

## COMMENTARIES

### History, What Is It Good For?

A Commentary on a Talk by Richard Posner\*

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Hegel remarks somewhere that all facts and personages of great importance in world history occur, as it were, twice. He forgot to add: the first time as tragedy, the second time as farce. . . . Men make their own history but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past.<sup>1</sup>

What does it mean to make a farce of history? A farce occurs when a commonly accepted story or situation is twisted in such a way as to make it appear ridiculous. To suggest that history can be mocked, then, requires that there be some way of distinguishing between valid and invalid interpretations of history. In attempting to make this distinction, however, one runs into the problem of all interpretations necessarily containing a large subjective element, thus calling any supposed validity they may have into question.<sup>2</sup> In law, this problem is compounded by the fact that when addressing legal precedence, one interprets cases, which are themselves interpretations of events. In other words, the judge is forced to provide an interpretation of an interpretation. In a cultural milieu in which even scientific inquiry is thought by some to be historically contingent and socially conditioned,<sup>3</sup> is it possible to come to a common understanding of history

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\* This commentary was written in response to a talk by Richard Posner, Chief Judge of the Seventh Circuit Court of Appeals, entitled “Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship.” The presentation was given on November 6, 1999 at Stanford Law School as part of the “Past Dependencies” Conference. Posner’s talk was based on a forthcoming article that will be published in the *University of Chicago Law Review*. The talk was moderated by Kathleen Sullivan, Dean of the Stanford Law School, and commented upon by Erika Frick and Professors Jack Rakove, Richard Rorty, and Hayden White. Their responses will be briefly discussed towards the end of this commentary.

<sup>1</sup> KARL MARX, *THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE* 15 (International Publishers Co. 11th prtg. 1987) (1963) [hereinafter MARX, *EIGHTEENTH BRUMAIRE*].

<sup>2</sup> There is a large debate within historiography over the validity of historical inquiry. I will not delve into this debate here except to the extent that it bears upon the questions of jurisprudence raised by Posner’s talk.

<sup>3</sup> See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 160–173 (3d ed. 1996) (arguing for an “evolutionary view of science” which conceives science as evolving from “primitive beginnings” to a more refined and detailed understanding of nature and an efficient research methodology through shifts in

against which a farcical interpretation can be constructed? Should one even be concerned about the validity of history as a necessary component of legal decision-making?

Richard Posner answers these questions in the negative in his talk “Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship” by taking the position that history is just a database and contains no normative value in and of itself. There can be no agreement upon a common understanding of history because history contains no internal coherence other than what is provided by its later interpreters. “History in the narrow sense of what happened does not reveal meaning.”<sup>4</sup> Because the interpreters of history cannot escape their own biases, they use history as a mask to justify their own ideological positions. As such, history, in the form of legal precedence, should not be determinative of the decisions that judges make but only one factor among many that judges should consider. This position must be viewed against Posner’s claim that law has traditionally been “the most historically oriented”<sup>5</sup> of all professions. By rejecting the determinative weight of history, Posner argues for a jurisprudence radically different from that which predominates today.<sup>6</sup> The jurisprudence Posner advocates continues his project of advancing a pragmatist theory of adjudication.

Posner begins his talk by discussing Friedrich Nietzsche’s essay “On the Uses and Disadvantages of History for Life,”<sup>7</sup> which Posner calls one of the founding documents of pragmatism. Nietzsche distinguishes between history as a simple chronology of events and history as a way of relating to and interpreting past events. It is this second sense in which Nietzsche and Posner are interested. In order to introduce the pragmatic view of history, Posner outlines three main points of Nietzsche’s critique of an over-reliance on history: 1) A scientific study of history is disillusioning because it creates a false sense of the nobleness of past events, giving the impression that the greatness of the past can be replicated in the present when in fact this almost invariably ignores the contingency and unpredictability of all history:

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scientific “paradigms,” but as not evolving toward anything, nor becoming closer to the truth: “We may, to be more precise, have to relinquish the notion, explicit or implicit, that changes of paradigm carry scientists and those who learn from them closer and closer to the truth.”) *Id.* at 170.

<sup>4</sup> Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, U. CHI. L. REV. (forthcoming 2000) (manuscript at 24, on file with author) [hereinafter Posner, *Past-Dependency*].

<sup>5</sup> *Id.* at 1.

<sup>6</sup> In making this assessment, Posner overlooks Nietzsche’s discussion of time as “eternal recurrence,” in which one wishes for the perpetual repetition of the past as a way of affirming the path that one has chosen in life. See generally ALEXANDER NEHAMAS, *NIETZSCHE: LIFE AS LITERATURE* (1985). However, there is a great deal of dispute as to what Nietzsche’s eternal recurrence means, and given that Posner interprets Nietzsche as putting the past at the service of the present, it is not entirely clear that the assessment just given would be inconsistent with the one offered by Posner. See Posner, *Past-Dependency*, *supra* note 4, at 6.

<sup>7</sup> FRIEDRICH NIETZSCHE, *On the Uses and Disadvantages of History for Life*, in *UNTIMELY MEDITATIONS* (R. J. Holingdale trans., 1983).

As long as the soul of historiography lies in the great *stimuli* that a man of power derives from it, as long as the past has to be described as worthy of imitation, as imitable and possible for a second time, it of course incurs the danger of becoming somewhat distorted, beautified and coming close to free poetic invention.<sup>8</sup>

In its stead, Nietzsche proposes a “critical”<sup>9</sup> mode of regarding the past “in the service of life,”<sup>10</sup> namely, a historiography that “scrupulously”<sup>11</sup> examines the past for the purpose of tearing it down and revealing its inadequacies. 2) History breeds complacency by convincing the historian that her current age is better than all previous ages.<sup>12</sup> Nietzsche rejects this notion of moral progress in favor of a historicism that does not seek to find transcendence in its purely local circumstances, noting that objectivity does not arise from judging the opinions and deeds of the past according to standards of the present.<sup>13</sup> 3) A “lively consciousness of the past”<sup>14</sup> creates a sense of “belatedness”<sup>15</sup> among people of the present because the view that everything in the present is an outgrowth of the past under-appreciates the role of genius in initiating change. This problem is exacerbated by the increasing specialization of those in academia. A lack of breadth among scholars, even within their own field, makes it difficult to see the underlying relations and interconnections upon which radical change is based.<sup>16</sup>

Posner then translates Nietzsche’s view of history into his own assessment of adjudication in American courts. Clearly, Posner is against history repeating itself. Indeed, attempts to repeat history often turn out farcically, though more because of the fundamental disconnect between the past and the present than because of the inability to agree upon a determinative interpretation of the past. In order for the past to have any informative value whatsoever for the present, it must be possible to draw an analogy between past events and current circumstances. The question then becomes how close such an analogy can reasonably be drawn; the closer the analogy, the more informative is

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<sup>8</sup> *Id.* at 70.

<sup>9</sup> *Id.* at 75.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 76.

<sup>12</sup> Posner admits that this position is somewhat inconsistent with the previous one. However, he argues that both share the similarity of failing to address current problems on their own merits. *See* Posner, *Past-Dependency*, *supra* note 4, at 3.

<sup>13</sup> NIETZSCHE, *supra* note 7, at 89–91.

<sup>14</sup> *See* Posner, *Past-Dependency*, *supra* note 4, at 4.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 4–5.

the historical example. Consequently, past cases can serve as precedents for current cases “only if the present resembles the past very closely.”<sup>17</sup> Posner argues, though, that originalists, those who seek to find historical justification for their interpretation of cases and statutes, too often twist history almost beyond recognition in order to get precedential cases to apply to current legal disputes. This can be seen, for example, in *Griswold v. Connecticut*,<sup>18</sup> which appealed to the Fourteenth Amendment to find a “zone of privacy”<sup>19</sup> basis for the right to procreate and hence to use contraception even though this logic could hardly have been on the minds of those ratifying the Fourteenth Amendment. This amendment was ratified in 1868 in an attempt to reverse the vestiges of slavery. Even if one were to concede that there was a commonly accepted interpretation of the Fourteenth Amendment at the time of its passage, the interpretation offered in *Griswold v. Connecticut* is clearly not it. Such a strained analogy, one could argue, makes a farce of the Fourteenth Amendment. According to Posner, such an interpretation of the Fourteenth Amendment amounts to the judicial practice of using history as a mask to disguise judicial discretion.<sup>20</sup>

So why do judges persist in relying upon precedent to decide cases? Posner is not entirely sure they do. As I have stated earlier, Posner believes that judges often use history as a mask to cover up other reasons for deciding a case a particular way. In the question and answer period following his talk, Posner elaborated upon this position by asserting that judges had to put *something* in their opinions and that it was neither dishonest nor disreputable to provide historical justifications for pragmatic decisions,

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<sup>17</sup> *Id.* at 7.

<sup>18</sup> 381 U.S. 479 (1965). The court held:

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand . . . . Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

*Id.* at 485–86. (citations omitted)

<sup>19</sup> *Id.* at 485.

<sup>20</sup> See Posner, *Past-Dependency*, *supra* note 4, at 8–11. In Posner’s words:

The legal profession’s use of history is a disguise that allows the profession to innovate without violating judicial etiquette, which deplores both novelty and a frank acknowledgment of judicial discretion and likes to pretend that decisions by non-neglected judges can be legitimated by being shown to have democratic roots in some past legislative or constitutional enactment.

*Id.* at 10.

especially since few people beyond academics ever actually read the opinions.<sup>21</sup> This position can be reconciled with his earlier criticisms of originalism as misusing history by making a distinction between the actual decision-making process that judges go through in deciding a case and the reasons that they offer to the public for their decision. Judges can appear to be originalists even when they are not actually originalists. Posner dismisses the idea that judges should be bound to precedent because that is what the public expects of them mainly because he believes that the public is rather casual in its belief that decisions must be based in “authoritative sources of law.”<sup>22</sup> Furthermore, the public’s general lack of knowledge about history makes historical justifications even less meaningful.<sup>23</sup> Posner does, though, suggest that if judges were not allowed to use history so freely as a mask, they would have to be more open and thoughtful about their reasoning process in deciding cases.

Despite his many criticisms, Posner does not completely dismiss the importance of precedent for his theory of adjudication. While Posner rejects the idea that there is a principled reason for deferring to precedence, he finds pragmatic reasons for providing at least limited authority to past cases. The public relies upon past judicial decisions in order to shape their actions in the future. Thus, if the facts of a case closely resemble those of a previous decision, then, absent other overriding reasons, the courts cannot ignore precedential cases. This, though, does not place any moral significance or sanctity on the past. Rather, Posner argues, it shows how the past is itself subject to pragmatic concerns in questions of adjudication. “The court must have a reason to ignore [a past case], just as it must have a reason to ignore any source of possible guidance to deciding the present case.”<sup>24</sup> In other words, history and past cases are just data to factor into a judge’s decisions. Presumably, if there is a dispute over the meaning of a particular case or historical event, that dispute is itself something to be considered by the judge. When history is not meant to be definitive, different interpretations can be weighed against each other not according to how well they reflect the “original” understanding of the case or event but rather for the way in which they illuminate current circumstances. Law is a social servant and needs to adapt to different situations rather than worry so much about fidelity to its own internal logic. This emphasis on weighing factors as they influence current circumstances is the credo of the pragmatic judge:

The historically oriented judge wants to decide cases in a way that will display their pedigree, their continuity with earlier cases, statutes, or constitutional provisions. The pragmatic judge wants to decide cases in

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<sup>21</sup> In response to a different question, Posner did criticize the use of history to “puff up” opinions lacking substance.

<sup>22</sup> See Posner, *Past-Dependency*, *supra* note 4, at 20. Posner argues that if the public did in fact care about consistency with “ancient texts and precedents,” Robert Bork would have been confirmed as a Supreme Court Justice.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 18.

the way that will best promote, within the constraints of the judicial role, the goals of society. He uses history as a resource but does not venerate the past or believe that it ought to have a “special power” over the present.<sup>25</sup>

One of the main pragmatic concerns that causes a judge to defer to precedence is path dependence.<sup>26</sup> Path dependence refers to the idea that our decision on how to act in a particular situation is largely determined by our starting point, even were it not for having started there, a different decision would have served us better now. The classic example is that of the typewriter keyboard: The original QWERTY keyboard design was meant to slow down typing speeds so that early typewriters would not malfunction.<sup>27</sup> However, once typewriter technology improved, it was too late to switch to a more efficient keyboard design because too many people had been trained to use the old keyboard design. The transition costs would have been too high. Similarly in law, legal regimes may have arisen surrounding past decisions that discourage overruling those past cases even if one would have decided the case differently were it not for this past history. Truly, as Marx said, people cannot make decisions unfettered by the traditions in which they find themselves, but must actively confront the past. *Stare decisis* serves as a pragmatic principle for judges to keep in mind when determining what the best possible outcome of a case is in light of the effects a particular decision will have on the public. Thus, even though certain inefficiencies may exist in the legal system and the legal doctrines that judges have handed down, these inefficiencies need to be tolerated because the transition costs in creating a new legal regime would be prohibitive.<sup>28</sup> Along these lines, Posner, borrowing from Holmes, reasserts his position that law is and must be a combination of various internal and external factors that contribute to the determination that judges make as to how a case can be decided in a way that is most beneficial for the public as a whole.<sup>29</sup> This impetus overrides any search for supposed truths or principles

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<sup>25</sup> *Id.* at 23.

<sup>26</sup> *See id.* at 12. The title of the conference, “Past Dependencies,” is a somewhat accidental play on the concept of path dependency. In a meeting to discuss possible future conference topics, one of the organizers, Hans Ulrich Gumbrecht, misheard “path dependency” as “past dependency.” The rest is, as they say, history.

<sup>27</sup> *See id.*

<sup>28</sup> *See id.* at 12–13. It is not clear here if Posner is talking purely in terms of economic efficiency or also in terms of the political opposition that may arise were one to abandon what many in the public view as commonly held rights. For instance, Posner elsewhere critiques the rise in the criminal rights of the accused under the Warren Court for contributing to an increase in crime rates. He contends that limiting resources for public defenders would force them to choose those cases in which the accused are most likely to be acquitted. This narrowing of focus would lead to far more effective counsel than the current legal regime where the requirement that everyone receive counsel leads to ineffective counsel for all. *See* RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 160–64 (1999) [hereinafter POSNER, *PROBLEMATICS*].

<sup>29</sup> *See* Posner, *Past-Dependency*, *supra* note 4, at 16. Posner, who is quite a prolific writer and is known as one of the founders of the law and economics school of thought, delves in many other places into how a judge is to make decisions as to what the goals of a society are and what constraints exist on the judge.

contained in laws or legal precedent. “The pragmatist’s real interest is not in truth at all but in belief justified by social need.”<sup>30</sup> The pragmatist judge, then, decides a case based on what the impact of that decision will be on the general public; the past, including judicial precedent, is merely one of these many factors that goes into this decision.

However, the past and path dependency may play a very great role in issues of adjudication. As Erika Frick, a lawyer with the United States Department of Justice, points out, law is a very risk-averse profession, especially since judges know that their decisions will have an impact not only on the present, but on the future as well. While one might question whether this sentiment would have as much pull were a majority of judges to decide cases along the pragmatic lines that Posner sketches by giving less deference to precedent, it is doubtful that judges will ever become adventurous and experimental because of the general belief that the role of judges is not to be overtly political. Richard Rorty, a comparative literature professor at Stanford University and himself a prominent pragmatist, agrees with Posner that history is only valuable to the extent that it offers hope to the future. Rorty, though, finds Posner to be too dismissive of the Romantic element of much of history and what it reveals about the human spirit that can then be taken to illuminate current situations and understandings.<sup>31</sup> Rorty characterizes Posner’s philosophical issue as whether the imagination rather than reason should be the instrument and guide for the creation of moral philosophy. Furthermore, Rorty notes that Nietzsche is correct in saying that, at times, forgetfulness of the past may be empowering and good by aiding in the shaping of a new identity. For example, in order for the Serbs to progress further towards peace, it may be necessary for them to forget certain aspects of their past.

More stringent criticisms of Posner come from Jack Rakove, a professor of history, American studies, and political science at Stanford University, and Hayden White, a comparative literature professor at Stanford University. Rakove argues that historians are essentially problem-solvers and not wedded to a particular methodological approach. In this sense, historians already are to some degree pragmatists, though this pragmatism is somewhat tempered by their view of themselves as custodians of the past. As such, they try to distinguish between valid and invalid interpretations, an approach that would allow judges to determine which uses of history are farcical and which are not. White criticizes Posner for making an undeveloped distinction between proper and improper uses of history and, more specifically, for labeling improper uses of history as

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*See, e.g.*, POSNER, *PROBLEMATICS*, *supra* note 28. It is beyond the scope of this commentary to address these issues except as they relate to the importance of the past in adjudication. The basic principle is that Posner seeks to look at the law in terms of the economic effects it has on the general public. *See, e.g.*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986). Indeed, Posner argues that judges should be limited largely to economic considerations and not base their decisions on questions of morality.

<sup>30</sup> RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 464 (1990) [hereinafter POSNER, *PROBLEMS OF JURISPRUDENCE*].

<sup>31</sup> At one point during the talk, Rorty light-heartedly accused Posner of having a “phobia for romance.” Despite the possibility for a definitive response, this question was not directed at Posner’s wife, who was sitting in the audience at the time.

“rhetoric.” White argues that the study of history has always claimed to be a matter of interpretation and not of science. As such, there can be no unrhetorical discourse on history because historians are quite aware that they cannot escape their own biases. Indeed, Posner’s attempt to label some uses of history as improper is itself a rhetorical move. White asserts that philosophers from Plato and Aristotle to Kant have tried to eliminate rhetoric from philosophy, but that this is an endeavor that is bound to fail. To the extent that Posner attempts to eliminate rhetoric from law, I would argue, he is also bound to fail.

This brings us to the question of how history can be a tragedy the first time it transpires, let alone its farcical repetition. Certainly, Marx was not saying that all important decisions in history have necessarily been bad decisions. Marx believed himself to be providing an explanation of the development of socioeconomic relations in history and their impact on the individual and social consciousness.<sup>32</sup> In this sense, historical decisions can be neither good nor bad. Rather, by looking to history for greatness, we fall into the mistaken belief that men move history when in fact it is history that moves men. This mistaken belief, critiqued by Marx, leads to the view that history is something to be repeated rather than learned from and moved beyond. The tragedy, then, arises from what we choose to study in history, not from the study of history itself. Posner may be correct in his claim that there is a fundamental disconnect between the events of the past and the circumstances of the present and in his subsequent claim that because of this precedent should not possess a sanctity that determines all future decisions, but he is wrong to conclude that by relegating history to a data source for judges he can derive a pragmatic theory of adjudication that is value-neutral. Posner happily admits that his view of pragmatism is deeply embedded in the local circumstances of the judge’s culture,<sup>33</sup> yet he ignores the tie between culture and its own history. History *does* contain meaning, it is just that this meaning cannot be definitively fixed, which is why all interpretations, whether of history or of economic efficiency, are necessarily rhetoric. As Marx suggests, the meaning of history comes not from “facts and personages of great importance,”<sup>34</sup> but from cultural forces and relations of power that underlie these events. If Posner wants to understand what is best for society in his role as a pragmatic judge, he must come to grips with these cultural forces and power relations. In order to do this, he must not only study history but also use it as an integral part of his theory of adjudication, even if this involves bringing his own biases and beliefs to the table.

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<sup>32</sup> See, e.g., KARL MARX, *Preface to A Contribution to the Critique of Political Economy* (renamed by editor, *Marx on the History of His Opinions*), in THE MARX-ENGELS READER 3, 4–5 (Robert C. Tucker ed., 2d ed. 1978).

<sup>33</sup> See POSNER, PROBLEMS OF JURISPRUDENCE, *supra* note 30, at 465.

<sup>34</sup> MARX, EIGHTEENTH BRUMAIRE, *supra* note 1, at 15.

