Book Review: Overcoming Law by Richard Posner

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BOOK REVIEW


Reviewed by Michael B. Brennan*

This most recent monograph by the country's preeminent academic judge is a book of and about legal theory. It issues a clarion call for an empirical approach to law's dilemmas and defends liberal individualism. It also raises troubling questions about the author's view of the role of a judge under our constitutional framework and the relationship of social and political theory to the business of judging.

In Overcoming Law, Richard Posner, the highly prolific and influential scholar and chief judge of the United States Court of Appeals for the Seventh Circuit, has summarized his systematic study of the law. Renowned for his interdisciplinary approach in the law and economics and law and literature movements, Posner offers three keys to his understanding of contemporary legal thought: pragmatism, economics, and liberalism. To Posner, the fusion of these three elements can transform legal theory: respect for social science and facts, coupled with belief in individualism and a practical approach, "can make legal theory an effective instrument for understanding and improving law, and social institutions generally; for demonstrating the inadequacies of existing legal thought and for putting something better in its place" (p. viii).

Posner uses these three keys to analyze a myriad of topics and to effectively summarize his synoptic view of the law. In addition to gathering and extensively revising many of his articles and book reviews, he has added six new essays (p. ix). Overcoming Law treats the length and breadth of the legal world, from the raw economics of the profession of law in its current state to its rarefied philosophical underpinnings. Posner's

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3. All parenthetical page references appearing in the text, and those appearing in the notes without another identifying source, are to RICHARD A. POSNER, OVERCOMING LAW (1995).
superior pedagogical skills, interdisciplinary approach, and knowledge of the legal profession, as well as his readable writing style, make his treatment of many of the topics examined in *Overcoming Law* a joy to read. The book has six parts, each of which is comprised of four or five chapters orbiting a common theme: the legal profession, constitutional theory, variety and ideology in legal theory, gender and race, philosophical and economic perspectives on law, and "cutting-edge" issues such as personal privacy and the regulation of sexual behavior.

I. THE KEYS TO POSNER'S LEGAL THEORY

In the Introduction to *Overcoming Law*, Posner discusses in depth each of the three keys he offers to understanding contemporary legal thought. Posner returns to these keys throughout the book as touchstones for the analytical and policy choices he makes.

For Posner, *economics* is a powerfully instrumental science that consists of man basing decisions "on the costs to be incurred and the benefits to be reaped from alternative courses of action" (p. 16). Rather than any "narrow, selfish goal such as pecuniary wealth maximization," Posner embraces an economic model of man as "rational maximizer" in which he compares future opportunities at the moment when a choice must be made (p. 16).

Posner operates from the premise that fact and theory are not opposed, and that good social science, such as a nuanced understanding of economic incentives and wealth maximization, can unite them (p. 19). Economics "epitomizes the operation in law of the ethic of scientific inquiry" (p. 15). Empirical research, and the theoretical framework economics provides for that research, can make the law "more realistic, more attuned to the real needs of real people" (p. 19).

*Overcoming Law* is unified by Posner's repeated call for scientific and empirical analysis as the solution for intractable legal problems. Posner calls for law to become "more empirical and less conceptual." His major goal "is to nudge the judicial game a little closer to the science game" (p. 8). For Posner, the project of economics, which is "to construct and test models of human behavior for the purpose of predicting, and [where appropriate] controlling that behavior" (p. 16), will help to overcome the shortcomings of classical legal theory. Pure deduction, for example, can only compare the facts of a contract case to a set rule derived from *a priori* concepts. Economics can test the outcome of a case against empirical criteria; if data proves the outcome to be incorrect, *per* science, the applicable rule should be altered (p. 19).
Posner admits that utilitarian and economic thinking can have "illiberal implications," and that "[n]ot all questions that come up in law... can be effortlessly recast as economic questions" (p. 22). When forced to take a stand on issues of political and moral philosophy, Posner stands with the liberalism espoused by John Stuart Mill in On Liberty: "every person is entitled to the maximum liberty—both personal and economic—consistent with the liberty of every other person in society" (p. 23). "Neither government nor public opinion should seek to repress 'self-regarding' behavior, that is, behavior that does not palpably harm other people" (pp. 23-24). Part of Posner's case for liberalism is its practical relation to economics: "By creating a large sphere of inviolate private activity and by facilitating the operation of free markets, liberalism creates the conditions that experience teaches are necessary for personal liberty and economic prosperity" (p. 24).

Posner also espouses a practical and instrumental philosophy that seeks to determine what "really works" rather than what "really is." He terms this philosophy pragmatism (p. 4). For Posner, pragmatism is forward-looking; it values "continuity with the past only so far as such continuity can help us cope with the problems of the present and of the future" (p. 4). Thus, applied to law, pragmatism would treat stare decisis as a policy rather than a duty, as a generally governing principle instead of a requirement (p. 4).

For Posner, the pragmatist is interested in facts and desires information about the probable effects of alternative courses of action. At the same time, the pragmatist is skeptical about certitudes or other "Truths" (p. 5). Because he doubts that he will ever arrive at an ultimate Truth, the pragmatist is anti-dogmatic: he desires to keep debate and inquiry open. This skepticism manifests itself numerous times throughout the book.

Under this pragmatic approach to law, Posner promotes adherence to precedent and "the immanent values of... legal tradition" (p. 11), but without obligation to do so. "[I]f there are good reasons to break with the past for the sake of the present and the future the judge should not hesitate to do so, just as mature sciences do not hesitate to forget their founders" (pp. 11-12). To Posner, pragmatism is the opposite of the formalistic, classical approach to legal theory, an approach that "is an unworkable response to difficult cases" (p. 12). He continues by stating:

The multi-layered character of American law (legislation superimposed on common law, federal law superimposed on state law, and federal constitutional law superimposed on state and federal statutory and common law), the undisciplined character of our legislatures, the intricacy and complexity of our society, and the
moral heterogeneity of our population combine to thrust on the courts a responsibility for creative lawmaking that cannot be discharged either by applying existing rules to the letter or by reasoning by analogy—the standard judicial technique for dealing with novelty—from existing cases. (pp. 12-13)

For Posner, Holmes remains law's greatest embodiment of the pragmatic philosophy towards law and judging.  

II. THE LEGAL WORLD ACCORDING TO POSNER

Posner's goal in Overcoming Law, with his three keys, is "to show that liberal individualism can be defended pragmatically by comparing its consequences with those likely to be produced by such alternatives as social democracy and moral conservatism" (p. 29). He describes his approach colorfully as "a taste for fact, a respect for social science, an eclectic curiosity, a desire to be practical, a belief in individualism, and an openness to new perspectives" (p. viii).

Posner taps a broad array of social, political, and legal sources to analyze contemporary legal thought. Especially compelling are his examinations of contemporary constitutional theorists (pp. 171-228), including his devastating critiques of radical feminist jurisprudence and critical race theory (pp. 329-84). On other occasions, the keys Posner employs buckle under the strengths of other philosophies, judicial or otherwise. Posner's analysis of the legal world under each of the three keys is illustrative of his unique approach to legal theory.

A. Pragmatism and Constitutional Interpretation

Posner's pragmatic philosophy identifies with two leading American jurists: Holmes and Hand. Judge Hand once ended a speech given on Justice Holmes's ninety-first birthday with the admonition, "[H]ave no confidence in principles that come to us in the trappings of the eternal. Meet them with gentle irony, friendly skepticism and an open soul." Posner's legal philosophy echoes Hand's admonition, both as Posner relates it in the Introduction to Overcoming Law and in his treatment of other legal philosophies in the book.


One example of Posner's application of his pragmatic philosophy is his treatment of certain contemporary styles of modern constitutional theorizing. Posner rejects "top-down" legal reasoning, in which a theory about an area of law is invented or adopted "and use[d] . . . to organize, criticize, accept or reject, explain or explain away, distinguish or amplify the decided cases to make them conform to the theory and generate an outcome in each new case as it arises that will be consistent with the theory . . .." (p. 172). To Posner, such thinking merely creates from a variety of unprioritized sources a comprehensive theory of constitutional rights, with the text given no particular primacy. The result is a submersion of textual distinctions, and ultimately, a legal universe resting upon "a handful of exemplary, often rather bodiless, cases" (p. 174).

Posner also rejects what he terms conventional, "bottom-up" legal reasoning, which includes reasoning by analogy and interpretation by plain meaning, in which a case or cases or a statute's words are the starting point and reasoning is accomplished entirely by induction (pp. 172, 174-75). Posner rejects this reasoning because of the inherent weaknesses of inductive logic and its unjustifiable exclusion of "whole worlds of other learning and insight" (p. 175).

Ultimately, Posner rejects as "imprudent, overambitious, excessively contentious, and in the end too inconclusive the task of fashioning a comprehensive theory of constitutional law" (p. 191). Instead, he does not object to judges "stretching" clauses given "a compelling practical case or imperative felt need for intervention" (p. 192). Posner looks to Holmes for guidance on this approach: "The point is only that our deepest values—Holmes's 'can't helps'—live below thought and provide warrants for action even when we cannot give those values a compelling or perhaps any rational justification. This holds even for judicial action" (p. 192). Posner thus locates a practical ground for judicial action in instinct rather than analysis, as he says Holmes did (pp. 192, 195-96), in part because it "can be a surer guide to action than analysis" (p. 194). Posner "accepts the role of personal values in adjudication" while asking "only that they be yoked to empirical data" (pp. 194-95).

Posner's skeptical view of constitutional theory exposes the faults in judicial reasoning that wanders from the Constitution's text. It also suffers from definitional and structural problems. It begs the question to limit judicial "intervention" to "compelling" or "imperative" cases: how are these to be determined, and by whom? The judiciary's role is constitutionally defined for specific political reasons, grounded in the separation of powers of our democratic system. Posner makes no attempt to reconcile a judge's "instinct" with this role. "Empirical data" can be used to support
numerous positions or conclusions; Posner offers no "check" to balance a judge's "instinctual" choice based on such data.

For example, Posner criticizes political scientist Walter Berns's argument for two distinct spheres of law as being "too narrow." One sphere is political, in which questions of the public good can be decided legitimately only with the consent of the governed. The second is a separate judicial sphere, in which judges find and apply the law, and administer but do not create or alter private rights (pp. 229-36). Posner asserts that society constantly presents to courts mixed questions of private law and public policy, and that courts make "creative" decisions addressing both spheres all the time (p. 231). For Posner, all interpolations by a court cannot be usurpative (p. 231). Posner notes how the Framers allowed substantial discretion to authoritative interpreters, as evidenced by the generality of certain key constitutional clauses (p. 233). For Posner, "[a] choice among semantically plausible interpretations of a text, in circumstances remote from those contemplated by its drafters, requires the exercise of discretion and the weighing of consequences" (p. 233).

The judicial restraint and original interpretation Berns calls for, however, is not the "too narrow" view of the law Posner ascribes to him. No species of judicial restraint or originalism is so narrow as to preclude the common law form of judging. Every court must render interstitial decisions. Berns criticizes the importation of personal values to choose the applicable rule of law, and would deny a court authority to choose the principle itself. He would not disallow the "creative" application of an acknowledged principle.

That judges make "creative" decisions all the time begs the question. The source of the rule of law in the "creating" is dispositive for Berns. He would find no fault with interstitial reasoning, as his political philosophy does not preclude historical common law decision-making. Berns's difficulty is with judges who interpret policy decisions for themselves, or who add a personal gloss to the legislature's policy judgment. Berns clearly draws the line between "interstitial application" and true "political" issues by relying on the language and structure of the Constitution. Although he expresses dissatisfaction with this line, Posner offers no principled rationale for a new one.

8. Id.
Whether Posner’s views on originalism are even well rooted in the pragmatic philosophy he espouses may be questioned. Another famous pragmatist whom Posner invokes, Hand (pp. 142, 438), takes a view closer to Berns’s on this issue. Upon his retirement from active service as a federal appellate judge, Hand, in identifying the essential qualities for judging, emphasized the necessity of “complete personal detachment. . . . [A]s far as it is possible . . . you must keep your personal choice out of the frame you select to impose upon the written words.”

Hand’s embracing of judicial restraint is well illustrated in his criticisms of the Supreme Court’s decisions in Brown v. Board of Education and Lochner v. New York.

Posner also offers criticisms, similar to those he makes of Berns, of Robert Bork and his articulation of originalism in The Tempting of America (pp. 237-255). To Posner, Bork fails to recognize that a “long term contract [like the Constitution] is bound eventually to require . . . flexible interpretation, to cope effectively with altered circumstances” (pp. 244-45). Posner concludes that Bork is a pragmatist, rather than an originalist, because he is “queasy about the consequences of originalist rulings” (p. 245). Posner finds support for this conclusion in Bork’s assumption of the doctrine of incorporation (p. 247), acceptance of Brown v. Board of Education, and agreement with the equal protection clause approach of Justice John Paul Stevens (p. 250). Posner asserts that “[o]riginalism is not an analytic method; it is a rhetoric that can be used to support any result a judge wants to reach” (p. 251). In this way, Posner finds Bork’s legal philosophy no different from the legal philosophies of others (including Posner) that accept “personal values” of judges in adjudication.

Bork’s originalism is not so easily characterized and dismissed. For Bork, judges ought not make policy “not fairly to be found in the Constitution,” but rather should apply known constitutional values to specific cases. Principles must be applied rather than invented, although they must be applied to keep them relevant in a changing world. Judges should apply the principles found in a common sense reading of the text, which are to be understood as the Framers intended. But if that intention

9. GUNThER, supra note 5, at 673. For a description of Hand’s broad attack on judicial activism and consistent devotion to judicial restraint, see id. at 652-59.
10. Id. at 118-23, 654-57, 661.
11. BORK, supra note 6, at 5.
12. Id. at 167, 189.
13. Id. at 168-69.
14. Id. at 5.
is unclear or unknowable, principles should be inferred from a common
sense interpretation of the general language of the constitutional clause,
and defined at “the level of generality that interpretation of the words,
structure, and history of the Constitution fairly supports.”

Bork’s originalism thus seemingly accomplishes the goal Posner sets for
legal theory. It copes with “altered circumstances” by explicating the
applicable doctrine to changes in society. As Bork puts it:

There would be little need for judges... if the boundaries of every
constitutional provision were self-evident. They are not. It is the
task of the judge in this generation to discern how the framers’
values, defined in the context of the world they knew, apply to the
world we know. The world changes in which unchanging values
find their application.

Bork’s explanation gives context to his application of originalism to
constitutional law.

Posner’s other problem with Bork’s originalism is that it is “not
originalist enough” (p. 251). But even Posner admits that “the impurities
of Bork’s originalism are a strength rather than a weakness of his book”
(p. 252). In this admission Posner has answered his second criticism of
Bork. Posner lists what he asserts are “inconsistencies” in Bork’s
application of originalism to the current state of constitutional law.
Bork’s strict adherence to stare decisis and its important judicial role
explain these positions. But whether Posner is right or wrong about
these alleged inconsistencies, he cannot credibly dispute Bork’s central
thesis that anything other than original intent jurisprudence is undemocratic
and at odds with the Framers’ expressed intentions. The ill-defined
contours of certain constitutional provisions are, as Bork acknowledges,
difficult to discern. That does not mean we should not try to discern them.
Bork’s articulation and defense of originalism as a theory of judicial
interpretation stands unrebutted by Posner’s observations of its putative
application.

Posner never addresses two points made by Berns and Bork: those
regarding the Constitution’s structure and the separation of powers. He

15. Id. at 150.
16. Id. at 167.
17. Id. at 167-68. (citing Bork’s opinion in Oliman v. Evans, 750 F.2d 970, 995-96 (D.C.
Cir. 1984).
18. See supra p. 335.
20. See BORK, supra note 6, at 6.
21. Id. at 167.
limits his attempted refutations to attacks on their minor premises, which are insufficient to defeat originalism as an objective analytic framework, grounded in the language and structure of the Constitution. Posner’s subjective pragmatism provides only a radical skeptical critique, one which may have violated his own canon by elevating the conceptual over the empirical (p. 7).

For Posner and his pragmatic approach, judges must bear in mind the consequences of their decisions. But at their core, relevant consequences include the systemic effects of a decision. Such effects include the debasing of constitutional or statutory language (p. 400) and the structural concerns of maintaining the legitimacy of our democratic structure by keeping intact the separation of powers and the Courts’ limited role within that structure.22 Rather than standing with Posner as a pragmatist, Bork’s articulation and defense of originalism encompasses Posner’s goal of considering a decision’s consequences while eliminating the vagaries and political illegitimations of judges applying their personal values to interpret the Constitution. Posner’s pragmatism, which in application manifests itself as a radical skepticism, ultimately is not reconcilable with the Constitutional role of the judiciary.

B. Economic Analysis and the Role of Judges

Overcoming Law calls insistently for an empirical approach to the law. Posner repeatedly emphasizes scientific and empirical analysis, particularly drawing from the field of economics, as an instrument to enhance the law by making it more responsive to reality.

Posner is at his strongest here. His comparison of the legal profession in its traditional form with a medieval cartel of providers of services related to society’s laws lays the groundwork for his examination of the profession’s current state. Using economic theory and models, Posner gives a cogent and enlightening explanation for the “industrialization” of legal services, including the growth of large law firms, the intensifying competition for legal business, and the effects of these changes on the increasing number of attorneys in this country (pp. 39-70).

Posner’s empirical analysis of constitutional theory, including the Supreme Court jurisprudence of the Warren era, exhibits the same strengths. For Posner, constitutional interpretation can only be aided by science: “Constitutional lawyers know little about their proper subject matter—a complex of political, social, and economic phenomena. They

22. Id. at 6, 139-41.
know only cases. An exclusive diet of Supreme Court opinions is a recipe for intellectual malnutrition” (p. 208). The practical consequences of an expansive reading of the Equal Protection Clause of the Fourteenth Amendment, for example, must be considered in judging the soundness of a decision interpreting that clause. Posner takes on and defeats left-wing constitutional theorists who want the Supreme Court to recognize a number of new constitutional “rights” by demonstrating how they have not considered what the aggregate impact of such “rights”-expansion would be on judicial workloads, the legitimacy of the Supreme Court, “or on the distribution of power among the different branches of government” (p. 214). Posner uses the same tool of empirical analysis to dismantle a critical legal studies’ history of American legal thought (pp. 271-86), and to educate on the forms and methods of persuasive speech in a chapter on rhetoric, legal advocacy, and legal reasoning (pp. 498-530).

Posner’s heavy emphasis on empirical analysis, however, raises the same structural difficulties encountered by Posner’s pragmatic approach to constitutional interpretation. Posner never answers the question as to which science is to be applied in which circumstances. Is economics always appropriate, or, for example, are sociology and psychology to be consulted in considering civil rights litigation? More importantly, can it be the judiciary’s role to so consult, or is it the duty of the legislature or the administrative state—with their constitutional roles to debate and to provide for notice and comment—to determine which science is better applied?

One area of interest in which Posner’s empirical emphasis and application of an economic model fails to persuade is in his analysis of utility maximization by judges (pp. 109-44). He posits a theory of judicial behavior based on an “ordinary” federal appellate judge working for a non-profit enterprise that has less incentive to be efficient than a profit-maximizing provider because cost savings do not accrue as profit (p. 113). This leads Posner to conclude that judges on average do not work as hard as lawyers of comparable age and ability, a conclusion that Posner says comports with his experience (p. 115).

Posner believes much judicial behavior can be explained in economic terms (p. 123). Dividing a judge’s day into two parts—time spent judging and leisure time—Posner identifies five areas that he labels as examples of “leisure-serving” judicial conduct:

1. “going along” voting—if not interested in a case, judges may cast their vote with an “opinionated” judge, one who feels strongly about a particular issue;
2. *theory of power without responsibility*—an insistence by judges that their decisions are "coerced by the law," and that they should not be blamed by anyone distressed by the outcome;

3. *norm of equality in assignments*—"[j]udges of the same court hear the same number of cases and . . . are assigned the same number of decisions to write"; an effort by one judge to hear more than his proportional share of cases is resented and rebuffed;

4. *holding/dictum distinction*—"[d]icta, unlike holdings, are not considered binding in subsequent decisions"; this engenders a "live and let live" attitude because dictum is nonbinding, and thus a judge can join an opinion that contains much with which he disagrees; and

5. *justiciability/jurisdictional devices*—invented by judges to "duck" issues presented by parties; examples include standing, mootness, ripeness, the political question doctrine (pp. 123-26).

Posner sees in these areas of judicial conduct a maximization of leisure time and a reduction in time spent judging. He offers simple, formularized models of the judicial utility function in which effort is approximated by time and which incorporate these "leisure-serving" influences (pp. 135, 138, & 139). Posner does so with the admonition that economics gives a disciplined understanding of the human side of judging: decision-avoiding, also known as maximizing leisure-seeking (p. 144).

Posner fails to consider an alternative, more compelling explanation of judicial behavior. Although Posner's models of the judicial utility function are valuable in their identification of some of the variables that influence a judge's conduct, factors other than "leisure-seeking" underlie the five influences he identifies, which are better explained as either efficiency maximizing, in light of the huge increase in judicial workloads, or common law doctrines to be applied for their own, well-documented reasons.

"[F]ew deny that [the federal judiciary's] appellate courts are in a 'crisis of volume' that has transformed them from the institutions they were even a generation ago."\(^\text{23}\) Posner himself has empirically chronicled the huge increases in federal court filings since 1960,\(^\text{24}\) including the increase in federal appellate filings.\(^\text{25}\) The finite resources of a court system expand-

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\(^{23}\) FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE-PART II 109 (1990). Judge Posner was a member of this committee at the time of the study.


\(^{25}\) Id. at 89-93, Figures 3.1 & 3.2, at 66-67, Table 3.9, at 82, and Table 3.10, at 90.
ing at a slower rate than the rate of case-filings has naturally resulted in each judge being able to devote less time to each case.\textsuperscript{26} As a result, the judge’s role has been transformed from decision drafter to case-decider, with the correlative delegation of opinion writing to law clerks (pp. 122-23).\textsuperscript{27}

Efficiency—deciding an increasing number of cases with a finite number of resources, rather than minimizing work and maximizing leisure—is the better explanation for “going along” voting, equality in assignments, and the holding-dictum distinction. “Indifference” towards a case, an opinion’s author, or an opinion’s dicta is a far cry from a judge as a rational decision-maker applying limited resources to an increasing number of cases. With less time available for each case, a judge may decide that once satisfied with a case’s result, his time spent judging must be shifted to other cases, rather than to leisure.

“Leisure-seeking” also fails to explain the two other areas of judicial time-allocation Posner identifies. Rather than a “cop out,” adherence to precedent, \textit{stare decisis}, serves the important institutional judicial role as “a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon ‘an arbitrary discretion.’”\textsuperscript{28} Efficiency is another reason why it is “wise judicial policy to adhere to rules announced in earlier cases.”\textsuperscript{29}

The justiciability doctrines and jurisdictional concepts Posner identifies as tools for judges to maximize leisure are actually rooted in their own separate rationales, many of which include an efficiency component. Standing is a concept of constitutional magnitude derived from the “case or controversy” requirement of Article III of the U.S. Constitution, and fosters the principle of separation of powers by confining the federal courts to performance of the traditional judicial function of resolving individual disputes and adjudicating the rights of individuals.\textsuperscript{30} Mootness also derives from the “case or controversy” requirement,\textsuperscript{31} and the same

\textsuperscript{26} Id. at 94-102.
\textsuperscript{27} See also id. at 102-119.
\textsuperscript{29} Hubbard v. United States, 115 S.Ct. 1754, 1763 (1995) (citing B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921)).
\textsuperscript{31} See DeFunis v. Odegaard, 416 U.S. 312, 316-20 (1974) (holding that a case could not be adjudicated in federal court because changing circumstances had caused the case to no
rationale underlies the concept of "ripeness."\textsuperscript{32} The political question doctrine has a separation of powers rationale as well.\textsuperscript{33}

Each of the areas of judging that Posner identifies as "leisure-seeking" influences on judicial behavior are alternatively explained by the rationales of efficiency, or as common law doctrines with constitutional underpinnings, some of which incorporate an efficiency component. Legal outcomes result from a range of concerns unrelated to judges maximizing leisure time. While creative and thought provoking, Posner's analysis of judicial utility maximization is not compelling as a unified theory.

An irony of the primacy of empirical analysis to Posner's approach is the criticism he has endured for his "breezy" accounts of the facts in the federal appellate opinions he has authored for the United States Court of Appeals for the Seventh Circuit.\textsuperscript{34} Posner's "frequent abridgement of the facts has . . . [resulted] in negative comments from his judicial colleagues."\textsuperscript{35} One study asserted that "[a] very substantial number of lawyers . . . believe that Chief Judge Posner routinely ignores crucial facts in order to reach desired conclusions," and that he "does not pay sufficient attention to the facts."\textsuperscript{36} The same study found that Posner criticized attorneys' behavior without a thorough record concerning the facts.\textsuperscript{37}

A concrete example in this vein is United States v. Hollingsworth,\textsuperscript{38} an entrapment case. Posner's colleagues take him to task for allegedly improperly abridging the facts of the case to support an introduction of a

\begin{footnotes}
\item[32] See United Public Workers of America v. Mitchell, 330 U.S. 75, 89-91 (1947) (federal courts may not adjudicate cases in which it is speculative whether the plaintiff will actually suffer injury, rendering the case premature).
\item[33] See Baker v. Carr, 369 U.S. 186, 208-37 (1967) (certain constitutional law issues are beyond the authority and competence of the federal judiciary to resolve; designed to avoid confrontation between the federal judiciary and the coordinate branches of federal government).
\item[35] See, e.g., Indianapolis Airport Auth. v. American Airlines, Inc., 733 F.2d 1262, 1273 (7th Cir. 1984) (Flaum, J., concurring); Original Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273, 283 (7th Cir. 1992) (Cudahy, J., dissenting) ("[t]he majority's review of the facts here is so lopsided as to be almost droll—if it were not serious business").
\item[36] Evaluation, supra note 34, at 799.
\item[37] Id. at 801.
\item[38] 9 F.3d 593 (7th Cir. 1993), vacated, reh'g, en banc, granted, 1994 U.S. App. LEXIS 558 (Jan. 10, 1994), reh'g en banc, 27 F.3d 1196 (1994).
\end{footnotes}
new “readiness” element into the doctrine of entrapment. Before Hollingsworth, faced with a colorable case of entrapment, “the government had ... to establish that the defendant committed the elements of the offense without having been provided an inducement by the government, and without [having had] the idea of criminality ... implanted by the government.” The en banc dissent in Hollingsworth criticizes Posner’s majority opinion for recasting the facts of the case to import a constitutional requirement that the government must also prove “that the defendant has sufficient aptitude ... to commit the crime, and thus poses an immediate danger to society.” The dissent points out the separation of powers problems with the importation of such a criterion by a court.

Alleged episodic failure by Posner to follow his own admonition to ground decisions in the facts is instructive on the role of an appellate judge, if nothing else. Although Posner the academic may seek and find the data to better decide legal issues in science, Posner the judge is ultimately constrained to review the record presented to the court as developed below. Even a wise economist or philosopher cannot “enlarge” the factual record. Empirical gaps in a record can tempt a decision-maker to either “formulate” a record or ignore certain areas in reaching a desired conclusion.

Ultimately, we cannot know whether Chief Judge Posner tends to improperly abridge the facts in the cases before him. But the contrast between the importance of empirical support to Posner’s economic approach to legal theory and the criticism he has received from colleagues and attorneys for loose accounts of the facts is noteworthy. As an explanatory and analytical tool, Posner’s invocation of economics and emphasis on empirical support for decisions is invaluable and well placed. That same tool, however, does not necessarily accurately reflect judicial behavior, including Posner’s own.

C. Liberalism and the Law

Posner advocates reliance on political philosophy only when an economic approach to law will not suffice (pp. 22-23). The political

39. See Hollingsworth, 27 F.3d at 1205-11 (Coffey, J., dissenting); id. at 1213-17 (Ripple, J., dissenting); see also Hollingsworth, 9 F.3d at 605 n.6 (Ripple, J., dissenting).
40. Hollingsworth, 27 F.3d at 1217 (Ripple, J., dissenting).
41. Id.
42. Id.
43. Posner has criticized such abuse of the facts in at least one other of his books. See R. Posner, Cardozo: A Study in Reputation 55 (1990).
philosophy he adopts is the classical liberalism of John Stuart Mill in *On Liberty*: “[each] person is entitled to the maximum [personal and economic] liberty consistent with the liberty of every other person in society” (p. 23). Posner defends Mill from criticism by a nineteenth century intellectual, Fitzjames Stephen.

Posner finds Stephen’s critique of Mill’s political theory a powerful defense of the idea that the law should “improve people’s morals and not just . . . prevent tangible harms to third parties” (p. 262). Posner contrasts this conception of the rule of law with Mill’s conception, in which liberty is the cornerstone of classic democracy, and that by setting tight limits on the scope of government, people should be free to do what they want, with the grand proviso that they refrain from doing things that interfere unreasonably with the liberty of other people (p. 263).

Posner sides with Mill. At bottom, he frames this as a disagreement over human nature (p. 265). Posner posits that Stephen views law as a regulatory force (p. 266), which implies “a natural and radical inequality among persons” (p. 267). Posner asserts that history has falsified Stephen’s political vision in two ways. First, contemporary men and women have achieved practical equality. Second, the view that law must have a moral and, in turn, religious basis, has been disproved by contemporary Europeans losing their religion but not their morality, and by contemporary Americans practicing religion without their moral state being any better than the moral state of Europeans (p. 268). Posner finds Mill’s vision of political community more realistic (p. 268) in that it “creates the conditions that experience teaches are necessary for personal liberty and economic prosperity” (p. 24).

Posner never justifies importing a political philosophy different from that of the Constitution’s Framers into judicial reasoning. Nor does he reconcile that the judiciary’s constitutionally defined role presupposes a certain type of reasoning. 44 This raises the same structural problems of the judiciary exceeding its constitutional role, not to mention the pragmatic problems of numerous judges making difficult choices among the multiplicity of possible political philosophies.

It is beyond the scope of this Review to delve into the shortcomings of the Enlightenment, including that law and morality are inextricably intertwined and that the state has a moral mission to inculcate virtue. 45

44. See BORK, supra note 6, at 146-47.
But certain observations may be made about Posner's choice of Millian liberalism.

First, Mill's utilitarianism has never clearly defined the "liberty" to which we are all entitled and which we must respect in others. "Liberty" is polymorphous; different definitions of it can be incommensurable, and there are no scales of quality or quantity on which to weigh them. As a concept, "liberty" can be stretched and extended in so many directions that it becomes useless for evaluative purposes.

Second, it is implausible to compare the personal and economic liberties of all others to an actor's personal and economic liberty in one single formula or conception of utility. Even if one person's personal and economic liberty could be defined, the idea of summing such liberties for groups of individuals, or for some affected population, has no clear sense. And if utility is not a clear concept, then its use as a rational criterion for evaluative purposes is greatly diminished, if not extinguished.

Third, does utilitarianism preserve values we share as human beings? The use of "liberty" as a criterion could often conflict with what is thought to be a proper cause of action. For example, the putting to death of an innocent man convicted of murder may, if the public believes him to be guilty, prevent numerous innocent people from being killed by other deterred murderers. Under a utilitarian view, the innocent convict should be put to death. Allowing utility to override other existing values—such as that a man should not be put to death for a crime he did not commit—weakens its case as a criterion for political evaluations.

Millian utilitarianism encounters more than just philosophical difficulties. The history Posner cites is a less than satisfying rebuttal to much of Stephen's world view. Many would disagree that men and women have achieved equality. Further, general observations about the relationship between religious worship and cultural mores speak only to the human condition. Few, if any, have the synoptic historical view required to conclude whether religion's influence upon morals, and their incorporation

46. Id. at 63-64.
47. ALASDAIR MACINTYRE, A SHORT HISTORY OF ETHICS 236 (1966).
48. MACINTYRE, supra note 45, at 70, 198-99.
49. Id.
50. Id.
51. MACINTYRE, supra note 47, at 240.
52. Id.
53. Id. at 240-41.
into the law, has improved the human condition. Posner's radical skepticism again raises its head.

The theoretical weaknesses in Posner's political philosophy of choice, however, do not necessarily result in faulty legal decisions when that philosophy is applied. A concrete example of Posner's application of his conception of liberty is his opinion in *DeShaney v. Winnebago County Department of Social Services*,\(^\text{54}\) in which he directly faced the question whether the law (here the state) existed just to prevent tangible harm to a child, or to affirmatively act to protect the child from violence (pp. 208-13).\(^\text{55}\) Posner's analysis of the "liberty" that the Fourteenth Amendment protects—the negative liberty of the right to be left alone by the state, rather than the positive liberty of entitlement to state services—evidences a proper conception of limited government. In *DeShaney*, Posner follows the well established rule "that the state's failure to protect people from private violence, or other mishaps not attributable to the conduct of its employees, is not a deprivation of constitutionally protected . . . liberty."\(^\text{56}\) Posner recognizes that the Framers' concern was with government oppressing citizens, not "failing to provide adequate social services."\(^\text{57}\) Posner is specific in *DeShaney* as to the state's role: "For such failures, political remedies . . . were assumed to be adequate."\(^\text{58}\) Posner concedes that Millian liberalism is not an all encompassing philosophy of government and law (p. 25). But Posner's decision in *DeShaney* demonstrates at least some merit in that philosophy as concretely applied, if only in particular circumstances.\(^\text{59}\)

### III. Conclusion

The "law" to be "overcome" in the book's title is the "uninformed, formalist" tradition of law as a series of unconnected rules. The project Posner undertakes in *Overcoming Law* sets him on the track to doing so by offering a cogent treatment of the state of legal theory from economic, philosophical, and political perspectives. His critiques of legal formalism are often persuasive, and always well articulated.

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\(^{54}\) 812 F.2d 298 (7th Cir.), aff'd, 489 U.S. 189 (1989).

\(^{55}\) *See supra* p. --.

\(^{56}\) *DeShaney*, 812 F.2d at 301.

\(^{57}\) *Id.*

\(^{58}\) *Id.*

\(^{59}\) Cf. *Hollingsworth*, 9 F.3d at 598, in which Posner applies the same philosophy, although perhaps incorrectly.
Overcoming Law makes a substantial contribution to current legal thought. Few contemporary works of legal scholarship combine the synoptic view of social science with legal knowledge, as does this one, in its quest to understand the law and improve its societal role.

Posner’s preeminent analytical skills make the critical and constructive aspects of Overcoming Law appealing. Gaps or inconsistencies in Posner’s treatment of certain topics usually reflect the limits of the philosophies Posner espouses, not his analysis of the legal world considering them. But Posner’s approach does raise troubling questions about his view of the judiciary’s role in our constitutional system, as well as about the social and political theories that he concludes should be applied in the business of judging.

In the end, Posner’s respect for the rule of law is a classic definition: The rule of law, in the sense of a system of social control operated in accordance with norms of disinterestedness and predictability, is a public good of immense value. Along with a market economy and a democratic political system, which in fact it undergirds, it is a presupposition of modern liberalism (p. 20). This judge’s continuing drive to define a body of systematic thinking about the rule of law through the use of three related theoretical prisms deserves critical consideration.