The Perils of Posnerian Pragmatism

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Law, Pragmatism, and Democracy,

The spark for this exchange with Richard Posner is the near simultaneous publication of our two recent books—his *Law, Pragmatism, and Democracy* and my *Skepticism and Freedom: A Modern Case for Classical Liberalism*.† This discussion continues an ongoing dialogue that began over thirty years ago when we squared off over how best to understand tort law.2 Even though each of us has migrated in outlook and academic interests, much of our present separation can still be teased out of those early exchanges. There is, of course, a new element injected into Posner’s work for the past ten years: his unrelenting defense of “pragmatic” conceptions to explain both judicial behavior and democratic institutions.

I confess to having no great love for the term “pragmatic,” nor even a clear sense of what it means. Sometimes the term has a negative connotation, as when a trader or nation furtively or defiantly breaches a contract or treaty for pragmatic reasons. It would be a cheap shot, however, to claim that Posner’s mission fails because his centerpiece carries with it some disreputable associations. After all, “pragmatic,” for all its elusive quality, conveys an abundance of positive connotations. My Microsoft Thesaurus offers this list of synonyms:

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1 See Richard A. Posner, *A Theory of Negligence*, 1 J Legal Stud 29 (1972) (arguing that the negligence standard in tort law is economically efficient); Richard A. Epstein, *A Theory of Strict Liability*, 2 J Legal Stud 165 (1973) (arguing for strict liability based on causation); Richard A. Posner, *Strict Liability: A Comment*, 2 J Legal Stud 205, 221 (1973) (concluding that economic theory is agnostic between strict liability and negligence if a contributory negligence defense is recognized, but strict liability without a contributory negligence defense is less efficient than negligence with a contributory negligence defense).
practical, realistic, hardnosed, hardheaded (but not hardhearted), sensi-
sible, matter-of-fact, and down-to-earth. I could find only one anto-
nym, idealistic, which in turn has many negative associations: naïve,
unrealistic, romantic, impracticable, and (puzzlingly) optimistic.

Relying on its positive connotations, Posner defends pragmatism
in two ways. First, it lines up with the need for "reasonableness" and
responsiveness to unruly facts in litigation. Second, it helps us reject
the hopeless idealism of deliberative democracy—the view that politi-
cal institutions should encourage extensive and enlightened public
debate over the central issues of our time while overlooking the
grubby horse-trading, interest-group intrigue, and petty-mindedness
so endemic to politics. Yet, judicial and democratic pragmatism are
only means to ends. Alas, only in his conclusion, and barely then, does
Posner mention their end: liberty, as naïve libertarians use the term,
with the need to control force and fraud, to preserve freedom "in such
pursuits as speaking and earning," and to secure the public provision
of infrastructure (p 384). Sign me on.

For Posner, this belated acknowledgment of classical liberal ideals
marks a welcome change from his earlier flinty stance, which treated a
commitment to liberty as an idle gesture that (unlike that hard-edged
concept of reasonableness!?) does nothing to constrain how judges
decide hard cases. The "handful of rudimentary principles of social co-
operation" are "too abstract to be criterial." But if so, why his dogged
pursuit of the instrumental virtues designed to get us from here to
there without knowing where we are going? His book cries out for a
systematic explication of the principle of liberty that he both belittles
and embraces. But as he does not develop his analysis of liberty there,
I shall concentrate instead on pragmatic judges and pragmatic democ-
archy, both oversold, in two discrete settings: the use of the reasonab-
leness standard in tort law; and the narrow role of the courts in allowing
constitutional challenges to government restrictions on civil and eco-
nomic liberties. On both issues, Posner's fierce devotion to Holmes
leads him astray in two ways. First, reasonableness in adjudication
need not favor rules that impose ground-level reasonableness stan-
dards in tort law; pragmatism thus fails because it cannot be made op-
erational. Second, the need for a no-nonsense pragmatic look cuts
both ways in constitutional adjudication. If we rightly fear the motives
and loyalties of some citizens, so too we should rightly fear the mo-
tives of voters and elected officials on those same grounds. In dealing
with litigation, I shall revert to our earlier disagreement over the role
of negligence and strict liability in tort cases. I shall then argue that a
Schumpeterian view of democratic institutions is consistent with a

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more aggressive stance of judicial review in such important cases as Korematsu v United States and Lochner v New York.1

I. PRAGMATIC ADJUDICATION

For a very long time, the law of torts has grappled with choosing a liability rule to deal with private rights of action for physical harms caused by one individual to the person or property of another. Posner, in his justly famous article, A Theory of Negligence, insisted that the key to tort law lies in the Hand formula set out in United States v Carroll Towing,' which cashed out the idea of reasonableness as a function of three variables—the burden of precautions \((B)\), the probability of loss \((P)\), and the magnitude of loss \((L)\).2 The defendant could be branded as negligent if \(B < PL\), but was freed of that charge when the inequality went in the opposite direction, \(B > PL\). Posner has consistently claimed that this cost/benefit formula unlocks and unifies the separate areas of tort law: nuisance, liability under the rule of Rylands v Fletcher,3 abnormally dangerous activities, ordinary running down cases, medical malpractice, occupier’s liability, and so on. He has not hesitated to implement these views in his judicial work,4 for which he has been extensively criticized.5 The basic point of Posner’s entire enterprise is to show the unity of the field, and to bring home the ability of economic theory to instantiate ideas of “reasonableness” in the definition and interpretation of liability rules.

This defense of the negligence standard comports with the Aristotelian view of moderation. At one extreme, it would clearly be derelict for any individual to take no care whatsoever no matter how great the risk of his own conduct to others. At the other extreme, it would be irresponsible for any individual to devote substantial resources for the prevention of an accident that has only a small probability of occurrence and carries with it the risk of only trivial harm. Stated more generally, in a world of scarce resources, the level of care required of any individual should be proportionate to the expected harm of his behavior. The point is surely not new. Indeed, it lies at the heart of Jus-

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2. 198 US 45 (1905). For Posner’s defense, see pp 78–79 (defending Lochner on economic grounds because limiting work hours impairs the efficiency of labor markets).
3. 159 F2d 169, 173 (2d Cir 1947).
6. See, for example, Halek v United States, 178 F3d 481, 484 (7th Cir 1999) (“Negligence is a function of the likelihood of an accident as well as of its gravity if it occurs and of the ease of preventing it.”).
stice Shaw’s famous defense of the displacement of a strict liability rule in cases of trespass to the person in his *Brown v Kendall* opinion." The defendant wielded a four-foot stick in order to break up a fight between his dog and that of the plaintiff’s. As the defendant retreated, the plaintiff advanced and was struck in the eye by the stick. The case could have easily gone off on the ground that the plaintiff had assumed the risk by advancing forward, or that the strict liability rule should be relaxed when the activity in question was as much for the benefit of the plaintiff as the defendant. But Chief Justice Shaw ignored these sensible defenses in favor of a broader defense of the negligence principle: “A man, who should have occasion to discharge a gun, on an open and extensive marsh, or in a forest, would be required to use less circumspection and care, than if he were to do the same thing in an inhabited town, village, or city.” At no point does he ask why smaller risks should fall to a passive plaintiff (unlike the one in *Brown*), while making the availability of regulatory or injunctive relief turn on the magnitude of the expected risk. In traditional terms, *Brown* broadly redefined an inevitable accident to mean one that could not have been avoided by reasonable care, in which case the risk lies with the plaintiff and not the defendant.

*Carroll Towing* and *Brown*, by relying explicitly on sliding-scale judgments of reasonableness, promise the best of both worlds. Back in 1972, Posner defended these opinions on grounds of economic efficiency; now he believes in the close affinity between the economic and pragmatic approaches. For Posner, “reasonableness” is a ubiquitous concept in the law. “The ultimate criterion of pragmatic adjudication is reasonableness,” (p 59) and in one of its protean manifestations “[t]he reasonable person’ standard of the tort law is fundamental” (p 74). The great virtue of “reasonableness” is to take people away from “high-level normative abstractions” like “liberty” and “autonomy” in order to direct attention to empirical issues, like the cost and effectiveness of certain precautions, with which judges and juries can work (p 75).

My early reaction to this synthesis of the tort law was twofold. First, was submission: it was hard to see how anyone could be opposed to reasonableness in the articulation or implementation of legal rules.

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11 *Brown v Kendall*, 60 Mass 292, 295–96 (1850) ("[T]he rule is . . . that the plaintiff must come prepared with evidence to show either that the intention was unlawful, or that the defendant was in fault; for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable.").

12 See *Carstairs v Taylor*, LR 6 Ex 217, 221–22 (1871) (applying a negligence standard where the activity undertaken was as much to the benefit of the plaintiff as of the defendant).

13 *Brown*, 60 Mass at 296.

14 See generally Posner, 1 J Legal Stud at 73–77 (cited in note 2) (arguing that the common law rules of negligence produce economically efficient outcomes).
Who wants to say that the purpose of the law is to be "unreasonable" in either thought or deed? Second, was horror: I recoiled then, as I recoil now, at the possibility that an undifferentiated reasonableness standard is the best we could do at the ground level. Stated otherwise, as an abstract or global criterion for guiding the choice of various legal regimes, reasonableness is, to use Posner's somewhat derisive term, an appropriate "aspiration" (p 78). But it was, and is, hard for me to believe that a legal system that relied heavily on rules of reasonableness at the ground level would in fact satisfy some overarching social criterion of reasonableness. Put in another way, it is unreasonable to put so much faith in the reasonableness standard as an arbiter of particular cases. Those who accept reasonableness at the global or aspirational level are free, often wise, and sometimes compelled, to reject it at the operational level precisely because it makes too many midlevel facts relevant to any inquiry, without making any of them dispositive. The implication becomes clear: the problem with reasonableness in general is that it is a chameleon-like term that utterly fails to distinguish between sound and unsound approaches. In the case law, it is common to say that a jury can be reasonable when it reaches either verdict on a question of fact. It is equally permissible, but far more damning, to say that each of two or more inconsistent legal theories are both reasonable when the point of the law is to choose between them.

The skeptic can make good of his unhappiness with the reasonableness standard only by answering two particular inquiries. The first is to explain the disquiet about the use of reasonableness standards on the ground and in individual cases. The second is to propose some alternative way to think about the problem that bends rules to the service of reasonableness, but that allows some predictability (which skeptics like) while avoiding fanaticism or absolutism in the application of legal rules (which, as pragmatists, skeptics don't like). For the reasons briefly summarized in the subsequent paragraphs, I believe that the resources in the tort law were, and are, capable of doing far better than any operational reasonableness standard.

Questions of reasonableness reduce to questions of degree. The Hand formula posits an inequality which makes it painfully clear, as with all such inequalities, that two points on the same side of the dividing line can be further apart than two points on opposite sides of the divide—assuming, optimistically, that we know where that divide is. The application of any set of tort rules is mediated by jury decisions that are often reviewed on an "unreasonableness" standard. It is highly likely that different juries looking at the same set of facts could easily come to opposite conclusions, neither of which could be branded as unreasonable. There is something unsettling about mapping a continuum of jury choices on appropriate care levels onto a
The want of consistency across cases and the administrative costs of deciding them are strong factors that tend to make a reasonableness inquiry unreasonable at the ground level.

Second, although Posner originally claimed that the Hand formula worked as a positive matter to describe the operation of the legal system, it is clear that, descriptively, the unruly body of case law does not remotely fit into Hand’s tidy framework. There are significant points of divergence.

One such point of divergence is that the common law adopted a strict liability rule for direct invasions covered by the tort of trespass but a negligence standard for indirect harms (such as dropping a log in the road) that were covered by the action on the case. The former rule is one that judges the liability of the defendant not by the inputs (for example, the level of care taken), but solely by the outputs, that is, whether the defendant’s conduct invaded the person or property of another individual. This particular system, therefore, avoids the continuity problem that plagues negligence: whether the defendant hit or did not hit the plaintiff is an on/off question that maps well onto the similarly discrete choice of whether the defendant is liable. Why, then, at the system-wide level is it not better to adopt this view of the world than the negligence alternative? Once that basic position is accepted, the next question is why outputs should govern trespasses and inputs should govern indirect harms. Brown tried to end that discontinuity by extending the negligence rule to both direct and indirect harms. However, Rylands v. Fletcher flipped matters over by adopting a strict liability rule for indirect harms to land, at a time when English courts were veering toward negligence for direct harms such as personal injury and property damage stemming from highway accidents. To make matters still worse, Holmes, in The Common Law, so profoundly misconstrued the analysis of causation that he advocated a uniform negligence principle on grounds that strict liability placed no serviceable limitations on the causal connection between plaintiff’s harm and defendant’s actions. If Holmes is wrong on the question of causation, his arguments for the uniform negligence system collapse. Posner’s dislike of philosophical pragmatism should make him deeply suspicious of Holmes’s hyperbolic reasoning in The Common Law.

15 Oliver Wendell Holmes, Jr., The Common Law 95 (1881) ("Nay, why need the defendant have acted at all, and why is it not enough that his existence has been at the expense of the plaintiff?").

16 For some arguments on this point, see Epstein, Skepticism and Freedom at 93–96 (cited in note 1) (arguing that a proper understanding of causation establishes an orderly progression from direct to indirect harms, all under a theory of strict liability).
mon sense does not hold the defendant responsible for water that a malicious meddler pours upon a third party.\footnote{See, for example, \textit{Rickards v Lothian}, LR (1913) AC 263, 278 (PC) ("[A] defendant cannot . . . be properly said to have caused or allowed the water to escape if the malicious act of a third person was the real cause of its escaping without any fault on the part of the defendant.").}

To make matters worse, the subsequent evolution of \textit{Rylands} does nothing to resolve the fundamental debate. In principle, the sliding scale of the Hand formula means that reasonableness calculations could be used across the board: abnormally dangerous or ultrahazardous activities are just like the use of guns to Shaw in \textit{Brown}. But three successive Restatements\footnote{Restatement of Torts §§ 519–20 (1934); Restatement (Second) of Torts §§ 519–20 (1979); Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles) § 20 (Tentative Draft No 1, Mar 28, 2001).} have rejected that view by drawing the line between abnormally dangerous and ordinary activities in a way that cuts against the marginalist logic of the negligence system. For example, the Restatement (Second) of Torts states, "[m]ost ordinary activities can be made entirely safe by the taking of all reasonable precautions; and when safety cannot be attained by the exercise of due care there is reason to regard the danger as an abnormal one."\footnote{Restatement (Second) of Torts § 520, comment h (commenting on factor (c)—"[risk not eliminated by reasonable care"] (emphasis added)).} But this cannot be. The negligence rule rests on the judgment that the plaintiff should bear the risk of losses that are not worth preventing, precisely because no activity can be made entirely safe. The ostensible bright-line distinction between ordinary and abnormally dangerous cases is at best a matter of degree, and that in a setting where no one has explained why it is worth drawing the distinction at all.

Nor does the modern view have the courage of its conviction. Airplanes that fall from the sky are subject to a strong per se rule\footnote{Restatement (Second) of Torts § 520A.} that ignores the laundry list of factors for deciding what activities are abnormally dangerous. These factors have been celebrated in some cases\footnote{See, for example, Judge Posner's majority opinion in \textit{Indiana Harbor Belt Railroad v American Cyanamid Co}, 916 F2d 1174, 1177 (7th Cir 1990) (stating that the Restatement factors "are related to each other in that each is a different facet of a common quest for a proper legal regime to govern accidents that negligence liability cannot adequately control").} and assailed in others.\footnote{See, for example, \textit{Koos v Roth}, 293 Or 670, 652 P2d 1255, 1261–62 (1982) (criticizing the factors and stating that civil liability should not be predicated on "a court's views of the utility or value of the harmful activity").} To that theoretical tension, the drafters of the Third Restatement shrugged and offered a pragmatic defense of the strict liability rule in airplane cases. It worked owing to the passive nature of the plaintiff.\footnote{Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles) § 20, Reporter's Notes to comment k (Tentative Draft No 1, Mar 28, 2001).} Then why isn't the per se strict liability rule for
aviation more reasonable than, for example, the ad hoc negligence inquiries for bursting oil wells and fumigation?

The dispute over reasonableness also crops up in the time-honored question whether a farmer should be able to recover from a railroad when he stores his flax so close to the railroad easement that it catches fire. In one famous exchange, Justice McKenna took the kind of absolutist position antithetical to Posner's thinking: "That one's uses of his property may be subject to the servitude of the wrongful use by another of his property seems an anomaly."\(^2\) Posner doubtless prefers the view of Justice Holmes that the plaintiff may put his flax where he chooses but that "the liability of the railroad for a fire was absolutely conditioned upon the stacks being at a reasonably safe distance from the train."\(^3\) But it is not clear which judge offers the pragmatic answer. McKenna's hard-edged approach may invite a moral hazard of placing flax too close to the tracks, but who would risk it if safer alternatives were available? Unfortunately, the Holmes approach requires answering questions of degree and discourages the railroad from retaining or condemning the needed easement over nearby property. Perhaps the hard-edged rule is the more reasonable approach.

In nuisance law, reasonableness is also malleable. To some courts, the term "unreasonable danger" conveys the core insight of the Hand formula: compare the utility of the defendant's behavior with the inconvenience caused to the plaintiff.\(^4\) But in other courts, the unreasonableness of the harm does not refer to that comparison, but rather to the extent to which the level of harm exceeds some low background level that is generally acceptable under a live-and-let-live rule.\(^5\) The impulse behind that latter rule is system-wide reasonableness, as it will not do to allow individuals to routinely sue, for an injunction no less, to recover trivial harms that are identical to the ones that they inflict on others. The average reciprocity of advantage makes the no-liability solution reasonable, but liability becomes strict for those harms to the plaintiff that are disproportionate in time and place. That flipover point is, however, more manageable than the discontinuity in the

\(^2\) *LeRoy Fibre Co v Chicago, Milwaukee & St. Paul Railway*, 232 US 340, 349 (1914) (holding a railroad strictly liable for damage to hay stored near but not on the railroad's right of way).
\(^3\) Id at 353 (Holmes concurring).
\(^4\) See Restatement (Second) of Torts § 826.
\(^5\) See, for example, *Jost v Dairyland Power Coop*, 45 Wis 2d 164, 172 NW2d 647, 653 (1969):

It will not be said that, because a great and socially useful enterprise will be liable in damages, an injury small by comparison should go unredressed. We know of no acceptable rule of jurisprudence that permits those who are engaged in important and desirable enterprises to injure with impunity those who are engaged in enterprises of lesser economic significance.
Hand formula because it looks only at observable outputs and not (largely) unobservable care levels. And typically, the relatively few intermediate cases can be ironed out by formal agreements or informal adjustments between neighbors.

The Hand formula is equally difficult to square with the tripartite distinction between trespassers, licensees, and invitees. Trespassers are only owed a duty to refrain from deliberate or willful harm; licensees need to be warned of latent defects known to the landowner; invitees receive reasonable care to discover as well as correct certain defects. The key English precedent treated these categories as "rigid in law" and explicitly rejected a sliding scale. Some American cases after *Rowland v Christian* treat all three categories under a single rubric of reasonableness, but others reject any effort to stiffen the duties to trespassers, and still others keep to the original English classification. Each of the various outcomes is defended on the ground that it conforms to settled expectations. It is hard to think that any of the countless variations are inconsistent with some pragmatic approach.

The many uses of reasonableness assert themselves in just about every other area of tort law worth disputing. For example, do we accept the open and obvious defect defense in product liability cases, or should we hold defendants liable for failure to take reasonable steps to avoid apparent design defects? I prefer the former because it shifts responsibility downstream to the party with the greater knowledge and capacity for avoidance. Virtually any plausible alternative theory meets the supposedly authoritative criterion of reasonableness, and it...
takes a good deal of patience and, yes, conceptual analysis to sort them out. Start with the comprehensive negligence test and all the hard work is done by the subrules. No one thinks (or should think) that neighbor disputes, intersection collisions, shooting accidents, slip and fall cases, or medical malpractice cases all play out the same way. Negligence theorists are much more willing to invoke *res ipsa loquitur* to bulk up the standard of care in stranger cases than to make the same move in malpractice cases. The Hand formula supplies one number needed to crack open the safe, but it does not supply the entire combination.

The odd set of results that one sees from the common law cases suggests that while reasonableness is a laudable goal, it is not a workable starting point for the analysis of these problems. The alternative method that I have long argued for is to break down the cases into subcategories (as with the premises liability situations) and to develop a set of presumptive liability rules that govern each class of cases. The charge of absolutism is defeated not by allowing any defense of reasonableness or inevitable accident, but by systematically introducing a set of excuses or justifications, each of which makes the overall system a bit more reasonable than before. Now variations in patterns of causation turn out to be irrelevant; strict liability presumptively governs all cases. Matters of degree remain relevant with threatened harm and injunctive relief, which is typically reserved for cases of imminent peril. Yet, when it is uncertain where harm will strike, states issue permits and licenses because no threatened party is likely to incur the expense of securing an injunction whose benefits will redound to thousands of faceless others. The Hand formula is an unreasonable criterion for setting liability because it needlessly works to measure initial uncertainty even after the outcome has been made certain by the passage of events.

Any excesses of the strict liability system can be checked by a reasonable set of affirmative defenses, such as plaintiff's trespass or assumption of risk. The former has to deal with adults and children, and accidental, deliberate, and nefarious trespassers. A greater duty is likely to be owed to a child attracted to a nuisance than a felonious entrant, but neither duty need be phrased in terms of the Hand formula. Assumption of risk is perhaps more important because the contractual connection between the parties neatly takes the case out of the domain of stranger cases: whether referencing premise liability, product sales, or medical services, the legal rules are best understood

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as default norms applicable in the absence of contract. This position makes the public policy limitations on freedom of contract most dubious, even when imposed only for "unreasonable" agreements. The default provisions may well avoid the Hand formula by looking either to latent defects (in premises or products) or customary standards (in medical care). Yet so much the better because contract should trump tort, rather than the other way around.

Enough—there is zero evidence that any search for global reasonableness invokes operational rules of reasonable care. Yet the alternative approach is consistent with global reasonableness. It makes incremental judgments and thus respects ideas of marginal benefits. Its use of rules and exceptions avoids the absolutism sensible people fear. It tracks everyday language and should therefore appeal to believers of "everyday" pragmatism, as Posner styles himself (pp 49-56). It is also consistent with the formal approaches in which difficult problems are solved by successive approximations rather than by some simple formula that purports to be a perfect equivalent to the ultimate objective, in this case, the reasonableness of the system.

This defense of moral incrementalism still leaves open the question of ends: just what is the tort system about? Here, there is a persistent source of tension. For the most part, in thinking about system-wide judgments, the emphasis is on what benefits the rules will provide in the future. But in thinking about the outcome of particular cases, the emphasis shifts to a comparison of past conduct against the applicable rules of judgment. I think that the backward-looking decisions in particular cases are an effort to preserve the integrity of the overall rule structure against special pleas for favoritism and advantage. If one allows the defendant to argue that the benefits of the rape that he committed exceed its cost, the number of false positives is likely to be enormous. The per se rule (limited by a defense of consent) stops that erosion at the small price of disallowing the one case in a million where the claim might be true.

All of this suggests that anyone who is interested in pragmatism should be some form of consequentialist, that is, someone who thinks that the goodness or badness of legal rules or individual actions should be evaluated in terms of their consequences. To most traditional economists, that discussion in turn veers to a question of what measure of social welfare should be used to evaluate critical forms of choices. The Pareto rule says that with two alternative legal regimes, one should adopt the regime that leaves at least one person better off and no one worse off. The alternative rule, Kaldor-Hicks, picks the regime under which the winners are able to compensate the losers for their losses. Both of these rules yield a strong preference for competitive markets and help to explain why either some form of negligence
or strict liability will generally do well against its competitors. As a first approximation, each creates the incentive for parties to take precautions up to the point where the marginal benefits are equal to the marginal costs. However, they differ in one important respect. The Pareto requirement is very hard to satisfy for any large-scale social change, so it is sometimes better to relax the rule in practice (pragmatically, I suppose) to allow huge gains to be realized even if one (uncompensable) person is left worse off in exchange. We could then have an argument over how often we should make those concessions and why. It is far better to address the substantive criteria for a decision than the psychological mood music that passes under the name of pragmatic thought.

Ironically, in one of the most baffling features of *Law, Pragmatism, and Democracy*, Posner actively distances himself from consequentialist reasoning generally (pp 65–71). He does not discuss any variations of the social welfarist, but notices only that “[t]here is no algorithm for striking the right balance between rule-of-law and case-specific consequences, continuity and creativity, long-term and short-term, systemic and particular, rule and standard” (p 64). At this point, all we can do is throw up our hands and wonder why anyone cares to fight so hard to justify a theory that flunks the most elementary pragmatic demand: being contentless, Posner’s theory does not tell us anything whatsoever, much less how it implements a system of liberty. At least with the standard theories, there is a first-round preference for voluntary exchange over coercion, and, within the domain of voluntary exchanges, competition over monopoly. These preferences can formulate much of the law of property, contract, tort, antitrust, and the like. We can then ask the instrumental questions of whether the pursuit of these targets is feasible in an administrative sense, and so on. But as a question of criterion, I agree with Kaplow and Shavell that it is hard to be against any legal rule that creates a Pareto improvement over its next best rival.34 But with pragmatism, all I can do is throw up my hands in despair. It reminds me of the old joke about the deconstructionist whom you can’t refuse because, unlike the Mafioso, he makes you an offer that you cannot understand. There are so many degrees of freedom in the pragmatic way of thought that by standing for everything, it ultimately stands for nothing. I know why I fear the socialist and the anarchist. But the pragmatist? Here it is best to judge legal rules by their consequences—which requires some criterion of judgment—and not by the creative impulses of the judges who formulate them. The deep flaw in Posner’s pragmatism is that it cares too

34 Louis Kaplow and Steven Shavell. *Fairness versus Welfare* 465–66 (Harvard 2002) (concluding that legal policy assessment should be done in light of welfare economics because the alternative notions of fairness lead to the adoption of legal rules that leave everyone worse off).
much about the mental processes of the judge and not enough about the merits of the legal rules created by the judicial process.

II. PRAGMATIC POLITICS

Posner’s second major theme addresses the operation of democracy. Notwithstanding his impatience with conceptual detours, he describes democratic theorists as being either Concept I (bad) or Concept II (good) types. Concept I types, advocates of “deliberative democracy,” are incurable romantics who think that it is possible to get even a tiny fraction of the polity to engage in disinterested deliberation over matters of public concern (pp 131–43). Concept II democrats are those whose hardheaded Darwinian understanding of human frailties rightly leads them to shun that utopian vision. Their job is to find sensible ways to prevent special-interest politics from overwhelming our electoral and legislative institutions. Naïve romantics often make matters worse because extensive deliberation only persuades interest groups of the chasm that separates their world views, and thus leads to unwanted polarization. People are likely to do better by resolving short-term disputes without going back to fundamentals. It is not, to use one of Cass Sunstein’s favorite phrases, that we have “incompletely theorized agreements.” Rather, people have completely theorized disagreements that no amount of deliberation can overcome.

Posner next treats Joseph Schumpeter as the great champion of the alternative realist vision, insofar as he champions an economic conception of democracy in which political parties compete for the support of various groups in periodic elections. The system is surely better than dictatorship or even one-party rule. By confronting the beast as it is, it allows for some imperfect check on faction and political aggrandizement. Its note of realism lowers expectations and allows wiser and more cautious voters and legislators to avoid empty idealistic programs whose implementation would prove both ruinous and divisive.

There is much of this analysis that I endorse. The dominant notion of self-interest does come straight from Darwin, whom we should take very seriously (p 385). It is too much to expect ordinary individuals to drop their attachments and biases when they enter the heady world of partisan politics. But to my mind, Schumpeter counts only as an early exemplar of public choice theory, which received its great impetus in Buchanan and Tullock’s *The Calculus of Consent,* to which Posner only devotes a brief footnote (p 197 n 93). Posner thinks, oddly, that “[m]issing from the [public choice] analysis . . . are the politicians

and voters—the sellers and buyers in the political market” (p 198). However, modern public choice literature postulates self-interest to all political players, and asks how they respond to the incentives created by the rules of the political game. Thus, it is best to see Schumpeter as one representative of a large and distinguished tradition, and not as the lone champion of some forgotten third way. What should be made of all this?

On this point, the first task is predictive. What results will a political process dominated by actors whose behavior conforms to the public choice script produce? Sometimes, by happenstance, these actors will deliberate to advance the public good. The debated measure must be general in its application and operate to benefit and burden all self-interested actors in equal proportion. Those stringent constraints place people involuntarily behind the veil of ignorance so they can benefit themselves only by picking the outcome that benefits the polity as a whole.

Unfortunately, self-interested politicians rarely work behind the veil, because they possess a wealth of private information that helps them to select that legal regime most beneficial to themselves and their allies. Alas, every interest group finds itself in the identical situation, so their multiple campaigns for votes and favors don’t quite cancel each other out, leaving outsiders and other losers in the lurch. It is hard to see why one should celebrate so dubious a set of political practices. Nor is it a sunny exception to this theory that politicians often hold up concentrated interest groups with threats of higher taxes and other sanctions. The predictive portion of the public choice theory is stunningly strong in forecasting suboptimal outcomes; it is stunningly weak, when set up against the huge array of initial conditions for voters, politicians, and interest groups, in predicting what form those suboptimal outcomes take.

It was this fear of faction that led the Founders to entrench rights of liberty and property in the Constitution. The critical question for Posner is whether his deep conviction on the permanence of interest group politics should lead him to support the effort to add judicial review of legislation into an already unstable brew. My clear answer to this question has always been an emphatic vote for judicial review. His, like Holmes’s, turns out to be a resounding vote against it. I think that it is instructive to briefly discuss the profound difference between constitutional entrenchment of individual rights and the political remedies in a Schumpeterian world devoid of constitutional safeguards. In the latter situation, the oppressed group might persuade the dominant coalition that it is about to kill the goose that lays the golden egg, thus forestalling marginal tax rates of 100 percent against the rich. But if persuasion fails, nothing can stop the majority from
having its way. Indeed, in future elections a virulent majority could dedicate itself, after due deliberation of course, to the continued oppression and exploitation of others based on race, ethnicity, national origin, or sex. We have one constraint against excess, but no ideal outcomes.

Now, certainly nothing guarantees that judicial review will make a bad situation better, but for those who, like Posner, believe in liberty, the judicial enforcement of the constitutional guarantees of liberty and property will, on balance, do more good and less mischief than total quiescence. Of course, Posner rightly rails against those who see our Constitution as a charter for an equal income policy (p 202). But so long as the pragmatist professes some fleeting confidence in the rule of law, as Posner does (p 61), he must accept that certain rules can reduce oppression borne of practical politics. Judicial review does not wait for the next election to throw the rascals from office, which it may not do anyhow. Rather, it protects minorities against entrenched majorities by invalidating a particular act or by requiring payment of compensation for the losses the majority inflicts. Since constitutional review takes place after a statute or regulation has been passed, it (like a strict liability system) does not have to trace out the twisted inputs of the political process to figure out how A robbed B. Rather, the court need only look at the legislative output to determine the wealth transfers, if any, between various groups, and respond accordingly. In any given case, either rich property owners or recent immigrants might have legitimate constitutional grievances. Indeed, following this course of action is the best way to improve the level of public deliberation, because no longer will one interest group try to persuade a second to do in a third. Now the rules of the game require that losers from coercive actions be compensated, so that deliberations will seek out Pareto improvements and not illicit wealth transfers. Knowing how incentives work, the belief in liberty, the power of property, and the use of markets should all lead to a belief in constitutional restraints. Certainly that is a strong part of the public choice legacy of James Buchanan.

This logic, unfortunately, has little resonance with Posner, who directs his hardheaded pragmatism to the targets of state force but not to public officials, and thus does a poor job of balancing the relevant risks. No one has to assume that courts are perfect to think that they should intervene. The pragmatic question is whether the overall operation of the system will work better with their intervention than without. Under that test, why not side with Peckham against Holmes.

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and strike down New York’s ten hour per day maximum hour law in *Lochner v New York*? Recall that the first leg of the stool protects liberty, including the liberty of earning a living. Take that position, and it is no longer credible to join Holmes in limiting liberty to freedom from restraints on bodily motion. Posner should embrace Peckham on the sensible ground “that people are generally the best judges of what is in their own self-interest” (pp 384–85).

So what interest lies on the other side? Posner is fond of noting that social “experimentation is important to material and intellectual process” (p 385), and invokes just this rationale to criticize *Lochner*, noting that “[n]o one could be confident at so early a date that a maximum-hour law was inefficient” (pp 78–79). But note the equivocations. His position should surely lead him to oppose maximum hour or minimum wage laws at the national level, and to strike down all maximum hour laws today. More critically, why think that state experimentation is better than the private experimentation by the thousands of firms that are now forced to follow a single, flawed business model? The state is hardly a disinterested social scientist. *Lochner’s* maximum hour law allowed union bakeries to stifle competition from small nonunion firms run by recent immigrants—just as public choice theory predicts. Local tyranny does not encourage experimentation.

The protection of health might justify the New York law, but no one said *Lochner’s* bread was not wholesome or that hours legislation was better than inspecting the finished product of all firms. So why should a tough-minded judge regard this statute as a health measure for the benefit of the workers whose freedom it restricts? I could understand Posner’s affection for the Holmes dissent if he thought that the hours limitation was actually justified, but a quick romp through the pages of his *Economic Analysis of Law* quickly reveals how little stock he places in state regulation of labor markets. So with liberty the primary good, why not strike this statute down? One can go further: pieced together, the opinions of the old Court show a remarkable sensitivity to the basic structure of liberty. They generally give it the broad definition that Posner supports, but deny it protection when there are substantial coordination problems or the risk of negative externalities. If judicial review is part of the picture, why not use it here? Even liberals who dislike Peckham’s opinion in *Lochner* profess themselves uneasy about the exact reason why the decision is wrong.

38 Compare *Lochner*, 198 US at 64 (majority), with id at 76 (Holmes dissenting).
This position is not quite right because these nineteenth-century judges accepted, often in an uncritical way, a very broad definition of the "morals" head of the police power that no tough-minded judge could find credible. Indeed, *Lochner* is small potatoes compared to *Plessy v Ferguson,* which in one disastrous trifecta upheld state-enforced racial segregation in marriage, transportation, and education. *Plessy* gave free reign to democratic politics in states where large portions of the population were denied the right to vote on grounds of race. Posner does not speak to *Plessy* directly, but his overall view on the subject is discouraging, for he thinks that constitutional invalidation should be largely reserved for "failed" policies (pp 121–28) such as the policy at issue in *Griswold v Connecticut.* And in a somewhat charged reading of history, he thinks that the Supreme Court—as if it were a unified continuous body—"waited until such [that is, official racial] segregation was largely limited to the former confederate states and 'separate but equal' was a proved constitutional failure before ruling that segregation was unconstitutional," on the ground that some experiments are "not worth continuing" (p 125).

Although he does not quite say it, the implication seems to be that he thinks that *Plessy* was correct when decided, even if proved wrong over the next fifty or so years. Unfortunately, when the rubber meets the road, Posner's pragmatism becomes but callous indifference to human suffering. The indifference is evidenced by his treatment of the Japanese internment during World War II. Pursuant to Executive Order 9066, issued February 1942, two months after the attack on Pearl Harbor, persons of Japanese ancestry, whether or not U.S. citizens, were excluded from the West Coast of the United States and herded into detention centers (pp 293–95). The detention order cries out for a balance of interest between liberty and security that no one, pragmatist or otherwise, can simply sweep under the rug. Posner, in his chapter entitled "Legality and Necessity," bravely, if foolishly, defends the Supreme Court's decision in *Korematsu,* on the ground that the squeamish fail to understand how in wartime the grand test of reasonableness requires national security to trump claims of individual lib-

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43 163 US 537 (1896).

44 381 US 479 (1965).

erty. The root mistake lies, he tells us, "in the prioritizing of liberty" (p 296), which Posner translates into familiar marginalist terms. Is the extra element of security to society greater than the extra cost (p 297)? Admit the force of this general statement, and Korematsu remains the "disaster" it was branded at the time.4

Start with the standard of review. If liberty counts as the primary good, this massive infringement of liberty has to count as a presumptive constitutional wrong. The question is not whether liberty is "prior" to security in some lexical sense. The more accurate formulation is whether the government must justify its curtailment of liberty in the case at hand. Justice Black, speaking for the six-member majority, admitted as much by acknowledging that the executive order had to be reviewed on a strict scrutiny standard.7 Despite this recognition, Black punctured miserably by rubber-stamping the order because top government officials "deemed necessary" the exclusion of the Japanese in light of the possibility of a disloyal few within their ranks.4 However, strict scrutiny requires hardheaded judges to press government officials and to follow up evasive replies with yet more no-nonsense questions. For starters, suppose that persons of Japanese ancestry were more likely to have sympathy for Japan than other citizens or permanent residents. Couldn't the same be said of individuals of German ancestry, many of whom actively supported Germany before the United States entered World War I on the side of the allies in 1917? So why not lock them up too? The government expressly rejected that policy in favor of making individualized determinations regarding the incarceration of individuals of German ancestry. The next question is: do we have to intern all Japanese to guard against the risk? Not according to J. Edgar Hoover after the FBI had rounded up the most dangerous suspects, including those of Japanese origin, right after Pearl Harbor. And why exclusion for all Japanese when a curfew policy was already in place and sustained in a prior (dubious) decision of the Supreme Court?"

Next there is the question of timing. The executive order took effect on May 9, 1942, over five months after the initial attack on Pearl

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46 See Eugene V. Rostow, The Japanese American Cases—A Disaster, 54 Yale L J 489, 491 (1945) (arguing that Korematsu and its companion cases were disastrous because they strengthened military power in relation to civil power and seriously weakened the writ of habeas corpus).

47 Korematsu, 323 US at 216.

48 Id at 218–19 ("[E]xclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country.").

49 See Hirabayashi v United States, 320 US 81, 101 (1943) (upholding congressional ratification of the Executive Order authorizing the implementation of curfews applicable only to individuals of Japanese ancestry).
Harbor. In the interim, the Battle of the Coral Sea had been won, the Japanese advance had been thwarted, and there was zero evidence of collaboration or sabotage anywhere during that period of maximum vulnerability. Defenders of internment, such as Walter Lippmann, thought this fact only proved the danger because the Japanese were determined to hold back until they could launch one unified attack. In essence, no evidence could have persuaded them otherwise. What about a cold-eyed motive? General John DeWitt, who organized the internment, spoke publicly about a security risk, but privately he justified the action to rally the public against the yellow peril. At the request of the War Department, he altered his report to play up a national security argument that he knew was bogus. The War Department continued the charade by concealing the existence of the early drafts (which had been burnt) from the Department of Justice when the case was before the Supreme Court. Nor was there any explanation as to why the government was defending internment as late as February 1944, when Korematsu came down, long after all the initial anxieties about the Japanese advances had passed. We know that racial prejudice was a significant motivation (p 293 n 4), and many locals acquired farms, homes, and businesses on the cheap when their owners and proprietors were uprooted.

Against all these nefarious facts, Posner writes that “[t]he Court noted that the fear of possible sabotage by persons affected by the order was supported by the reported refusal of thousands of American citizens of Japanese ancestry to swear unqualified allegiance to the United States” (p 293). The number was in fact, 5,000, and the number interned was 120,000. Well, why not exact loyalty oaths from all citizens? Indeed, why bother to incarcerate anyone who signs a loyalty oath? Posner notes that the “pragmatic” Justice Jackson dissented, but accuses him of betraying his pragmatic origins by not remembering that the Constitution is not a “suicide pact” as he wrote later in a case that dealt with direct threats of the use of force. All of the pragmatic virtues could be called into play, but the guns were turned in the wrong direction. It is no wonder that Korematsu has no (other) de-

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50 Walter Lippmann, Today and Tomorrow: The Fifth Column on the Coast, Wash Post 9 (Feb 12, 1942).
51 See Peter H. Irons, Justice at War 41, 46 (Oxford 1983).
52 See Stone, Perilous Times (cited in note 45).
53 Korematsu, 323 US at 219 (“Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.”).
54 See Terminiello v City of Chicago, 337 US 1, 37 (1949) (Jackson dissenting) (“The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”).
fenders today, and that a presidential apology, a congressional commission, and a reparations statute all rest on the unhappy conclusion that national hysteria and not national security drove the internment decision. Clearly, something is deeply amiss in Posner’s effort to taunt his reader with such a selective and dubious reading of history. Apparently, however, his pragmatism has not saved him from conclusions that read as naïve, illiberal, and intolerant. We should all be better off if our sense of pragmatism were broad enough to allow us to acknowledge past national mistakes in order to move forward to construct a society composed of free and responsible individuals. In order to do that, we have to begin with the substantive conceptions of individual rights and their relationship to overall social welfare. On this score, Posner’s peculiar brand of pragmatism fails the most pragmatic test. It doesn’t work.

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55 An American Promise, Presidential Proclamation 4417, 3 CFR 4417 (Feb 19, 1976) (“We now know what we should have known then—not only was the evacuation wrong, but Japanese-Americans were and are loyal Americans.”).

56 Commission on Wartime Relocation and Internment of Civilians, Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians (GPO 1982) (reporting the findings of a congressional commission established to review the Japanese internment and making recommendations for appropriate remedies).