REVIEW ESSAY

Totemism Transcended?: The Ambivalent Aspirations of Richard Posner's Jurisprudence

RICHARD A. POSNER,† OVERCOMING LAW, Cambridge: Harvard University Press (1995) (597 pages) ($39.95)

*Norman W. Spaulding III**

I. INTRODUCTION

> The "law" to which my title refers is a professional totem signifying all that is pretentious, uninformed, and spurious in the legal tradition. A pragmatic approach can help demolish the totem. Economic analysis can help put better things in its place.
>
> —Richard A. Posner, *Overcoming Law*[1]

> It was in fact the ancient totem animal, the primitive god himself, by the killing and consuming of which the clansmen renewed and assured their likeness to the god.
>
> —Sigmund Freud, *Totem and Taboo*[2]

If there is a modern *legal* expression of totemic religion, its origin must be sought in a political analogy to the primal patriarchal horde, dominated, as Freud suggests, by "a violent and jealous father who keeps all the females for himself and drives away his sons as they grow up."[3] Substituting political sovereignty for females as the object of male desire, the monopoly on power justified by divine right in monarchies would seem to be the appropriate analog.[4] The distinction between subject and sovereign parallels the prohibition on incest, assuring the patriarchal figure exclusive rights to both the power of pleasure and the pleasure of power.

In the overthrow of monarchy, the murder of the king, democracy emerges as a compromise between anarchy (constant war among the brothers of the horde) and tyranny (a retrenchment of the patriarchy/parricide logic that would result should any one

---

† Chief Judge, Seventh Circuit Court of Appeals.

* Candidate for J.D., 1997, Stanford Law School, B.A. 1993, Williams College. I am especially grateful to Professors Thomas Grey, Margaret Jane Radin, and Janet Halley for thoughtful criticism and generous support.

1 Richard A. Posner, Overcoming Law 21 (1995).

2 Sigmund Freud, Totem and Taboo 171 (James Strachey trans., 1950).

3 Id. at 175.

4 Id. at 186.

brother be deemed king). What keeps the peace, in Freud's analysis, is totemic worship, a faith requiring the observance of two primary taboos that mirror the original commands of the primal father: one prohibits the killing of totem animals, the other prohibits sex between members of the same totem clan. Ironically then, the price of collective liberation from the domination of the primal father is continuing submission to his prohibitions:

> The most primitive kind of organization that we actually come across — and one that is in force to this day in certain tribes — consists of bands of males; these bands are composed of members with equal rights and are subject to the restrictions of the totemic system. . . . One day the brothers who had been driven out came together, killed and devoured their father and so made an end of the patriarchal horde. . . . *The dead father became stronger than the living one had been.* . . . What had up to then been prevented by his actual existence was thenceforth prohibited by the sons themselves in accordance with the psychological procedure so familiar to us in psycho-analysis under the name of 'deferred obedience.' They revoked their deed by forbidding the killing of the totem, the substitute for their father; and they renounced its fruits by resigning their claim to the women who had now been set free.[5]

In a democracy, rule of law principles serve the purposes of the totem, separating the creation of legal rules in the political process from the application of those rules in the judicial process, making taboo the intermingling of law and politics. So long as the objectivity, neutrality, and autonomy of legal reasoning is maintained, and so long as law remains separate from politics, submission to the rules generated in the political process can be accepted as democratic in purpose and effect rather than tyrannical. Thus, just as in fraternal clans — where totemic powers are attributed to animals which then become the object of worship — in the legal theories of modern democracies we attribute totemic powers to and worship rule of law principles that protect the boundary between legal and political decision-making. Violation of the incest taboo (admitting, for instance, that mechanical rules cannot constrain judges' human biases, or conceding more generally that law is inherently if not completely subjective, partial, and interdependent) is an attack on the totem principles, the rule of law itself, and the transgressor becomes taboo. As Freud summarizes, "The violation of a taboo makes the offender himself taboo. . . . [A]nyone who has transgressed one of these prohibitions himself acquires the characteris-

---

[5] *Id.* at 175-78 (emphasis added).

tic of being prohibited . . . ."[6]

In exploring the "riddle of taboo"[7] Freud also noted an ambivalence in the worship of totemic figures which repeats the feelings of ambivalence vis-a-vis the father. On the one hand, there is reverence for the totem born of remorse for the murder of the father; on the other hand there is hatred of the totem born of rebellious lust for its power. Freud suggests that in fraternal clans the periodic sacrifice of the totem animal — violation of the taboo on its harm or consumption — permits expression of this ambivalence. In such ceremonies the triumph of the original parricide is reenacted on the totem animal while rituals of atonement simultaneously reaffirm the general prohibition on its killing.

This concatenation of hatred and reverence, desire and guilt, drives the totemic system. Both general observance and ceremonial violation of the taboos work to preserve the détente between the brothers, the first by setting down a unifying rule of order, the second by providing means of transgression which vent the tension built up during observance of the rule. Freud writes:

> [T]he ambivalence implicit in the father-complex persists in totemism and in religions generally. Totemic religion not only comprised expressions of remorse and attempts at atonement, it also served as a remembrance of the triumph over the father. Satisfaction over that triumph led to the institution of the memorial festival of the totem meal, in which the restrictions of deferred obedience no longer held. Thus it became a duty to repeat the crime of parricide again and again in the sacrifice of the totem animal, whenever, as a result of the changing conditions of life, the cherished fruit of the crime — appropriation of the paternal attributes — threatened to disappear.[8]

In legal theory similar sacrificial gestures are made. Theorists, following the traditional logic of critical inquiry, first question the possibility of rule according to law in its present manifestation and then argue for another conceptualization which, by responding to the changed conditions of life, promises to better preserve the underlying principles. Ambivalence finds expression, and in finding expression rebellious and divisive tendencies are overcome, assuaged by rehearsing the power of parricide.

Although this kind of legal theory is still prevalent, the sacrifice of rule of law principles is no longer a ceremonial procedure resulting in a universal affirmation of their virtue and utility. In a

---

6 *Id.* at 26, 29.
7 *Id.* at 29.
8 *Id.* at 180.

tradition beginning with Holmes and running forward to critical legal studies, critical race theory, and feminist legal theory, American theorists have become increasingly disenchanted with legal formalism as a totem and factionalism now characterizes the discourse of the discipline. On one side are aligned adherents of the original totemic system, more or less reverential of the principles of autonomy, objectivity and neutrality, ever faithful that the totemic system is the best alternative to tyranny and anarchy. On the other side are aligned a whole variety of (taboo[9]) dissenters. Some are disbelievers, angered by their exclusion and oppression at the hands of the original clan members, while others are disgruntled members no longer enamored either of the taboos or the cathexis of their ceremonial transgression. All dissenters are more or less skeptical of the distinction between law and politics and ever intolerant of the power effects produced by the system as is.

In short, American legal theory is in a state of revolution, perhaps even anarchy. Inherent ambivalences are no longer sated by the old methods and the totemic system is a shambles. Traditionalists treat dissenters as taboo and warn against the threat of nihilism; dissenters, for their part, ridicule traditionalists' naiveté and warn against blindness induced by the old faith.

Into this maelstrom steps Judge Richard Posner, whose latest book, *Overcoming Law*, promises nothing less than the transcendence of totemism in legal theory, a middle path between the conflicting worship of legal formalism and legal radicalism. As Posner announces in the Preface, the book has two corresponding parts; one criticizes neo-traditionalists and dissenters in order to illustrate how he thinks legal theory should not be done, the other combines a unique version of pragmatism, economic analysis, and classical liberalism to illustrate how he thinks legal theory should be done.[10] The critical question in reviewing *Overcoming Law* is whether Posner offers a true transcendence of totemism, a viable overcoming, or merely another ceremonial sacrifice in which the totemic system is attacked for the purposes of affirmation and reset with new premises for the purposes of continued worship. As Freud suggests, the logic of totemism is not easily eluded, it may indeed be endemic to the human condition:

---

9 On the designation of Critical Legal Studies theorists as taboo, see Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984) ("[T]he nihilist who must profess that legal principle does not matter has an ethical duty to depart the law school.").

10 POSNER, *supra* note 1, at viii.

> Totemic religion arose from the filial sense of guilt, in an attempt to allay that feeling and to appease the father by deferred obedience to him. *All later religions are seen to be attempts at solving the same problem.* They vary according to the stage of civilization at which they arise and according to the methods which they adopt; but *all have the same end in view and are reactions to the same great event with which civilization began and which, since it occurred, has not allowed mankind a moment's rest.*[11]

II. TOTEMISM ORDAINED

Overcoming Law is a revealing text in which readers seeking the normative universe of an extremely prolific and influential legal mind will find some measure of reward. Chapter One is a material history of the totemic system in law. Posner offers a cartel theory which describes the transition from a "guild" economy of legal services to an economy of "mass production" and demonstrates the relationship between these material developments and the worship of rule of law principles in legal theory. Although it is an elite history describing the profession and its scholarship from the perspective of its elite practitioners and scholars, the chapter is worth exploring for its illustration of the way an essentially ideological view of the law became so entrenched (indeed we might say deified or totemized) as to have assumed the status of obviousness or truth.[12]

Posner begins the chapter with a portrait of the legal profession pre-1960 in its heyday of ideological consensus.[13] He writes, "[t]he legal profession in its traditional form is a cartel of providers of services related to society's laws."[14] As a cartel its primary objective is to create a monopoly by regulating to limit entry and policing to ensure high quality. These measures enable cartel members to "increase . . . prices above competitive levels and make the higher prices stick . . . ."[15] Any cartel with a desire for longevity must therefore do two things. First, it must conceal (both to its

---

11 Freud, *supra* note 2, at 180 (emphasis added).

12 I mean ideological in the most literal sense of a set of beliefs reflecting the particular interests of a particular class of people — here legal professionals.

13 That Posner offers a material history of legal theory in this first chapter does not conflict with the Freudian analysis of the introduction. Rather, the motives in both explanations coincide. Totemism in legal theory and cartelization in the profession each reflect a need to bring order to the exercise of power (which is the same as creation of wealth) by establishing conditions of membership for its exercise and an ideology to create a sense of internal consensus and external legitimacy.

14 POSNER, *supra* note 1, at 39.

15 *Id.* at 39 (citation omitted).

own members and to society at large) its self interest in a legitimating ideology. And second, it must provide for procreation by drawing individuals into the cartel in a process that preserves the cartel's restricted size as well as its high standards of quality.[16]

Much like the medieval guilds, Posner argues, the cartel structure of the legal profession was the result of such material interests. Also like medieval guilds, he continues, the legal profession required a legitimating ideology. With this need for ideology the totemism of rule of law principles was born: "The profession's cartel structure produced as a by-product a certain view of 'law' — that it is an enigmatic but 'real' and ultimately knowable entity that by constraining the behavior of lawyers and judges justifies the independence of the profession from political and market controls."[17] On the basis of this ideology a whole methodology of legal reasoning developed as well as a whole system of apprenticeship designed to indoctrinate new members into the totemic system — into the methods, the ideology and the rewards of "law" so conceived.

Tracing the antecedents of the American legal profession's cartel back to the English system of barristers and solicitors, Posner dates its true genesis at 1870 when Langdell began his tenure as dean of the Harvard Law School with a "program of educational reform . . . explicitly based on the premise that law was a science."[18] With the aid of other factors critical to the full flowering of the cartel, such as state mandated bar exams and the substitution of law school for apprenticeships, Langdell's idea of law would come to shape the ideology of the legal profession as a whole — what we more respectfully call its jurisprudence. Summing the primary tenets of this jurisprudence, as well as the consensus that surrounded it, Posner writes:

> Only thirty years ago the legal profession was secure in the belief that it had cogent tools of inquiry — primarily, deduction, analogy, precedent, interpretation, rule application, the identification and balancing of competing social policies, the formulation and application of neutral principles, and judicial restraint — which added up to a methodology that could generate objectively correct answers to even the most difficult legal questions.[19]

Such was the confidence and security of the profession at the time that its "oracle," the Supreme Court, "was said to be 'predestined

---

16 *Id.* at 43.

17 *Id.* at 33.

18 *Id.* at 49 (citation omitted).

19 *Id.* at 34.

. . . to be a voice of reason,' for 'reason is the life of the law.'"[20]

Thus Posner's theory of totemism in law is not simply that worship of rule of law principles in legal theory made democracy possible, worship also served to legitimate a monopoly on legal power (a monopoly on its means of production) by ensuring consensus within the profession and the perception of constraint from without.[21] Taboos on questioning the authority of reason and the power of its attendant jurisprudential methods to constrain legal decision-making worked alongside ceremonial sacrifices in which one generation's method replaced another's madness. Yet all the while underlying commitments to rule of law principles remained basically unchanged. Transitions from Langdellian formalism to sociological jurisprudence and legal realism back to legal process as a new formalism demonstrated the profession's "remarkable capacity for domesticating, co-opting, and where necessary ignoring its critics."[22] Indeed, Posner contends that even the radicalism of Holmes was tamed by Justice Felix Frankfurter who "made his hero stand for things important to professional autonomy and self-esteem but not important in Holmes's actual thinking . . . ."[23]

The primary tenet of the totemic system, then, was the worship of reason. Whatever theoretical guise dominated the thought of any given era, reason secured the ontological and political legitimacy of the three central rule-of-law principles (autonomy, objectivity, and neutrality in legal reasoning). These principles formed

---

20 *Id.* at 34 (citation omitted).

21 This theory bears a strong resemblance to Alexis de Tocqueville's account of the legal profession as a mollifying aristocracy.

> The more we reflect upon all that occurs in the United States, the more we shall be persuaded that the lawyers, as a body, form the most powerful, if not the only, counterpoise to the democratic element. In that country we easily perceive how the legal profession is qualified by its attributes, and even by its faults, to neutralize the vices inherent in popular government. When the American people are intoxicated by passion or carried away by the impetuosity of their ideas, they are checked and stopped by the almost invisible influence of their legal counselors. These secretly oppose their aristocratic propensities to the nation's democratic instincts, their superstitious attachment to what is old to its love of novelty, their narrow views to its immense designs, and their habitual procrastination to its ardent impatience.

ALEXIS DE TOQUEVILLE, I DEMOCRACY IN AMERICA 278 (Phillips Bradley ed., 1990)(1835).

22 POSNER, *supra* note 1, at 59. No one, it seems, can get Posner to take legal realism seriously. Thus its status as a major starting point in the demise of totemism is relegated to the category of "ignored" criticism in Posner's narrative. *See id.* at 3, 20, 392-93; RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE xii, 441-42 (1990).

23 POSNER, *supra* note 1, at 59.

the core of the legal profession's formalistic ideology, and at what Posner identifies as the totemic system's high-water mark, the legal process school exemplified the profession's commitment to them.[24] In a fascinating section of the chapter Posner illuminates the nature of the process school's totemic commitment by reviewing one of its representatives' discomfort with *Brown v. Board of Education* — a discomfort Posner believes was shared by the professional elite generally.[25]

The problem with the *Brown* decision was not the "rightness" or "justice" of its desegregation mandate, rather it was that the oracle itself revealed the fallacy of reason as the life of law in the process of reaching (indeed we might say "reaching out for") that result. How could the profession defend its autonomy, objectivity and neutrality — the basis of its right to monopoly power — in the face of a decision which thrust the Supreme Court directly to the center of the most divisive political issue in the nation's history on the basis of a repudiation of more than a half-century of countervailing legal precedent and an utterly equivocal record on the intent of the Equal Protection Clause?[26] How, in a word, could the profession deny the transparent "madeness" of the *Brown* decision?

Posner argues that Herbert Wechsler's renowned article *Toward Neutral Principles of Constitutional Law*, reflected the interests, if not the sentiments, of the professional elite as a response to *Brown*. According to Wechsler the decision is indefensible, an example of what not to do, but it need not impeach "the legitimacy of judicial review," so long as that review is constrained by a search for neutral principles in interpretation and a proper respect for procedural and jurisdictional boundaries.[27] "The mission of jurisprudence," Posner summarizes, "was to show that law was more than politics and rhetoric," and Wechsler rose to the occasion, proposing a viable "alternative to strict construction as a guarantor of law's freedom from politics and public opinion."[28]

Without mounting a defense of the *Brown* decision[29] Posner attacks Wechsler's article as a manifestation of the weaknesses in traditional legal theory. First, he argues that like so much legal scholarship, factual inquiry is inexcusably absent.[30] Second, the ar-

---

24 *Id.* at 60.
25 *Id.* at 61.
26 *See id.* at 61-63.
27 *Id.* at 70.
28 *Id.* at 77-78.
29 *Cf. id.* at 249.
30 *Id.* at 73.

ticle mirrors the lawyer's traditional reliance on rhetorical devices, "abstract concepts, arguments from logic, and hypothetical cases."[31] Posner writes, "Wechsler is not interested in the motives for or the effects of segregation, except that in typical lawyer's fashion he speculates on the possibly deleterious effects of integration — that is — *the only consequences he is interested in are the speculative bad consequences of the position that he questions.*"[32] Thus in the three-quarters of a century separating Langdell and the ascent of law as science from Wechsler and the legal process school, Posner concludes that formalism was the defining characteristic of legal reasoning, the centerpiece of the totemic system, and perhaps the totem itself:

> Wechsler is not at all a strict constructionist and I daresay would not like to be called a formalist. Yet rather little of substance separates the Harts and the Wechslers from the Langdells and the Beales. The vocabulary is different, more modern; the touchstones are reasonableness and institutional competence rather than authoritative legal texts and fundamental jural concepts. But at bottom there is the same unspoken conviction that the relations among legal concepts are rightly the focus of legal analysis, the same unacknowledged dependence on homogeneity of outlook and of values as the real motor of consensus . . . the same indifference to the empirical world, and the same antipathy to legal novelty because a genuinely new case is not continuous with precedent or the other conventionally authoritative materials for legal judgment.[33]

Of formalism and a "totally unified conception of the law," Posner quips, "the dream dies hard."[34] As we will see, one of the curious aspects of *Overcoming Law* is that Posner's own analysis often manifests the traits of law's totem. The formalist's dream from which Posner would liberate legal theory is one into which he too sometimes slips.

III. Totemism in Crisis

What brought the totemic system to its present state of chaos? Posner offers a composite of economic, social and legal factors to explain the demise of consensus in the legal profession. Continuing his material history, Posner argues that law has undergone an

---

31 *Id.* at 73.

32 *Id.* at 72-73 (emphasis added).

33 *Id.* at 75-76.

34 *Id.* at 76.

"industrial revolution"[35] in the last three decades which has "transformed the profession in the direction of competitive enterprise."[36] The primary cause is "a surge in demand for legal services," which itself arose from a melange of social and legal factors.[37] For instance, Posner offers a list tracing the liberalization of legal services beginning with the Federal Rules of Civil Procedure and the Warren Court: "the creation of new rights, much higher crime rates, greatly relaxed rules of standing, more generous legal remedies . . . and the increased subsidization of lawyers for indigent criminal defendants and indigent civil plaintiffs . . . ."[38] Responding to the rise in demand the profession has expanded in size, become increasingly specialized and competitive, and abandoned both price fixing and bans on advertising. The result is a demise of the guild culture and ethos. "Gone," Posner reflects, "are the joys of artisanality and the security of the guild."[39]

The law school — the institution responsible for the production and protection of legal ideology as well as its inculcation in future generations of teachers and practitioners — has experienced a parallel revolution. In the totemic system "[t]he job of the professor was to produce knowledge useful to the practitioner."[40] Today however, legal scholarship has become less doctrinal, teaching methods less traditional, law faculty less homogeneous, and traditional rule of law ideology is, as a result, much less compelling. Posner attributes this transformation to four primary factors: artificially high demand for law professors and a surfeit of legal scholarship, enhanced diversity produced by affirmative action, a dramatic rise in interdisciplinary scholarship, and political upheavals.[41] Combined, these factors have assaulted the cultural homogeneity and political consensus of the profession and in the process the autonomy, objectivity, and neutrality of legal reasoning have all come into question. With the disintegration of consensus legal scholarship has shifted from a relatively narrow focus on the concrete level of practice to a meta-level debate between competing ontological accounts of the law stretched along a matrix of continua (liberal-conservative, doctrinal-interdisciplinary, normative-positive).

---

35 *Id.* at 70.
36 *Id.* at 64.
37 *Id.* at 64.
38 *Id.* at 64.
39 *Id.* at 68.
40 *Id.* at 83.
41 *Id.* at 102.

Interestingly, Posner evinces no nostalgia for the loss of autonomy and objectivity in legal scholarship. He readily concedes that "[t]he ultimate premises of legal doctrines are political," and that without a basic consensus on underlying political questions objectivity is impossible.[42] But he also knows that consensus driven by mere homogeneity "can produce a fragile, sterile objectivity" — one not worth defending.[43] Thus insofar as the loss of consensus and objectivity in legal theory is a product of new, vigorous, and diversified challenges to the homogeneity of the totemic system, Posner welcomes the revolution. Summarizing the costs and benefits, he writes, "A certain professionalism, a certain dependability, a certain craftsmanship has been lost, but intellectual sophistication has been gained along with a broadening of legal scholarship that has for the first time enabled it to touch, and potentially to enrich, neighboring fields."[44]

Yet Posner is not wholly content with the present situation. Indeed there are several developments with which he seems decidedly uncomfortable. First, artificially high demand for law professors and a rise in interdisciplinary studies have combined to encourage scholarship which has no legal utility. As Posner puts it, "Law professors can find publication outlets for their scholarship too easily . . . . Some crazy stuff is being published in law reviews nowadays."[45] Although nowhere near as staunch as Judge Harry Edwards in the belief that legal scholarship should only be doctrinal or otherwise "in the service of the legal profession," Posner does claim that much of the new interdisciplinary scholarship is simply "bad."[46] He also worries that interdisciplinary scholarship is weak either in its legal analysis or in its appropriation of other disciplines. Although law professors can evaluate the doctrinal aspect of interdisciplinary pieces, there is no way to know if the "borrowed" aspect of a piece is sub-par.[47]

Second, Posner is extremely uncomfortable with affirmative action — the primary cause of socio-cultural diversification in the legal profession. He argues that efforts to increase gender, sexual orientation, and especially racial diversity in law schools have worked to increase representation, but at the risk of lower overall quality in both teaching and scholarship. For instance, Posner at-

---

42 *Id.* at 83.
43 *Id.* at 102.
44 *Id.* at 102.
45 *Id.* at 101.
46 *Id.* at 98-99.
47 *Id.* at 101.

tributes the declining use of the Socratic method in law school classrooms to the presence of "less qualified on average" minority students who, by virtue of their supposed academic inferiority, are "more likely to be embarrassed by the 'cold call' method . . . ."[48] Even if the premise is true — even if minority students are on average less qualified according to the traditional criteria of undergraduate grades and LSAT scores — the conclusion that this explains some perceived deficiency in responding to the Socratic method is highly questionable.

A better reason, and one documented in the literature on the subject, may be that Socratically debating legal decisions which involve issues of race[49] makes students of color less comfortable, in part because it may require painful emotional abstraction from what one may have experienced personally, in part because of the frequency with which students of color feel silenced when white students say unconscionably racist things in the guise of a Socratic analyst, and in part because of the way white students and professors often assume people of color to be spokespersons for "the" view of "their" race.[50] Here it is the game theory aspect of the Socratic method which can be particularly offensive and hurtful.

But the problem of emotional abstraction is hardly unique to students of color. It arises anytime a legal issue discussed by the Socratic method involves a matter of emotional significance to a student (child abuse, divorce, rape, same-sex marriage, adoption, etc.).[51] Whatever its virtues,[52] the general difficulty with the Socratic method is that it requires a student to suppress his or her emotions in order to achieve a "neutral" analytic pose and from there to "objectively" manipulate legal rules without regard to the moral and emotional impact of the outcomes they would pro-

---

48 *Id.* at 82. According to Posner the Socratic method is not the only institutional victim of affirmative action. "The *Harvard Law Review*," he writes, "with its epicycles of affirmative action, is on the way to becoming a laughing stalk." *Id.* at 77.

49 And there is seldom a legal question which does not involve issues of race.

50 *See, e.g.*, Kimberle W. Crenshaw, *Forward: Toward a Race Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L. J. 1 (1989); Ann E. Freedman, *Feminist Legal Method in Action: Challenging Racism, Sexism and Homophobia in Law School*, 24 GA. L. REV. 849 (1990).

51 Though even here it would appear that most emotionally charged subjects revolve around issues significant to groups who were excluded from law schools during the dominance of the totemic system and its Socratic method. *See* Lani Guinier, et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994); Freedman, *supra* note 50.

52 *See* Jennifer Howard, *Learning to "Think Like a Lawyer" Through Experience*, 2 CLINICAL L. REV. 167, 172-73 (1995); Burnele V. Powell, *A Defense of the Socratic Method: An Interview with Martin B. Louis*, 73 N.C. L. REV. 957 (1995).

duce.[53] This is bad not merely because it so frequently makes students of color, women, gays, and lesbians uncomfortable, nor merely because it may sometimes make white men uncomfortable. It is bad because it reinforces traditional ideas of the law, legal reasoning, and legal practice, which Posner himself criticizes.[54] But Posner evades all this in lamenting the endangerment of the Socratic method and he attributes the evil to affirmative action without argument or evidence, as though the point is obvious, a matter on which there is great consensus in the profession.

As to affirmative action in faculty hiring, Posner concedes that it is properly defended with diversity and social justice rationales but challenges Duncan Kennedy's allegedly unique assertion "that it will *raise* the quality of scholarship."[55] While Posner is confident that economic and feminist scholarship have "improved the field" by introducing a diversity of approaches to legal thought, he is dubious about the possibility and propriety of using race as proxy for diversity in academic scholarship.[56] According to Posner, identifying "culturally authentic," which is to say non-assimilated, minori-

---

53 *See* Lawrence M. Friedman, *Looking Backward, Looking Forward: A Century of Legal Change*, 28 IND. L. REV. 259, 265 (1995) ("The use of [the Socratic method] practically guaranteed a total detachment of law from politics. If there was to be any discussion of the real world, with all its problems and conflicts, it would take place in the hallways and corridors, not in the classroom."); David Luban and Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J LEGAL ETHICS 31, 62 (1995) ("[I]n the traditional Socratic method, the teacher's own ultimate judgment remains hidden or suspended. While that doubtless teaches students to avoid premature moralizing, it never offers them examples of mature moralizing. The Socratic shell game seems for that reason particularly ill-suited to cultivating ethical judgment."); Susan H. Williams, *Legal Education, Feminist Epistemology, and the Socratic Method*, 45 STAN. L. REV. 1571 (1993). *See also* Suzanne Dallimore, *The Socratic Method — More Harm Than Good*, 3 J. CONTEMP. L. 177 (1977); Duncan Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71 (1970); Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School,"* 38 J. LEGAL EDUC. 61, 67 (1988).

54 Here, I am thinking of all the tenets of formalistic legal reasoning Posner is so eager to eliminate (i.e., the "autonomy" claim that legal materials are all one need analyze, the "objectivity" claim that legal materials are analytic objects which can be studied and manipulated with deductive or scientific rigor, and the "neutrality" claim that such study is and ought to be dispassionate, divorced from one's emotional response to the issues at stake) and the fact that the Socratic method has been identified as one of the primary heuristic devices for their indoctrination. *See* note 53. This is not to say that the Socratic method could never work as a means to other ends, to inculcate other forms of legal reasoning, only that formalism has been its chief product thus far.

55 POSNER, *supra* note 1, at 103 (emphasis added).

56 *Id.* at 105. For instance, although Posner believes that the "favorite expository technique" of critical race theory (narrative) is a "respectable genre," he believes it is "unlikely to transform legal scholarship." *Id.* at 107.

ties who will contribute their "distinctive perspective" is not the same thing as hiring according to race per se where one may end up with minorities "who have adopted the dominant culture."[57] A true commitment to diversity, he suggests, would entail discriminating against assimilated minorities and, in the case of blacks, it would "confine most black law professors to the academic ghetto of critical race theory."[58]

Posner also argues that the greater the preference given to black scholars in hiring, "the farther down the pool of eligibles the law schools will have to dip to fill them, so the average quality of black academics will fall."[59] With a rise in minority hiring would come increased competition for the fewer nonminority slots, and thus, "if merit criteria of selection are used, average quality will rise . . . widening the gap between the two groups and fostering perceptions of minority inadequacy."[60]

On the question of hiring assimilated blacks, I doubt that any black person would characterize herself in Posner's terms as "*completely* assimilated to the dominant white Eurocentric culture."[61] Thus it is presumptuous at best for Posner to assume that Kennedy's desire for diversity requires any wholesale discrimination against "assimilated" blacks. Posner appears to have bought into the notion that critical race theory is the only "authentically" black form of scholarship, that it would somehow be inauthentic or unblack to be a doctrinal scholar in addition to or to the exclusion of writing about race. In this light it is worth noting that as far back as W.E.B. DuBois one can identify at least three paradigms of black political identity, each possessing equal "authenticity" in the sense of having a strong basis of support in black history and consciousness: black nationalism, "assimilation through self-assertion," and assimilation through "adjustment and submission."[62]

---

57 *Id.* at 106.

58 *Id.* at 106.

59 *Id.* at 106.

60 *Id.* at 107.

61 *Id.* at 106 (emphasis added).

62 THE SOULS OF BLACK FOLK 34-42 (1989). Although, DuBois tentatively preferred the second stance, he recognized that such questions of authenticity are not only painful and complex, but question-begging, insofar as they assume any possibility of unequivocal reply. Indeed, contemporary writers have stressed that authenticity is most frequently employed by proponents of the dominant culture as a rhetorical and political device to justify indifference toward, or the refusal of claims for reparation. *See, e.g.*, JAMES CLIFFORD, PREDICAMENT OF CULTURE (1984) (discussing the way native americans have had to appear authentic to make successful claims for land); TONI MORRISON, SONG OF SOLOMON (1982) (demonstrating that authenticity is the requirement and expectation of the dominant culture in her depiction of Pilate, a black

The real dilemma regarding affirmative action is the same axiological question that infects the analysis of post-totemic legal scholarship generally: who and what defines quality? What, after all, are the appropriate merit-based criteria of selection?[63] Ironically this sends us right back to Posner's thesis that ideological dissensus in legal scholarship has produced evaluative dissonance in the academy—a dissonance, recall, which he embraces:

> The problem of evaluating the new legal scholarship is made more acute by the fact that the methods and objectives in the different fields of nondoctrinal scholarship are different. How to compare practitioners in different fields? How to judge whether a critical race theorist's narratives of discrimination are superior to or inferior, as scholarship, to an economist's rational model of discrimination? Only when the practitioners of an academic discipline agree on criteria of excellence will a discipline . . . be able to claim objectivity for its output.[64]

On affirmative action and interdisciplinary scholarship then, we find Posner in an ambivalent position, simultaneously welcoming the demise of the totemic system while revealing vestiges of its logic. He recognizes approvingly that there is no longer any objectivity-producing consensus in legal scholarship as to what quality is, but he then criticizes affirmative action and some forms of interdisciplinary work for lowering quality in some relevantly objective and measurable fashion.

One way to make sense of this ambivalence and how it pervades *Overcoming Law* is to query Posner's strategic position in the legal profession. As a scholar, Posner has been an outspoken champion of law and economics, one of the most influential new schools of thought to emerge from the ashes of the totemic system.

---

woman who goes from being strong and independent, to a black mammy, in order to get a relative out of trouble with the police). Both of these examples are discussed by Susan Willis, who notes that "[t]he dominant culture's desire for authenticity has been enhanced rather than eroded by the mass-market. . . . The only culture not required to be authentic, to replicate its past in its present, is the invisible, never stated, but all-powerful central void of the dominant culture. Can anyone imagine the white middle class put on trial and asked to prove its claim to property on the basis of cultural authenticity." Susan Willis, *Memory and Mass Culture, in* HISTORY AND MEMORY IN AFRICAN-AMERICAN CULTURE 183 (Genevieve Fabre & Robert O'Meally eds., 1994).

63 Unfortunately, legal scholarship has not yet produced a detailed mapping of this axiological quandary. *Cf.* Daniel A. Farber and Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 840-46 (1993). Inspiration and insight can be drawn, however, from the work of Barbara Hernstein Smith in literary criticism — an area no less plagued by axiological disorder. *See* BARBARA HERNSTEIN SMITH, CONTINGENCIES OF VALUE (1988).

64 POSNER, *supra* note 1, at 101.

In *Overcoming Law*, Posner seeks to establish the legitimacy of economic analysis as the rightful heir to the totemic status once held by legal formalism. To do this he must identify law and economics with the esprit de corps which brought down the old totem, but he must simultaneously distance himself from this spirit to demonstrate the superiority of economic analysis relative to competing movements that also occupy the field of contemporary legal theory. The former need encourages a revolutionary tone in which Posner is critical of the old rule of law principles, the ideologies defending them, and the methodological blindness induced therein; the latter, however, often forces him into a reactionary stance where he takes the very same principles seriously in articulating the merits of economic analysis and in attacking other post-totemic movements. Unfortunately, perhaps inevitably as we will see, in this reactionary stance Posner falls back on many of the old formalist methodologies and manifests the same blindness he hopes to overcome.

IV. TOTEMISM TRANSCENDED? POSNER'S MIDDLE PATH

A. *Methods of Merit: Empiricism, Economics, and Pragmatism.*

> The true science of the law does not consist mainly in a theological working out of dogma or a logical development as in mathematics, or only in a study of it as an anthropological development from the outside; an even more important part consists in the establishment of its postulates from within upon accurately measured social desires instead of tradition.[65]

Posner's path to overcoming "law" is decidedly Holmesian. He aims to free legal decision-making from the bounds of tradition and ground it in a scientific method at once empirical, pragmatic, and consistent with classical liberal values. Like Holmes he disdains the legal profession's anti-realism — its prudish denial that a decision's real life consequences should, and in fact do, count in choosing between outcomes. Also like Holmes, he rejects the methods of traditional legal reasoning insofar as they enable or encourage one to avoid confrontation with such consequences when

---

[65] Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 452 (1899). Most comparisons of Posner and Holmes begin with Holmes famous essay *The Path of the Law*. Indeed, Posner believes that Holmes's prophecy in *The Path of the Law*—that "the man of the future is the man of statistics and the master of economics"—"is in the process of being fulfilled at long last" by law and economics. Posner, *Problems*, *supra* note 22 at 466. As the following subsection suggests, however, *Law in Science and Science in Law* may be a better means of getting at the Holmesian core of Posner's scientific spirit.

it comes to so-called hard cases.[66] "[I]n our legal system," Posner writes, "formalism is an unworkable response to difficult cases."[67] Logic, precedent, analogy, plain meaning, originalism, are all part of the traditionalist's arsenal of denial. As Holmes puts it:

> The theory of the law as to any possible conduct is that it is either lawful or unlawful. As that difference has no gradation about it, when applied to shades of conduct that are very near each other it has an arbitrary look. We like to disguise the arbitrariness, we like to save ourselves the trouble of nice and doubtful discriminations.[68]

Thus both Posner and Holmes agree that where underlying values conflict and legal doctrines are not clear judges are called on to "exercise the sovereign prerogative of choice."[69]

Rather than hide this choice in the garb of "empty phrases"[70]

---

66 Holmes defines hard cases as the result of a conflict between two conflicting social desires. "[W]henever a doubtful case arises, with certain analogies on one side and other analogies on the other . . . what is really before us is a conflict between two social desires, each of which seeks to extend its dominion over the case, and which cannot both have their way." Holmes, *supra* note 65, at 460. It has been argued that Posner's enthusiasm for economic analysis, particularly the theory of wealth maximization, has become more cautious because he has conceded that a great proportion of the cases judges handle are easily decided. The implication is that only in hard cases where none of the traditional judicial materials reveal the "right" answer would economic methods be wheeled in. But this is an uncontroversial concession given that the measure and the limit of any legal theory's success is what it says about deciding hard cases. As Posner is well aware, these are the most pressing problems of jurisprudence. Although Posner is more cautious in *Overcoming Law* about suggesting that wealth-maximization is the solution to all hard cases, he has not stepped back from earlier claims that it is the best tool for judges to use. Indeed, his criticism of other methods is so broad, one gets the sense wealth maximization is the only thing Posner intends to leave standing. POSNER, *supra* note 1, at 22-23.

67 POSNER, *supra* note 1, at 12.

68 Holmes, *supra* note 65, at 457.

69 Id. at 461. Posner's argument for limited judicial activism goes as follows:

> 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.

POSNER, *supra* note 1, at 12-13. *See also id.* at 231.

70 Of the reliance on "empty phrases" in legal reasoning, Holmes writes:

> My object is not so much to point out what seems to me to be fallacies in particular cases as to enforce by various examples and in various applications *the need of scrutinizing the reasons for the rules which we follow, and of not being contented with hollow forms of words merely because they have been used very often and have been repeated from one end of the union to the other.*

—incantations of rules which may have lost their connection to the "felt necessities of the time"—Holmes would have judges look to science to measure and compare underlying social desires. Posner's theory of jurisprudence gives content to Holmes's scientific aspirations by positing economics as the proper method to do the work of measurement and comparison. If "it is for science to determine, so far as it can, the relative worth of our different social ends,"[71] Posner believes economic analysis, fitted with a pragmatist epistemology, is best suited to the task. Law and economics, he claims, "epitomizes the operation in law of the ethic of scientific inquiry, pragmatically understood. Its project . . . is to construct and test models of human behavior for the purpose of predicting and (where appropriate) controlling that behavior."[72] Not only does economics predict human behavior, it does so in a way that measures the cost, what Holmes called the relative worth, of social desirables. Hence Posner is confident that "[m]odern economics can furnish the indispensable theoretical framework for the empirical research that law so badly needs."[73]

Why is Posner, following Holmes, so intent upon infusing the law with empiricism? His hope is that an economic social science can navigate a safe passage between the Scylla of formalism and the Charybdis of legal radicalism, that it can facilitate the rejection of traditional rule of law principles without simultaneously having to concede that "law is politics all the way down"[74] and reject the rule of law itself. After all, Posner thinks the rule of law has significant utility in liberal societies: "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."[75] Thus although joining the general assault on the totemic system, Posner parts company with "bad-boy legal realists . . . and their crit epigones who deny that law has any principles."[76]

> We must think things not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and the true.

Holmes, *supra* note 65, at 460 (emphasis added).

71 *Id.* at 462.

72 POSNER, *supra* note 1, at 15-16.

73 POSNER, *supra* note 1, at 19.

74 Mark Tushnet, *Critical Legal Studies: A Political History*, YALE L.J. 1515, 1526 (1991).

75 POSNER, *supra* note 1, at 20.

76 *Id.* at 20.

The theory of judging which emerges from this middle road is one of the central contributions of *Overcoming Law.* It begins with a pragmatic epistemology, the first element of which is a deep commitment to consequentialism, especially its rejection of foundationalist premises.[77] In law, consequentialism posits that the autonomy, objectivity, and neutrality of legal reasoning cannot be defended on purely analytical or theoretical grounds. "[J]udicial decision," Posner reminds us, "predates articulate theory."[78] Therefore, autonomy exists only as a legal fiction (legal reasoners are consummate borrowers), objectivity is made in the foundry of consensus, not guaranteed by the universality of reason, and neutrality is rendered by acknowledging the role of intuition,[79] common sense, bias,[80] even instinct,[81] and checking them with facts rather than pretending these forces do not exist.[82] Legal outcomes, then, are just not by virtue of their formal coherence, but rather by virtue of their ultimate consequences, their ability to match means (rules) to concrete ends (social desires).

The second element of Posner's pragmatic epistemology, which follows from the first, is a commitment to empiricism. Holmes was not the only turn of the century pragmatist who believed that democracy requires a mature social science to inform the structure of its laws. John Dewey was also noted for his plea that democracy be a scientific endeavor. Like Dewey, Posner promotes empiricism as an ethos, a spirit of open-minded inquiry and

---

77 Foundationalism relies on a correspondence theory of truth. It posits that ideas can be grounded independent of human experience and contingency. "Pragmatism," Posner states, "emphasizes the social over the natural." *Id.* at 7. It "is formed to engender doubt about all philosophical foundations, but not necessarily in order to upset the practices that appear to rest on them — rather to show that they do not rest on them, that their validity depends on the evaluation of their consequences rather than on their having foundations; that metaphors drawn from the building trades do not illuminate the justification of social institutions." *Id.* at 463.

78 *Id.* at 194.

79 "Even our most tenaciously held 'truths' are not those that can be proved, probed, discussed, investigated . . . . A proof is no stronger than its premises, and at the bottom of a chain of premises are unshakable intuitions, our indubitables, Holmes's 'can't helps.'" *Id.* at 5.

80 "[A] judge's philosophical or religious or economic or political views are bound to shape his response to specific cases in the open area where judicial decisionmaking is critical." *Id.* at 197.

81 "[I]nstinct," claims Posner, "can be a surer guide to action than analysis." *Id.* at 194.

82 "[P]ersonal values," Posner writes, "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 . . . ." *Id.* at 195.

attention to facts, however socially constructed they may be.[83] "The responsible judge," he writes, "will not be content with a naked statement of values. . . . [H]e will seek to inform himself through empirical inquiry more searching than is normal in judicial opinions. Prudence dictates that before you react strongly to something you try to obtain as clear an idea as possible what that something is."[84] This transition from anti-foundationalism to empiricism is also summed nicely in a passage regarding the indeterminacy of constitutional interpretation:

> One cannot choose among these interpretations on semantic or conceptual grounds. Choice must be based on which interpretation seems best in a sense that includes but also transcends considerations of fidelity to a text and a tradition. The interpretative question is ultimately a political, economic, or social one to which social science may have more to contribute than law.[85]

Where traditionalists suppressed the role of intuition and bias in legal decision-making Posner concedes that their role is inevitable. Where legal realists and their offspring tout various ideological paradigms for decision makers to adopt in considering consequences, Posner offers an economic social science. As the graphic below demonstrates, his theory of decision-making may indeed be a middle way, providing a means of extending legal reasoning beyond its traditional methods and materials without sacrificing rule of law virtues (i.e., objectivity, neutrality, constraint, stability, and predictability). Judges, according to Posner's scheme, can finally apply legal rules to reality and keep the law apace with social change without renouncing the possibility of constraint and succumbing to the charge of illegitimate activism.

---

[83] *Id.* at 331. On Dewey's vision of democracy and science see Margaret Jane Radin, *A Deweyan Perspective on the Economic Theory of Democracy*, 11 CONST. COMMENT. 539 (1994-1995). *See also* Timothy V. Kaufman-Osborn, *Pragmatism, Policy Science and the State in* II JOHN DEWEY: CRITICAL ASSESSMENTS 244-66 (J. E. Tiles ed., 1992); ALAN RYAN, JOHN DEWEY AND THE HIGH TIDE OF AMERICAN LIBERALISM 86-87 (1995).

[84] POSNER, *supra* note 1, at 192-93. *See also* POSNER, *supra* note 22, at 465 ("law needs more of the scientific spirit than it has — the spirit of inquiry, challenge, fallibilism, open-mindedness, respect for fact, and acceptance of change").

[85] POSNER, *supra* note 1, at 207.

TRADITIONALIST THEORY OF DECISION-MAKING
intuition/bias (suppressed)
+ cases/statutes/other legal materials
+ logic/other forms of discretely legal reasoning
= judicial opinion

LEGAL REALIST THEORY OF DECISION-MAKING
intuition/bias
+ cases/statutes/other legal materials
+ consequences (ideologically perceived)
= judicial opinion

POSNER'S PRAGMATIC THEORY OF DECISION-MAKING
intuition/bias
+ cases/statutes/other legal materials
+ consequences (scientifically examined)
= judicial opinion

Of course, whether Posner's theory is possible in practice is a critical question. Perhaps the best way to answer it is to query how Posner himself employs the theory, to ask, in other words, whether in his hands it provides a true middle way or yet another incarnation of the totemic system.

B. Totemism Reinscribed.

1. Empiricism as a rhetorical device.

In *Overcoming Law* the empirical inadequacy of contemporary legal theory becomes a familiar trope. As Posner surveys theorists, ranging from Ronald Dworkin and John Hart Ely to Patricia Williams and Martha Minow, his assessment often turns on whether the theory being pitched is grounded in fact or ideological fiction. He complains, for instance, that "[c]onstitutional lawyers know little about their proper subject matter — a complex of political, social, and economic phenomena. They know only cases. An exclusive diet of Supreme Court opinions," he continues, "is a recipe for intellectual malnutrition."[86]

In one example, Posner offers a criticism of two articles on the *DeShaney* case. In *DeShaney*, the Supreme Court held that the failure of a publicly funded social worker to remove a child from the custody of an unmistakably abusive father before the child was beaten into a vegetative state was not a violation of the Fourteenth Amendment's due process clause.[87] Posner indicates that the case

86 *Id.* at 208.
87 *Id.* at 208.

turned on a distinction between positive and negative liberty, that the Court held the Fourteenth Amendment protects "negative liberty — the right to be let alone by the state — rather than positive liberty, the right to state services."[88] He then turns to an article by David Strauss which argues that the Court should have held the social worker liable under a positive liberty concept of the due process requirement. Claiming that Strauss does nothing to examine the consequences which would result if the Court had decided the case on these grounds, Posner's admonition is harsh:

> Now as it happens the University of Chicago Law School, where Strauss teaches, is one block east of the university's School of Social Service Administration, the nation's premier school of social work. A two minute walk would have brought Strauss into the presence of experts with whom to explore the practical consequences of a decision the other way in *DeShaney*.[89]

Strauss' thesis, coming as it does without consequentialist analysis beyond the confines of the case's facts, becomes for Posner a perfect example of overly ambitious constitutional theorists who are capable of manipulating legal doctrine but lack any substantive expertise relevant to the diverse social arenas in which the doctrinal issues arise. Indeed, Posner suggests that Strauss may actually only be interested in the *DeShaney* case insofar as it provides an attractive set of facts upon which to construct a compelling normative claim for positive liberty in due process analysis.[90] If this is true, Strauss's thesis is merely another abstract theoretical salvo in the ideological battle between positive and negative concepts of liberty — a model of an alternative decision that mimics the Court's ignorance of empirical consequences and thus repeats in legal scholarship the formalism of traditional judicial decision making. "Too many constitutional scholars," Posner laments, "conceive their role as that of shadow judges, writing in the guise of articles, alternative judicial opinions in Supreme Court cases."[91]

Amar and Widawsky's suggestion that the social worker in *DeShaney* could have been held liable under the Thirteenth Amendment, if child abuse were conceived as a form of slavery, fares little better. Here, Posner is most concerned about "metaphorical," as opposed to "literal," readings of key constitutional phrases. The danger, not surprisingly, is that metaphorical read-

---

[88] *Id.* at 208 (citing DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189 (1989)).

[89] *Id.* at 209.

[90] *Id.* at 210.

[91] *Id.* at 210.

ings divorce key terms from their history and intent, effectively "remov[ing] any textual check to constitutional interpretation."[92] Again, Posner is witty, if sharp, in reply. To the suggestion that "'the state turned a blind eye to de facto slavery within its jurisdiction and violated the Amendment,'" Posner quips, "'The state' did not know anything. A social worker employed by the state stupidly though not maliciously failed to remove DeShaney from his father's custody. Is Wisconsin therefore a slave state?"[93]

Posner is less concerned with the viability of analogizing child abuse to slavery than with the fact that other analogies are equally plausible. A choice between analogies is almost always required, and, by Posner's lights, the choice can only be meaningfully informed by taking into account the same empirical issues Strauss ignored.[94] As with Strauss, Posner is especially troubled by Amar and Widawsky's expansive interpretive approach because it fails to address the practical consequences, the actual social costs, such an expansion would entail. Speaking of liberal constitutional theorists generally, Posner concludes wryly, "Implicitly they assume that the incremental social cost of indefinitely expanding federal judicial capacity is zero. They have no sense of priorities. They are piecemeal analysts, like the judges themselves."[95]

The move to practical consequences is attractive for a number of reasons. First of all, it replaces a false sense of autonomy in legal reasoning with a more promising connection to the actual effects such reasoning produces. Rather than allow judges and theorists to disguise their normative stance in empty phrases, an empirical approach forces some measure of accountability into the calculus. Second, depending on the relative hardness of the facts at stake (which is a reflection of the degree of consensus they engender) a commitment to practical consequences introduces the possibility of objective analysis where at present, there is a seemingly interminable war of "all against all" on the level of legal ideology. Finally, depending on the relative universality and fixity of the methods employed, a commitment to empiricism promises some measure of neutrality since it can check with facts the biases introduced by intuition and ideology.

But before embracing Posner's empiricism it is worth noting the inconsistency with which it is applied in *Overcoming Law.*

---

92 *Id.* at 212.

93 *Id.* at 213 (citation omitted).

94 *Id.* at 213.

95 *Id.* at 214.

Although almost every theorist surveyed is accused of having a "weak sense of fact,"[96] Posner makes a number of statements which either have no basis in fact or go unsupported in the text. For example, Posner's confidence in liberalism and science sometimes verges on blind faith. Having just championed the scientist "not as the discoverer of ultimate truths . . . but as the exposer of falsehoods,"[97] Posner makes a facile distinction to explain the disparity in relative health and financial well-being among nations of the world. He states emphatically, "Societies that refuse to play the science game suffer various consequences, including high levels of poverty and illness and an acute risk of being dominated or destroyed by other societies. Those consequences are important to the pragmatist, and a society that ignores them may be inflicting great suffering on its people . . . ."[98] The proposition that societies refusing to play the science game suffer a harder lot may be true, but the cause of this suffering is not to be found, at least not as an initial matter, in their refusal to play the science game. Quite the contrary, it is to be found in the actions of societies already playing the science game without respect for the consequences the game has on others. Posner's argument otherwise is a staggering empirical slip. The majority of contemporary "suffering" societies that "refuse" to "play the science game" are post-colonial — the product of western scientific and economic intrusion or exploitation.

Moreover, Posner's analysis inverts colonialist logic in a way that suggests the colonized are wholly responsible for their fate. It is "their" refusal to play the science game, not the actions of science game players, which explains "their" oppressed condition. This assumes either the moral or the practical superiority of the science game in a context in which many societies have ample reason to question both its merits and the motives of those who promote it. Indeed, the initial distinction Posner draws begs the question of what the science game is. Although Posner seems relatively convinced that science has to do with a process of falsification or of "narrow[ing] the area of human uncertainty by generating falsifiable hypotheses and confronting them with data,"[99] others well versed in the so-called science game have of-

---

96 *Id.* at 205, 298, 311, 367, 377.

97 *Id.* at 6. Elsewhere, Posner makes clear his belief in the affinity between liberalism and science: "[T]he strongest link between science and liberalism . . . is not a love of abstraction; it is a belief, which is fundamental both to scientific progress and to political liberty, in the virtues of free inquiry." *Id.* at 331.

98 *Id.* at 8.

99 *Id.* at 6.

fered compelling definitions of its rules that would make the "religion games" played by the societies Posner labels unscientific more difficult to distinguish.[100] It is important to note that the difficulty here need not even be that Posner's distinction and conclusions are false,[101] it is enough to show that they go unsubstantiated in a book that both criticizes inattention to facts in others and promotes the science game as a superior legal method. Whether the science game is the way out of suffering for certain societies, or just another form of suffering (i.e., cultural rather than economic or political), is indeed a partly empirical question. Nevertheless, the facts on this issue, as well as their moral and social implications, are controverted and deeply contested.[102]

Another slip arises in Posner's discussion of whether "liberalism should be thought antagonistic to feminism."[103] Beginning from the position that "[w]omen have fared much better in liberal societies than in traditional or otherwise antiliberal ones," Posner goes on to attribute this success to the economic and scientific progress that liberalism engenders.[104] Dismissing male dominance theories put forth by feminist legal scholars, he claims that the key to women's emancipation has been technological progress rather than a shift in social values or beliefs. "[W]hat," Posner queries, "enabled women to throw off, if not all their chains, many of them? The economist can point to the expansion of jobs in the service sector, improved household labor saving devices, improvements in contraception, and other economic or technological factors as causes of women's increasing emancipation from dependence on

---

100 *See e.g.*, RICHARD RORTY, *Science as Solidarity and Is Science a Natural Kind?* *in* OBJECTIVITY, RELATIVISM, AND TRUTH 35-62 (1991) (arguing that "science" merely designates a commitment to persuasion or "unforced agreement" rather than any "special set of methods" or any "special relation to reality"). *See also* Roland Barthes, claiming that "the object of science is any material society deems worthy of being transmitted. In a word, *science is what is taught.*" ROLAND BARTHES, THE RUSTLE OF LANGUAGE 3 (1984) (emphasis added). Given contemporary transformations in scientific methodology, the Popperian idea of science, embraced by Posner, may be an outdated paradigm. *See* JAMES GLEICK, CHAOS: MAKING A NEW SCIENCE (1987).

101 Indeed, some of them are quite true. Some post-colonial countries have embraced the science game to their benefit. *See, e.g.*, ROBERT WADE, GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIA (1990) (discussing the rapid industrial success of Taiwan, Singapore and Hong Kong).

102 *See, e.g.*, MARY LOUISE PRATT, IMPERIAL EYES: TRAVEL WRITING AND TRANSCULTURATION 15-107 (1992) (discussing, from a critical perspective, the proliferation of the science game during the period of western imperialism). *See also*, JAMAICA KINCAID, A SMALL PLACE 23-37 (1988) (commenting on the absurdity of expecting the adoption of capitalist values in the post-colonial West Indies).

103 POSNER, *supra* note 1, at 329.

104 *Id.* at 329.

men. To what," he then demands, "can the dominance theorist point? Her own writings?"[105] Moreover, any shift in the ideology of women's place in society is attributed to the political and social force of liberalism. Posner claims that liberalism has "created a friendlier climate for the emancipation of women from traditional bonds and prescribed roles" because it is "antagonistic to immutable status, restricted entry into occupations, and the infusion of religious dogma into political decision-making."[106]

This is all a plausible theoretical account of women's emancipation, but it fails as an empirical account because it makes the liberation of women seem a predestined or natural consequence of liberalism, economics, and the science game. It is as though Posner believes as a matter of common sense that technology and liberal ideology work as a kind of irrepressible liberating force in history, for his assertions here come without data to back them up. Posner simply assumes the superior condition of women in liberal societies without offering any evidence of clear standards by which to objectively measure the relative emancipation of women in societies with different political structures and underlying cultures. There is actually a great deal of debate about whether such comparative questions can ever be meaningfully answered, not merely because the concepts of liberalism and technological progress are indeterminate, but also because the concepts of subordination and emancipation are hotly contested.[107]

One would expect Posner, as a pragmatist, to be particularly sensitive to these underlying terminological debates in evaluating the legal scholarship of feminists.[108] One would also expect him, as an empiricist, to be particularly cautious in making generaliza-

---

105 *Id.* at 356. *See also, id.* at 329-30.

106 *Id.* at 330.

107 *See, e.g.*, Gayle Rubin, *The Traffic in Women: Notes on the "Political Economy" of Sex in* TOWARD AN ANTHROPOLOGY OF WOMEN (Rayna R. Reiter ed., 1975); Martha C. Nussbaum & Amartya Sen, *Internal Criticism and Indian Rationalist Traditions in* RELATIVISM: INTERPRETATION AND CONFRONTATION 326 -38 (Michael Krausz ed., 1989). *Cf.* Bimal Krishna Matilal, *Ehtical Relativism and Confrontation of Cultures in* RELATIVISM: INTERPRETATION AND CONFRONTATION 339-62 (1989).

108 Pragmatism means many things to many people, but Posner seems to contradict his own definition of pragmatism in these passages on women, the science game, and liberalism:

> Pragmatism, in the sense that I find congenial means looking at problems concretely, experimentally, without illusions, with full awareness of the limitations of human reason, *with a sense of the "localness" of human knowledge, the difficulty of translations between cultures,* the unattainability of "truth," the consequent importance of keeping diverse paths of inquiry open, *the dependence of inquiry on culture and social institutions,* and above all the insistence that social thought and action be eval-

tions about what "liberal societies" do absent concrete corroborative information. The reality of liberalism in practice, whatever its ideals, and the degree of emancipation women have achieved within it, seem considerably less pristine than Posner's analysis suggests. It is just this point about liberalism that feminist legal scholars have tried to make.

The difficulty with Posner's willingness to make and rely on generalizations which ignore or suppress empirical complexity becomes especially evident once his analysis shifts to an issue of contemporary concern in the emancipation of women, namely, whether women should be allowed to serve in the armed forces. In addressing this question Posner falls back on biology and technology to explain women's exclusion from service and to deny that ideologies of male domination play any significant role. He writes:

> I do not find it plausible to suppose that women were excluded from the combat branches of the armed forces until recently because of phallocracy. Recent changes in the technology of warfare have reduced the role of brawn, stamina, and aggressiveness. The armed forces' demand for people able to march through mud carrying hundred-pound packs on their backs and to kill at short range with fists or knives or rifle butts or submachine guns has not vanished, but it has shrunk. We live in an age of push-button warfare. Women can push buttons as well as men.[109]

The implication here is that feminists want to blame men for womens' exclusion and oppression when, in fact, it was only neutral biological forces (women are weaker, less aggressive, etc.) that necessitated their exclusion. Since the causes were in fact neutral, the logic continues, the effects are not properly labeled oppressive and attributed to men — the problem was not phallocracy, a will to dominate. Moreover, technology, another neutral, physical force, is properly credited with emancipation, not any history of social or political struggle on the part of women directed at changing the consciousness of men and the structures of institutions they controlled.

Not only is this kind of biological and material determinism a strange bedfellow for a professed pragmatist, it rings particularly hollow as a refutation of so-called feminist "dominance theorists" because it comes without any factual evidence to back it up. In-

---

uated as instruments to valued human goals rather than ends in themselves.

POSNER, *supra* note 22, at 465 (emphasis added).

[109] POSNER, *supra* note 1, at 355.

deed it smacks of the same kind of phallocratic assumptions about women — their emotional and physical propensities, and the roles they are "capable" of performing in society — which Posner denies are relevant to their emancipation.[110]

The difficulty raised by each of these examples is that what seems obvious to Posner by virtue of common sense[111] is not subjected to empirical scrutiny in *Overcoming Law* — a book that takes the sword of empiricism to battle against every major form of legal theory. As a pragmatist, Posner is aware that common sense is but a "lay term" for a person's "frame of reference," that indispensable quantum of "unshakable intuition" which colors one's interpretive universe and all the "facts" lying within. He also knows that any good pragmatist "is both for and against common sense;"[112] *for* common sense because it always operates in the formation of beliefs and decisions; *against* it because common sense can change, can *be* changed, by deeper inquiry or experience.

The trouble with a commitment to pragmatic empiricism is that nothing about it tells us when to take common sense for granted and when to challenge it. There is a constant tension between the questioning, which arises from a desire to change the prevailing consensus by exposing its latent biases, and the reliance which arises from a desire, whether conscious or not, to accept the prevailing consensus and suppress its biases. Ironically, the resolution of this tension by any given theorist often reflects the biases of his or her frame of reference, the prejudices of his or her common sense. It also defines his or her relationship to the status quo. What is commonly accepted can either be grounds for comfort and confidence (the pejorative forms being apathy/indifference and conservatism) or it can generate resistance and inspire transformative efforts (the pejorative forms here being paralyzing cynicism and detached idealism).

In Posner's case, this tension plays out with criticism of most contemporary forms of legal theory and empathy for economic theory. Posner would, for instance, "clip the wings" of contempo-

---

110 *Cf. id.* at 5.

111 A partial list of the "obvious by virtue of common sense" is: (1) that affirmative action is the primary cause of the decline in the Socratic method; (2) that liberalism is more liberating for women than other societies; (2) that this liberation is in fact due to liberalism and science; (4) that child abuse is not in any useful sense analogous to slavery; (5) that due process liberty is negative; and (6) that there are unscientific societies who suffer needlessly by virtue of their refusal to embrace western politics and praxis.

112 *Id.* at 5.

rary constitutional theorists by forcing them to narrow their focus and to get empirical on the issues they address.[113] He would also have feminist legal scholars, critical race theorists, and postmodernists remedy their "flight from fact" by augmenting their theories with empirical research.[114] On the other hand, renowned economic theorists such as Milton Friedman are excused both for their theoretical breadth and for their lack of empirical analysis. Posner writes:

> It shows no disrespect to Friedman to point out that he has not conducted any detailed, painstaking case studies of the subject matter of his policy positions outside of the fiscal and monetary areas and . . . professional licensure. He arrived at those positions as a matter of theory. Had he followed the case-study route his range would have been narrower and economics would be poorer as a result.[115]

Posner has equal sympathy for the theoretical work of Gary Becker on household production. Calling Becker "a formidable theorist," Posner notes that Becker's primary assumption "that people are rational maximizers of their satisfactions. . .has guided fruitful empirical work."[116] For this reason, he concludes, "We need not regret the absence of economic case studies of individual families."[117]

The bias in favor of economic theorists — the latitude Posner is willing to give them in evaluating their contributions — runs beyond the question of empiricism to their mode and style of expression. Postmodernists, Posner announces, "write in an ugly, impenetrable jargon, sometimes with the excuse that to write clearly is to buy into the Enlightenment mythology of unmediated communication between author and reader."[118] On the use of math in the writing of economists, however, Posner encourages great deference, admonishing those who would be dismissive on account of its (arguably ugly and impenetrable) jargon:

> Mention of mathematics raises a larger question, that of complexity versus simplicity in expression. Many people believe with Orwell that writing ought to be as clear as a windowpane, implying simple words and short sentences. For many purposes this is true. But it is not universally true. . . . *[L]imiting the range of one's vocabulary can limit the range of one's thought. A larger, richer vocabu-*

---

113 *Id.* at 209.
114 *Id.* at 311.
115 *Id.* at 432-33.
116 *Id.* at 433.
117 *Id.* at 433.
118 *Id.* at 317.

> *lary, even a more intricate syntax, may enable a greater understanding.* Modern-day economics may overdo math, but it is not true that mathematics is simply an obscurantist mode of communication.[119]

Adam Smith's invisible-hand theory and Darwin's theory of natural selection Posner continues, are "extremely simple . . . once grasped [they] seem (though not to everyone) completely intuitive and obviously correct."[120] He then goes on to associate Ronald Coase's theory of transaction costs with this tradition of "simple theory."[121] Postmodernist tendencies, however, "can lead an author away from clear-headed analysis of social institutions and into a terminological miasma."[122]

The point here is not just to show that Posner is inconsistent in the application of his empiricist critique, nor is it to show that the inconsistency has a bias that works in favor of the type of legal theory he prefers. The point is to expose the danger of a complacent pragmatism in which empiricism becomes a rhetorical device no more valid as a method of legal reasoning than the rhetorical devices of traditional legal theorists. Because pragmatism relies on consensus for its claim to objectivity there is always a danger that what comes to enjoy the status of the objective is based more on homogeneity of outlook than truly exhaustive and self-critical scientific inquiry. The ever-present danger, in short, is an epistemological tyranny of the majority.

Pragmatism is always susceptible to this danger, even, perhaps especially, when it turns to the world of fact. The positive, the empirical, is no less ideologically constructed than the normative. Retrospectively, social science regularly produces "bad facts" which have formed the basis for unjust action. Holmes himself, while famous for many great decisions, is also notorious for his opinion in *Buck v. Bell,* where he unflinchingly declared that "three generations of imbeciles is enough" in upholding a Virginia sterilization law with explicit origins in the eugenics movement.[123] Indeed, history is replete with the blunders of empiricism, instances where what was so confidently taken as fact turned out to be fiction, a

---

119 *Id.* at 311 (emphasis added). *Cf. id.* at 526 (where Posner concedes that scientists employ rhetorical devices "to bolster their authority"). Following the concession, though, is a comment that such devices are less likely either to be employed or unwittingly accepted by a pragmatist. *Id.*

120 *Id.* at 418.

121 *Id.* at 418.

122 *Id.* at 318.

123 274 U.S. 200 (1927).

mere rhetorical device in the garb of truth or reason or reality.[124]

One may believe that the benefits of a pragmatic empiricism outweigh the costs, that as society becomes more sophisticated, so will its science, but this requires a leap of faith many victims of bad social science can ill afford. (I am thinking here especially of those groups who have suffered from the ascription of bad facts on a continuing basis such as women, gays, lesbians, and people of color.) It may, after all, be a leap of faith none of us should be willing to take. Posner's pragmatism presupposes an openness to corrective experience, but this openness itself assumes a margin of error the breadth of which may be radically different for law versus science. Lives only infrequently, and then often indirectly, hang in the balance where scientific experimentation is concerned. In law, however, lives almost always hang directly in the balance. As Robert Cover reminds us, "[l]egal interpretation takes place in a field of pain and death."[125] Our willingness to wait for corrective experience, then, may rightly be weaker in law than in science.

Posner's pragmatism tries to recognize the social construction of facts in order to liberate legal theory in general, and economic analysis in particular, from its traditional foundationalist moorings. Following the pragmatic moves of Holmes and Dewey, he offers empiricism as a method that can save legal theory from relativism and radicalism. But in order to make empiricism compelling, Posner must deny the degree to which social construction can so change the nature of facts for different communities inhabiting the same legal space that empiricism becomes a fictive device, incapable of providing either the objectivity or the constraint law requires to keep its distance from politics.[126]

---

124 The eugenics movement is a compelling example. On the relation between the eugenics movement and the contemporary "scientific" study of racial differences see WILLIAM H. TUCKER, THE SCIENCE AND POLITICS OF RACIAL RESEARCH (1994). Posner appears not to have any serious qualms with such research. Indeed, he characterizes those who do have qualms with it as misguided adherents of political correctness:

> If you show a player in [the political correctness] game a sheaf of scientific reports purporting to show that the races or the sexes differ in their potential for doing mathematics, the player will refuse to read them; the empirical investigation of racial and sexual differences is rejected in that game, just as the empirical investigation of planetary motion was rejected by Bellarmine [the Cardinal who refused to look through Galileo's telescope at the moons of Jupiter because their existence seemed to refute the orthodox view that the planets were fixed to the surface of crystalline spheres].

POSNER, *supra* note 1, at 7.

125 *Violence and the Word*, 95 YALE L.J. 1601 (1986).

126 This ambivalence or tension in Posner's pragmatism was noted in a review of

A vigilant anti-foundationalist pragmatism, one ever suspicious of common sense and consensus, holds some promise. But Posner himself demonstrates the strength of the temptation to take "can't helps" for granted, to work from, rather than against, or in spite of them. He cannot help preferring economic discourse to postmodernist discourse, cannot help doubting the veracity of Patricia Williams' stories,[127] cannot help believing biology, not misogyny, was the key limitation on women's freedom. Insofar as Posner's "can't helps" are America's "can't helps" there may be little cause for concern—a community of consensus may exist to which those who disagree with Posner must either adjust or pose a credible challenge. But this is an inference legitimately ventured only on the most solid of empirical documentation. And even if it were true that such a community of consensus exists, would that prove a legitimate victory in the marketplace of ideas, or just a tyranny of the majority against which the very theorists Posner attacks are struggling for recognition?

2. Formalism and economics.

Posner must concede that economic analysis has formalistic elements. It is, after all, a formal theory that works from abstract assumptions about human beings in order to better predict their behavior.[128] Yet he is more cautious about whether it fits the criteria of legal formalism (autonomy, objectivity, and neutrality). If the most formalistic aspect of traditional legal theory was its claim to autonomy, Posner is right that law and economics is not the "new Langdellism."[129] Economic analysis of law "almost by definition denies law's autonomy."[130] It rejects the idea that legal reason-

---

The Problems of Jurisprudence by Stanley Fish. Stanley Fish, *Almost Pragmatism: Richard Posner's Jurisprudence*, 57 U. CHI. L. REV. 1447, 1459-62 (1990).

127 POSNER, *supra* note 1, at 373-77.

128 *See* POSNER, *supra* note 22, at 61 ("Having criticized legal formalism at such length I should make clear that I am not opposed to all formalism. . . . Economics has its formalist side. . . . Abstracting from particulars is an essential part of science; so in a sense all science, not just economic science, is formalist.").

129 *Id.* at 18. In *The Problems of Jurisprudence*, Posner again tries to cabin legal formalism as commitment to autonomy:

> The most useful sense of this protean term, however, derives from the contrast between form and substance — form referring to what is internal to law, substance to the world outside of law, as in the contrast between formal and substantive justice. The autonomy and objectivity of law are secured by confining legal analysis to the formal level, the level requiring only an exploration of the relations among legal ideas.

POSNER, *supra* note 22, at 4.

130 POSNER, *supra* note 1, at 18.

ing is an independent discipline free of the need to borrow from other fields to enhance its analytic power. It also rejects the idea that law either does or should evolve as an internal system according to its own logic "rather than in response to political and economic pressures."[131] And although economic analysis is a deductive system like Langdellian logic, Posner is quick to distinguish the two methods on the grounds that the former is falliblist, insistent upon empirical verification and open to revision based on corrective experience. "Langdell," he writes, "wanted to stop with deduction—with comparing the facts of a case to a rule derived from a priori concepts . . . . The economist is committed to testing his theories empirically and discarding them if falsified by data."[132]

Nevertheless, it is still worth asking whether Posner's economic analysis escapes the bad traits of legal formalism merely because it introduces an interdisciplinary empirical method—worth asking because, as Posner has commented elsewhere, "[t]he only prerequisite to being a formalist is having supreme confidence in one's premises and in one's methods of deriving conclusions from them."[133]

Rational actors and reified abstractions. The notion that human beings are rational maximizers of their wants in life is the centerpiece of economic analysis. Interestingly, Posner claims that the assumption need not in fact be true. "Realistic about means as well as ends, economics does not depend on the idea that human beings are effortless and infallible calculators."[134] For instance, Posner points out that "[a] market may behave rationally, and hence the economic model of human behavior would apply to it, even if most of the individual buyers (or buys) are irrational."[135] Thus, economic models can work "even when the [rational actor] assumption is false."[136]

The fictional status of the rational actor assumption indicates that it is a theoretical abstraction. But according to Posner, this abstraction is saved from the label of formalism because the models it produces are empirically verifiable. As we have seen, one of the defining characteristics of a formalistic legal theory is its ability to "spare[ ] the lawyer or judge from a messy encounter with em-

131 *Id.* at 17.
132 *Id.* at 19.
133 POSNER, *supra* note 22, at 40.
134 POSNER, *supra* note 1, at 16.
135 *Id.* at 16.
136 *Id.* at 17.

pirical reality."[137] In contrast, traditional concepts such as private property and free contract are formalistic because they function as categories within an a priori universe of legal reasoning utterly divorced from the realities of social intercourse.

Although Posner applauds critical legal studies scholars such as Morton Horowitz for demonstrating the ideological underpinnings of the traditionalist's theoretical abstractions—for showing how they become reified, taken as necessary reflections of nature, rather than contingent human constructions—he accuses critics of falling into the same trap. "[I]n the flush of youth, realists and especially the crits had really just exchanged one set of reified abstractions—Property and Contract—for another and equally unexamined set—Equality, Liberation, Socialism, and Democracy."[138] Indeed, this criticism (that contemporary legal theorists have adopted the formalistic habit of simply positing some new abstract legal concept to address a perceived social ill without any connection to the world of fact) is pervasive in *Overcoming Law.*

Strauss and Amar and Widawsky are examples we have visited, but the book is filled with chapters where Posner illustrates the "recklessness"[139] with which these abstractions are advocated. Catherine MacKinnon, he claims, is so "obsessed" with pornography that she reifies an abstract concept of gender equality in order to justify regulation of pornographic expression that would otherwise violate the First Amendment.[140] Drucilla Cornell reifies Hegellian concepts such as "reciprocal symmetry" and the "personhood" aspects of property to justify the elimination of the common law doctrine of employment at will.[141] Martha Minow reifies the artificiality, the constructedness, of human relations and structures of perception in order to argue against the "ascription of legal rights and duties" on the basis of categories (i.e. normal/disabled) that impose badges of inferiority on certain groups.[142] Patricia Williams reifies both blackness[143] and whiteness[144] in her attempts to challenge the typical legal constructions of race, and Robert Bork reifies original intent in the process of arguing that it

137 POSNER, *supra* note 22, at 41.

138 POSNER, *supra* note 1, at 281.

139 *Id.* at 362.

140 *Id.* at 359.

141 *Id.* at 302-5.

142 *Id.* at 287-89.

143 *Id.* at 373, 374-75.

144 *Id.* at 380.

is the only responsible mode of constitutional interpretation.[145] Posner plays the role of demystifier, exposing the ideological underpinnings of each theory, warning against the temptation to believe its concepts are either natural or necessary. Wielding economic empiricism as method, he demonstrates the "real" consequences, especially the costs, such proposals would entail.

A clarification is in order, however. The lay definition of reification is simply to treat something which is in fact contingent and socially constructed as though it were natural, inevitable, necessary. It means to "thingify." A more complex, politically charged definition is offered by Robert Gordon:

> This process of allowing the structures we ourselves have built to mediate relations among us so as to make us see ourselves as performing abstract roles in a play that is produced by no human agency is what is usually called (following Marx and such modern writers as Sartre and Lukács) reification. It is a way people have of manufacturing necessity: they build structures, then act as if (and genuinely come to believe that) the structures they have built are determined by history, human nature, economic law.[146]

Under either definition it is difficult to see how any of the theorists listed above except Bork, and perhaps Posner himself, is guilty of purveying reified abstractions. One of the essential elements of reification is that there already be an existing structure of social action which then gets treated as though it were natural or inevitable. That is, the process of reification requires some cognizable social practice to reify. (The classic example is capitalism and its attendant ideologies.) All the theorists except Bork are in fact arguing *against* already reified social practices and *for* social practices which do not yet exist. Perhaps the only unifying tenet of these theorists is that the existing constructions of humanity (race, gender, physical ability, and labor) are neither natural nor inevitable, and therefore hold no special claim to the legal relations they produce, protect, and preclude. Thus the notion that they are guilty of dealing in reified abstractions is at least somewhat ironic. Indeed it would be a supremely ironic victory for law and economics if the rational actor assumption—one of the very first concepts to which the label "reified abstraction" was attached—was deemed a useful premise for legal reasoning while most other concepts of human behavior were relegated to the trash bin of reification.

---

145 *Id.* at 240.

146 Robert W. Gordon, *New Developments in Legal Theory in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 420 (D. Kairys ed., rev. ed. 1990).

Now Posner's point may be more complex. He may be saying that, unwittingly, theorists who attack today's reified abstractions are merely "thingifying" their own ideals for tomorrow in the process. By treating their concepts as natural or inevitable ways of perceiving the world such theorists commit a formalistic error akin to that which they so often criticize in traditional legal theory. "Even a Horowitz," Posner remarks:

> cannot escape the lure of formalism. The inseparability of public and private is . . . as much a dogma for him as their separability is a dogma of classical liberals. He seems unable, moreover, to visualize an alternative to legal formalism, and this failure of imagination leads him into a formalist trap. All law for Horowitz is divided into formalism and politics, with the latter viewed as an arena of power, of inarticulate struggle.[147]

If this is Posner's point about reification, though, it is difficult to see how it contributes to a meaningful critique of radical theorists. Many radical theorists have raised the issue that we lack a language either for justification or transformation of the status quo that can work apart from reification in Posner's sense of the term. Theorization and persuasion may simply require that we abstract and "thingify." In this case the interesting question is not whether reification exists, but rather *what* is being reified and whether it is done *self-consciously* or not. Patricia Williams, for instance, relates stories of white racism and black innocence quite self-consciously. This may reify whiteness as evil and blackness as good, but it does so for the explicit purpose of combating the hegemonic reifications of race that legitimate racial oppression. Martha Minow may reify the contingency of social meaning when she insists that the disabled are just different, but she does so to combat the reification of biology which undergirds societal assumptions about the inferiority of the disabled. In this sense, the debate about whether a theory relies on reified abstractions for hegemonic or counter-hegemonic purposes resembles the tired debate about whether one can distinguish invidious from remedial racial discrimination. Those on the right tend to think one can't or shouldn't, and those on the left tend to think one can and must.

Speculative consequentialism and the rhetoric of cost. "A pragmatist," Posner reminds us, "is interested in the consequences of reform proposals, and one consequence is cost."[148] The most basic

---

147 POSNER, *supra* note 1, at 284. For his more general critique of dogmatism in leftist pragmatic theory *see id.* at 393.

148 *Id.* at 290.

formalistic threat of economic analysis as legal theory, however, is the reduction of general social consequences to narrow economic costs. One of the most frequent criticisms in *Overcoming Law* is that contemporary legal theorists promote reforms without analysis of what these changes will cost. Minow wants the disabled to be treated as if they were normal; Strauss wants social workers held liable for failing to prevent child abuse, Radin wants tenants to be able to renew their leases indefinitely; and Cornell wants workers to be fired only upon a showing of just cause. None of them, however, offer any detailed consideration of the economic viability of their proposals, and, as Posner argues, economic analysis reveals that their proposals may have effects opposite from those desired. The disabled may be resented for sucking inordinate resources from general education, social workers may be paralyzed because they will be liable for both action and inaction, rental housing may disappear as tenants continuously renew their leases, and unemployment may rise while wages fall as job security is mandated.

Posner's point is well taken. Legal theorists often talk as if the cost of a given course of action is not relevant to its normative validity. The danger, however, is that economic analysis will become yet another formalistic method of speculating about hypothetical bad consequences much like Wechsler's neutral principles and Landgell's logic. The danger is particularly acute prior to empirical verification, and, unfortunately, most judicial decisions in hard cases take place in this situation. The temptation to rely on economic cost as a measure of social consequences can thus become just another form of abstract legal reasoning, divorced from the complexity of reality, which allows judges to avoid a true confrontation with conflicting social desires. Posner himself concedes that "most economic analysis is partial, and therefore incomplete, seeking to explain a part of the social world rather than the whole of it."[149]

A related problem hinted at above is reductionism. The economist may be tempted to focus only on cost by asking about efficiency and wealth maximization because they are more readily measured than moral, emotional, or political consequences. Indeed, Posner has repeatedly suggested that this is the proper role of judges in hard cases, focusing on an ostensibly neutral and objective goal such as maximizing wealth and/or efficiency while leaving difficult, indeterminate, distributive questions to legislatures.[150]

---

149 *Id.* at 344.

150 In *The Problems of Jurisprudence* Posner writes:

But suppressing non-economic consequences in this fashion has two formalist consequences.

First, this separation of decision-making power mirrors the Legal Process school's emphasis on decisional jurisdiction as a means of ensuring judicial restraint. "Here," as Mark Kelman has written, "the legal economists reengage the typical mainstream Legal Process academics concerned above all with the allocation of decision-making authority."[151] As we have seen, Posner ridicules "process jurisprudence" for its formalism. Ironically, he is especially critical of its willingness to leave so much in the hands of legislators. "[T]he legal process generation," he claims, "substituted an unreflective, indeed naive, faith in the probity and wisdom of legislators and administrators. Legal fiction flourished as before, but bromides about federalism and institutional competence replaced ones about freedom of contract."[152] Why the delegation of distributive concerns to legislature is any less a formalistic dodge than the legal process generation's desire to delegate so-called political questions to the same branch goes unanswered in *Overcoming Law.*

Second, the focus on efficiency and wealth maximization is inherently formalistic. Both principles rely on a highly abstract and politically charged definition of what people value. If one only measures preferences as they are revealed in the marketplace, a tainted picture of social desires and costs emerges—one that corresponds to the dictates of formal economic theory, but not to empirical reality. Again, as Mark Kelman illustrates, "the fact that people may be unable either to pay much to make a certain use (or even to resist large bribes to waive the right to insist on that use unless compensated) does not really mean that they don't value the use highly; the legal economist's focus on wealth-dependent valuation of resources is simply biased, without consequentialist explanation,

---

> Legislatures . . . have by virtue of their taxing and spending powers powerful tools for the redistribution of wealth. So an efficient division of labor between the legislative and judicial branches has the legislative branch concentrate on catering to interest-group demands for wealth distribution and the judicial branch on meeting the broad-based social demand for efficient rules governing safety, property, and transactions.

POSNER, *supra* note 22, at 360. Particularly prominent in other writings by Posner is the combination of this proposition with the assertion that wealth maximization has been the hidden logic of the common law. *See id.* at 359; RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 22-23, 251-264 (4th ed. 1992).

151 Mark Kelman, *A Critique of Conservative Legal Thought in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 442 (D. Kairys ed., rev. ed. 1990).

152 POSNER, *supra* note 1, at 76 (citation omitted).

toward those with market power."[153] In this sense, economic analysis provides only a partial, income-biased empirical method. Other means of valuation are formalistically dropped from the picture, and judges are thereby authorized to make decisions about conflicting social desires with market blinders on, no different in effect than the laissez-faire blinders of the Lochner era.

A good example of the formalism Posner's blend of empiricism and economic analysis produces is his willingness to reject (on the grounds that it is "inefficient and regressive"[154]) Cornell's suggestion that we eliminate employment at will. On the efficiency claim, Posner runs a clean, relatively sophisticated economic analysis which allows him to conclude that granting workers tenure would not be "an efficient method of fostering [cooperative relations between labor and management]."[155] "If it were," Posner quips, "why would not companies adopt it without prodding by government?"[156] This is precisely the kind of blindness typically induced by wealth-dependent valuation. Having zeroed in on efficiency as the main consideration in evaluating a change in the structure of employment, the market is assumed to already indicate what is justified by efficiency. The result is a profoundly conservative analysis which, by shifting all "distributive" concerns off the judge's palate, ignores the arbitrariness of the initial set of entitlements in which the market functions along with a whole host of other social consequences relevant to the evaluation of employment at will.[157]

Posner attempts to dismiss some of these consequences by arguing that eliminating employment at will would be regressive, a reversion from contract to status. Here he employs the traditional lawyer's techniques of legal reasoning that he derided in Chapter One to speculate further on the bad consequences job tenure would produce and to avoid a head on confrontation with the full normative import of Cornell's suggestion. Although job tenure might enhance an individual's sense of personhood, Posner argues, tenure might also be a denial of personhood—"forc[ing an employee] to forgo his preferred job-tenure package and accept a

153 Kelman, *supra* note 151, at 443. *See also* MARGARET JANE RADIN, CONTESTED COMMODITITES (1996) (discussing problems of value-commensurability and reductionism as problems of commodification in the rhetoric and practice of economic analysis).

154 POSNER, *supra* note 1, at 300.

155 *Id.* at 309.

156 *Id.* at 309.

157 Kelman, *supra* note 151, at 443.

lower wage in exchange for greater job security . . . ."[158] He goes on to reduce the concept of personhood and its relation to property to a claim "merely that everyone dislikes losing what he had grown accustomed to having."[159]

Posner then queries rhetorically whether those who already have some form of tenure in the workforce have more personhood than those who currently do not. "Does the union worker have more personhood that the nonunion worker? Does the civil servant have a greater sense of personality than his counterpart who works without tenure in a private sector job?"[160] Having drawn the positive consequences of job tenure into question, Posner then juxtaposes these against the certainty of its negative consequences. "[I]t is far from clear," he remarks, "that Cornell's proposal would if adopted cause these notions [personhood and reciprocal symmetry] to be more fully actualized than they already are. What it clearly would do is curtail freedom of contract, an important part of Hegel's notion of freedom."[161]

Posner's negative speculative stance in the analysis of personhood generates some dubious, unempirical generalizations. For instance, losing one's job is assumed to be a "known risk" which apparently "anyone who desires and is willing to pay for" can negotiate themselves out of, either by contract or by entering part of the work force which offers job protection.[162] On being fired under the common law regime of employment at will, Posner dismissively minimizes the harmful effects, once again dodging any real confrontation with the concept of personhood and its relation to an individual's experience of work or lack thereof. "Given unemployment and welfare, [the consequences of being fired] do not even include becoming a poor person, in the sense of someone utterly destitute without property . . . ."[163] Even if the effect *is* to become poor in Posner's thin sense of the term, he claims startlingly that "[p]oor people in the United States have enough goods to retain a lively sense of themselves as persons. It is patronizing," he ventures with confidence, "to suggest otherwise."[164]

Finally, Posner hammers home the point that job tenure would be regressive by implying a term into Cornell's argument

---

158 POSNER, *supra* note 1, at 304.
159 *Id.* at 303.
160 *Id.* at 305-6.
161 *Id.* at 306.
162 *Id.* at 305.
163 *Id.* at 303.
164 *Id.* at 303.

and analogizing job tenure to a practice laden with highly charged, negative moral and emotional sentiment. First, job tenure is assumed by Posner to logically imply a right on the part of the employer "to demand a reason of the employee for quitting."[165] From there he suggests that job tenure is troublingly analogous to slavery since "the employee who could not show just cause for leaving his employment might be forced to spend his whole life in a job he hated."[166] In sum, job tenure would take us long strides back on the path, reified here as logical and progressive, that liberal societies have traveled to freedom. "Employment at will," Posner writes, "happens to be the logical terminus on the road that begins with slavery and makes intermediate stops at serfdom, indentured servitude, involuntary servitude, and guild restrictions."[167]

The formal resemblance to Wechsler's rhetorically embellished "speculation on the deleterious effects of segregation" is striking. Although economic concepts are interspersed with, if not wholly substituted for, purely legal concepts, the theorizing remains abstract and unempirical. Posner manifests the same dependence on logic, rhetorical persuasion, and hypothesis, and, just as he says of Wechsler, "the only consequences he is interested in are speculative bad consequences of the position that he questions."[168] Thus even if all that Posner argues against eliminating employment at will turned out to be true (and this is far from clear), he has not escaped the lure of formalism in the process. For an exclusive focus on the relations between legal concepts Posner substitutes economic conceptualism; for homogeneity of outlook and of values as the motor of consensus he substitutes a pragmatic philosophy which indeterminately relies on and questions consensus; for indifference to the empirical world he substitutes an almost obsessive, if incomplete and potentially biased, economic empiricism; and for antipathy to legal novelty born of prudish commitment to precedent he substitutes antipathy to legal novelty born of excessive commitment to the principles of neoclassical economics.[169] The predictive accuracy of his method would therefore be no answer to the question whether it is the way legal theorists should reason, whether it is a true middle path between traditionalism and radicalism.

---

165 *Id.* at 306.

166 *Id.* at 306.

167 *Id.* at 301.

168 *Id.* at 73.

169 *See supra* notes 30-32.

V. CONCLUSION

The old totem is dead. Law is not science, an art of deduction or a priori reasoning; nor is law independent of the political, social, and economic forces which shape our cultures, our intuitions, and our conceptions of justice. About this there is now almost universal consensus. Joining the ranks of contemporary dissenters (a group he calls "Skeptics"[170]), Posner participates in reenacting and celebrating the demise of the old totem. *The Problems of Jurisprudence*, Posner's 1990 farewell message to the epistemology and metaphysics of traditionalism, is a great achievement in this regard.[171] In *Overcoming Law*, however, we find Posner magnifying and implementing his pragmatic, social scientific legal theory (first suggested in *The Problems of Jurisprudence*) with considerable ambivalence. This ambivalence, I have tried to show, is born of a need to save economic analysis from being deemed just another post-totemic ideology—a need itself born of the rather nostalgic, if not thoroughly totemic, desire to save law and legal theory from anarchy, from a full fledged descent into competing idealisms and ideologies. Posner makes credible anti-foundationalist, anti-formalist gestures toward the camp of Skeptics and even places economic analysis on the Skeptics' epistemological premises, but he then slips into the same traditionalist habits that he so acutely criticizes in an attempt to avoid the utopianism and nihilism which Skeptical theories supposedly embody.[172]

On the one hand, it is tempting to conclude that there simply is no middle road—no denial of formalism that does not require an acceptance that law is politics all the way down, and no acceptance that law is politics without denying that the dream of a viable formalism can ever be realized apart from the very totemization which legal theory has so recently escaped. On the other hand, it is tempting to embrace the notion that a pragmatically-based economic social science (or some other hybrid methodology) can traverse the path to justice without succumbing to the pitfalls of either formalism or radicalism. These are the temptations which polarize the field of legal theory today. The old totem is dead and each

---

170 POSNER, *supra* note 22, at 32-33.

171 *See* Sanford Levinson, *Strolling Down the Path of the Law (and Toward Critical Legal Studies?): The Jurisprudence of Richard Posner*, 91 COLUM. L. REV. 1221 (1991) (book review).

172 On the problem of utopianism *see* POSNER, *supra* note 1, at 295. On nihilism in the descendants of legal realism *see id.* at 20.

legal theorist faces a choice between them in venturing onto the field.

In favor of the first temptation it is worth noting with Max Weber that "[a]n anarchist can surely be a good legal scholar"—this because:

> [T]he Archimedean point of his convictions, which is outside the conventions and presuppositions which are so self-evident to us, can equip him to perceive problems in the fundamental postulates of legal theory which escape those who take them for granted. *Fundamental doubt is the father of knowledge.*[173]

Weber's point is that realpolitik—"the art of the possible"[174]—is not the only, certainly not the best, form of socio-legal analysis. "The possible," he reminds us, "is often reached only by striving for the impossible that lies beyond it."[175] Robert Gordon makes a similar point in reply to the charge that critical theory is idealism. The charge is true, he writes, "in that the belief it criticizes is indeed that among the main constraints upon making social life more bearable are these terrible, constricting limits on imagination . . . ."[176] Overcoming these constraints, "getting to the point of seeing that change is possible, is a necessary first step. People do not revolt because their situation is bad; they can suffer in silence for centuries. They revolt when their situation comes to seem *unjust* and *alterable*."[177] Radicalism in legal scholarship, then, however disturbing or unconventional its voice, may have as much to contribute to the life of the law as any more "practical," more "predictive," or more "empirical" method such as economic analysis. One might, in fact prefer some version of radical skepticism precisely because of the totemic temptations latent in any attempt to establish a middle position.

In favor of the second temptation we have all the dangers, all the weaknesses of radical skepticism so assiduously detailed in *Overcoming Law*—a book perhaps best described as a plea for the art of the possible in legal theory. Unfortunately, as between the two (radicalism and realpolitik) there is no neutral, empirical, or even ethical means of choosing.[178] Here, then, it is perhaps most true

---

173 MAX WEBER, *The Meaning of "Ethical Neutrality" in* THE METHODOLOGY OF THE SOCIAL SCIENCES 7 (Edward A. Shils and Henry A. Finch ed., trans. 1949) (emphasis added).

174 *Id.* at 23-24.

175 *Id.*

176 Gordon, *supra* note 146, at 422.

177 *Id.* (emphasis original).

178 As Weber puts it:

> [E]ven in the sphere of personal conduct there are quite specific ethical

that one ends up falling back (hopefully with caution, if not with deep skepticism) on intuition, experience, and, alas, common sense.

---

problems which ethics cannot settle on the basis of its own presuppositions. Those include above all, the basic questions: (a) whether the intrinsic value of ethical conduct — the "pure will" or the "conscience" as it used to be called — is sufficient for its justification . . . or (b) whether the responsibility for the predictable consequences of the action is to be taken into consideration. All radical revolutionary political attitudes . . . have their point of departure in the first postulate; all *Realpolitik* in the latter. Both invoke ethical maxims. But these maxims are in eternal conflict — a conflict which cannot be resolved by means of ethics alone.

WEBER, *supra* note 173, at 16.