Law & Society REVIEW

might show new perspectives that contribute to the feminist critiques of rape reform that Corrigan identifies early in the book about professionalization, funding issues, and neoliberal ideology.

The unavoidable conclusion of *Up Against the Wall* is that the emphasis on criminal prosecutions of rape has short-circuited the movement against sexual violence. The question begged by the accumulation of evidence of failure in Corrigan's work is how to conceptualize "success" in light of this quandary. While feminists may not have specifically "theorized" sexual violence adequately in recent decades, feminist critique and socio-legal methods do offer rich resources to argue the limits of the mainstream approaches described in the book and move beyond them. Taken as a whole, the study confirms the need to reinvigorate feminist identified coalitions to mobilize resistance and alternatives to conservative reactions and strategies currently deployed in response to sexual violence.

* * *

Reflections on Judging. By Richard A. Posner. Cambridge: Harvard University Press, 2013. 370 pp. $29.95 cloth.

Reviewed by Jason E. Whitehead, Department of Political Science, California State University, Long Beach.

From his perch at the U.S. Court of Appeals for the Seventh Circuit, Judge Richard A. Posner has churned out more books in the last decade than most academics write in their entire careers. His books on diverse subjects like catastrophic risk (Posner 2004), intelligence and counter-terrorism (Posner 2005, 2006, 2007), and the financial crisis (Posner 2009, 2010) reveal a remarkable facility for analyzing complex systems. This same facility is evident in Posner's recent work on judging. Indeed, both *How Judges Think* (Posner 2008) and the present volume approach the federal judicial process by describing and analyzing its complex interactions and by proposing solutions to manage this complexity. *Reflections on Judging* takes a more personal approach. Its analysis of the federal judiciary is "mixed with personal recollections, references to a number of [Posner's] own judicial opinions, and recommendations to judges and judicial administrators" (p. 11). In the end, Judge Posner succeeds in describing judicial complexity and proposing some moderate solutions, but his overall diagnosis of the problem is overly empiricist.

https://doi.org/10.1111/lasr.12100 Published online by Cambridge University Press

Posner summarizes his central theme in the introduction and again in Chapter 3. The "external complexity" of federal cases is growing, he says, because of increasingly "complicated interconnections or interactions" within technological, economic, or other systems (p. 54). At the same time, Posner warns, the "internal complexity" of the law is also growing as federal judges increasingly hide behind old-fashioned formalist habits that obscure external complexity. He begins in Chapter 1 with a short autobiographical sketch summarizing his disillusionment with law and legal institutions at nearly every stage of his career. The reasons for this unimpressed attitude may be found in Chapters 2 and 3, where Posner traces the rise of internal complexity. Institutionally, judicial preoccupation with managing bloated staffs of law clerks leads to low-quality ghostwritten opinions. Substantively, judicial obsession with legal language and multifactor tests leads to needlessly complicated legal doctrines. Both problems, Posner claims, prevent judges from understanding and analyzing complex factual issues in cases involving medicine, computers, banking and finance, biochemistry, and other fields. To decide these cases well, he asserts, judges need better "evidence" and "data" concerning these complex systems (pp. 62, 70). But "judicial insouciance about the real," Posner concludes, prevents judges from considering these things (p. 78).

In Chapter 4 and the remainder of the book, Posner traces "judicial insouciance" to formalism: a "passive," "umpireal" conception of judging that seeks the "right answer" in doctrinal tests, canons of construction, rules of citation, and other obscurantist paraphernalia (pp. 110–111). The solution, he claims, is for judges to pursue "realism with depth" (p. 353): to be "guided by a sense of the purpose of the text" and its "likely consequences" (pp. 120–21). Chapters 5 and 8 counsel judges to simplify their opinions through pictures and information from Google, Wikipedia, and other web sources, by using law clerks as editors rather than drafters, and by excising legal jargon. Chapter 6 decries most theories of judicial restraint as bad-faith efforts to hide judicial discretion, and it urges judges to be restrained instead by the "real-world impact" of their decisions and to allow more local experimentation (p. 175). Chapter 7 critiques conservative and liberal theories of legal interpretation for assuming that textual meaning can be ascertained conceptually, and it defends a "loose constructionist" approach (p. 120) that is sensitive to the "full factual context" (p. 234). Chapter 9 defends an "inquisitorial" style of fact finding by district judges (p. 299), and it makes suggestions for improving jury trials. Chapter 10 concludes with a list of recommendations for judicial staffing and training, as well as legal education.

Illustrating every chapter with examples from Posner's experience helps create a more intimate book. And he is right that the

https://doi.org/10.1111/lasr.12100 Published online by Cambridge University Press

formalism he critiques is too simplistic, resulting in needlessly complex legal arguments and opaque, jargonistic opinions. His moderate recommendations to fix these problems are welcome: judges should be prepared and educated more systematically, and academic legal scholarship should be less self-indulgent. But other recommendations are troubling. When appellate judges wander from the record by using Google, for example, to discover facts outside the record, they deprive litigants of the right to contest these facts through an adversarial process. Posner notes the danger of internet research by juries, warning about misleading, confusing, and prejudicial information. But he never explains why appellate judges would not run the same risks. Surely, trial judges are in a better position to fairly assess opposing arguments about this evidence.

Posner's nonchalant embrace of the internet as a way of managing external complexity is but one small example of a major problem with the book: even as he attacks formalists for uncritically accepting traditional legal norms, he uncritically accepts modernist hubris about empirical reality. The book's central argument depends upon a fact fetish—belief in a realm of pristine reality, and faith that this reality can be accessed objectively. But as other pragmatists have noticed, abandoning what count as persuasive facts within one worldview does not lead us to a neutral perspective on reality. We merely adopt another worldview where different facts are seen as persuasive (see, e.g, Fish 1991: 56–62). Ignoring this constructivist lesson, Posner assumes that when judges conduct Google searches, for example, they are seeing the objective context of the case rather than the carefully selected results of Google's search algorithm. Similarly, he assumes that when judges examine social scientific studies, they are seeing objective data rather than the carefully selected results of dominant research paradigms.

Posner admires Holmes's Darwinist view of truth. But if truth is merely a "body of ideas that has thus far survived the competitive struggle in the intellectual marketplace" (p. 169), there is no realist escape from formalist illusions. There is only a power struggle where "might ultimately prevails," and judges should "get out of the juggernaut's path" (p. 172). Paradoxically, "insouciance about the real" seems quite consistent with this cynical attitude. But others with a more robust conception of truth, justice, and the rule of law are unlikely to be moved.

References

Fish, Stanley (1991) "Almost Pragmatism: The Jurisprudence of Richard Posner, Richard Rorty, and Ronald Dworkin," in Brint, Michael, & William Weaver, eds., *Pragmatism in Law and Society*. Boulder: Westview Press. 47–81.

https://doi.org/10.1111/lasr.12100 Published online by Cambridge University Press

Posner, Hon. Richard A. (2004) *Catastrophe: Risk and Response*. New York: Oxford University Press.
——— (2005) *Preventing Surprise Attacks: Intelligence Reform in the Wake of 9/11*. New York: Rowman and Littlefield Publishers.
——— (2006) *Uncertain Shield: The U.S. Intelligence System in the Throes of Reform*. New York: Rowman and Littlefield Publishers.
——— (2007) *Countering Terrorism: Blurred Focus, Halting Steps*. New York: Rowman and Littlefield Publishers.
——— (2008) *How Judges Think*. Cambridge: Harvard University Press.
——— (2009) *A Failure of Capitalism: The Crisis of '08 and the Descent into Depression*. Cambridge: Harvard University Press.
——— (2010) *The Crisis of Capitalist Democracy*. Cambridge: Harvard University Press.

* * *

American Memories: Atrocities and the Law. By Joachim J. Savelsberg and Ryan D. King. New York: Russell Sage Foundation, 2011. 264 pp. $37.50 cloth.

Reviewed by Ron Levi, Department of Sociology, University of Toronto

Maurice Halbwachs survived for 8 months in the Buchenwald concentration camp. He died of dysentery in Block 56 of Buchenwald's *kleines lager*, or "Little Camp," in 1945 (Semprum 1994: 27). Separated by barbed wire even from the remainder of Buchenwald, the most extreme conditions of starvation, disease, forced labor, torture and medical experimentation were visited upon inmates. The Buchenwald crematorium, throughout this time, was visibly located above inmates held in the *kleines lager*.

"Does the world know what happened to us?" survivors of Buchenwald are recalled asking repeatedly, on the day in which U.S. troops entered the camp in April 1945 (Fox 2013). How all the more unspeakable, then, that among the dead of Buchenwald was Maurice Halbwachs, the French sociologist whose signal contribution was giving life to the concept of collective memory, and the social process of witnessing, remembering, and commemorating the past (Halbwachs 1950).

In *American Memories: Atrocities and the Law*, Savelsberg and King build on Halbwachs' thinking to examine the role that legal institutions can play in forging collective memories of atrocities. In the process, Savelsberg and King develop an inventive and rigorous sociology of law and of politics in the process. They argue that collective memory is strengthened in those cases when legal

https://doi.org/10.1111/lasr.12100 Published online by Cambridge University Press