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The book ostensibly reviewed by my distinguished academic colleague Richard Epstein[1]—*Law, Pragmatism, and Democracy*—offers pragmatic accounts both of adjudication and of democracy.[2] Epstein, no fan of democracy, is interested only in my analysis of adjudication. He treats my analysis of democracy as a trivial variant of the public-choice theory of politics, which emphasizes interest groups. But central to my analysis is the claim that politicians should be viewed as principals in the political process, not just, as in public-choice theory, agents of interest groups.[3] The claim may be right or wrong, but as it is central to the theory of democracy expounded in the book and takes up more than a hundred pages, one might have expected *some* discussion of it. There is none (beyond a one-page brush off); nor is there any mention of my applications of the theory, to election law or to the contested 2000 presidential election.

Against legal pragmatism Epstein levels the standard charge that it is contentless, but he ignores my endeavor to give it content. The following passage from my book sketches my response to the charge of contentlessness:

> 1. Legal pragmatism is not just a fancy term for ad hoc adjudication; it involves consideration of systemic and not just case-specific consequences.
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> 2. Only in exceptional circumstances, however, will the pragmatic judge give controlling weight to systemic consequences, as legal formalism does; that is, only rarely will legal formalism be a pragmatic strategy. And sometimes case-specific circumstances will completely dominate the decisional process.
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> 3. The ultimate criterion of pragmatic adjudication is reasonableness.

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† Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer, The University of Chicago Law School. This is a reply to Richard A. Epstein, *The Perils of Posnerian Pragmatism*, 71 U Chi L Rev 639 (2004), reviewing my book *Law, Pragmatism, and Democracy* (Harvard 2003).

1 Richard A. Epstein, *The Perils of Posnerian Pragmatism*, 71 U Chi L Rev 639 (2004).

2 Richard A. Posner, *Law, Pragmatism, and Democracy* (Harvard 2003).

3 See id at 130–249.

4. And so, despite the emphasis on consequences, legal pragmatism is not a form of consequentialism, the set of philosophical doctrines (most prominently utilitarianism) that evaluates actions by the value of their consequences: the best action is the one with the best consequences. There are bound to be formalist pockets in a pragmatic system of adjudication, notably decision by rules rather than by standards. Moreover, for both practical and jurisdictional reasons the judge is not required or even permitted to take account of *all* the possible consequences of his decisions.

5. Legal pragmatism is forward-looking, regarding adherence to past decisions as a (qualified) necessity rather than as an ethical duty.

6. The legal pragmatist believes that no general analytic procedure distinguishes legal reasoning from other practical reasoning.

7. Legal pragmatism is empiricist.

8. Therefore it is not hostile to all theory. Indeed, it is more hospitable to some forms of theory than legal formalism is, namely theories that guide empirical inquiry. Legal pragmatism is merely hostile to the idea of using abstract moral and political theory to guide judicial decisionmaking.

9. The pragmatic judge tends to favor narrow over broad grounds of decision in the early stages of the evolution of a legal doctrine.

10. Legal pragmatism is not a supplement to formalism, and is thus distinct from the positivism of H.L.A. Hart.

11. Legal pragmatism is sympathetic to the sophistic and Aristotelian conception of rhetoric as a mode of reasoning.

12. It is different from both legal realism and critical legal studies.[4]

These points are elaborated in chapter after chapter of the book.

Epstein could grant all twelve points yet still argue that legal pragmatism is too vague and subjective to be an appropriate lodestar for U.S. judges. My reply would be that all the other approaches to judicial decisionmaking that are on offer, including Epstein's, are no less vague and subjective. For though Epstein has, as I explain in my review of his book, changed his legal philosophy over the years, he has

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[4] Id at 59–60 (footnote omitted).

not changed his policy views; and it is apparent that they well out of temperamental and other personal factors, and political convictions, rather than being generated by jurisprudential theory. In any event, he ignores my twelve points completely,[5] not to mention their elaboration, and instead bases his criticisms of the book on a series of misunderstandings.

The first and longest part of his "review" is devoted to a discussion of issues of tort law. This is remarkable. My book contains no index reference to tort law and only a handful of scattered sentences pertaining to it. Epstein refers to a single one of these sentences: "The 'reasonable person' standard of tort law is fundamental."[6] The sentence appears in a list of legal doctrines that use "reasonableness" as a legal criterion. (Another entry in the list is the doctrine of promissory estoppel, which makes a promise that is relied on enforceable even if not supported by consideration, provided the reliance was "reasonable.")

From this innocent example, Epstein infers that I have abandoned the economic approach to tort law and that I now believe that every tort case should be decided by asking whether the defendant was negligent within the meaning of the Hand formula[7]—conceived of no longer as an economic formula but as an implementation of legal pragmatism. Epstein is off base in two respects. The first is in thinking that I want to replace economic analysis of tort law with pragmatic analysis of tort law. As I make clear in the book, I continue to believe that deciding common law cases in a way that will promote economic efficiency is the right way for judges to go; it is also the pragmatic way.[8] Pragmatism need not displace specific legal approaches, as distinct from guiding the choice among them.

The second mistake, though it has almost nothing to do with my book (which does not even mention the Hand formula), is to suppose that I believe—that I have ever believed—that the right way to decide *every* tort case is to apply the Hand formula to it, in which event tort law would contain a single standard ($B < PL$) and no rules.[9] This would mean that I thought tort law had no place for strict liability, the doctrine of assumption of risk, the last clear chance rule, the defenses

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5 As when he says that "Posner actively distances himself from consequentialist reasoning generally." Epstein, 71 U Chi L Rev at 650 (cited in note 1).

6 Posner, *Law, Pragmatism, and Democracy* at 74 (cited in note 2).

7 That is, negligence is failure to take precautions when the burden of the precautions (B) is less than the loss if the accident that the precautions would have prevented occurs (L) discounted (multiplied) by the probability that the accident will occur unless the precautions are taken (P). Hence $B < PL$.

8 See Posner, *Law, Pragmatism, and Democracy* at 78 (cited in note 2).

9 Recall point 4 in the indented quotation, see text accompanying note 4, where I said that rules have a place in a system of pragmatic adjudication.

of public and private necessity, liability for defamation in cases of republication, and the "reasonable person" rule itself, which bases the duty of care on average capabilities rather than on the idiosyncratic capabilities of particular injurers and victims. All these are economically sensible doctrines that I have no desire to see abrogated, as should be obvious from even a cursory glance at my writings on tort law.[10] Much of Epstein's purported review of my book is devoted to contesting a view of that law which I have never held (though it is less contestation than a summary of Epstein's own preferred rules of tort law).

But in the course of that irrelevant diatribe, he lets slip an observation that reveals the inadequacy of the utilitarian philosophy that he expounds in his book. He says, "If one allows the defendant [in a rape case] to argue that the benefits of the rape that he committed exceed its costs, 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."[11] The implication is that, were there no risk of legal error, it should be a defense to a rape case that the rapist, perhaps a sadist, obtained more pleasure from the act than the victim suffered pain. Examples such as this merely show that utilitarianism is an inadequate guide to law.

The rest of the "review," except for the single page on my democratic theory,[12] is an extended criticism of me for having an insufficiently aggressive conception of the judicial role in enforcing constitutional rights. Epstein incorrectly states that I do not believe that constitutional rights should be justiciable at all.[13] This mistake leads him repeatedly to mischaracterize my evaluation of specific constitutional decisions, such as *Lochner v New York*.[14] I did not, as he believes, pronounce the decision unpragmatic; I merely said there were pragmatic considerations on both sides,[15] concluding: "All that is certain is that

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[10] See, for example, Richard A. Posner, *Economic Analysis of Law* 167–213 (Aspen 6th ed 2003). See also William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law* (Harvard 1987).

[11] Epstein, 71 U Chi L Rev at 649 (cited in note 1). He means false negatives, that is, acquittals of guilty defendants. A false positive would be convicting the innocent.

[12] See id at 651.

[13] Epstein states:

> 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.

Id at 652.

[14] 198 US 45 (1905).

[15] See Posner, *Law, Pragmatism, and Democracy* at 78–79 (cited in note 2).

Lochner was no more willful than aggressive modern decisions such as *Roe v. Wade*."[16] Epstein acknowledges that I do not discuss *Plessy v Ferguson*,[17] but says that "[a]lthough he [Posner] does not quite say it, the implication seems to be that he thinks that *Plessy* was correct when decided."[18] And he claims that I "bravely, if foolishly, defend[] 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 liberty."[19] Actually, I didn't defend the decision, though I criticized Justice Jackson's dissent for its internal inconsistency (unremarked by Epstein).[20]

It is careless of Epstein to misrepresent what I said about these cases. (It is apparent that he did not read my book carefully.) What he could have said, however, which would have had the merit of accuracy, is that I am more sympathetic to these decisions than he is. Part of the reason, though only a small part, is factual; I have in mind his risible suggestion that by May 9, 1942, when the Japanese exclusion order (upheld in the *Korematsu* decision) took effect (though it had been issued in March), "the Battle of the Coral Sea had been won, [and] the Japanese advance had been thwarted."[21] The Battle of the Coral Sea—so far from being a clear-cut victory for the United States that the loss of the *Lexington*, one of our few carriers, in the battle was concealed from the American public until the victory at the Battle of Midway in June[22]—was fought on May 7 and 8, so could hardly have been a ground for rescinding the exclusion order on the ninth, which was far too soon to evaluate the consequences of the battle. And the Japanese advance had not been thwarted by May; Japan remained on the offensive, attacking Midway the following month.

But these are details, and the real difference between us concerning these cases is that I am reluctant to make hindsight judgments, especially judgments designed to make me look more intelligent and more morally sensitive than the people of earlier epochs. When *Lochner* was decided in 1905, a large body of respectable opinion held that laws fixing minimum wages and maximum hours of work were enlightened measures that would improve the welfare of the working class at negligible social cost.[23] (Many economists now believe, as do

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16 Id at 79. See *Roe v Wade*, 410 US 113 (1973).

17 163 US 537 (1896).

18 Epstein, 71 U Chi L Rev at 655 (cited in note 1).

19 Id at 655–56 (footnote omitted). See also *Korematsu v United States*, 323 US 214 (1944).

20 See Posner, *Law, Pragmatism, and Democracy* at 293–94 (cited in note 2).

21 Epstein, 71 U Chi L Rev at 657 (cited in note 1).

22 See H.P. Willmott, *The Barrier and the Javelin: Japanese and Allied Pacific Strategies, February to June 1942* 286, 515 (Naval Institute 1983).

23 Epstein suggests that the issue of health in *Lochner* should have been whether

Epstein and I, that this view was mistaken.) The question for the Supreme Court was whether to invalidate such measures on the ground that they deprived employers of "liberty of contract," a term not found in the Constitution, in circumstances constituting a denial of "due process of law," a term not obviously related to the content of a law as distinct from its form or the circumstances of its enactment or application. Holmes pointed out in his dissent that to invalidate New York's maximum-hours law would require the Court to choose between economic theories, for it could hardly be thought that the framers of the Constitution had made the choice for the Justices.[24] By knocking down the law, the Court impeded, though as it turned out only rather trivially, what amounted to a social experiment. I thus see Holmes's dissent as the precursor to the majority opinion in the recent school-voucher case.[25] The goal of school vouchers is to enlarge parental choice and to place competitive pressure on the public schools; but because most private schools are parochial schools, there is a worry that a voucher system would give a boost to religion. No one could predict how big a boost (there might be none, since a voucher system would stimulate the creation of new secular private schools) and whether there would be offsetting educational benefits. The sensible approach, adopted by the Court, is to allow individual cities to adopt voucher systems, thus setting the stage for a social experiment that will answer the critical questions, impossible to do in advance.

As for *Plessy v Ferguson*, the claim by the Court's majority that "separate but equal" would offend blacks only if they chose to be offended was ridiculous. It must have been obvious by 1897 that the purpose of segregation was to keep blacks down. The hard question is whether it would have been feasible for the Supreme Court to have dismantled segregation at so early a date. I suspect it would not have been. I doubt that the southern states would have complied with the Court's orders or that the federal government would have called out the army (at that time of trivial size) to enforce them, risking a renewal of the Civil War. Invalidating segregation would probably have been a quixotic gesture. It might have burnished the Court's record in

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Lochner's bread (the law in question limited bakers to working ten hours a day) was wholesome. Epstein, 71 U Chi L Rev at 654 (cited in note 1) ("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."). The actual issue was the bakers' health. It is unclear why their health should be less deserving of protection than consumers' health.

24 See *Lochner*, 198 US at 75–76 (Holmes dissenting).

25 See *Zelman v Simmons-Harris*, 536 US 639, 652 (2002):

> [W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.

history, but at the cost of underscoring the Court's weakness, and perhaps encouraging future defiance of its decisions. A court, as Epstein fails to understand, cannot get too far ahead of public opinion.

And finally *Korematsu*. Epstein seems to disagree not with my approach, but only with its application to the facts of the case,[26] a disagreement unrelated to the merits of legal pragmatism. In March 1942, when the exclusion order was issued, there was considerable doubt in government circles that the order was necessary or appropriate.[27] The decision to issue it was, moreover, tainted by racial hostility;[28] and in retrospect we know that few if any persons subject to the order (the most suspicious characters among Japanese living in the United States having been rounded up earlier) were disloyal—this was a possible justification for the subsequent enactment of a statute providing monetary reparations to them. It's a different question, however, whether President Roosevelt was mistaken to issue the order. To answer that question we have to think ourselves into the minds of the American people three months after Pearl Harbor. The Japanese army and navy were on a rampage, and there were fears of an invasion of the West Coast. Unprepared at the time of Pearl Harbor, our armed forces were on the defensive in March and would be incapable of offensive action for months. In these parlous circumstances it was natural, maybe inevitable, to resolve all doubts in favor of taking whatever measures of self-defense seemed feasible; for it may well be vital to morale in wartime that a nation's leaders show themselves resolute, unflinching, and even brutal in the prosecution of the war.[29] Does Epstein think that, had he been an adult in 1942, he would have criticized Roosevelt's order?

I would not be comfortable having judges who think as Professor Epstein does decide such questions, and not only because of his shaky hold on the military situation that confronted the nation at the time of the exclusion order. He suggests the following alternatives: a curfew (hardly calculated to prevent Fifth Column activities), a loyalty oath (which the disloyal would sign with alacrity), and, for the sake of

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26 That, at any rate, is how I read the following rather murky passage:

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

Epstein, 71 U Chi L Rev at 656 (cited in note 1) (footnote and citations omitted).

27 See id at 657.

28 See Gil Gott, *A Tale of New Precedents: Japanese American Internment as Foreign Affairs Law*, 40 BC L Rev 179, 226–32 (1998).

29 So at least I have argued, with reference to the severe measures that Britain took against suspected subversives during the dark days of World War II, in Richard A. Posner, *Overcoming Law* 164–67 (Harvard 1995).

equity, a roundup of persons of German descent as well—which would have been absurd, since they were scattered among the states, mainly in the Midwest, and were not, like the Japanese, in the direct path of a feared invasion. These suggestions confirm the reluctance expressed in my book to entrust lawyers with responsibility for making judgments of national security.[30]

[30] See Posner, *Law, Pragmatism, and Democracy* at 292–321 (cited in note 2).