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Book Review: Overcoming Law

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civil and criminal procedure and contends that strictly criminal approaches were intrinsically unsuitable to the resolution of civil disputes. The author concurs, however, with the traditional assumption on the function of magistrates, who, he insists, weighed cultural norms and local customs more heavily than codified law. Philip C.C. Huang, on the other hand, arrives at the opposite conclusion. Through his careful analysis of 221 civil cases involving land, debt, marriage, and inheritance in the Baxian, Baodi, and Dan-Xin courts, Huang convincingly argues that magistrates did not act as mediators but as judges, strictly observing the code.

Kathryn Bernhardt's chapter is a penetrating study of divorce in the Republican period. The civil code adopted in 1927-1931, Bernhardt points out, not only contained many features compatible with the Qing code and social custom but also redefined the legal rights of individuals in the family and provided for a liberal divorce law, even allowing easy "no fault" mutual consent divorce, surpassing its Swiss and German models. To the author, actual legal practice, seen through some 200 cases in Beijing and Shanghai courts, was the manifestation of the tension between legal ideals and the backward social reality; women of the Republican period found it far easier to obtain a divorce than women of the Qing, but divorce did not become commonplace.

In her essay on the legal profession, Alison W. Conner surveys the regulatory framework established under the 1912 and 1927 statutes and the outlook of some 10,000 lawyers during the 1920s and 1930s. Although it suffered from such shortcomings as low standards, a shortage of lawyers, and negative government attitude, the legal profession, Conner insists, developed a "self-conscious identity" and achieved a reasonably high status for its members in Shanghai and other commercial centers. Madeleine Zelin sees the beginnings of new commercial law in the civil disputes handled by the new Chamber of Commerce in Zigong (the production center of the Sichuan salt industry) during the Guomindang period. Zelin asserts that the Chamber of Commerce, to which the people turned to protect their business interests, performed the judicial functions of the official court system, while effectively utilizing Qing customary law of settling business disputes by mediation.

All in all, *Civil Law in Qing and Republican China* is a significant contribution to Chinese legal history. The editors' succinct introduction unifies the essays into a coherent whole, along the dual themes of continuity and change. As the first volume of a new series, *Law, Society, and Culture in China*, this book has set a high standard. Scholars would look forward, in the subsequent volumes, to equally important but more detailed studies on specific topics and on regional diversities.

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RICHARD A. POSNER, *Overcoming Law*. Cambridge, MA.: Harvard University Press, 1995. x, 580 pp. $39.95.

This fine book amplifies and applies the pragmatic theories which Posner—a founder of the law and economics movement and currently a federal appellate judge—first propounded in *The Problems of Jurisprudence*.[1] Posner argues that a

1. R. A. Posner, *The Problems of Jurisprudence*, (Cambridge, 1990).

fusion of liberalism (á la Mill), economics, and pragmatism "can transform legal theory" (p. 29). He supports this thesis both by applying his pragmatic approach to analyze specific issues, and by using it to critique the legal analysis of dozens of other scholars.

The original applications are not nearly as successful as Posner's critique of other legal scholars, which makes up the bulk of the book. For example, Posner's behavioral analysis of homosexuals (chapter 26) and judges (chapter 3) seems inconsistent with his own definition of pragmatism, particularly his claim that the pragmatist is "*skeptical* about claims that we can have justified confidence in having arrived at the final truth about anything" (p. 5). The mathematical formulas and unqualified, deductive reasoning in these chapters do not naturally admit skepticism or pragmatic self-doubt.

The real value of the book comes, however, in Posner's powerful criticism of more than two dozen of the most influential legal scholars of the day. On the whole, the essays call on legal scholars to develop and rely on more empiricism about likely consequences of different legal rules. On this score, the bottom-up or analogic reasoning of constitutional law theorists—which Posner claims "is not reasoning but is at best preparatory to reasoning" (178)—is a particular focus of attack.

But, the essays also display great humanity. For example, in reviewing a book analyzing the eager complicity of German courts during the Nazi period, Posner writes: "[These judges] repeatedly rejected positivism, and did so with a brutal forthrightness that should make our judicial activists, realists, utilitarians, and pragmatists squirm. (I am one of those pragmatists, and I'm squirming)" (p. 155). He later draws even more specific implications for our own criminal jurisprudence:

> Our retention, indeed our expanding use, of capital punishments (many for intrinsically minor, esoteric, archaic, or victimless offenses), our adoption of pretrial detention, as a result of which some criminal defendants languish in jail for years awaiting trial, and our enormous prison and jail population, which has now passed the one-million mark, mark us as the most penal of civilized nations. This is a disturbing state of affairs—justifiable perhaps, remote from Nazi justice, but problematic all the same. (p. 157).

Posner's unease even leads him to question, at least implicitly, his own possible over-reliance on law and economic analysis: "[J]udges on the one hand should not be eager enlisters in popular movements, but on the other hand should not allow themselves to become so immersed in professional culture that they are oblivious to the human consequences of their decisions." (p. 158).

The book also demonstrates that Posner has developed formidable rhetorical skills. Not only is he a masterful and lucid essayist, but he now is willing to analyze and even deploy some of the verbal tropes of his own critics. For example, in reviewing Patricia William's analysis of the Baby M. case, Posner notes "Mrs. Stern [the wife in the infertile couple] is made invisible." (p. 374).

I was slightly disappointed that the original analysis of policy issues was not as successful as Posner's wide-ranging criticism of others. But attempting to provide a more unified structure would be somewhat inconsistent with the pragmatist thrust of the book itself. While the book claims an overarching thesis, pragmatists by their very nature are doomed to be foxes instead of hedgehogs. Posner at times still reverts to dry, reductive analysis, but his prose on the whole displays a newfound confidence and spirit. The specter of a sitting federal judge speaking so freely about "overcoming law" and proposing the necessity and appropriateness of

judicial activism is itself jarring.

It is somewhat ironic that Posner has devoted so much of his scholarship to studying the allocation of scarce resources, because Posner himself seems to have no capacity constraints. One can only be in awe at the sheer volume of his work and at its breadth and quality. His critics persist in claiming that Posner is only capable of spinning out unworldly and reductive theories, but the essays in this book amply demonstrate that he has become a persuasive rhetorician who can illuminate vast areas of the legal landscape with pragmatic reason and compassion.

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ALAN WATSON, *The Spirit of Roman Law*. Athens Ga. and London: University of Georgia Press, 1995. xix, 241 pp.

I am made a little uneasy by the concept of a legal system's having a "spirit," though of course the expression has a pedigree. Since this book is the first of a new series on legal spirits under Alan Watson's editorship, it offers an occasion to ask just what one is looking for when one seeks the spirit and looks past the flesh. Certainly, Watson's hardboiled common sense is proof against anything mystical or mysterious. The book is about some salient general features of Roman law and not about the rules for their own sakes. The only reason to make the least fuss over the conception is that a certain ambiguity affects the discussion. In a predominant sense, the book is about a mentality, a simple translation of "spirit"—that of the Roman jurists, the socially prestigious consultants to the citizens, the magistrates, the courts, and ultimately, the Emperor who over centuries, with little change of style from age to age, largely shaped the private law. At moments, however, one is left wondering how far Watson means to go in attributing characteristics of a system to the habits of mind of a caste. Substantial freedom of contract (within strictures of form), testamentary freedom, marital law based on consent rather than ceremony, legal non-interference between master and slave—are such Romanisms (mainly reviewed in Chapter 14) owing to the monopolization of legal lore by the heirs of an aristocratic tradition of interpretation isolated from life (Watson's essential thesis about them)? In asking the question, I do not imply an answer one way or the other, only that causal relationships, including uncertainty about them, could sometimes be made more explicit.

Nor is ingratitude for an interesting and useful book implied in my most general criticism: as Watson says with complete forthrightness, he is synthesizing from his prolific earlier work and in some places reproducing pieces of it directly. The procedure results in an unevenness of exposition. So far is the book intended to be accessible to the previously uninstructed that it starts with a very basic sketch of Roman law. But as it progresses and illustrative material is abundantly introduced, there is insufficient attention to whether a beginner or common reader will understand the legal particularities presented and be able to construct the steps from those material data to the spiritual conclusion. It is probably a good rule that when a scholar as qualified as Watson is by learning and years of lively reflection sits down to address a grand theme for a general audience, he should start over with blank paper, spelling out the argument from the beginning with that audience in view. The tedium of saying again in new language what one has already said in more technical contexts, and explaining more than an expert can