH AND THEORY* 118-19 (1983)). The section in this chapter of Kidder headed "Can Law Change Attitudes?" focuses on a single study, Hyman & Sheatsley, *Attitudes Toward Desegregation*, *SCI. AM.*, July 1964, at 16. But Robert Kidder says that this study showed that "racial attitudes became more tolerant" after the Supreme Court's decision in *Brown v. Board of Education*, 349 U.S. 299 (1955), and that this evidence confirms the cognitive dissonance theory of how law affects attitudes: "If the law prevents people from acting consistently with old beliefs and values, then they abandon the old beliefs and adopt new ones which fit the actions they find themselves doing. . . . Law can change 'folkways' or 'mores' through the process of cognitive dissonance." R. KIDDER, *supra*, at 118-19. Posner cites Kidder as a general source on studies investigating the law-norm relationship; however, he fails to note that Kidder's discussion directly contradicts Posner's assertion regarding the results of such studies. Another general source cited by Posner, Schwartz, *Law and Normative Order*, in *LAW AND THE SOCIAL SCIENCES* 63 (L. Lipson & S. Wheeler eds. 1986), does discuss the rather scanty state of empirical evidence on the law-norm relationship. *Id.* at 85 (stating that "[d]espite years of research, social scientists have rarely been able to demonstrate the behavioral impact of a given law, much less its normative effect"). But Professor Richard Schwartz says much more than this: he argues that while social mores in open, heterogeneous societies such as contemporary America are too weak to really shape the law, "[t]he reverse process is, if anything, more significant. The enunciation—and widespread adoption—by society of such principles may well depend largely on legal initiative." *Id.* at 75. Schwartz concludes by setting forth several ways in which law can contribute strongly to the shaping of normative order in a pluralistic society, *id.* at 91-98, and cites several empirical studies indicating that recent legal changes have indeed changed attitudes. One such study is Weitzman & Dixon, *The Alimony Myth: Does No-Fault Divorce Make a Difference?*, 14 *FAM. L.Q.* 141 (1980). Schwartz says that this "careful" study "points to the conclusion that no-fault divorce diminishes overt hostility" in divorce. Schwartz, *supra*, at 93.

125. R. POSNER, *supra* note 5, at 214.

126. *Id.* at 214 n.33.

127. Kutchinsky, *The Legal Consciousness: A Survey of Research on Knowledge and Opinion About Law*, in *KNOWLEDGE AND OPINION ABOUT LAW* 101, 112-20 (1973).

128. Williams, Gibbs & Erickson, *Public Knowledge of Statutory Penalties: The Extent*

showing that criminal penalties are more a product than a determinant of social mores.¹²⁹ On my earlier account, however, this is exactly what one would expect. Criminal penalties should reflect conventional mores, and could therefore have a norm-changing effect only with respect to individuals who do not share the community conventions. The final study cited by Posner¹³⁰ shows only that laypeople retain their faith in the rule of law even when they are made aware “of the operations of our undignified local courts.”¹³¹ Even Posner almost admits,¹³² however, that this study shows only that ordinary people are not very concerned with how the law is crafted. To the extent that such people are affected by law, even rough “undignified” local law, Posner’s central thesis is again refuted rather than supported.

These omissions and discrepancies in Posner’s treatment of the theoretical and empirical work on law’s norm-shaping function are exceptionally troubling. Pragmatism, especially Posner’s scientific pragmatism, calls for rigorous, open inquiry. It requires both the scholar and the judge to listen fairly to contesting points of view. Posner may be correct in criticizing the legal profession for its unthinking faith in law’s expressive function: lawyers may have too little courage to be told that they are not the leaders of public opinion, but are an instrument for its expression. Yet Posner also rests on faith. He does not look squarely at the theory and evidence on law’s expressive function, but instead ignores both the theory and much of the evidence, and interprets a very limited sample of the available evidence in a way that is superficial and unconvincing.

From a pragmatic perspective, this failure is especially unfortunate because, at the very least, the pragmatist can unpack the many behavioral conjectures buried beneath general approaches to law that are premised on law’s norm-shaping or expressive function. In decrying the “over-simplification of the democratic idea indulged in by the authors of our republican government,”¹³³ John Dewey addressed a crucial issue underlying contemporary civic republicanism.¹³⁴ Dewey compared the citizens who the Framers had in mind—“persons whose daily occupa-

and Basis of Accurate Perception, 23 PAC. SOC. REV. 105 (1980).

129. R. POSNER, *supra* note 5, at 214 n.33.

130. Merry, *Everyday Understandings of the Law in Working-Class America*, 13 AM. ETHNOLOGIST 253 (1986).

131. R. POSNER, *supra* note 5, at 214 n.33.

132. *Id.*

133. J. DEWEY, *FREEDOM AND CULTURE* 45 (1939), *excerpted as Culture and Human Nature and reprinted in THE PHILOSOPHY OF JOHN DEWEY* 679, 693 (J. McDermott ed. 1981).

134. That is, how can political debate among such citizens succeed in revealing “objectionable preferences”? See Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1550 (1988).

tions stimulated initiative and vigor, and who possessed information which even if narrow in scope, bore pretty directly upon what they had to do, while its sources were pretty much within their control"¹³⁵—with today's "average person," who is surrounded by:

much information about which judgment is not called upon to respond, and where even if it wanted to, it cannot act effectively so dispersive is the material about which it is called upon to exert itself. The average person is surrounded today by readymade intellectual goods as he is by readymade foods. . . . He has not the personal share in making either intellectual or material goods that his pioneer ancestors had. Consequently they knew better what they themselves were about, though they knew infinitely less concerning what the world at large was doing.¹³⁶

I believe Dewey is correct, but my views are not my point. It is, rather, the productivity of this passage from Dewey. The idea that information, when too dense, too broad, and too easily accessible can itself create passivity and dependence, and thus disempower the citizen by making his preferences no longer the subject of his own creation, is a potentially devastating criticism of the New Republicanism.¹³⁷ Dewey's discussion of democracy also has a more constructive, reforming aspect. In Dewey's view, the "social intelligence" of the electorate is not only a precondition for successful democracy, but also something whose development democratic institutions should promote actively.¹³⁸ A democracy that denies opportunity and information to the underprivileged and "rationalizes entrenched privilege" is a democracy that must be reformed.¹³⁹ By simply dismissing civic republicanism, Posner himself is guilty of "blocking the path of inquiry"¹⁴⁰ into the relationship between legal structure and democratic self-expression.

Posner makes a similar blocking move when he summarily rejects feminist approaches that call for empathetic judging.¹⁴¹ He says that such approaches are not useful to the judge because they lead to biased judging.¹⁴² More precisely, while Posner wants judges to "cultivate empathy," he believes that to discard traditional legal principles in favor

135. J. DEWEY, *supra* note 133, at 45, reprinted in *THE PHILOSOPHY OF JOHN DEWEY*, at 693.

136. *Id.* at 45-46, reprinted in *THE PHILOSOPHY OF JOHN DEWEY*, at 693-94. For a discussion of the centrality of Dewey's concern with the split between science and moral and social practice, see Bernstein, *Dewey, Democracy: The Task Ahead of Us*, in *POST-ANALYTIC PHILOSOPHY* 48, 51-52 (J. Rajchman & C. West eds. 1985).

137. That is, how can we speak about "public values" when individuals have not developed basic habits of intellectual involvement? Cf. Sunstein, *Naked Preferences and the Constitution*, 84 *COLUM. L. REV.* 1689 (1984).

138. See Putnam, *supra* note 16, at 1676, 1687.

139. *Id.* at 1676, 1687-88.

140. *Id.* at 1676 (quoting a phrase originated by Charles Sanders Peirce).

141. See, e.g., West, *Jurisprudence and Gender*, 55 *U. CHI. L. REV.* 1 (1988).

142. R. POSNER, *supra* note 5, at 412-13.

of a jurisprudence of empathy would be "inherently biased."¹⁴³ It is hard to see, however, how a situated consequentialist can make this distinction between abstract legal principle and concrete empathy in the individual case. As Catherine Wells has recently argued, "even the most abstract forms of deliberation ultimately rely upon contextual decisions," and "the structured elements of legal decisionmaking are themselves situated."¹⁴⁴ Even a judge interested in furthering the efficiency norm in common-law adjudication must, to be effective, have accurate information about the preferences of people whose behavior he is trying to shape. In other words, to borrow Wells's metaphor, abstraction and reason are necessary to map making, but "their usefulness depends upon the accuracy of the information that they analyze."¹⁴⁵ The interesting issues, which Posner leaves unexplored, are how empathy affects principle, and what we mean by bias.¹⁴⁶

Posner's vision falls short not only in dismissing republicanism and feminism, but also in confining economics. The economic approach to law can only profit from expanding its model to allow for the interdependence among preferences, norms, and law. We may not gain new discoveries of the "objective essential nature" of law by such expansion, but these discoveries must strike any pragmatist, however economic, as doubtful because they are precisely what pragmatism denies. As economics increasingly becomes, through game theory, the study of strategic behavior in situations in which market competition does not effect a complete constraint, economists have been drawn steadily to the subject of rationality and preference itself.¹⁴⁷ In a game, even a game characterized in an abstract, mathematical way, it is quite natural to think that the players may have preferences which are functions of the game itself.¹⁴⁸ As for norms, if we agree that talk shapes the norms we accept, then we may be led to ask how talk figures in an essentially evolutionary game of social survival, a game closely related to the competitive survival process of which Posner is so enamored.¹⁴⁹ More concretely, the

143. *Id.*

144. Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1727, 1741 (1990).

145. *Id.*

146. Feminist theorists have addressed precisely this issue. See Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945 (1988); Resnick, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988).

147. See, e.g., B. SKYRMS, *THE DYNAMICS OF RATIONAL DELIBERATION* (1990); Binmore, *Modeling Rational Players* (pts. 1 & 2), 3 *ECON. & PHIL.* 179 (1987), 4 *ECON. & PHIL.* 9 (1988). For the classic statement of skepticism regarding the economist's model of human satisfaction, see T. SCITOVSKY, *THE JOYLESS ECONOMY* (1976).

148. See, e.g., Geanakoplos, Pearce & Stacchetti, *Psychological Games and Sequential Rationality*, 1 *J. GAMES & ECON. BEHAV.* 60 (1989).

149. See Gibbard, *Norms, Discussion and Ritual: Evolutionary Puzzles*, 100 *ETHICS* 787

core pragmatist idea that experience shapes self has been captured nicely in Jon Elster's work with dynamic preference change.¹⁵⁰ His model of "sour grapes" explains how people rationally decide not to like what they have been denied.¹⁵¹ A recent example shows how this model conjectures a relation from law to individual preference: college educators believe that the recent decision by the United States Department of Education to deny funding to schools offering minority scholarships will discourage minority applicants by creating the impression that the school has reduced its financial aid (a nice, pure incentive-modifying effect of legal change).¹⁵² The sour grapes model suggests that a poor minority student who decides not to apply to college because she perceives the chance of getting financial aid as too low to justify the effort may lose her preference for education, and indeed become anti-education as a rational response to her disappointment. The model thus suggests a fairly direct connection between law, choice, and preference. Moreover, drawing on models such as Elster's, the economic analysis of law has recently been extended to examine both how law shapes norms and how norms supplement and interact with legal sanctions.¹⁵³

IV. CONCLUSION

Cultural and intellectual evolution may not be the steady progress toward the discovery of something "out there" to which we bear an uncanny isomorphic relationship. Our law may never progress, as Posner may wish, in the Peircean sense of converging to a limit of happy consequence.¹⁵⁴ Law may be, as language and culture, a thing that "took shape as a result of a great number of sheer contingencies . . . as much a result of thousands of small mutations finding niches (and millions of others finding no niches), as are the orchids and the anthropoids."¹⁵⁵

(1990).

150. J. ELSTER, *SOUR GRAPES* (1983).

151. Or as Sinéad O'Connor puts it in her latest compact disc title, "I do not want what I haven't got."

152. See Jaschik, *Colleges Fear Debate on Minority Scholarships May Fuel Racial Tension*, Chron. Higher Educ., Jan. 9, 1991, at A1.

153. See, e.g., Dau-Schmidt, *An Economic Analysis of the Criminal Law As a Preference-Shaping Policy*, 1990 DUKE L.J. 1; Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 J. LEGAL STUD. 67 (1986); Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597 (1990).

154. Posner clearly shares with Peirce a notion of truth as the limit of an infinite process of "unforced, undistorted, and uninterested" inquiry. R. POSNER, *supra* note 5, at 114. Whether he is right, however, in characterizing evolutionary epistemology as the project of investigating our "intuitive grasp of the principles of nature," *id.* at 116 n.20, is not so clear. See, e.g., Campbell, *Evolutionary Epistemology*, in *EVOLUTIONARY EPISTEMOLOGY, THEORY OF RATIONALITY, AND THE SOCIOLOGY OF KNOWLEDGE* 47 (G. Radnitzky & W. Bartley eds. 1987).

155. R. RORTY, *supra* note 31, at 16.

But however random, however chaotic may be the evolution of our legal culture, I can imagine no future shock so great, no contingency so discontinuous, that in looking back upon our own age, Richard Posner's *The Problems of Jurisprudence* will not stand as a beacon. Even in stopping short, Posner has identified an issue—the norm and preference-shaping function of law—that is fundamental to our contemporary conversation about law, and, hence, to the evolution of our inquiry into law and its aims. In stopping short, Posner has not failed. For the pragmatist, hope lies precisely in the infinity of inquiry, and not even Richard Posner can compress this infinity within a finite lifetime.

