were substantially undermined by the legal realists? How does Professor Radin's conception of pragmatism complete their dissolution? Law, she suggests, is perhaps best understood as social practice: "social" because it depends on "social context" and a "practice" because it depends on "reiterated human activity." How does this compare with the formalist conception of law? With the realist conception? With other contemporary conceptions?

2. Professor Radin identifies four consequences of a pragmatic Wittgensteinian conception of rules: the distinction between rule-making and rule-application tends to dissolve; rules are denied their "generality" because they are largely indistinguishable from the particulars of their application; rules are contingent not only upon the specific institutional practices that generate them but also upon the surrounding cultural context; and rules are not immutable. Thus understood, can rules really rule?

3. Hermeneutics, Professor Radin suggests, will form the epistemology of the pragmatic re-conception of law. Is this sufficient grounding for an effective conception of law? Conversely, is it too foundational to be considered pragmatic?

4. Professor Radin draws upon the work of the late Professor Robert Cover to suggest that judges must respect "the law of various dissenting communities." See Robert Cover, Violence and the Word, in Chapter Ten: Reconstructions. Interpretive practice, she suggests, must be holistic, pragmatic, and historically situated, and should strive to achieve coherence within and among interpretive communities. Does this burden judges with too much responsibility? Can judges, in theory or practice, assume this responsibility? Can they avoid it?

5. Professor Radin uses the word "vehicle" to briefly illustrate one aspect of formalism. Recall one of the most popular of all interpretive exercises, the attempt to discern the meaning of the proscription "No Vehicles in the Park." See H.L.A. Hart, Positivism and the Separation of Law and Morals, excerpted in Chapter One: Legal Realism. Assessing the reach of the ban is a fairly low-stress intellectual exercise: it might arguably extend to bicycles, to an ambulance, to skateboards, to wheelchairs, to a commemorative armored tank, and so on. More stress-inducing is the assessment of the methodology for these determinations: how does one decide? What would Professor Radin identify as the relevant considerations?

Richard A. Posner

THE JURISPRUDENCE OF SKEPTICISM


* * *

The skeptical vein in American thinking about law runs from Holmes to the legal realists to the critical legal studies movement, while behind Holmes stretches a European skeptical legal tradition that runs from Thrasymachus (in Plato's Republic) to Hobbes and Bentham and beyond. Against the skeptics can be arrayed a vast number of natural lawyers, legal conventionalists, and formalists, including Cicero, Coke, Blackstone, and Langdell, not to mention the majority of contemporary lawyers, judges, and law professors. This article will set forth and defend a moderately skeptical approach to law and judging, one not so far-reaching as that of the critical legal studies movement or even of
Holmes but distinct from orthodox legal thought or at least its pietistic expressions.

A summary of my own judicial credo may help orient the reader to the type and degree of skepticism that the article will defend. Many—though certainly not most, and perhaps only a tiny fraction—of the legal questions in our system, and I suspect in most others as well, are not merely difficult, but impossible, to answer by the methods of legal reasoning. As a result, the answers—the fourteenth amendment guarantees certain rights to fathers of illegitimate children, the right of sexual privacy does not include sodomy, a social host owes a duty of care to persons injured by a drunken guest, laws against selling babies make contracts of surrogate motherhood unenforceable, and so on ad infinitum—depend on the policy judgments, political preferences, and ethical values of the judges, or (what is not clearly distinct) on dominant public opinion acting through the judges, rather than on legal reasoning regarded as something different from policy, or politics, or values, or public opinion. Sometimes these sources of belief will enable a judge to come to a demonstrably correct result, but often not; and, when not, the judge’s decision will be indeterminate in the sense that a decision the other way would be equally likely to be pronounced correct by an informed, impartial observer.

The skepticism that gives rise to this conclusion is an epistemological skepticism, but it is often and will in this article be conjoined with a skepticism (again partial rather than complete) about the existence of invisible entities, such as "justice" and "legislative intent," to which appeal is sometimes made for answers to legal questions. (These forms of skepticism are distinct: one could believe that there are moral entities such as justice, but that they are unknowable). Ontological skepticism has significance for legal factfinding as well as for legal reasoning. Doubts about the existence of such mysterious mental entities as legislative intent can incite doubts about the existence of the mind itself and thus make problematic the requirement of proving a mental element in criminal, tort, discrimination, and other cases.

* * *

There is more to this article than an exposition and defense of a particular judicial philosophy. I argue that a skeptical perspective can cast light on a variety of jurisprudential questions—not only the nature of legal reasoning, but also criminal intent, civil disobedience, judicial ethics, the issue of specialized courts, the unit of Holmes’s thought, the validity of behaviorist approaches to law, and even the law of deodands. I sketch the decisionmaking process of the skeptical judge, emphasizing the importance of what I call social vision. I try, in short, to show that a skeptical perspective can be a stimulant to inquiry and understanding rather than just a slogan, provocation, or wet blanket.

Perspective—not theory. Even if skepticism as dogma is not a contradiction in terms (as well it may be), my own skepticism is a mood or attitude—a disposition to scoff at pretensions to certainty, to question claims (even my own) to the possession of powerful methodologies founded on professional expertise, and to disbelieve in absolutes and unobservable entities—rather than a theory.
The skeptical mood can be a by-product of realism or anti-realism; of reverence for science or hostility to science; of cultural and other forms of relativism; of positivism, pragmatism, anti-essentialism, materialism, or agnosticism; of Romanticism or of the rejection of Romanticism. But despite its confused lineage and affinities, the skeptical mood has, as I hope to demonstrate, not only a distinctive and bracing tone—arresting, irreverent, unsentimental, no-nonsense—but many fruitful applications to law.

There are, of course, degrees of skepticism. Since mine is of intermediate degree, this article performse faces in two directions: I am as intent on distinguishing my position from that of the radical skeptics in the critical legal studies movement as on challenging the position of Dworkin, Fried, and others that there is a right answer to every legal question. I believe I can do this without having to indicate precisely which, or precisely how many, decisions I regard either as indeterminate, period, or as indeterminate by the methods of legal reasoning.

The distinction in the last sentence deserves emphasis. Mingled throughout the article, but important to hold separate in one’s mind, are two different though overlapping forms of legal skepticism (this is a different axis of distinction from that suggested earlier between epistemological and ontological skepticism). One form, skepticism about the determinacy of legal outcomes in difficult cases, denies Dworkin’s "right answer" thesis . . . as well as the older legal formalism. The other form, skepticism about the existence of a distinctive legal-analytic methodology ("legal reasoning"), denies Coke’s and Fried’s "artificial reason" thesis, but is consistent with the possibility that some legal outcomes can be made determinate by methods of analysis that owe little or nothing to legal training or experience. The "right answer" thesis may be said to reflect nostalgia for lost certitudes; the "artificial reason" thesis, nostalgia for a lost sense of the law’s autonomy.

* * *

Practical reason in this sense is not a single analytical method or even a set of related methods but a grab bag of methods, both of investigation and of persuasion. It includes anecdote, introspection, imagination, common sense, intuition (due apparently to how the brain structures perceptions, so that, for example, we ascribe causal significance to acts without being able to observe—we never do observe—causality), empathy, imputation of motives, speaker’s authority, metaphor, analogy, precedent; custom, memory, "induction" (the expectation of regularities, related both to intuition and to analogy), "experience." There is duplication in this list; and some of the methods listed can be viewed as crude approximations to exact inquiry—for many of the inferences we draw with the aid of practical reason, whether in everyday life, literary criticism, or legal analysis, reflect a form of hypothesis-testing and thus are parallel to scientific inquiry.

Miscellaneous and unrigorous it may be, but practical reason is our principal
set of tools for answering questions large and small. And often it yields as high
a degree of certainty as logical demonstrations do; an example is the
proposition, neither analytic nor verifiable (and hence, to a strict logical
positivist, a pseudo-proposition), that no human being has ever eaten an adult
elephant in one sitting.

* * *

Coming closer to the use of practical reason in law, I note (here breaking
very sharply with logical positivism) that practical reason can answer some
ethical questions with a high degree of certainty. It is almost as certain that the
Nazi racial policies were evil as that no person has ever eaten an adult elephant
in one sitting. Of course, a thousand years from now, perhaps a hundred years
from now, the consensus that pronounces those policies evil may dissolve, but
at the moment it is so strong that a person who challenges it is likely to be
thought crazy (at least by educated persons in Western societies), like a person
who thinks the earth is flat, or was created five minutes ago complete with its
history, or is going to disappear on the stroke of midnight December 31, 1999.

Thus I do not believe that merely because the methods of exact inquiry are
rarely usable by judges in deciding cases, most judicial decisions must be
political or random. Practical reason can answer most of the legal questions that
logic cannot answer (and logic can answer some, as we saw).

* * *

I can illustrate my conception of judicial decisionmaking with the example
of antitrust law. The first step in deciding a tough antitrust case, a case not
controlled by precedent, is to extract (not—it goes without saying—by a
deductive process), from the relevant legislative texts and history, from the
institutional characteristics of courts and legislatures, and, lacking definitive
guidance from these sources, from a social vision as well, an overall concept of
antitrust law to guide decision. A popular candidate for such a concept today
is the economic concept of wealth maximization, but it is, needless to say, a
contestable choice. Having made this choice (the current Supreme Court has
almost, but not quite, made the choice for him), the judge will then want to
canvas the relevant precedents, and other sources, for information that might
help in deciding the case at hand. This is step two. Step three is a policy
judgment (in some cases it might approximate a logical deduction) resolving the
case in accordance with the principles of wealth maximization. Step four
returns on the precedents, but now viewed as authorities rather than merely as
data; the judge will want to make sure that the policy judgment made in step
three is not ruled out by authoritative precedent. Actually this is the third rather
than the second time that the judge will have consulted precedents, since they
must be consulted at the outset to determine whether the case is indeed in the
open area; if not, the four-step analysis that I have described is predetermined.

The suggested approach describes, I believe, the actual (though often
implicit) reasoning process that good judges use in the tough cases.

* * *
Because legal rules frequently, perhaps characteristically, do not make a perfect fit with the facts that lawyers and judges subsume under them—either the facts were not foreseen when the rule was adopted or the rulemakers were not able to agree (or just would not agree) on how to deal with those particular facts—the judge has to decide whether to extend or modify or "interpret" the preexisting rule. In such a case the rule does not rule, yet the case is decided somehow. So law must be more than rules, unless we want to say that judges are lawless whenever they exercise the kind of discretion I have just illustrated.

We can save Holmes' account and reconcile it with his skepticism by noting that if the law is just a prediction of what the judges will do, it is meaningless to ask how the judges can use prediction to discover the law. The law is not a thing they discover; it is the name of their activity. They do not act in accordance with something called "law," they just act; and the law is the bar's attempt to discern the regularities in their action. If this is right, the question whether "the law" is just the rules, or also includes the consideration that judges take into account when the rules "ran out" or when a brand-new rule is being created, is a pseudo-question, whose significance is political and ideological rather than analytical. Because the word "lawless" is a pejorative and because aggressive judges want to minimize the appearance of judicial discretion in order to give their (discretionary) decisions a more "objective," less political, and therefore more authoritative ring, commentators such as Ronald Dworkin who approve of an aggressive judiciary define "the law" as broadly as possible, while those desiring greater restraint define it more narrowly. It is just a semantic game (the game of "persuasive definition"), and it seems unworthy of the academic attention that it has received. The question whether judicial decisionmaking should be more or less freewheeling is interesting and important, but it is not a question about the nature of law. The law is not a thing, and it has no nature. Like "literature," time," "fascism," "democracy," and "beauty," the word "law" is not referential, that is, does not denote some set of objects, physical or mental, real or fictitious, as the word "chair," or "rabbit," or "unicorn," or "ice cream," or "electron," or "fear" does, though often with much ambiguity at the edges (and some of my examples are controversial). The word can be used, but not defined; "definitions" of law are political statements or jurisprudential claims.

* * *

Law relies very heavily on practical reason, often to good effect. But sometimes a legal question will not yield to methods of practical reason. There is thus an area of indeterminacy, which, of necessity, judges fill with contestable judgments of ethics or policy. The more heterogeneous the judiciary, the larger the area of indeterminacy; and the modern American judiciary, like the society it mirrors, is extremely heterogeneous.

All this can be summed up in the proposition that the goal of the careful judge is nothing more pretentious than a reasonable decision. If only one of the possible outcomes would be reasonable, it can fairly be described as the correct outcome—the "right answer" to the legal question posed by the case. But often
two or more outcomes will be reasonable, and the choice among reasonable outcomes is an open one, though not, I argued, precisely a legislative one.

* * *

Notes

1. Judge Posner is critical of the positivist conceptions of law he associates with Professors Ronald Dworkin and Charles Fried. As to the "one-right-answer" thesis of the former, see Chapter Five: Law and Literature, supra; as to the latter's view of law as an autonomous discipline, consider the following:

If the law is to do its work, which I want to insist is modest work, it must once more be viewed as a local, rather than a grand and global discipline. . . . Now an important reason for resisting this notion of law as really rather technical and consisting of uninteresting picky little rules, is that it is a conception that seems to freeze out the layman and make laymen feel quite puzzled about the areas they wander into. I am not sure that is such a bad thing, but it is exaggerated as a result. . . . I do think that it is by this return to law as a rather technical subject, somewhat cut off from its ethical, philosophical, and other heady roots, that we can once more have a measure of order, predictability, discipline, and limitation put into the law, because it is the lack of these which is the great illness from which the law suffers. And what I am talking about therefore is a return to rules.

/ Charles Fried, Jurisprudential Responses to Legal Realism, 73 CORNELL L. REV. 331, 332-33 (1988). How does Professor (at the time, Solicitor General) Fried's conception of law differ from Judge Posner's? In what ways is it the antithesis of the pragmatic conception? In what ways—if any—might it be consistent with pragmatic thought?

2. Is Professor Fried right, that a "return to rules" will bring a return to "order, predictability, discipline, and limitation"? Is Judge Posner's "grab-bag" of problemsolving techniques reasonably calculated to serve the same values?

3. Judge Posner suggests that the skeptical perspective does not preclude certainty. He notes that it is certain, for example, that no human being has ever eaten an adult elephant in a single sitting, and "almost as certain" that the Nazi racial policies were evil. But by what methods and criteria can he declare these beliefs "certain"? How might their certainty be placed in doubt? Does the existence of a dissenting perspective dissolve the certainty? Can Judge Posner, in other words, achieve certainty without consensus? Or do some forms of dissensus not count? In both epistemological and metaphysical terms, can skepticism avoid the problem of infinite regress without imposing some random closure on the inquiry? Consider Wittgenstein's suggestion, first, that "[i]f you tried to doubt everything you would not get as far as doubting anything"; and, second, that there are, at times, "hinge propositions": "the questions that we raise and our doubts depend on the fact that some propositions are exempt from doubt, are, as it were, like hinges on which those turn." LUDWIG WITTGENSTEIN, ON CERTAINTY §§ 115, 341 (Oxford ed. 1969).

4. Judge Posner suggests that the indeterminacy of law will be in proportion to the heterogeneity of the judiciary, which, he asserts, "is extremely heterogeneous." Is he correct that the judiciary is "extremely heterogeneous"? Can you see why Professor Radin—and Professor Cover, whom she cites—might object to this portion of Judge Posner's thesis? Consider Judge Posner's reliance on, inter alia, "common sense":

Common sense reasoning is one of the intellectually weakest methods of
NPJ V.L. claims, community’s pragmatism. Indeed, the unquestioning acceptance of certain "common sense" beliefs is necessary to their perpetuation. Because common sense is concerned with cultural transmission and replication, it is conservative in orientation and method . . .


5. "[T]he goal of the careful judge," Judge Posner concludes, "is nothing more than a reasonable decision." Is this sufficiently constraining? Is it too constraining?

Steven D. Smith

THE PURSUIT OF PRAGMATISM


* * *

Dworkin’s criticism of legal pragmatism can be presented in the form of two claims, one descriptive and the other normative. His descriptive claim is that pragmatism as a theory of law holds that legal officials—in particular judges—"do and should make whatever decisions seem to them best for the community’s future, not counting any form of consistency with the past as valuable for its own sake." Dworkin’s normative claim is that judges should maintain continuity with the past, at least to some extent. Taken together, the descriptive and normative claims can form the premises of a loose syllogism. If pragmatism values only future good but not continuity with the past, and if continuity with the past is valuable, then pragmatism offers an inadequate or undesirable theory of law.

* * *

Let us begin with two propositions that, if they do not quite qualify for the lofty status of "self-evident truths," at least come awfully close. First, a person ought to choose and act so as to produce more rather than less good. Second, any given choice or action can affect what happens in the future but cannot alter what, at the time of the action or decision, has already happened in the past.

* * *

The two propositions have an obvious plausibility and an ability to deflect or withstand apparent objections. And if the two propositions are accepted, the logical conclusion with respect to law is—legal pragmatism. Legal officials should choose and act to promote the greatest good. And since the only good that they have any power to affect lies in the future, it follows that they should act to promote good in the future. If it does not serve that purpose, then continuity with the past is not valuable.

This analysis suggests that legal pragmatism, as Dworkin defines it, is, or at least is close to being, a kind of irresistible truth. Of course, that truth leaves