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BOOK REVIEW

POSNER'S *OVERCOMING LAW*: "MUDDLING THROUGH" THE HARD CASES*

Peter Blum†

One of the many illustrations Richard Posner uses in *Overcoming Law*¹ is a story familiar to first-year law students. About 100 years ago, lawyers began searching for an appropriate system of property rights in petroleum, a new natural resource. At that time, there was a well-developed body of law holding that there were no nonpossessory rights in wild animals. Lawyers drew an analogy to this body of law in dealing with petroleum, because petroleum, like wild animals, was a nonstationary natural resource. Accordingly, just as with rabbits and foxes, the courts decided that there were no nonpossessory rights in petroleum.²

Thus the issue of property rights in petroleum was treated "as one *internal* to legal materials, an issue of the relations between legal concepts."³ Whether the rule formulated was the most efficient or socially apt rule played no part in the analysis; those best equipped to make such a judgment—petroleum engineers, ecologists, and economists—were not asked for their opinions.⁴ Indeed, the no-nonpossessory-rights rule was quite inefficient: it impaired incentives to

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¹ RICHARD A. POSNER, *OVERCOMING LAW* (1995).

² *Id.* at 399, 519-21; see also *Hammonds v. Central Kentucky Natural Gas Co.*, 75 S.W.2d 204, 206 (Ky. 1934); *Westmoreland & Cambria Nat'l Gas Co. v. De Witt*, 18 A. 724, 725 (Pa. 1889).

³ POSNER, *supra* note 1, at 519.

⁴ POSNER, *supra* note 1, at 399, 519.

conserve a valuable resource, presenting the danger that petroleum could be prematurely depleted in a race to extract it from the ground.⁵

According to Posner, the sort of wooden legal reasoning used in the early petroleum cases is alive and well today, although perhaps better camouflaged. In *Overcoming Law*, Posner makes a largely successful argument against the view that difficult legal questions can be answered by examining the relationship between legal concepts. Rather than ask the traditional question of whether a legal rule can be derived from an authoritative source, Posner posits that lawyers should be more concerned with whether the rule makes sense as a matter of social policy. To make this judgment, lawyers must have a grasp of the consequences of different courses of action, a grasp that can only be attained through empirical and scientific inquiry. In Posner's view, economics, "the instrumental science par excellence,"⁶ is indispensable in this inquiry.

A SUMMARY OF POSNER'S APPROACH: PRAGMATISM, ECONOMICS AND LIBERALISM

Many chapters of *Overcoming Law* originated in earlier writings,⁷ and it shows; the chapters sprawl. However, while the book does sometimes have the feel of a collection, there is an underlying theme, summarized in Posner's Introduction, that more or less links the chapters together. In the Introduction Posner states:

[M]ost lawyers, judges, and law professors still believe that demonstrably correct rather than merely plausible or reasonable answers to most legal questions, even very difficult and contentious ones, can be found—and it is imperative that they be found—by reasoning from authoritative texts, either legislative enactments (including constitutions) or judicial decisions, and therefore without recourse to the theories, data, insights, or empirical methods of the social sciences, or to personal or political values: without, in other words, an encounter, necessarily messy, with the worlds of fact and feeling.⁸

⁵ POSNER, *supra* note 1, at 520.

⁶ POSNER, *supra* note 1, at 15.

⁷ POSNER, *supra* note 1, at vii-x.

⁸ POSNER, *supra* note 1, at 20 (citation omitted).

Posner's prescription is that lawyers take a more pragmatic approach to the law. He defines pragmatism as "an approach that is practical and instrumental rather than essentialist—interested in what works and what is useful rather than in what 'really' is."⁹ A pragmatist is empirical, concerned with the facts and the probable consequences of alternative courses of action. At the same time, the pragmatist is skeptical of reaching the final truth about anything, and realizes that our certitudes are often nothing more than the transient beliefs of the community to which we belong. Posner's brand of pragmatism, however, refuses to accept skepticism and relativism as dogma; even while acknowledging that our deeply held beliefs may be overthrown, Posner maintains that a person must act on the assumption that some propositions are more sound than others.¹⁰

Being antidogmatic, Posner's pragmatist believes in debate and free inquiry, especially scientific inquiry. Scientists can expose falsehoods by generating hypotheses and testing them through experimentation. Thus, scientists can help us understand and control our natural and social environment; useful knowledge can grow even if "truth" remains beyond our reach. Indeed, experience, which is paramount to the pragmatist, has shown that societies which slight the scientific method suffer consequences such as high levels of poverty and illness.¹¹

Emphasizing the practical and useful, Posner doubts the efficacy of analytic philosophy and traditional legal reasoning in ordering society. Both fields overemphasize the logical manipulation of concepts and underemphasize the importance of empirical support for one's views. Rather than allowing legal rules to expand to their semantic limits without regard to observable facts, Posner feels that lawyers should view legal rules in instrumental terms.¹² He agrees with Cardozo's aphorism: "The final cause of law is the welfare of society."¹³

Because law is instrumental, Posner's pragmatist finds it

⁹ POSNER, *supra* note 1, at 4.

¹⁰ POSNER, *supra* note 1, at 5-6.

¹¹ POSNER, *supra* note 1, at 6-8, 390-91, 396.

¹² POSNER, *supra* note 1, at 8-9, 391, 399, 446-47 & 466-67.

¹³ POSNER, *supra* note 1, at 391 (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66 (1921)).

strange to talk of immutable rights, moral obligations, and reverence for the past—the currency of traditional legal reasoning. For example, as to *stare decisis*, the pragmatist “is apt to think it as odd to suppose that . . . a modern scientist has an obligation to maintain a fit between what he does and what Archimedes and Aristotle did.”¹⁴ Not that the pragmatist has anything against *stare decisis* and judicial conservatism *per se*; there may be sound practical reasons why a judge should adhere to precedent and maintain a low profile. Posner maintains, however, that whatever one’s judicial philosophy, it should be justifiable on pragmatic grounds.¹⁵

To Posner, the most useful tool for the pragmatic lawyer is modern economics. “Modern” economists do not limit themselves to analyzing business firms, markets for goods and services, and the like, but treat economics as an approach that can be used to analyze nonmarket behavior in fields as diverse as education, politics, health, family, and, of course, law. For Posner, it is natural for economic methods to be applied to the law: law controls human behavior, and economics constructs and tests models to predict and control that behavior.¹⁶

There are, however, essential aspects of the law that are inherently unpragmatic and uneconomic. In “easy” cases—those cases where clearly established rules control—a judge must adhere to the rules whether or not they comport with economic theory.¹⁷ Even in novel cases, where the use of economic methods is most legitimate, the judge may be faced with issues that resist economic analysis. The abortion question is a perfect example of this latter problem. According to Posner, while the costs to the mother of bearing an unwanted child can be measured using economic methods, whether the costs to the fetus of being aborted “shall be counted at all depends on whether fetuses are part of the community whose welfare is to be maximized,” and this question “cannot be answered within economics.”¹⁸

To fill some of the gaps left by economic analysis, Posner

¹⁴ POSNER, *supra* note 1, at 11.

¹⁵ POSNER, *supra* note 1, at 5, 11-12, 400-03.

¹⁶ POSNER, *supra* note 1, at 15-16, 421-25.

¹⁷ POSNER, *supra* note 1, at 21.

¹⁸ POSNER, *supra* note 1, at 22.

turns to the liberalism of John Stuart Mill.¹⁹ Like Mill, Posner argues that "every person is entitled to the maximum liberty—both personal and economic—consistent with the liberty of every other person in the society."²⁰ People should be free to engage in "self-regarding" behavior, "that is, behavior that does not palpably harm other people."²¹ Stated differently, what Posner calls "mental externalities" are not an adequate basis to suppress conduct.²² Therefore, that some people are horrified by the self-regarding behavior of homosexuals is not an adequate basis to discriminate against them.²³

Posner argues that a pragmatic case can be made for liberalism. Societies which adhere most closely to liberal tenets, according to Posner, have produced and are likely to produce better consequences than those societies embracing socialism, social democracy, moral conservatism, or fascism.²⁴ Furthermore, liberalism and pragmatism mesh together neatly: "Liberalism . . . is the political philosophy best suited for societies in which people don't agree on the foundations of morality, and pragmatism is the philosophy of living without foundations."²⁵

Unfortunately, although liberalism can fill gaps left by economic theory, it is no better than economics in dealing with some issues. Abortion is again the perfect example, because the issue of whether abortion is self-regarding depends on whether the fetus is a member of the community.²⁶ Consideration of especially tough issues like abortion forces Posner to admit that his liberal-pragmatic "approach works well only when there is at least modest agreement on ends," and that "there are areas of discourse where a lack of common ends precludes rational resolution."²⁷ Therefore, the value of pragmatism sometimes "lies in preventing the premature closure of issues rather than in actually resolving them."²⁸ Posner's counsel to the legal system in these most difficult cases is to

¹⁹ See JOHN S. MILL, ON LIBERTY (1859).

²⁰ POSNER, *supra* note 1, at 23.

²¹ POSNER, *supra* note 1, at 24.

²² POSNER, *supra* note 1, at 24.

²³ POSNER, *supra* note 1, at 23, 27.

²⁴ POSNER, *supra* note 1, at 27, 29.

²⁵ POSNER, *supra* note 1, at 29 (citations omitted).

²⁶ POSNER, *supra* note 1, at 27.

²⁷ POSNER, *supra* note 1, at 404.

²⁸ POSNER, *supra* note 1, at 397.

"muddle through."²⁹

Posner is careful in *Overcoming Law* to note that pragmatism has "no inherent political valence."³⁰ In line with this statement, Posner criticizes the unpragmatic reasoning of commentators on both the political left and right. Although Posner is certainly not shy about giving his own conservative and libertarian opinions on specific questions of policy, he often downplays his own opinions, qualifies them, or blurts them out without a real attempt to support them. For example, he criticizes Drucilla Cornell's "ethical argument" (her description) in favor of employment tenure, which she bases on a reading of Hegel.³¹ Posner defends employment at will on economic grounds, taking the position that just-cause protection would lead to high unemployment.³² He concludes his analysis, however, by deemphasizing his opinion ("I shall not pretend that all economists would accept the analysis that I have presented") and stating that he objects to Cornell's argument only because she has substituted political theory for the study of consequences.³³ Thus, while sometimes jarring, Posner's practice of stating and then downplaying his opinions is consistent with his goal of exposing and refuting traditional methods of legal analysis; he is not as interested, at least in this book, in advocating specific policy outcomes.³⁴

²⁹ POSNER, *supra* note 1, at 404.

³⁰ POSNER, *supra* note 1, at 393.

³¹ POSNER, *supra* note 1, at 299-311; Drucilla Cornell, *Dialogic Reciprocity and the Critique of Employment at Will*, 10 CARDOZO L. REV. 1575, 1576 (1989).

³² POSNER, *supra* note 1, at 309-11.

³³ POSNER, *supra* note 1, at 311.

³⁴ Another example of how Posner handles his own opinions is provided by his commentary on the political writings of philosopher Richard Rorty. Posner writes:

It is not clear, for example, that rich nations exploit poor ones, that either the federal budget deficit or Japanese competition is a truly grave problem for the United States (the latter is not a problem at all), that AIDS represents a social crisis for this country rather than an ugly, dangerous, but fairly easily controlled and only moderately expensive disease, that the total amount of money we are spending on health care is excessive although the allocation among patients may be distorted, that the shift of employment from manufacturing to services is a problem, that the savings and loan debacle is anything more than the predictable harvest of foolish New Deal banking regulations, that the problem of drug addiction is much more than an artifact of foolish efforts to solve it (like the alcohol problem during Prohibition), that income and wealth are too unequally distributed, that the American educational system taken as a

AN EXAMPLE OF POSNER'S APPROACH: CONSTITUTIONAL INTERPRETATION³⁵

Posner develops his position on constitutional interpretation, like most of his positions in *Overcoming Law*, by responding to what he views as the unpragmatic arguments of others. Posner's first victim is Herbert Wechsler. In his famous article on "neutral principles,"³⁶ Wechsler restated the question in *Brown v. Board of Education*³⁷ as one of freedom of association. He asked whether there was a neutral principle that would permit blacks to complain about being kept out of white schools, but would forbid whites from complaining about going to school with blacks. Because Wechsler could not find an adequate principle, he objected to the Supreme Court's decision.³⁸

Posner handily refutes Wechsler's traditional legal thinking:

One might have supposed that the central question in *Brown v. Board of Education* was not the scope of some abstract principle of

whole is either markedly inferior to the educational systems of the other wealthy countries or starved for resources, or that our physical infrastructure is disintegrating. I do not think we should regret the decline of labor unions any more than we should regret the decline of those other industrial dinosaurs, the Detroit automakers.

These assessments may be wrong. All I know for sure is that the so-called problems that I have just mentioned present difficult analytical and empirical issues that can no more be understood, let alone resolved, by the intuitions and analytic procedures of persons schooled only in the humanities than problems in high-energy physics or brain surgery can be understood and resolved by close study of the *Tractatus Logico-Philosophicus*.

POSNER, *supra* note 1, at 455-56.

³⁵ While Posner's chapters on constitutional law are illustrative of his approach, they only begin to scratch the surface of *Overcoming Law*. Posner has written memorable chapters comparing the legal profession to a Medieval guild and arguing that the practice of law should be opened up to nonlawyers; relating the stories of Nazi judges and executive detention in wartime Britain; comparing modern social conservatives to nineteenth century anti-liberal James Fitzjames Stephen; excoriating Catherine MacKinnon for not properly considering the costs (heavy) and benefits (questionable) of her proposal to ban sexually explicit materials; and exploring the relationships among rhetoric, legal reasoning, and science.

³⁶ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

³⁷ 347 U.S. 483 (1954).

³⁸ Wechsler, *supra* note 36, at 34.

freedom of association but whether racial segregation of public facilities in the South was intended or likely to keep the blacks in their traditionally subordinate position. This was a factual question, the answer to which was obvious. . . .³⁹

Wechsler's concept of neutral principles meant "that judges should avoid grounds of decision that would require them to engage with the messy world of empirical reality—to inquire for example into the motives and consequences of public school segregation."⁴⁰

Posner also criticizes the methodology of more recent works, such as John Hart Ely's book, *Democracy and Distrust*.⁴¹ Ely creates a unified theory to organize cases and advocate an outcome in future cases by adopting what Posner calls a "top-down" approach to constitutional interpretation.⁴² From examining the Constitution and what the framers said about it, Ely theorizes that the principal purpose of the Constitution is to promote democratic values—especially the representation of all citizens in the political process. Therefore, the recognition of a new fundamental right is warranted only when such a decision is "representation-reinforcing."⁴³

Although Posner praises Ely's book as "a work of outstanding merit," he criticizes it for not being "a masterpiece of social science."⁴⁴ According to Posner, the main weakness of *Democracy and Distrust* is that Ely ignores the political science and economic literature on the effects of reapportionment, interest groups, and public choice.⁴⁵ For example, Ely applauds the Supreme Court's reapportionment cases,⁴⁶ but he does so without taking note of the disagreement among political scientists as to whether reapportionment has any effect on policy outcomes.⁴⁷ Ely finds affirmative action unproblematic because he views it as a matter of the white majority discrimi-

³⁹ POSNER, *supra* note 1, at 72.

⁴⁰ POSNER, *supra* note 1, at 74.

⁴¹ JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

⁴² POSNER, *supra* note 1, at 172, 198.

⁴³ ELY, *supra* note 41, at 101-03.

⁴⁴ POSNER, *supra* note 1, at 198, 206.

⁴⁵ POSNER, *supra* note 1, at 205.

⁴⁶ ELY, *supra* note 41, at 120-24.

⁴⁷ POSNER, *supra* note 1, at 205.

nating against itself,⁴⁸ but he ignores the possibility that interest groups can push through legislation that does not reflect majority preferences.⁴⁹ Ely disagrees with *Griswold v. Connecticut*⁵⁰ because he believes that the case had nothing to do with representation,⁵¹ but Posner points out that the case may have had everything to do with representation: an interest group, consisting of the Catholic church and devout Catholics, was blocking the repeal of an archaic law banning contraceptives, a repeal which would have benefitted a group with a weaker political voice—lower- and lower-middle-class women. Understood pragmatically, *Griswold* may have been more about overcoming representation-blocking inertia in the political system than anything else.⁵²

In sum, Posner criticizes the conceit that lawyers are especially equipped to analyze the issues of representation and participation that Ely discusses. According to Posner, Ely needs "more social science":

The effects of apportionment, the political dynamics of affirmative action, the conditions for effective minority politics, the significance of conflicting interests within a group, the force of inertia in the political process—these and other matters central to the construction and evaluation of a participation-oriented representation-reinforcing jurisprudence are issues in social science. They are not issues of "process" rather than "substance" in any sense relevant to lawyers' capacities.⁵³

Posner is also critical of two articles that disagree with the result in *DeShaney v. Winnebago County Department of Social Services*.⁵⁴ In *DeShaney*, the Supreme Court held that although the fourteenth amendment concept of liberty encompasses the right to be left alone by the state, it does not encompass positive liberty, that is, the right to state services. Therefore, a social worker's failure to protect an abused child was

⁴⁸ ELY, *supra* note 41, at 170-72.

⁴⁹ POSNER, *supra* note 1, at 203-04.

⁵⁰ 381 U.S. 479 (1965).

⁵¹ Ely does not state directly in *Democracy and Distrust* that he disagrees with *Griswold*, but his disagreement directly follows from his criticism of the entire line of privacy cases. See ELY, *supra* note 41, at 248 n.52.

⁵² POSNER, *supra* note 1, at 193-94, 204.

⁵³ POSNER, *supra* note 1, at 206-07.

⁵⁴ 489 U.S. 189 (1989).

not actionable under the Fourteenth Amendment.⁵⁵ Posner first discusses an article by David Strauss, who criticizes the Supreme Court's distinction between negative and positive liberty, action and inaction.⁵⁶ According to Posner, Strauss is not sufficiently empirical in several respects. First, Strauss gives short shrift to the razor's edge upon which social workers would have been placed had the Supreme Court decided the case differently: social workers would have been subject to liability both for depriving parents of their children and for not doing so. Posner also accuses Strauss of slighting the existence of state tort remedies against negligent child care workers. Most importantly for Posner, Strauss does not consider the possibility that the costs of increased litigation against welfare agencies could lead to a curtailment of benefits. Posner notes the existence of articles written by experts in public administration and finance that analyze these issues and indicts Strauss for not consulting this literature.⁵⁷

Posner notes that an article by Akhil Amar and Daniel Widawsky avoids one of the pitfalls of Strauss's argument but Posner criticizes this article on other grounds.⁵⁸ Whereas Strauss's approach might lead to a rash of *DeShaney*-type cases against police and fire departments, Amar and Widawsky sidestep this whole issue by saying that the state's failure to protect Joshua DeShaney violated the *Thirteenth* Amendment.⁵⁹ Amar and Widawsky reach this startling conclusion by positing that the status of a battered child is equivalent to that of a slave.⁶⁰ Although Posner thinks this analysis faulty on its own terms, he accepts, for the sake of argument, that the Thirteenth Amendment could be interpreted as broadly as Amar and Widawsky say.⁶¹ That still leaves the problem of choosing between analogies: Is Joshua DeShaney closer to a slave, or to a mugging victim who gets beat up while an inade-

⁵⁵ *Id.* at 195-97.

⁵⁶ David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. REV. 53, 56-57.

⁵⁷ POSNER, *supra* note 1, at 208-10.

⁵⁸ Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359 (1992).

⁵⁹ *Id.* at 1365; POSNER, *supra* note 1, at 209, 212.

⁶⁰ Amar & Widawsky, *supra* note 58, at 1363-65.

⁶¹ POSNER, *supra* note 1, at 211-13.

quately trained police officer stands and watches? To Posner, making the choice between these analogies requires consideration of empirical factors, to which Amar and Widawsky, like Strauss, have paid little attention.⁶²

Posner also criticizes such leading scholars as Ronald Dworkin⁶³ and Bruce Ackerman.⁶⁴ Enough, however, has already been said to convey the flavor of Posner's criticisms of constitutional theorists. But before leaving this subject, it must be noted that Posner spares no ammunition in shooting down conservative "strict constructionists" such as Walter Berns⁶⁵ and Robert Bork.⁶⁶ Unlike the strict constructionists, Posner has no doubt that judges necessarily act creatively in applying old rules to new situations, and must be flexible in interpreting broadly worded constitutional provisions. Indeed, Posner favors the view that judges legislate "interstitially."⁶⁷

Up to this point, all is well with Posner's analysis. Even a lawyer who disagrees with the results Posner would reach in particular cases cannot help but feel that he or she must be ready to meet Posner with pragmatic and empirical counterarguments. It becomes apparent, however, when Posner sets forth his own method of constitutional interpretation that the methods of those Posner criticizes may have more value than he has conceded.

Posner begins by quoting with approval Justice Holmes's statement that a law is constitutional unless it makes him want to "puke."⁶⁸ Posner explains: "The point is only that our deepest values . . . live below thought and provide warrants for action even when we cannot give those values a compelling or perhaps any rational justification."⁶⁹ Thus he locates a basis for judicial action in instinct; a judge can invalidate a law that "he deeply feels to be terribly unjust, even if the conventional

⁶² POSNER, *supra* note 1, at 213.

⁶³ POSNER, *supra* note 1, at 172-88.

⁶⁴ POSNER, *supra* note 1, at 215-28.

⁶⁵ POSNER, *supra* note 1, at 229-36.

⁶⁶ POSNER, *supra* note 1, at 237-55.

⁶⁷ POSNER, *supra* note 1, at 231-35.

⁶⁸ POSNER, *supra* note 1, at 192 (quoting Letter from Oliver Wendell Holmes to Harold Laski (Oct. 23, 1926), in 2 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916-1935, at 888 (Mark DeWolfe Howe ed. 1953)).

⁶⁹ POSNER, *supra* note 1, at 192.

legal materials are not quite up to the job of constitutional condemnation."⁷⁰

Posner anticipates that his reliance on instinct will be criticized as subjective and unprincipled. His reply is that reference to one's personal values is unavoidable, and that the instinct of a pragmatic judge will be informed through empirical inquiry:

I may seem to be indulging in paradox in proposing an approach that accepts the role of personal values in adjudication and asks only that they be yoked to empirical data. But personal values, while influenced by temperament and upbringing, are not independent of adult personal experience. Research—into facts, not just what judges have said in the past—can substitute for experience, enlarge and correct the factual materials on which temperament and outlook react, and thus bring home to a judge the realities of a law against contraception or against abortion or against sodomy.⁷¹

It is at this point that Posner appears to retreat from the criticisms he has made of others. He states: "I am not against judges stretching clauses—even such questionable candidates as the due process clause—when there is a compelling practical case or imperative felt need for intervention." He also notes: "the responsible judge will not be content with a naked statement of values. He will not ignore objections, or fail to test the consistency of his values by exploring hypothetical cases within the semantic domain of his statement."⁷²

Therefore, if a judge is faced with a law that makes him want to puke, but "the conventional legal materials are not quite up to the job," he still has to find a rationale to justify his value judgment and tie his decision into the Constitution. It might be necessary to stretch a clause by resorting to the sort of reasoning that Amar and Widawsky used. It might be useful to test the semantic limits of one's newfound principle, as Wechsler felt was essential. It might be beneficial to create a unified theory to structure one's thinking, like Ely. It might be appropriate to use all sorts of tools which are those of the analytic philosopher, not the empiricist.

Posner surely understands these things. As noted above, Posner admits that cases where there are disagreements on

⁷⁰ POSNER, *supra* note 1, at 192.

⁷¹ POSNER, *supra* note 1, at 194-95.

⁷² POSNER, *supra* note 1, at 192.

ends are difficult for his empirical methods to resolve; in those cases one must "muddle through." Perhaps the only problem is one of emphasis. While Posner's empirical tools remain ever-useful in exploring the consequences of different courses of action, the analytic methods he has criticized are, in the end, just as necessary in the difficult cases as his empirical methods. So Ely and the others may not be so far off the mark after all.

CONCLUSION

In *Overcoming Law*, Richard Posner pleads with the legal community to stop addressing complex social issues solely by manipulating legal concepts. Instead, lawyers should open their eyes to the insights of modern science, and realize the value of empirical data in analyzing the consequences of different legal rules. While traditional legal reasoning will always have its place, Posner's pragmatic jurisprudence clears up much confusion caused by exclusive reliance on that reasoning. As Posner states: "If it plants no trees, this pragmatic jurisprudence that I have been defending, at least it clears away a lot of underbrush. It signals an attitude, an orientation, at times a change in direction. That is something, and maybe a lot."⁷³

⁷³ POSNER, *supra* note 1, at 405.

