

PRAGMATISM AND LAW: A RESPONSE TO DAVID LUBAN

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Judge Posner's "Pragmatic Adjudication"¹ is enormously refreshing. It cuts through an immense amount of tiresome and pointless talk about "the nature of law" and "the relation of law to politics" and gets down to the question: how should appellate court judges in a particular country at a particular time do their work? It not only argues lucidly for a particular answer to that question, but it also gives a good sense of what it must be like to be in Judge Posner's shoes. Posner helps you understand what sorts of things judges have to worry about, and what sorts of self-doubt they experience. His frankness about the need—given certain specifically American conditions—for judicial rule-making is as cheering as it is infrequent. His claim that judges would be blameworthy if they failed to have emotional reactions to certain statutes, and his reminder that, in the end, every society has to trust its wise elders, are similarly illuminating.

If, having read Posner, you wish there were more judges like him, you might nevertheless agree (as I do) with Thomas Grey that these desirable judges need never have considered, and can forever remain in blithe ignorance of the pragmatist philosopher's critiques of metaphysics and epistemological foundationalism.² Though Posner himself has read lots of pragmatist and non-pragmatist philosophers, another judge, one who would endorse everything in Posner's paper, might well have read so little philosophy as to have no views whatever on such questions as:

(1) Should true beliefs be thought of (a) as accurate representations of reality, or (b) as useful rules of action?

(2) Does reality (a) have an intrinsic nature which we must try to discover, or (b) are all possible descriptions of it equally relational and extrinsic, in the sense of having been chosen in order to gratify various human needs and interests?

(3) Are the traditional problems of metaphysics and epistemology (a) inevitably encountered by any reflective mind, or (b) do they arise only in certain socio-cultural situations? Should we

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¹ Richard Posner, *Pragmatic Adjudication*, 18 *CARDOZO L. REV.* 1 (1996).

² Thomas C. Grey, *Freestanding Legal Pragmatism*, 18 *CARDOZO L. REV.* 21 (1996).

try (a) to solve them, or, (b) by altering our own socio-cultural situation, to dissolve them?

(4) Do we think because (a) we take pleasure (as David Luban puts it) "in the rapt, silent, yet active contemplation of truths, regardless of whether they pay"³ or (b) in order to solve problems?

I think Grey is right to suggest that this philosophical ignoramus could, *ceteris paribus*, be just as good a judge as Posner. We want our judges to have read widely—to be cultivated men and women—but if one judge cannot read novels, another cannot read economics, and still another cannot read metaphysics and epistemology, that is no great matter. Somebody can be cultivated even if he or she has a few blind spots. Many useful political thinkers and agents seem to have found metaphysics and epistemology pretty silly. Thomas Jefferson professed himself unable to read Plato, despite repeated attempts. He showed no interest whatever in the epistemological works of Hume and Locke, though he sopped up their political writings. Some people just cannot hack metaphysics and epistemology (or even metaethics) but that does not prevent them from successfully fulfilling their socio-political functions.

What about the judge who does enjoy reading philosophy, but has bad philosophical taste? This judge answers "a!" to each of the above questions. Would her commitment to these wrong answers make her less ready to accept Posner's description of how she should do her job? I cannot see why it should. Such a judge might be thoroughly sympathetic to Posner's account of what our country needs from its appellate courts, even though she is also thoroughly sympathetic to John Searle's warnings against the baneful influence of Kuhn, Derrida and Rorty.⁴ If Posner had used some buzzword like "holist" to contrast with "positivist," instead of using "pragmatist," his colleague might never have suspected that Posner would—or so I fondly imagine—answer "b!" to all of the above test questions.

Suppose she finds out that she disagrees with Posner on all matters epistemological, metaphysical, metaethical, and metaphilosophical. Once she recovers from the initial shock, I suspect this would matter as little to their collaboration on the bench as her discovery that Posner is an atheist (while she is a cradle Catholic who has never had any serious doubts about the faith,

³ David Luban, *What's Pragmatic About Legal Pragmatism?*, 18 *CARDOZO L. REV.* 43 (1996).

⁴ See John Searle, *Rationality and Realism: What is at Stake*, 22 *DAEDELUS* 55-84 (1992).

even though she regards the present pope as an old fuddy-duddy). Few of Jefferson's contemporaries could have imagined that one day you would see atheistical and devout jurists sitting around the same table, arguing out, peaceably and fruitfully, the constitutionality of legal barriers to gay marriage. But one of the nice things about contemporary America is that such arguments take place all the time. The concluding section of Grey's paper helps one see how this is possible.

Like Grey, I "have trouble seeing how . . . Rorty's metaphysical⁵ anti-realism (or alternatively Putnam's 'internal realism')—is supposed to help deal with those 'real human problems' which the pragmatists say philosophers should work on."⁶ But, as Grey goes on to say, not all pragmatist philosophy professors should spend all their time on real human problems. Some of us are detailed to work part-time on, for example, Searle.⁷ We carry out this assignment by refining still further the ever more complex and technical arguments for "b" and against "a." Searle is to us as Cardinal Ratzinger is to Hans Küng and his allies. Küng hopes that his church will spend less time on theology and more on real human problems, and that the future will hold ever fewer Ratzingers. But, trained as a theologian, he serves a useful function by doing his little reactive thing—even while foreseeing that thing's eventual obsolescence.

David Luban and I disagree on this question of obsolescence. He is inclined to answer "a" to question (3) above, though doubtless he would add some qualifications. Luban sees something like a natural order of argument stretching from jurisprudence to philosophy. He sees metaphysical and epistemological disputes not as optional, but as inevitable once one presses, Socratically, for justification of morally significant decisions. He says, for example:

The Supreme Court's "inviolability of the human personality" [a phrase the court used in deciding a case about the right to self-incrimination] may best be understood as a secular counterpart of the immortal soul that concerned the Inquisition. It is a philosophical concept, and it is hard to see how the legal argument

⁵ I prefer Luban's description of me as a "postphilosophical pragmatist" to Grey's suggestion that I still hold a metaphysical view. But I see what Grey means.

⁶ Grey, *supra* note 2, at 32.

⁷ See Searle, *supra* note 4; and my reply: Richard Rorty, *Does Academic Freedom Have Philosophical Presuppositions?*, 80 *ACADEME* 52-63 (1994). The latter piece will be reprinted in a volume on academic freedom edited by Louis Menand, forthcoming from the University of Chicago Press.

can stand free of the philosophical arguments that support the conclusion that human personality is inviolable.⁸

I agree that this phrase refers to a secular counterpart of the immortal soul, but I am not sure I know what philosophical arguments Luban has in mind. I think of Kant, for example, as having used this inviolability as a premise rather than having deduced it as a conclusion. More generally, I think of Enlightenment thinkers as having said: the immortality of the human soul needs argument, but the dignity of human beings does not. We can peel off our moral intuitions from the theological premises from which they were once deduced—intuitions which, had we lacked a religious upbringing, we might not have had. We can hold these intuitive truths to be self-evident.

Suppose the Court, when asked why it thought that the human personality is inviolable, replied that this principle is embedded in the beliefs of most Americans, that it is central to our moral and legal tradition, and that the Court is not about to look behind it for premises from which it might be inferred. This would be a move like the one Rawls makes when he says that his conception of justice is “political, not metaphysical,”⁹ and when he responds to Habermas that

[j]ustice as fairness is substantive . . . in the sense that it springs from and belongs to the tradition of liberal thought and the larger community of political culture of democratic societies. It fails then to be properly formal and truly universal, and thus to be part of the quasi-transcendental presuppositions (as Habermas sometimes says) established by the theory of communicative action.¹⁰

Suppose that the Court, in response to a request for philosophical backup, simply cited this passage, and similar passages in Rawls. Suppose it just said: we don't have a philosophical argument, we just have an appeal to American common sense. Would this be to make the American legal system what Luban calls “a regime of force imposed on a domain of cynicism”?¹¹ Would it no longer be such a regime if the Court quoted, and convinced people by quoting, the parts of Rawls which offer what Luban calls “the

⁸ Luban, *supra* note 3, at 64.

⁹ See John Rawls, *Justice as Fairness: Political, not Metaphysical*, 14 PHIL. & PUB. AFF. 225 (1985).

¹⁰ John Rawls, *Reply to Habermas*, 92 J. PHIL. 179 (1995).

¹¹ Luban, *supra* note 3, at 65.

fair-play argument of Hart and Rawls"?¹² Is the difference between the indirect appeal to intuition made by the premises of a fair-play argument and the direct appeal to common sense and tradition really that big a deal? Does the difference between the latter appeal and an appeal to the quasi-transcendental, the difference between Rawls and Habermas (whose theory of communicative action is a sort of surrogate for metaphysics and epistemology), matter all that much?

My sense is that it does not, but Luban clearly differs, and I am not sure how to argue the point. I take Grey to have already answered, in the concluding section of his paper, the rhetorical question with which Luban ends his: "[H]ow can legal pragmatism stand free of first philosophy, of metaphysics, metaethics, and epistemology?"¹³ Grey's account of the common ground which he and his evangelical friend manage to find, common ground which would enable them to work together as Posner-style judges, seems to me perfectly plausible.

All I can add to what Grey has already done is to remark that the kind of religious believer Luban and Grey have in mind—the kind whose appeal to Scripture is backed up with what Luban calls "a handful of beliefs that are straightforwardly philosophical"¹⁴—is pretty rare. Even Thomists do not try to give an argument from unaided natural reason for including *Leviticus* in the scriptural canon, much less for coming down hard on 18:22 while weaseling out of obedience to all those other divine commandments (the dress code, for example). Kierkegaardians and Tillichians, and most listeners to the televangelists, would not dream of trying to give such arguments, even for belief in the existence of God. They have *faith*, and do not think they need to answer Socratic questions (nor that Euthyphro needed to). The Grey/Luban philosophy buff who is also a fundamentalist is a helpful fantasy, but I have never run into anybody much like him.

Let me conclude with some more general remarks on the relation between philosophy and the rest of culture. Luban offers three conceptions of philosophy to choose from: intellectual hygiene, "*strenge Wissenschaft* aimed at formulating, analyzing, and once and for all settling questions,"¹⁵ and Arendt's Heidegger-like

¹² I am not quite sure what argument Luban has in mind here, but I think that it would be hard to find in Hart or Rawls an attempt to ground anything in "a metaphysical conception of personality and human dignity."

¹³ Luban, *supra* note 3, at 73.

¹⁴ *Id.*

¹⁵ *Id.* at 51.

view that “philosophy doesn’t aim to solve problems and doesn’t seek to make progress.”¹⁶ Luban assimilates this third view to Wilfrid Sellars’s definition of philosophy as “how things in the broadest possible sense of the term hang together in the broadest sense of the term.”¹⁷

I favor a fourth conception, one which also incorporates Sellars’s definition. My conception entails neither that philosophy does not seek to make progress, nor Arendt’s suggestion that “the aim of philosophy is not an increase in knowledge, but an attempt to understand the *meaning* of whatever it is that the philosopher is thinking about.”¹⁸

This emphasis on *meaning* goes hand-in-hand with the view—currently held by Stanley Cavell, Thomas Nagel, and Barry Stroud, among others—that the deepest and most important philosophical problems come naturally to the human mind, and arise independently of that mind’s socio-historical circumstances.¹⁹ It also goes along with Luban’s claim that

[p]hilosophical problems . . . begin with a distinction that we use in everyday life, for example the distinction between voluntary and involuntary action, or between justified and unjustified belief. A philosophical problem arises because it turns out that natural arguments show that the distinction is specious or inexplicable.²⁰

Contrast this view, which tempts people to answer “a!” to question (3) above, with Dewey’s view that

[w]hen it is acknowledged that under disguise of dealing with ultimate reality philosophy has been occupied with the precious values embedded in social traditions, that it has sprung from a clash of social ends and from a conflict of inherited institutions with incompatible contemporary tendencies, it will be seen that

¹⁶ *Id.* at 52.

¹⁷ *Id.* at 52-53 (quoting WILFRID SELLARS, *SCIENCE, PERCEPTION AND REALITY* 1 (1963)).

¹⁸ *Id.* at 52.

¹⁹ Luban cites Nagel’s metaphilosophical views with approval in his long, complex, and valuable article *Doubts about the New Pragmatism*, reprinted in DAVID LUBAN, *LEGAL MODERNISM* 132 (1994). He also argues in that article that “the neopragmatists have drastically misunderstood Wittgenstein” by treating him as one of themselves. *Id.* at 131. Luban has a point. Wittgenstein did, indeed, recoil in distaste from the realization that what he was saying sounded like pragmatism. So did Nietzsche. The question is whether it is these men’s pragmatist-like views, or their last-minute fears of turning into Trattenbachers, that most deserve our attention.

²⁰ Luban, *supra* note 3, at 54.

the task of future philosophy is to clarify men's ideas as to the social and moral strifes of their own day.²¹

The sort of clarification of ideas that Dewey recommends is not the same as Arendt's "attempt to understand the *meaning* of whatever it is that the philosopher is thinking about."²² Arendt thought that she and Socrates were both thinking about a lot of the same things: justice, for example. For Dewey, we and Socrates can't really think about many of the same things, because the problems we are trying to solve are so different. We live in different times, believe a lot of different things, and have different senses of what is relevant to what. There are some abstract similarities between justice then and justice now, but these similarities neither help formulate the current problems, nor provide much help in solving them. (Analogously, there are some abstract similarities between Democritus's and Bohr's atoms, but there is an obvious sense in which these two scientists were not talking about the same things.)

I think Dewey's description of philosophy can be synthesized with Sellars's by saying that the "things" which the philosopher wants to make hang together keep changing. Philosophy has and will make progress, at least if one agrees with Dewey, that we have been making a lot of moral, political and social progress in recent centuries. For philosophical progress piggybacks on this latter sort of progress. We philosophers do not have a *strengere Wissenschaft* nowadays, but the things we are trying to make hang together are bigger and better than the things Socrates talked about.

They are bigger in the sense that they are much more complicated. They are better in that we live in a better age of the world: one in which the idea of finding an authority to which to subject ourselves is gradually getting replaced by the idea of coming to an agreement among ourselves. Socrates, or at any rate the Socrates of Plato's *Republic*, wanted an unwobbling pivot, something that would stay fixed forever and serve as a guiding star. So did St. Thomas and Luther, and so did the thinkers of the Enlightenment who made much of the notions of "Reason" and "Science" and "Nature."

²¹ John Dewey, *Reconstruction in Philosophy*, in 12 JOHN DEWEY: THE MIDDLE WORKS 1899-1924, at 94 (Jo Ann Boydston et al. eds., 1982). I have enlarged on this definition of Dewey's, and offered some examples of the strifes he was talking about, in RICHARD RORTY, *Philosophy and the Future*, in RORTY AND PRAGMATISM 197-205 (Herman Saatkamp, Jr. ed., 1995).

²² See Luban, *supra* note 3, at 52.

We are better off than these intellectual ancestors because we have a lot of historical knowledge about how and why such stars first blazed, and then faded out—knowledge which has made us wonder whether we might not be able to get along without any such stars. The switch in modern philosophy from what Habermas calls “subject-centered reason” to what he calls “communicative reason”—a change which Dewey embodies best—is a recognition of the historical contingency of philosophical problems, and of socio-political vocabularies and institutions. That switch is the most recent version of the revolt against authority which found expression first in the Reformation, and then in the Enlightenment.

For Deweyans, the whole idea of “authority” is suspect. We can still say, if we like, that the American legal system possesses a legitimate authority, and that we have an obligation to obey our country’s laws. But we should not press either point. Dewey preferred to skip talk of “authority,” “legitimacy” and “obligation” and to talk instead about “applied intelligence” and “democracy.” He hoped we would stop using the juridical vocabulary which Kant made fashionable among philosophers, and start using metaphors drawn from town meetings rather than from tribunals. He wanted the first question of both politics and philosophy to be not “What is legitimate?” or “What is authoritative?” but “What can we get together and agree on?” This is the strand in Dewey’s thought which Rawls, especially in his later writings, has picked up and developed.

Posner’s vision of the function of American judges—his vision of their ability to travel back and forth between the present and the future and to try to fashion a moral unity out of our national history—fits nicely into Dewey’s way of thinking. Nor is Posner’s vision very different, I suspect, from that of most Americans who take an interest in what the courts, and especially the Supreme Court, are up to—at least those who are grateful for the Court’s decision in *Brown v. Board of Education*.²³ For those who believe that the Civil Rights Movement, the movement which *Brown* initiated, was an enormous boost to our national self-respect and a reassuring instance of our continuing capacity for moral progress, the thought that the courts do not just apply rules, but make them, is no longer frightening. Nor is the Deweyan suggestion that it is a waste of effort to try to figure out just where, in *Brown* and in similar decisions, finding and applying old law stops and making new law begins.

²³ 347 U.S. 483 (1954).

Luban is nostalgic for unwobbling pivots, for the kind of authority which is supposed to be possessed by those raptly and silently contemplated truths of which he speaks. Luban uses the same language as Kant, who thought that only the fixed and eternal could fill the mind with awe (e.g., “the starry heavens above, and the moral law within”²⁴). He fears that without respect for the authority of the fixed and eternal, we shall become Trattenbachers: “Take away Plato and you take away Euclid. Take away Euclid and you find yourself in Trattenbach. Athens or Trattenbach: there is no third way.”²⁵ This seems to me just wrong. We have been inventing alternatives to both Athens and Trattenbach for a long time. Of these, contemporary America, warts and all, is the best so far discovered.

The wise elders whom Posner describes, doing their best to keep America intact by keeping our political responses to suprising developments in harmony with our moral intuitions and our national traditions, are, and deserve to be, revered. As our presidents, political parties, and legislators become ever more corrupt and frivolous, we turn to the judiciary as the only political institution for which we can still feel something like awe. This awe is not reverence for the Euclid-like immutability of Law. It is respect for the ability of decent men and women to sit down around tables, argue things out, and arrive at a reasonable consensus.

²⁴ See the first sentence of the “Conclusion” of IMMANUEL KANT’S CRITIQUE OF PRACTICAL REASON (Norman Kemp Smith trans., 1929).

²⁵ LUBAN, *supra* note 19, at 129.

