CONTROVERSY

The Tempting of Richard Posner

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The reputation of Richard Posner among law professors of the Left, its measure being taken from published and casual comments, might not be any blacker if he boiled babies in their own blood and ate them.[1] Actually, he has suggested only that babies be bought and sold on the free market, as a more efficient alternative to government-regulated adoption (Landes and Posner 1978, 323). (In the absence of price incentives and disincentives, the demand for newborns continually outstrips supply. Meanwhile millions of unwanted fetuses, not permitted to possess any exchange value, are killed—in this context a better word would be "wasted"—still in their mothers' wombs.) With capitalism and profits roughly equivalent in their depravity to cannibalism in some legal academics' eyes, it is no wonder Posner is reviled. But this guru of the movement called "Law and Economics," at one time a professor of law himself and currently a judge on the U.S. Court of Appeals, has other aspects to his thought that should endear him to enemies of conservatism. Indeed, at least since the publication of Posner's book The Problems of Jurisprudence, calls

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1. A Marxist assessment of Posner, by an author little disposed to veil his contempt for his subject, is found in Hager 1991.

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by conservatives for Posner's elevation to the U.S. Supreme Court seem inexplicable. Fond though Posner is of free enterprise, his jurisprudence is distinctly at odds with the jurisprudence on which conservatism smiles.

Conservatives are not all cut from the same marble. Some incline to libertarianism, some to a traditionalism that reveres morality and order before individual freedom. Others, of an ecumenical bent, try to fuse together the claims of liberty and tradition, perhaps on the assumption that out of the tension of opposites—if opposites they be—comes moderation, an Aristotelian and conservative virtue (Evans 1971, 30). Thus there is no single preferred philosophy of law among conservatives. By implication, what Richard Posner conceives to be good laws and bad laws, though not without interest, is indecisive in determining whether his jurisprudence is of a conservative cast or better fit in some other pigeonhole. Decisive, however, is his philosophy of judging. The role of courts and how judges ought to perform their office, every bit as important in jurisprudence as philosophy of law, are issues where there can be said to be a specific conservative position, an orthodoxy with which Posner is out of sync.

Take Me to Your Leader

In their views on the judiciary, traditionalist conservative intellectuals in the United States, with the exception of the natural-law booster Harry V. Jaffa, line up behind Robert Bork.[2] Liberal senators rebuffed his Supreme Court nomination in 1987—a kind of martyrdom to conservatives. And the media attention he received at the time, which he did not relish, has had the unintended benefit of lending Bork the kind of visibility and public stature legal scholars dream of but seldom attain. The inevitable book, Bork's The Tempting of America: The Political Seduction of the Law, became a best-seller and what one law professor calls "surely the most widely and most unfavourably reviewed book in law review history" (Graglia 1992, 1019). Sticking with the superlatives, it and its author probably garnered the highest number of sheer insults in law review history.[3] Constitutional scholarship in American legal academe amounts almost to vindicating the

2. The majority of conservatives, including Bork, may support natural law, but not including Jaffa they say it is the responsibility of legislators rather than judges to bring positive law into conformity with natural law. Jaffa's book Original Intent and the Framers of the Constitution has been harshly reviewed by Bork. See Bork 1994.

3. Of note is the review by a liberal law professor whose credentials are positively dwarfed by Bork's: Suzanne Sherry says that Bork is "not much inclined to serious thought" and continues: "Indeed I would have doubts about granting tenure to the author of The Tempting of America." So she says of a one-time Yale Law School professor, solicitor general of the United States, and U.S. Court of Appeals judge (Sherry 1990).

judicial activism of the Warren Court era, which extended into the Burger Court, and the spirit of which is not dead even in the Court currently presided over by conservative Chief Justice William Rehnquist. It was against that scholarship and the judicial activism it lauds that Bork set his book.

Recounted in the early pages of The Tempting of America is an anecdote involving Oliver Wendell Holmes Jr., that singular giant of U.S. Supreme Court history. After Justice Holmes and Judge Learned Hand had lunched together one afternoon, and Holmes began to leave to resume work, Hand called out, "Do justice, sir, do justice." Holmes reproached him: "That is not my job. It is my job to apply the law" (Bork 1990, 6). Holmes did not intend, and Bork does not intend, to say that a judge ought to be unjust. But laws are sometimes unjust, and without being unconstitutional. When a judge is faced with one of those laws, as a servant of the law, he has to swallow hard and apply it. Perhaps that implicates him in injustice. (Holmes probably thought so, hence his reply to Hand.) Holmes, like Bork, believed that that is preferable to judges thinking of their duty as serving justice first and law second. Otherwise, the just judge would be, in a way, "above" the law. Rule by Platonic Guardians, whatever its merits, must give way, or self-government by the people must; they cannot stand together. That, in a nutshell, is the thesis of The Tempting of America. In the United States, the merits of the two regimes are irrelevant, frankly. America's Founding Fathers—who wrote a constitution that did not even make explicit allowances for judicial review (Graglia 1991, 1350)—chose self-government, and our elected representatives have not used the amendment process to replace self-government with an improved design, as of the last time Bork checked.

Bork counsels the judiciary to restrain itself, to resist the "temptation" to substitute for law abstract principles of justice and moral philosophy, which, Bork adds, may be less disinterested principle than raw policy preference. Bork indicates that over the course of American constitutional history, "judicial activism has had no single political trajectory.... The values enforced change, and sometimes those of one era directly contradict those of the prior era" (Bork 1990, 17). At the turn of the century, and at the beginning of Franklin Roosevelt's New Deal, the U.S. Supreme Court zestfully struck down government regulation of economic and labor practices, for what does not seem to be any better reason than that those legislative measures ran afoul of the laissez-faire economics in which the justices believed. But for the last four decades, judicial activism, reflecting elite intellectual opinion and cheered by law professors, has advanced what Bork calls the "modern liberal agenda" (9) when the give-and-take of democratic politics has let the liberals down.

Though personally enamored of laissez-faire economics, Bork even-

handedly dismisses both the old and the new style of political judging:

> Constitutional philosophies always have political results. They should never have political intentions. The proper question is not what are the political results of a particular philosophy, but, under that philosophy, who chooses the political results.... [In Bork's philosophy] legislators make the political decisions, and the courts do their best to implement them. That is not a conservative philosophy or a liberal philosophy; it is merely the design of the American Republic. A theory of judging that allows the court to choose political results is wrong, no matter in which direction the results tend. (Bork 1990, 177)

Not that courts should rubber-stamp whatever legislatures propose to do. Where the Constitution clearly draws a line that the government may not cross, Bork would have the judiciary hold that line against legislative encroachment (147). It is essential, however, that the protected right be in the Constitution, not concocted out of thin air.

Judicial activists whose views Bork canvasses, some of whom have sat on the U.S. Supreme Court, try to justify wide judicial discretion in interpreting the Constitution by lionizing a "living Constitution," by which is signified a document that has no fixed meaning but instead evolves over time and is malleable material out of which judges can fashion the tools needed in different circumstances to "do justice." Bork calls that interpretive theory an excuse for judges to avoid the work of interpreting law. He says there is only one credible means of interpreting the Constitution, despite most law professors' holding it in disrepute as "thoroughly passé" and "probably reactionary" (143). That means is original understanding:

> If the Constitution is law, then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended. If the Constitution is law, then presumably, like all other law, the meaning the lawmakers intended is as binding upon judges as it is upon legislatures and executives. There is no other sense in which the Constitution can be what article VI proclaims it to be: "Law." (145)

Unfortunately, The Tempting of America is itself replete with quotations from constitutional law scholars who refuse to concede that the Constitution is law—forget what Article VI says. To American judicial activists who conceive of constitutional law as a quick road to progressive social change, the Constitution's text is quite an inconvenience. The Constitution itself

though, as a revered artifact, has been a useful pretext for judges' legislating their policy views from the bench.

Liberal jurisprudence and liberal politics usually go hand in hand. But because Bork's jurisprudence would not purposely further what one might call the "modern conservative agenda" in politics, what makes it particularly conservative? Bork writes that when he speaks at law schools some students are always left cold by his pleas for reading the Constitution in the light of the Founding Fathers' understanding of the document's content. He says one of these students is sure to ask, "But why should we be ruled by men who are long dead?" (170). That question shows why Bork's jurisprudence is quintessentially conservative, notwithstanding his own claim that the philosophy of original understanding and judicial restraint is not a conservative philosophy or a liberal philosophy. His jurisprudence echoes Edmund Burke's reverence for past prescription and implies Burke's conception of society as linking generation with generation in a union of "the living, the dead, and the yet unborn." Not an ideology, conservatism is an attitude of mixed piety and skepticism, distrustful of human rationality and unchecked power. Conservatives know that "men who are long dead," speaking through the Constitution they bequeathed, are to be feared less than the ideology-driven jurist very much alive, whose "interpretation" of the Constitution is cynical and dishonest and who is himself accountable only to the judgment of God and history. For his own reasons or out of sheer coincidence, a judge might see eye to eye with a conservative on ideological ephemera like policy. Yet in his habit of thought and his ineffable quality of "attitude," he can betray that neither he nor his jurisprudence is conservative at all.

A Tale of Two Judges

Like Bork, Posner was appointed to the U.S. Court of Appeals during the Reagan administration. On the authority of the legal profession's proverb that a judge is only a lawyer who knows a politician, one might surmise, in explaining their appointments, that Bork and Posner's most salient common trait is that they knew the same politician. Not so. They were both identified, vaguely, as "right wing," which would tend to commend them to an administration of similar description. More pointedly, both were renowned as pro-free-market law professors of the "Chicago School"; Posner a pioneer in economic analysis of law, Bork the author of The Antitrust Paradox, a penetrating book on the faulty economics undergirding antitrust law. One obvious difference between the two men in the first half of the 1980s, when they assumed their duties as judges, is that whereas Bork's economics-related work in the field of antitrust was overshadowed by his notoriety as a proponent of original-understanding jurisprudence, Posner's mature ideas

about the role of the judiciary and interpretation of law were relatively undisclosed. In 1990, the year Bork's The Tempting of America was published, Posner came out with a review essay on Bork's jurisprudence and a book, The Problems of Jurisprudence, the latter providing a far-ranging, more densely reasoned statement of Posner's position. To someone reading these works, the thought occurs that the rumors of Posner's conservatism have been highly exaggerated. [4]

Posner's "Bork and Beethoven," a review essay printed in the Stanford Law Review, does not go far before Posner remarks that he has "the highest personal and professional regard" for Bork and believes "The Tempting of America is a fine book which deserves its best-sellerdom" (Posner 1990a, 1368). To anyone familiar with the tactics used in book reviewing, that remark is an unmistakable tip-off that Posner intends to slash the book's contents to pieces. (To the seriously paranoid, who know what sort of literary effluvia become bestsellers, the phrase "deserves its bestsellerdom" would appear to be an example of damning with faint praise.) The first charge Posner levels against Bork is that "Bork fails to produce convincing reasons why society should want its judges to adopt originalism as their interpretive methodology in constitutional cases" (1368). Posner is correct only insofar as Bork, innocent of the recondite interpretative theories of French deconstructionists, takes for granted that "interpreting a document means to attempt to discern the intent of the author," as Lino Graglia has put it, noting that the "difference between writing and reading (or between making and interpreting law) is that the writer seeks to communicate with the reader while the reader seeks to understand the writer's communication" (Graglia 1992, 1024). Bork's understanding of interpretation, in fact, accords with that of everyone else in the world, save the academics influenced by the deconstructionists, whose teaching that words have no meaning seems borne out only by the unintelligibility of their own writings. If Posner has an alternative definition of interpretation, it is incumbent on him to produce "convincing reasons" why his definition ought to prevail over the one in common currency. He does not offer that definition in "Bork and Beethoven." He does not, probably, because he is aware that the real issue is not how the Constitution should be interpreted but whether the Constitution should be the dispositive factor in constitutional-law cases

4. Posner's productivity is a legend in the making. Since becoming a judge, he has, in addition to handling a heavy court docket, published half a dozen law review articles per year and a stack of scholarly books on an eclectic range of subjects, one of them on sex. The average law professor, with academic leisure, is hard-pressed to sweat out even one law review article a year. So Professor Hager's cattiness is understandable: "People wonder how Judge Richard Posner writes so much.... Part of the answer...is that Posner works incessantly and has few outside interests. The other part of the answer is that Posner's stuff is not that good" (Hager 1991, 7).

at all.

It is simply untrue that Bork, as Posner contends, relies on "militance and dogmatism" to make his case: "A summons to holy war is not an argument for originalism."[5] Worse than wrong, Posner is being deceptive: he knows that Bork has reasons for accepting and advocating originalism, writing that one of them is that originalism "is implicit in our democratic form of government. Originalism is necessary in order to curb judicial discretion, and curbs on judicial discretion are necessary in order to keep the handful of unelected federal judges from seizing the reins of power from the people's representatives" (1369). Posner calls Bork's attachment to originalism "democracy-mongering" and tries to refute the argument with embarrassingly irrelevant points, one of which is that "on the evidence of the book, Bork himself is not an admirer of popular government" (1370). That inference Posner makes from Bork's admission—an admission one hopes Bork would make—that majorities and the politicians they elect often support stupid laws. Suppose that Bork does not really believe in popular government; that he would endorse H. L. Mencken's perception of democracy as the art of running the circus from the monkey cage; and that he has a notion of a better system with which to replace democracy. How would those considerations debunk Bork's argument for originalism, which is that originalism is implicit in the form of government the Founding Fathers devised? If Bork dislikes democracy, and yet his position is that democracy has to survive and rule by unelected judges end, that only strengthens Bork's credibility by demonstrating that he practices what he preaches about the individual judge having to discount his own values and politics. Posner is obviously on thin ice if he has to nimbly skate in a very short space from denying that Bork has an argument, to admitting that he does, on to refutations of the argument that make Bork look better than he might without Posner's "critical analysis."

The objection to Posner is hardly that it is out of bounds to criticize Bork. A syllogism on the order of "Robert Bork is a conservative; Richard Posner disagrees with Bork; therefore Posner is not a conservative," would be invalid, were anyone to formulate it. The Tempting of America comes unhinged in several places, and Posner perspicaciously draws attention to these shortcomings that almost all conservatives have noticed with displeasure. For instance, Bork mounts an originalist defense of the conclusion, certainly not the reasoning, in the U.S. Supreme Court's decision in the 1954 school desegregation case Brown v. Board of Education. The state law in

5. Posner affects a pose of hard-headed rationality and juxtaposes that with Bork's "religious" posture. That only helps Posner come across as a smart-alecky village atheist, throwing tomatoes at the local priest. Not an endearing picture (Posner 1990a, 1369).

question was an offshoot of the baldest kind of racism. An orthodox reading of the Constitution would have upheld the law. In Chief Justice Earl Warren's own words, the Supreme Court chose to "do the right thing," furnished an utterly tortured interpretation of the Fourteenth Amendment, and voided the law.

Anyone today who suggests that the Supreme Court was wrong to outlaw racial segregation in public schools, which is the uncomfortable stand a consistent originalist has to make, disqualifies himself from any respectful hearing: because he is ipso facto "immoral," because he is a "racist," the liberal law professors whisper and nod among themselves, when they are not shouting the accusations at originalists like Bork. Bork opted to spare himself the trouble. The result in Brown, he wrote, "is consistent with, indeed, is compelled by, the original understanding of the fourteenth amendment's equal protection clause" (Bork 1990, 76). The problem is, no one besides Robert Bork believes that, if even Bork believes it. Posner rightly observes that the original intent of the Fourteenth Amendment's equal protection clause is comprehended by recalling "its background in the refusal of law enforcement authorities in southern states [after the Civil War] to protect the freedmen against the private violence of the Ku Klux Klan"; this historical background suggests "that all the clause forbids is the selective withdrawal of legal protection on racial grounds. A state cannot make black people outlaws by refusing to enforce the state's criminal and tort law when the victims of a crime or tort are black" (Posner 1990a, 1374–75). As unjust as racial segregation seems to us, it was never unconstitutional. Bork ought to have had the courage to say that.

If the sum of Posner's reservations about Bork was the proposition that Bork is on the right track but insufficiently careful to stay on it, that would be criticism one might expect and applaud from a fellow conservative jurist. But Posner's More-Originalist-than-Thou critique of Bork's position on Brown is only role-playing, meant to prove that nonconstitutional "interpretation" is inevitable and, all in all, a pretty good thing. Posner approves of Brown for the same reason liberals approve of Brown: it was a good result, and the end justified the means—the style of constitutional interpretation—that achieved the result. Posner is, in a way, more radical than some of the standard liberal critics of Bork and originalism. Some of the liberals rest their position on the claim that it is epistemologically impossible to grasp the original understanding of a provision of the Constitution as a law; thus it is folly for a judge to worry about what an amendment or law meant at its inception. However, as shown by Posner's excellent interpretation of the Fourteenth Amendment's equal protection clause, Posner knows that original understanding is within a judge's power of comprehension. He just thinks it should not matter very much. In Posner, one

can almost hear the arrogant whine of Bork's presumptuous law student: "But why should we be ruled by men who are long dead?" Much as that question, put to Bork, reveals the conservatism of Bork's jurisprudence, the fact that Posner can be easily imagined asking the question exposes Posner's core liberalism.

The question of why we should be ruled by men long dead—self-evident, to the liberal, as devastating and unanswerable—proves too much. Why not bury the Constitution with the men who made it? Why not draft a new Constitution and, if not exactly surrender it to the worms, at least retire the old one to a museum where, as a quaint historical curiosity, it can be propped up on a cushion alongside George Washington's wooden teeth and Betsy Ross's flag? (Of course, the original document is in a museum, but one catches my drift.) Had America's founders not desired that their country's constitutional law be somehow anchored in the past, they would not have departed from England's tradition of keeping an unwritten constitution, which by definition would be unfixed and evolve like the "living Constitution" liberals, and Posner, too, say they want.[6] The American conservative in public life seeks to conserve what the Founding Fathers wrought; the American liberal, like Lot fleeing Sodom, tries not to look back. Opposed to Bork's challenge to the judiciary to let the Founding Fathers guide its work, Posner advises against "slavish obeisance to the [Constitution's] framers' every metronome marking" (Posner 1990a, 1380). Whatever Posner's jurisprudence is, conservative it is not.

Once Bork's originalism has been reduced to ruins (Posner thinks), Posner too briefly unveils the jurisprudence to which he subscribes: "in the capacious, forward-looking account of interpretation that I am calling pragmatic, the social consequences of alternative interpretations are decisive; to the consistent originalist, they are irrelevant" (1380). One of the first pragmatists, John Dewey, was entitled, as everyone is, to go by the name he chose to describe himself. But he was still a liberal, well-nigh the most important American liberal intellectual of the twentieth century. The jurisprudence Posner calls pragmatic is similarly liberal jurisprudence rebaptized. Posner's jurist, instead of glancing back to the Founding Fathers or more proximate lawmakers or the Constitution—prescriptive sources—falls back on his "private stock of reason," which Burke recognized is too small in most individuals to carry them through their own lives, never mind to judge and reinvent societies by—the project the liberal French philosophes of the

6. Posner says, "Bork is well aware of the practical impediments to amending the Constitution, but he is unwilling to draw the inference that flexible interpretation is therefore necessary to prevent constitutional obsolescence. The amendment process is too slow, too cumbersome, too easily thwarted to maintain a living Constitution" (my emphasis; Posner 1990a, 1372–73).

Enlightenment envisaged. Judicial activism, the collapse of the distinction the Constitution makes between legislative and judicial branches of government, would proceed apace under the aegis of the "pragmatism" to which Posner builds a shrine.

Once More into the Breach

The shrine to pragmatism, party visible in "Bork and Beethoven," is starkly displayed in Posner's Problems of Jurisprudence. The book was received with open arms by academics usually placed opposite Posner on the political spectrum, including the doyen of Political Correctness, not to mention trendiness, Stanley Fish (1990): "it is perhaps superfluous for me to say that I agree with him on almost every point" (1456). Sanford Levinson's (1991) review gloats that "Posner's newest work will be much more happily embraced by the left than by many of his mundane political allies on the right" (1233 n.60). A Marxist law professor writing about The Problems of Jurisprudence was uncharmed, but Posner had evidently softened, or grown, enough that the professor could not help but wonder if Posner hoped to stake out ground as a "centrist jurisprude, appropriate perhaps for a Republican nomination to the Supreme Court. Perhaps because his reputation as an ideologue of the right could stand in the way of ascension to the Court, Posner goes to considerable lengths to disclaim identification as an ideologue of any sort" (Hager 1991, 8). (After Robert Bork's Supreme Court nomination was torpedoed, having a "right-wing reputation" was clearly a liability to an ambitious jurist.) Again, "conservatism is the negation of ideology," someone once said. Posner comes off as every bit the ideologue in his jurisprudence book; what he says is just so conventional in the liberal milieu of legal scholarship that the ideology, manifest in a license extended the judiciary to indulge in social engineering, seems too unremarkable to make a fuss about.

There is no gainsaying that The Problems of Jurisprudence is brilliant. It is a study of jurisprudence covering every orbit of jurisprudence and commenting on all, or what appears to be all, of the bright lights who have illuminated the field. Unleavened by the concessions Bork made to hold the attention of a broader audience, The Problems of Jurisprudence is erudite in a fashion The Tempting of America does not come close to being.[7] But so far as Posner's treatment of the judiciary and judicial interpretation of law is concerned, the prowess of the oarsman is little compensation for the gaping holes in the bottom of the boat he propels. Or to employ a metaphor closer

7. The Tempting of America was published by a commercial publisher, The Problems of Jurisprudence by a university press. The latter did not grace the bestseller list.

to home: Posner's predicament is that of the good lawyer with a bad case. He states in his introduction, sensibly, that

> Judges do not want to be the handmaidens of the powerful. But if independence means only that judges decide cases as they like without pressure from other officials, it is not obvious that an independent judiciary is in the public interest; the people may be exchanging one set of tyrants for another. (Posner 1990b)

The word tyrant is appropriate: tyranny is rule without subordination to law. Posner condemns "lawless" judges. His task, then, is to present the judiciary in the role he believes it should perform—active, not self-restrained; attentive to social consequences, not oblivious to all but the inexorable logic of the law—and to show that the judiciary in that role would be something other than a law unto itself, something other than tyrannical. Posner fails that task.

An interesting observation, somewhat amusing on its face, is that both Bork and Posner pledge fealty to Justice Holmes and invoke the words and deeds of the old master to support their views on precisely the issues about which they disagree with each other. Ironic, but not incredible, for the same man has two different legacies. Holmes the Supreme Court justice, on the high bench for the first three decades of this century, was not quite an un–failing practitioner of judicial restraint, but he was nearly that. Though skeptical that there was much wisdom in increasingly popular legislation interposing the state between worker and employer (White 1982, 656), for instance, Holmes said if a majority of Americans wanted to go to hell and their representatives passed laws to that effect, he was obligated to help them get there. This is Bork's Holmes. But the other Holmes, the scholar and theorist, prepared the intellectual foundations for judicial activism through writings of the stamp of "The Path of the Law," a speech made in 1897 and printed in the Harvard Law Review, destined to become the most famous law-review article ever. In that article Holmes derided the idea that law is discovered in preexisting legal materials, asserting that on the contrary, judges' opinions are only policy choices couched in logical form and that the model judge always considers social advantage and the remoter consequences of his decisions. The "black letter man" has had his day, Holmes declared: the lawyer and judge of the future would be "the man of statistics and the master of economics" (1897, 469). Here is Posner's Holmes.

Consciously retracing Holmes's footsteps, Posner attacks legal formalism, defined by him as "belief in the possibility of obtaining right answers to legal questions by means of conventional methods of legal analysis, mainly the careful reading of texts to find the rules in them, followed by deduction

from the rules to the outcomes of the particular case." Or, he simplifies further, "formalism can refer simply to the use of logic to reason from premises to legal conclusions" (Posner 1990b, 40).

Obviously Bork is a formalist. He writes in The Tempting of America that "A judge who announces a decision must be able to demonstrate that he began from recognized legal principles and reasoned in an intellectually coherent and politically neutral way to his result" (Bork 1990, 2). Bork is not gullible; The Tempting of America is a testimony, albeit damning, to judges' churning out decisions by gut instinct, and almost according to digestion. But what Bork despairs over as deviant, Posner, keeping company with the leftist law professors of the Critical Legal Studies movement, seems to fancy is simply the way judges are, have always been, and will be for time without end. "Rules mask—they do not eliminate and may not even reduce—the role of the subjective and the political in the formation of legal rights and duties" by jurists, Posner writes (1990b, 48).

As a bare description of today's judiciary, Posner's assessment, as well as that of the "Crits," has a modicum of merit. It may overgeneralize from the empirical evidence, but enough specific cases can be cited to lend the theory a surface plausibility. But as an argument against legal formalism, and Posner intends his description of the judiciary to be such an argument, Posner's argument is fallacious. Specifically, Posner commits the naturalistic fallacy: deducing the ought from the is. It does not follow that because judges inject their own policies into the law that they should do so. Legal formalism prescribes what judges ought to do; it does not necessarily describe what judges do. If Posner wants to topple legal formalism as a normative theory of adjudication, he has to demonstrate not that judges do not currently perform their jobs in line with legal formalism's principles but that legal formalism is either impossible or undesirable. Impossibility he entertains but finally spurns: "I risk leaving the impression that I think all statutory and constitutional interpretations are policy decisions by judges. That would amount to a denial of the possibility of written communication" (1990b, 293). What can one take that statement to be, besides an admission that legal formalism is not only possible but occurs in the real world? In a delightful passage that could have been written by Bork or any other originalist, Posner takes down "text skeptics" more than a few notches:

> Extreme communication skeptics are, without exception, academics. This is curious. They more than most people depend on, and daily experience, successful communication. Their careers depend on their ability to communicate with other people (often many other people) in writing. When their books and articles are misunderstood they are indignant. When they write an examination they

> expect their students to understand it; if the examination contains an ambiguity the teacher is embarrassed—he does not say to the students, "Well, what did you expect?" A leading text skeptic was not amused when, his article submitted to the University of Chicago Law Review having been turned down after a letter from the editors that he interpreted as a promise to publish the piece, he was told by the editors that they interpreted the letter differently. (Posner 1990b, 295)

The truth is that Posner rejects legal formalism because it would keep judges on too short a leash. His is, in a manner of speaking, a mind at war with itself. He feels constrained to make the customary assurances that judges ought not to be lawless, ought not to be tyrants loosed on society; but he desires for judges—perhaps it is accurate to say he desires for himself as a judge—wiggle room to "do good." That giving judges such room means allowing them, allowing himself, discretion to potentially do evil does not seem to have made it into his calculations. He does not so much fail in The Problems of Jurisprudence his task of disproving that an activist, pragmatic judiciary would be subordinate to law; his attempt, if he ever took it seriously, just slowly fizzles out. He states, boldly, that

> Obedience to rules is just one virtue among many, and it cannot be given its proper weight without considering the content of the rules and other pertinent social and moral values. It is surprising that a nation which has embraced an ideology of hostility to bureaucrats contains so many judges who apotheosize the bureaucratic virtues. (1990b, 140)

Simplistic though it may sound, the only choice is having judges who are bureaucrats or having judges who are tyrants. If he obeys all the rules without question, emulating the good soldier, the judge's office might very well be one of unmitigated, machine-like drudgery, which is how one pictures the lot of the bureaucrat. People who want creative careers should labor in vineyards other than the judiciary. The judge who picks among rules which to obey and which to ignore—or who taps his talents as an amateur moral philosopher to legislate, though that be not his sphere and he need never worry about facing an electorate—has power without responsibility, the tyrant's prerogative.

"Greatness in law implies the transcending of law—when law is defined as narrowly as the neotraditionalists would define it" (1990b, 452). Transcending law, flouting law—Posner can attach whatever label he likes to how he would have judges behave; he ends up at the same place: rule by Platonic Guardians. It is typical of the rationalistic liberal to strive to reinvent the

wheel every generation, to presume that we live in a historical vacuum and that there is no question of morals or government that is no longer an open question, res judicata. When Posner, possessed by this spirit, asks, "how do we know that legislators really are better policy makers than judges?" (143), one wonders how a man with the breadth of knowledge to be cognizant that in India people's ages are not measured from time of birth, but from time of conception,[8] could be unaware that his own country settled at its founding that those who apply policy (judges) are not to be the same people as those who make policy (legislators). Who would better handle the legislators' responsibilities, legislators or judges, is a moot question, completely irrelevant.

The British satirist Malcolm Muggeridge, charitably crediting Pascal with coming up with his idea first, said that "judges have to be attired in robes and wigs as otherwise the threadbare nature of the justice they mete out would be too apparent for them to have authority over their courts" (Muggeridge 1978, 77). A judge is only a man or a woman, eminently fallible. Only the clothes worn, and the legal expertise the clothes represent, give the jurist the right to decide another's cause, and maybe his fate. Were every judge a Solomon, able to hold his authority just by dint of being superior, a true sage, the word of the judge alone would probably be law enough for everyone's satisfaction. But judges are not all Solomons; they are not, on average, superior to the—what, lesser breeds?—who appear before them. If people go to courts expecting justice, they are fools: the best that can be hoped for on this side of the grave and the Day of Judgment is an impartial application of the law, and these days getting that may be a long shot. Sure, Judge Posner is brilliant (not the same thing as wise). He can see that legislatures, and the White House and Congress as well, brim with comparatively mediocre men of whom the most celebrated and powerful, when they retire, cannot compose their own memoirs without the aid of third-rate ghostwriters. When Posner implies that judges are more capable policy-makers than are legislators, what he means is that he believes he is more capable, and chances are he is right about that. But what elected legislators have and Judge Posner lacks is authority to make private policy choices into law. Posner writes,

> The concept of judicial decision making implicit in the preceding chapters and here made explicit raises a question of judicial legitimacy: who has licensed judges to decide cases in accordance with

8. Posner's familiarity—which extends well beyond just superficial knowledge—with an array of fields of learning gives The Problems of Jurisprudence, and almost everything else authored by Posner, the mark of having come from the pen of a cosmopolitan, a Renaissance man (Posner 1990b, 266).

> social vision? But to state the question this way is to appeal covertly to a political theory, one that regards the judge as an agent of legislators, of constitutional framers, or of earlier judges and thus insists that every judicial decision be fairly referable to a command by a principal—in other words, that decisions be pedigreed. (1990b, 135)

Thus does Posner elude answering the question he poses, the answer to which is that no one has "licensed judges to decide cases in accordance with social vision." And the political theory to which he refers has a name: it is "constitutionalism," and one of its premises is that arbitrariness has no proper place in a legal system, even when practiced by brilliant people like Judge Posner.

Conclusion

Posner, as a law professor and as a federal judge, has passed as a conservative because he has exhibited a sign usually peculiar to conservatives in academe and the judiciary: a better than tenuous grasp of economics. For membership in the conservative fraternity, that gets his foot in the door, but he goes no further. Posner's views about the judiciary clearly put his jurisprudential position nearer to the camp of the Left than of the Right. Conservatives are generally practical, but they have always sniffed philosophical pragmatism suspiciously, inclining to excoriate it as a repudiation of prescription in favor of an unprincipled end-justifies-the-means way of approaching problems. The cool disregard Posner has for America's Founding Fathers, as though their meticulous design for republicanism and separation of powers does not matter because they have passed from the scene, runs counter to one of American conservatism's most deeply rooted convictions, which holds that if the present generation can reach higher than those who have lived before, it is only because it stands on the shoulders of giants. In the United States, the Founding Fathers are giants; dispense with their vision, their support, and Americans might come crashing down. Posner's fulminations against what he calls "framer idolatry" puts one in mind of George Santayana's sardonic swipe at liberalism's anti-intellectual presentism: that we do not nowadays refute our ancestors, we kindly wave them good-bye.

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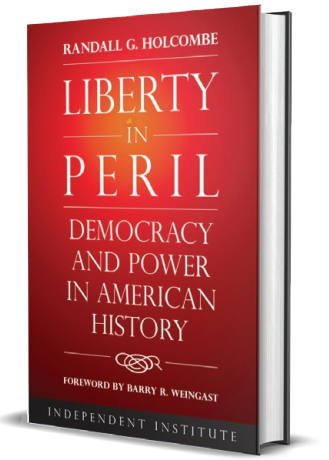

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