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A Farewell to Pragmatism

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I. CLASSICAL LIBERALISM VERSUS LIBERTARIANISM

The purpose of this brief response is to correct some of the many misconceptions about classical liberalism that have insinuated their way into Richard Posner's *Pragmatic Liberalism versus Classical Liberalism*.[1] In this iteration, pragmatic liberalism stands only for the modest proposition that one should proceed "by pointing out the[] advantages and disadvantages [of his views] and asking the reader to decide whether he believes the former outweigh the latter."[2] That benign formulation leaves little rhetorical space between classical and pragmatic liberalism. My stress on *classical* liberalism is articulated in opposition to hard-core libertarian positions that do claim the status of necessary truths, a position that I strenuously attacked in *Skepticism and Freedom*.[3] I wrote: "My intellectual odyssey has been from a staunch libertarian who distrusted consequentialist explanations to a classical liberal who embraces these explanations."[4] This basic point escapes Posner, who makes the bizarre and incorrect claim that "[o]nly the minuscule Libertarian Party subscribes to something like Epstein's political philosophy."[5] The Libertarian Party treats taxation as theft, and then never explains how any government is funded.[6] In contrast, my views line up with the benefit theory of taxation of Locke, Smith, and Hayek, under which the flat tax emerges as a sensible compromise that allows democratic processes to reach revenue targets while minimizing the risks of political favoritism and preju-

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1 Richard A. Posner, *Pragmatic Liberalism versus Classical Liberalism*, 71 U Chi L Rev 659 (2004).

2 Id at 659.

3 Richard A. Epstein, *Skepticism and Freedom: A Modern Case for Classical Liberalism* 7 (Chicago 2003).

4 Id at vii. Posner mistakenly dates my migration to consequentialism to as late as 1993. Posner, 71 U Chi L Rev at 664 (cited in note 1). By that date it was long complete. See, for example, Richard A. Epstein, *Self-Interest and the Constitution*, 37 J Legal Educ 153, 154 (1987).

5 Posner, 71 U Chi L Rev at 668 (cited in note 1).

6 See, for example, Libertarian Party of Georgia, *2003 Libertarian Party of Georgia Platform: Economic Freedom*, online at http://www.lpgeorgia.com/ga/stateparty/platform_II.html (visited Mar 5, 2004).

dice.[7] Posner compounds his error by saying that "[l]iberalism in Epstein's construal of the term refers not to self-government but to freedom from government regulation."[8] The libertarian might embrace this position, but the classical liberal cannot. So long as governments spend tax revenues, an ideal system of government must provide both for zones of individual freedom and for collective self-governance over public expenditures to maintain social order and infrastructure. How anyone could conflate these two positions is hard to fathom. Richard Posner cannot refute classical liberalism because he cannot describe either its methodology or its content.

Far from being aridly conceptual, classical liberalism starts with the empirical regularities of human behavior (of which scarcity and limited self-interest are key) in order to identify the legitimate uses of state power. It treats traditional libertarian synthesis not as incorrect, but as incomplete, insofar as this synthesis precludes forced exchanges that permit such institutions as taxation and condemnation. Unlike the hard-core libertarian, the classical liberal is overtly consequentialist in seeking to create social institutions that maximize the overall satisfaction of all their members. The theoretical standard (and, yes, we need some measuring rod *in order* to make pragmatic calculations) takes into account the level of satisfaction of *all* individuals. It then holds, as a *first* approximation, that one set of social institutions is better than a second so long as at least one person in the first is better off than in the second and no one is left worse off in the second than in the first. Even that position falls short of the desired objective because it is silent about the distribution of the surplus created by social improvements. Here, my view remains that state power must seek to divide that gain pro rata among all individuals in order (as with the flat tax) to minimize corrosive interest group politics that undermine democratic institutions.

This position is not intended to "cow" people into accepting alien beliefs and practices on matters of ideology, marriage, religion, and work.[9] It does purport to speak to everyone from Marxists to Muslims in order to persuade them to limit their use of coercion against those who disagree with them, and to ask them to provide arguments that underlie their position. But no one should suppose that it is intended to force devout Muslims to swap the Koran for *The Wealth of Nations*.[10] Rather, in the kind of philosophical generalization that Posner

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[7] See generally Richard A. Epstein, *Can Anyone Beat the Flat Tax?*, 19 Soc Phil & Pol 140, 146–60 (Winter 2002) (arguing that the flat tax works well regardless of whether one supports wealth redistribution).

[8] Posner, 71 U Chi L Rev at 661 (cited in note 1).

[9] Id at 674.

[10] See id at 659.

deplores but everyone needs, it seeks to maximize the scope of individual choice consistent with the like liberties held by others. The believer cannot kill, maim, or restrict the civil liberties of the infidel, just as the infidel cannot do the same to the believer. Thus, classical liberalism explains when coercion may be properly directed by an organized state against any of its members without their consent. Posner, alas, refuses to address that question for he conceives of political debate as directed solely to the hearts and minds of his readers. He never tells us what should be done when persuasion fails and one person seeks to kill others who offend his beliefs. Does the pragmatist allow the unpersuadable holdout to wreak havoc?

The classical liberal answer contains two parts. First, neither side should be allowed to use force against the other simply because of a fundamental and unbridgeable disagreement in outlook. Thus, when the rubber hits the road, the mutual renunciation of force between different persons dominates the Hobbesian world of the war of all against all. Second, when state coercion is used, it should be directed to make all persons *better off* than before. Obviously, that goal cannot be achieved if state power is used to reform the individual's tastes and preferences. But it can, and should, be satisfied to overcome problems of coordination, as in the creation of public goods or the management of common pool assets, when state power blocks the degenerative outcomes of the standard prisoner's dilemma game.

I see nothing that confines this general approach to the United States or to advanced Western democracies. The program is capable of application and implementation, if only one cared to do it, in any society, regardless of its level of wealth or the peculiar customs and histories of its populations. The program here is not Utopian as Posner charges.[11] It does not require the implementation of dewy-eyed legislative schemes, the creation of a new bureaucracy, or massive amounts of redistribution within or across national borders. It lends no aid and comfort to grotesque public initiatives (such as, for example, the "No Child Left Behind" Act[12]) that wreak havoc on the very institutions that they are intended to strengthen. Classical liberalism only requires a major cutback in social legislation with a consequent reduction in levels of taxation and regulation. Indeed, this approach works *better* in diverse societies than in homogenous ones. If all individuals have (roughly) the same preference schedules, any uniform public good would have uniform benefits for all members of society, so that it becomes easier to decide whether each person benefits on net from the collective initiative. Homogenous societies can sustain a higher level

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[11] See id at 661.

[12] Pub L No 107-110, 115 Stat 1425 (2002).

of collective control than diverse societies in which one person's public good is more likely to count as another's public bad. The classical liberal framework should enable people to work together—or to go their separate ways.

This set of concerns is not an attack on democracy, nor, as Posner asserts, is it only "weakly supportive" of it.[13] At one level, in parliamentary democracies, it could be read as a plea to legislators to exercise self-restraint. At another, in the United States, it argues that a constitutional democracy that imposes meaningful limitations on state power will outperform a democracy in which voting majorities are free to plunder minorities. The bulwarks of freedom of speech and private property are parts of the overall scheme. The first without the second, however, will prove unavailing, as the following example suggests. Imagine a small community with nine plots of land arrayed on a tic-tac-toe grid. The eight outer boxes each have a single family home built on it, and the public deliberates on whether the last owner should be able to build a similar home on his own land. At the outset, each of the eight outer owners values his home at $10,000, and the center owner values his land for building purposes at $2,500. The unrestrained democratic process with full and free debate could easily allow the eight outside owners to restrict the ninth's use of his land, that is, not allow him to build. The process of free debate lowers the costs of their coalition. Each of the eight gains $100 by preventing the ninth from building, increasing their land value to $10,100 each, while the ninth loses $2000 in land value and is left with only $500. The question is whether this result is better than one which treats the restriction on development as tantamount to a taking of a partial interest in the land, such that the other eight must tax themselves to cover the losses that their decision inflicts on the hapless ninth.

I can see no reason why they should not be required to take the ninth's loss into account. Unless the compensation is forthcoming, the eight will act so long as their gains exceed the costs of organizing the winning coalition; the huge losses to the loser will be ignored. Putting the constitutional requirement in place *improves* the level of deliberation by forcing the dominant coalition to consider all the consequences of its own actions. Now the deliberation of the dominant coalition will be directed to *social* costs and benefits, which would both restrict *and* pay if the benefits to each were $300 instead of $100. The scheme is subject to endless permutations, but in none does public deliberation without property protection against confiscation outperform a system that protects both.

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[13] Posner, 71 U Chi L Rev at 661 (cited in note 1).

All of this is not to make, as Posner misleadingly suggests, "freedom of contract the supreme constitutional principle."[14] Rather, as the basic theory suggests, classical liberalism only precludes the low "rational basis" level of scrutiny, but fully permits (as the hard-line libertarian does not) the state to regulate contract to control against externalities and common pool problems. On this view, the decision in *Lochner v New York*[15] is correct because the maximum hours legislation that it struck down produced a transfer in wealth (from nonunion to union firms) no different from that in the land use example set out above. Of course, a nation could survive as a democracy if this decision is wrongly decided, but it will do better on both political and economic grounds if it pushes forward with the constitutional protection of both political and economic freedom. Does anyone think that any "harm" done by *Lochner* comes within a country mile of that done by *Plessy v Ferguson*?[16] The latter *sustained* segregation in transportation, schools, and marriage on the strength of a broad definition of the police power, illustrating the ugliness that can infect an unconstrained democratic process, which, for what it is worth, systematically binds disenfranchised groups. We can condemn *Plessy* because it inverts the relationship between individual rights and democratic practices. The classical liberal tradition starts with a set of individual rights that is fully justified on institutional terms. It then asks how political institutions can be put into place in order to secure these rights against private violence without exposing them to the perhaps greater peril of public force. Posner's uncritical commitment to democratic outcomes guards against the first risk, but simultaneously opens societies up not only to the horrors of the American South, but also the far greater horrors of Nazi Germany and other nations that have practiced systematic extermination. Why anyone would want to be a quasi-apologist of such odious policies on the strength of a flimsy pragmatism is a mystery that Posner will have to carry to his grave. To everyone else in the world, it is not just a simple matter that *our* ears don't like Osama bin Laden.[17] As the worldwide outpouring of sympathy and remembrance this past September 11th reminds us, all neutral parties on this issue (and by no means on all others) were lined up on our side. But for Posner the only question is whether that view "could be proved correct in a debate with bin Laden."[18] No way. That argument is no better than one in the domestic front which says that we could not prove murder was wrong to the killer who maintained to the

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14 Id.

15 198 US 45 (1905).

16 163 US 537 (1896).

17 See Posner, 71 U Chi L Rev at 668 (cited in note 1).

18 Id.

contrary. After all, what sounds rights to *our* ears might not sound right to *his*. The man who is a moral skeptic *between* groups has no way to deny skepticism *within* groups. Each person becomes the (pragmatic) judge of the propriety of his own actions. It is not hard to isolate the defect in so toxic an approach. Proof in moral argument does not require logical inconsistency. Nor does a single holdout defeat the conclusion. My son Benjamin, aged 22, upon hearing Posner's views, tersely observed that if Posner ventured these views in any bar in New York City, he would be bloodied within the hour. That is not the reaction that an everyday pragmatist hopes to receive from a neutral audience.

II. CAUSATION AND CORRECTIVE JUSTICE

The question thus remains as to why Posner is so tone-deaf on matters of political theory. In part, I think that the answer lies in his overall impatience with conceptual work in legal and philosophical arenas. That dismissive attitude is revealed in his treatment[19] of my earlier writings on causation and corrective justice, much of which was written from a perspective that was more libertarian than classical liberal.[20] I think that the systematic errors of the libertarian approach do not manifest themselves in cases of small-number interactions, because no forced exchange improves on the social outcomes that the corrective justice theory supplies, at least until we get to large-number nuisance cases, when the balance of convenience shifts.[21] It is hard to detect the differences between the two approaches when their outcomes so strongly overlap.

Posner's conceptual errors stem less from the evolution of my position, and more from his "pragmatic" rejection of all conceptual analysis. Here I shall point to only two errors in his exposition. First, on causation he claims that statements of causation "typically" follow rather than precede ascription of responsibility. "We say that the arsonist caused the fire, rather than the match or the oxygen in the air, because we want to make the arsonist legally responsible."[22] Even if we ignore his impermissible use of the royal "we," ascriptivism is long dead as a theory of meaning[23] because once the inversion is demanded,

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19 See id at 662–64.

20 See Richard A. Epstein, *A Theory of Strict Liability*, 2 J Legal Stud 151 (1973).

21 See Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J Legal Stud 49, 75–76 (1979).

22 Posner, 71 U Chi L Rev at 662 (cited in note 1).

23 See, for example, Peter Geach, *Ascriptivism*, 69 Philosophical Rev 221, 224 (1960) (arguing that "to ascribe an act to an agent is a causal description of the act"); George Pitcher, *Hart on Action and Responsibility*, 69 Philosophical Rev 226 (1960) (arguing against Hart's thesis that when one says "Smith hit her," one is both stating the fact that Smith hit her and ascribing responsibility to Smith).

it offers no independent explanation as to why this defendant is in fact an arsonist or why anyone would want to hold him responsible. The standard definition of arson is the willful destruction of the property of another by fire without justification or excuse.[24] The causation question has to be faced in order to explain the role of natural events and third-party actions on the causal equation. If one person sets a fire that a second person fans until it reaches a third person's house, who committed the bad act and why? The cases on this matter are legion and often get the analysis wrong.[25] Posner does not offer a clue on how to determine what outcomes count as a consequence of a particular act. My early analysis of causation goes a long way to answer this question even if, standing alone, it is not the only building block needed to formulate a comprehensive political theory.

Posner is every bit as wrong in his views on corrective justice. He starts with the undisputed position that rectification requires the defendant's wrongful action against the plaintiff, but he blunders badly in thinking that wrongfulness requires the presence of negligence or intention and, therefore, precludes use of a theory of strict liability.[26] The first point is that negligence and intention themselves do not establish the conclusive wrongfulness of any act. Negligence may be excused and intentional harms could be excused or justified. Thus, the full statement of responsibility requires the introduction of a wide range of defenses (trespass by plaintiff, self-defense, assumption of risk, etc.) before deciding that any particular action is wrongful. At this point, the method of presumptions[27] offers a systematic way to begin: the causation of harm (that is, the use of force and analogous methods) to the person or property of another states a valid prima facie case which then invites a full range of defenses first for accidental and then (after the replication) for deliberate harms. The organization is much crisper than the contemporary system that lumps together discrete issues under a reasonableness umbrella. The hard work pays off with a legal system that is easier to articulate and implement than the negligence system with its multi-factored tests of reasonableness whose complexity makes it vulnerable to a functional attack.

Posner's failure to work his way through these conceptual issues forces him to pay a high price for his political theory. Since he thinks that no conception of rights and duties is worth the powder required

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24 See Model Penal Code § 220.1 (Proposed Official Draft 1962).

25 See, for example, *Ryan v New York Central Railroad*, 35 NY 210, 212 (1866) (refusing to allow damages due to remoteness because "[t]hat a building upon which sparks and cinders fall should be destroyed or seriously injured, must be expected, but that the fire should spread and other buildings be consumed is not a necessary or a usual result").

26 See Posner, 71 U Chi L Rev at 663 (cited in note 1).

27 Epstein, *Skepticism and Freedom* at 91–96 (cited in note 3).

to blow it to hell, why not treat pragmatic democratic deliberations as dispositive on all questions of entitlements? On this issue Posner, of course, does not stand alone, but joins a long list of ostensible realists and critical legal theorists who have sold out both the rule of law and all conventional morality for a mess of porridge. What makes his conceptual mistakes so ghastly is his customary willingness to go the whole nine yards. He offers aid and comfort to the likes of Hitler and bin Laden by insisting that no one can prove them wrong so long as they aren't prepared to scream uncle. I doubt that the term "pragmatism" can survive so heinous a set of associations. "Pragmatism" had a certain luster in the hands of William James and Oliver Wendell Holmes, Jr., but in light of Posner's massive influence, we should all be better off if a once-honorable term were struck from the philosophical and legal lexicon.