
Allison B Tirres, DePaul University

Available at: https://works.bepress.com/allison-tirres/14/
BOOK NOTES

THIRTEEN WAYS OF LOOKING AT THE LAW


I was of three minds
Like a tree
In which there are three blackbirds.2

The emergence of external disciplines within legal scholarship seems to have fractured its intellectual focus.3 Technical and specialized academic writing, moreover, appears to be drifting ever farther from the theaters of legal action.4 Judge Richard Posner’s latest book of essays, Frontiers of Legal Theory, challenges such perceptions: Even as it celebrates the breadth of interdisciplinary legal scholarship, it seeks coherence among myriad methodologies. Even as it delights in the abstract constructs of social science, it emphasizes their practical impact. And as one might expect of Judge Posner’s work,5 it pursues these apparent cross-purposes with assuredness and flair.

In assembling this eclectic set of essays, Judge Posner proposes to show that interdisciplinary legal scholarship can be a wide-ranging and yet cohesive enterprise. His hope is “to bridge the conventional academic boundaries that have made legal theory sometimes seem a kaleidoscope or even a heap of fragments rather than a unified quest for a better understanding of the law” (p. 14).6 The unifying vision of legal scholarship that he advances, however, is achieved only by apply-

---

1 Judge, U.S. Court of Appeals for the Seventh Circuit, and Senior Lecturer, University of Chicago Law School.

2 WALLACE STEVENS, Thirteen Ways of Looking at a Blackbird, in HARMONIUM 123, 123 (1931).

3 Judge Posner connects this perception to trends within the academic disciplines themselves: “With the expansion in the size of faculty in virtually all fields [of academic research], specialization has increased, and with it the isolation of scholars from broad currents of thought.” Richard A. Posner, Legal Scholarship Today, 115 HARV. L. REV. 1314, 1322 (2002).


5 See, e.g., RICHARD A. POSNER, OVERCOMING LAW (1993). Frontiers of Legal Theory is something of a sequel to Overcoming Law, an earlier collection of interdisciplinary essays.

6 To be sure, if any observer has the field of vision to track these academic movements with a steady eye, it would be Judge Posner, a pioneer in Law and Economics and longtime commentator on other “Law-and” approaches. See generally RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988); POSNER, supra note 5; RICHARD A. POSNER, SEX AND REASON (1992); Richard A. Posner, The Problematics of Moral and Legal Theory, 111 HARV. L. REV. 1637 (1998).
ing a narrow analytical lens — one that obscures insights peripheral to rational-actor models of human behavior. The result is a compact but confined perspective on legal thinking, too tightly focused on the theoretical possibilities of rational choice to encompass even the most proximate empirical findings on how people really live, choose, and act.

Nevertheless, *Frontiers* should easily accomplish its goal of making interdisciplinary legal scholarship "more accessible and useful to practitioners, students, judges, and the interdisciplinarians themselves" (p. 14). Like *Overcoming Law* before it, *Frontiers* showcases Judge Posner's virtuosity in deploying the methods and rhetoric of diverse disciplines to generate surprising conclusions about law and legal institutions. The thirteen essays — in sections titled Economics, History, Psychology, Epistemology, and Empiricism — span topics ranging from the economics of the Federal Rules of Evidence to the intellectual legacies of Friedrich Carl von Savigny and Oliver Wendell Holmes; from the optimal use of social norms to statistical correlations between political stability and income equality. Throughout, Judge Posner emphasizes the applicability (even indispensability) to legal practice of concepts from the social sciences:

- Bayes's Theorem,
- regression analysis,
- type I (false positive) and type II (false negative) errors, and cognitive biases in decisionmaking.

---

7 POSNER, supra note 5.
8 See Chapter Twelve, "The Rules of Evidence" (pp. 380–408).
9 See Chapter Six, "Savigny, Holmes, and the Law and Economics of Possession" (pp. 193–221). Judge Posner explores Holmes's early struggle toward judicial pragmatism: "What Holmes lacked was a social theory to take the place of the kind of internal legal theory that he denigrated in the German theorists [such as Savigny]. We now have that theory; it is called economics" (p. 207).
10 See Chapter Nine, "Social Norms, with a Note on Religion" (pp. 288–315).
11 Finding a positive correlation between political stability and level of income, but an indiscernible correlation between stability and inequality, Judge Posner disputes the argument that concern for political stability is a good reason to care about income inequality (pp. 115–21) and argues for emphasizing wealth maximization over distributional concerns. See Chapter Three, "Normative Law and Economics: From Utilitarianism to Pragmatism" (pp. 95–141).
12 He observes that the successes of these methods "in illuminating some dark corners of the legal system and pointing the way to constructive changes have been sufficiently numerous to make [them] an indispensable element of legal thought" (p. 14).
13 Bayes's Theorem, a mathematical relation between prior and posterior probabilities, appears in Judge Posner's model of optimal investment in the search for evidence for trial (pp. 343–45).
14 Judge Posner uses regression analysis to explore the relation between political stability and income inequality (pp. 115–21) and to test whether the number of judges on a United States Court of Appeals affects the "quality" of the court's opinions, as measured by the number of summary reversals by the Supreme Court (pp. 412–18).
15 "Trading off type I and type II errors is a pervasive feature of evidence law" (p. 366). In Judge Posner's criminal trial example (p. 366), a type I error would be a false conviction, and a type II error would be an erroneous acquittal.
16 Judge Posner seems of two minds regarding cognitive psychology and its findings. He devotes one chapter (Chapter Eight) to criticizing the approach of Behavioral Law and Economics
The essays in *Frontiers* are expressly *not* about "legal theory" as commonly understood, however; Judge Posner specifically rejects what lawyers and law students might take the term to mean.\(^{17}\) What, then, accounts for the title? A working premise of the book is that "the only approaches to a genuinely scientific conception of law are those that come from other disciplines, such as economics, sociology, and psychology" (p. 3). Accordingly, "it is appropriate when speaking of 'legal theory' at large to confine the term to theories that come from outside law" (p. 3). The radical nature of this usage — turning "legal theory" inside out — is entirely intentional.\(^{18}\) Misnomers, after all, have the power to transform meaning. In this sense, the title of the book is not only ambitious and "wrong," but also ambitiously "wrong." Stitching together the book's scattered topics into an intellectual corpus called "legal theory" is a rhetorical move that serves a grander design: to breathe life into a "research program" (p. 4) that can demonstrate the possibilities of "legal theory as a unified field of social science" (p. 15).

The essays amply demonstrate how a practitioner of "legal theory" (thus defined) could unflinchingly apply the clinical instruments of social science to even the most viscerally gripping legal questions. Chapter Two, for example, applies cost-benefit analysis to free speech jurisprudence, mapping the theoretical costs and benefits of regulating any form of speech onto variables in an equation.\(^{19}\) In such a framework, the normative policy rule follows immediately from the question as posed (are costs greater than benefits?).\(^{20}\) But the insights of economic

---

\(^{17}\) "The term 'theory' has long been used in law as a pretentious term for a litigant's submission ... or as a generalization proposed to organize a body of case law ... or as a purely internal theory of law, a theory ginned up by law professors with little use of insights or methods from other fields — most constitutional 'theory' is of that character" (pp. 2–3).

\(^{18}\) Judge Posner remarks dryly about his inversion: "I realize it is a little late to be trying to appropriate the term 'legal theory' for the external analysis of law" (p. 2).

\(^{19}\) Drawing inspiration from Justice Holmes's "clear and present danger" test in *Schenck v. United States*, 249 U.S. 47 (1919) (pp. 64–66), Judge Posner offers what is essentially an expansion of Judge Learned Hand's familiar negligence formula from *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). In Posner's specification, the speech should be allowed if and only if

\[
B \geq pH[(1 + d)^n + O - A]
\]

where \(B\) is the benefit of the speech; \(p\) is the probability that the harm \(H\) will occur; \(d\) represents the time-discounting of future costs and benefits; \(n\) is the number of years until the harm would be realized; \(O\) is the offensiveness; and \(A\) is the administrative cost of the regulation (p. 67). Judge Posner discusses the Hand formula (pp. 37–38) and notes the similarity of his analysis to Hand's (p. 65 n.9).

\(^{20}\) "[B]an the speech if but only if ... the expected costs of the speech exceed the sum of the benefits of the speech and the costs of administering a prohibition of it ..." (p. 67).
theory do not end with an accounting of pros and cons.\textsuperscript{21} There may be externalities or other failures in the “speech market”\textsuperscript{22} that divert rational individual behavior from what would be theoretically optimal. For example, “[c]ommercial speech is robust . . . because the commercial speaker normally expects to recoup the full economic value of his speech . . . . In contrast, hate speech is fragile because the costs are concentrated but the benefits diffused” (p. 85). Hence Judge Posner offers a cleverly counterintuitive result: hate speech might deserve greater protection than commercial speech. Moreover, because “[l]enity is the antidote to martyrdom” (p. 74), tolerating hate speech may actually reduce the incentives for some actors to engage in it.\textsuperscript{23}

Not only are emotionally charged topics like free speech suitable subjects for social-scientific dissection in this research regime, but so is emotion itself.\textsuperscript{24} Recognizing the discord between a conventional view of law as “a bastion of ‘reason’ conceived of as the antithesis of emotion” (p. 226) and the reality that litigation is “an intensely emotional process, rather like the violent methods of dispute resolution that it replaces” (p. 226), Judge Posner sets out in search of the conception of emotions most useful for determining their optimal treatment in the legal system: to what degree should jurors, police, judges, and other legal actors constrain their emotions? After all, “[l]ove notoriously can lead to bad judgments, and likewise fear and anger” (p. 228). And if love, fear, and anger need to be suppressed in the legal theater, how could legal institutions ensure the optimal emotional poise?

Judge Posner quells the dissonance by rejecting as “thoroughly conventional” the “dichotomizing [of] reason and emotion” (p. 227). To conjoin reason and emotion, he turns to recent elaborations by philosophers and psychologists on a line of thought dating back to Aristotle. Invoking what he calls a “cognitive theory of emotion” (p. 226),

\textsuperscript{21} To be sure, even an accounting of pros and cons is not a trivial task. Judge Posner rightly warns that merely formalizing Holmes’s calculus is “not the same thing” as making it operational (p. 67): “The problems of operationalizing the instrumental approach to free speech are formidable because . . . [w]e just don’t know a great deal about the social consequences of various degrees of freedom of speech” (p. 68).

\textsuperscript{22} “The Speech Market” is the title of Chapter Two (pp. 62–94). Such a market is rife with potential “failures” of efficiency: property rights in information are difficult to establish; valuations can be elusive; and the market can be thin (or merely metaphorical) for speech that is neither bought nor sold (p. 84).

\textsuperscript{23} More explicitly: “Tolerating inflammatory speech may . . . [make] it more difficult for speakers to prove that they are in deadly earnest about what they are saying” (p. 74). In the spirit of the economics-style analysis, one might also deploy a basic idea of classical economic theory, the “substitution effect”: making hate speech a less effective means of expressing hatred may simply induce haters to substitute nonspeech forms of expression, for example, physical violence. As with most questions of economics, this sort of theoretical indeterminacy can only be resolved by empirical analysis.

\textsuperscript{24} See Chapter Seven, “Emotion in Law” (pp. 225–51).
Judge Posner contends that emotion (like reasoning) is a form of cognition—an alternative (if more primitive) form of evaluating information and making decisions. It is a "cognitive shortcut" (p. 229) that distorts information in identifiable and systematic ways.\textsuperscript{25}

One key emotion-linked distortion is the "availability heuristic," the "tendency . . . to give too much weight to vivid immediate impressions" (p. 243). This distortion operates, for example, when legal actors "pay too much attention to the feelings, the interests, and the humanity of the parties in the courtroom and too little to absent persons likely to be affected by the decision" (p. 243). Judge Posner asserts that this distortion promotes "excessive lenity for the murderer who makes an eloquent plea for mercy, his victim being unable to enter a counterplea by reason of being dead; or an excessive tilt in favor of the rights of tenants . . . ; or a tax break for a struggling corporation" (p. 244). He also speculates that the use of ultrasound photographs of fetuses "canceled the rhetorical advantage that the proponents of abortion rights had enjoyed by virtue of the availability heuristic" (that is, from telling stories of women who have died in illegal abortion attempts) by bringing the "victim" of abortion into plain view (p. 244).\textsuperscript{26}

The task for Judge Posner's interdisciplinary project is either to cure these biases or to neutralize their effects on legal decisionmaking. His ultimate prescription is a strong dose of economic analysis of law, which he imagines to be cleansed of the availability heuristic and yet "empathetic because . . . it brings into the decisional process the remote but cumulatively substantial interest of persons not before the court—such as future victims of murderers, future seekers of rental housing, future taxpayers, and future consumers" (p. 244).\textsuperscript{27} By using one set of external approaches (here, cognitive science and philosophy) to identify another (economic analysis) as the best framework for answering a legal question, Judge Posner demonstrates the possibilities of bringing multiple disciplines to bear on a single legal problem.

\textsuperscript{25} Though "an emotion expresses an evaluation of the information [that triggers it] and so may operate as a substitute for reasoning in the usual sense" (p. 227), in doing so it "short-circuits reason conceived of as a conscious, articulate process of deliberation, calculation, analysis, or reflection" (p. 228).

\textsuperscript{26} Of course, the heartrending testimony of a murder victim's loved ones might generate even more passionate reactions against leniency; and rather than merely leveling the field, ultrasound photographs of fetuses may have tipped the abortion debate in favor of latter day abortion opponents. Resolution of such differing accounts depends, again, not on abstract argument but on empirical observation.

\textsuperscript{27} Yet Judge Posner demonstrates how rhetoric alone can achieve the same result—quoting Angelo from Shakespeare's Measure for Measure, who says of mercy: "I show it most of all when I show justice; / For then I pity those I do not know, / Which a dismissed offense would after gall . . ." (p. 245) (quoting WILLIAM SHAKESPEARE, MEASURE FOR MEASURE, act 2, sc. 2, ll. 101–03, at 127 (N.W. Bawcutt ed., Clarendon Press 1991) (1623)).
When the blackbird flew out of sight
It marked the edge
Of one of many circles.\textsuperscript{28}

To appropriate the phrase "legal theory" is also to demarcate the bounds of meaningful inquiry. In this sense, the term "frontiers" in the title may refer not so much to the outer reaches of social scientific advance but to the \textit{boundaries} of legal scholarship that Judge Posner seeks to define. The scope of the book is as notable for what it excludes as for what it includes: "I mean to exclude both philosophy of law . . . which is concerned with the analysis of high-level law-related abstractions such as legal positivism, natural law, legal hermeneutics, legal formalism, and legal realism — and the analysis of legal doctrine, or its synonym, legal reasoning" (p. 2).\textsuperscript{29}

A strategy for defending such intellectual borders is articulated in the essays themselves. The chapter on free speech analogizes to the "forward defense" that the United States adopted during the Cold War, when "[o]ur front line was the Elbe, not the Potomac" (p. 82). Similarly, in free speech jurisprudence, "rather than defending just the right to say and write things that have some plausible social value, the courts . . . defend the right to say and write utterly worthless and deeply offensive things as well" (p. 82). In his Introduction, Judge Posner generalizes this observation to the whole of judicial review: "[T]he power of judicial review secures the core of the Constitution against infringement . . . . Litigation at the rind provides a bulwark against infringement of the rights in the core" (p. 21).

For Judge Posner, cost-benefit analysis (CBA) is the vital core of "legal theory" that he defends against critics and competing ideas.\textsuperscript{30} In his normative analyses, CBA serves as the dominant device for policy evaluation; in his descriptive modeling, CBA is embedded in rational-actor models, describing agents who make all decisions as if calculating costs and benefits. And in \textit{Frontiers}, "forward defense" accurately characterizes his means of protecting this core framework. He openly omits from his broad survey not only internal legal analysis but also the clearly \textit{external} approaches of "Feminist jurisprudence" (p. 7), "So-

\textsuperscript{28} STEVENS, supra note 2, at 123.
\textsuperscript{29} One might wonder whether Judge Posner's very act of exclusion implicates jurisprudence — that is, whether his philosophy of "legal theory" is itself a "philosophy of law."
\textsuperscript{30} As his essays on regulating free speech and controlling emotion in legal discourse demonstrate, Judge Posner applies CBA to a wide range of questions. He appears to treat even other varieties of economic analysis of law as secondary to CBA: the essay on the Federal Rules of Evidence suggests six possible economic approaches to evaluating the rules of evidence (pp. 337–38), but privileges one that is a simple CBA (p. 338). Chapter Three includes a defense of traditional CBA against an array of critics, including Professor Amartya Sen, who warns about valuations where no market and hence no prices exist (as in the case of endangered species) (pp. 123–41).
ciology of the law, and the law and society movement” (p. 10), “Law and literature” (p. 12), and “Critical and postmodern legal studies” (p. 13). 31 Given his broad construction of the term, he rightly locates these external approaches within his realm of “legal theory” — but only barely. He effectively exiles them to the borderlands, just short of the outright banishment he has imposed on jurisprudence and doctrinal analysis.

There would be no problem with Judge Posner’s promoting CBA or keeping disfavored schools of thought at bay, were not one of his aims also to extol the breadth and impact of interdisciplinary legal scholarship. His defensive posture tends toward exclusion rather than inclusion of approaches outside the core; where inclusive, it tends toward cursory acknowledgement rather than engagement and synthesis. The essays’ handling of emotion, epistemology, and psychology, for example, reveals a purposive remoteness from the topics themselves. The essays address these vast subjects only to the extent that they augment (or threaten) CBA and rational-actor analysis. The discussion of emotions, for example, merely characterizes them as deviations from rational decisionmaking. 32 The essay on the Federal Rules of Evidence, while briefly citing several studies of jury decisionmaking, otherwise brushes aside the “epistemological and psychological literatures dealing with rational inquiry” (p. 337). 33 And the rejection of the Behavioral Law and Economics school’s interpretations of data from psychological experiments 34 reveals the danger that Judge Posner’s “forward defense” might not only fend off internal and some (disfavored) external frameworks for legal analysis, but also deflect important empirical findings — in this instance, findings that turn out to be highly relevant for CBA and rational-actor analysis.

A constrained view of what constitutes valuable empirical inquiry may be self-defeating for Judge Posner’s project of advancing “legal

---

31 Posner explains that he excludes these topics because he has treated them fully in previous works (pp. 7–14). Yet his disdain for certain approaches is no secret. For example, he writes (in an essay on the use of history in legal discourse) that “[Nietzsche] does not deny that there are knowable facts about things that happened in the past; he is not a postmodernist crazy” (p. 146).

32 The original title of the University of Chicago lecture from which he draws much of this essay is telling: “Emotion vs. Emotionalism in Law” (p. 445).

33 Observing this move, one might wonder whether Part IV’s title, “Epistemology,” is yet another intentional misnomer.

theory" — even if this term were to encompass only CBA and rational-actor analysis. After all, without empirical assessment of actual costs and benefits, and without data on how real people respond to incentives, CBA and rational-actor analysis offer little more than rhetorical frameworks. Judge Posner is an avowed advocate of empirical research, and his most creative essays in Frontiers are those employing real-world data: a statistical analysis of Supreme Court reversals of circuit court decisions, for example, leads him to conclude that increasing the number of judges in a given circuit is likely to increase that court’s rate of “error,” as measured by summary reversals (pp. 411–20).

For the most part, however, these essays primarily exhibit Judge Posner’s enthusiasm for cleverly using abstract ideas to generate novel theoretical possibilities — while only minimally engaging empirical findings from the field. Simply as a practical matter, showing how social science methodologies can establish empirical facts may be a more compelling way to convince lawyers and judges — who daily must make do with whatever facts they can muster — to pay attention to the writings of interdisciplinary legal scholars.

35 “A dearth of quantitative scholarship has been a serious shortcoming of legal research, including economic analysis of law” (p. 411). Elsewhere, he writes that the book’s “emphasis on economics and on the need for more empirical study of law is not a new theme in my work” (p. 2).

36 Neglect of empirical measurement would place the law’s use of economics close to what Judge Posner decries as the “law’s rhetorical use of history . . . [which is] entwined with the idolatry of the past that is a conspicuous feature of conventional legal thought” (p. 154). Replace “history” with “economics” and “past” with “the market” and the point is clear.

37 It is surprising, for example, that a book celebrating the contributions of social science to legal scholarship does not mention the work of perhaps the two most methodologically sophisticated researchers in Law and Economics: Professors John J. Donohue III (who has assessed the economic impacts of civil rights legislation and of employment discrimination law) and Steven D. Levitt (who has examined the determinants of criminal behavior). See, e.g., John J. Donohue III, Advocacy Versus Analysis in Assessing Employment Discrimination Law, 44 STAN. L. REV. 1583 (1992); John J. Donohue III & James Heckman, Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks, 29 J. ECON. LITERATURE 1603 (1991); Steven D. Levitt, Juvenile Crime and Punishment, 106 J. POL. ECON. 1156 (1998); Steven D. Levitt, Using Electoral Cycles in Police Hiring to Estimate the Effect of Police on Crime, 87 AM. ECON. REV. 270 (1997); John J. Donohue III & Steven D. Levitt, The Impact of Race on Policing, Arrest Patterns, and Crime (Nat’l Bureau of Econ. Research, Working Paper No. 6784, 1998). Frontiers cites neither author for his work; it mentions Professor Donohue in passing only as an example of a “liberal” legal economist (p. 50).
THE DOUBLE EDGE OF LEGAL IDEALS


In his new book, The Legalist Reformation: Law, Politics, and Ideology in New York, 1920–1980, leading historian and legal scholar William E. Nelson presents a novel approach for understanding legal change in the twentieth-century United States. He argues that in that period legal academics, the state legislature, and most notably courts in New York developed a new, highly influential ideology, which he calls “legalist reform.” First articulated by Judge Benjamin Cardozo in the early 1920s, the ideology centered on four primary principles: equality, liberty, dignity, and economic opportunity. According to their proponents, these ideals should be sought through the rule of law rather than through alternative political channels. Furthermore, the reform ideology focused on extending these ideals to disadvantaged groups. Nelson maintains that this ideology eventually came to influence not only the state of New York but also the nation and, by the 1980s, the world.

This thoroughly researched account2 is one of the first to synthesize one state’s law in the twentieth century. In addition, it gives students a coherent way to understand the nation’s turn to the rule of law in this period. The main trends of twentieth-century legal reform — the rise of administrative law, the extension of constitutional protections to various minorities, the loosening of moral restrictions, the expansion of notions of property, and the development of legal realism — are familiar to many legal scholars,3 but Nelson provides an overarching theory to connect these seemingly disparate strands. Nelson also offers a new legal angle on how and why white ethnic Americans lost the stigma of

1 Joel and Anne Ehrenkranz Professor of Law at New York University School of Law.
2 As Nelson notes in his introduction, in addition to looking at 620 volumes of the New York Supplement and at other New York federal court materials, he took a random sample of more than 50,000 unreported trial court cases; however, he did not analyze most criminal cases (p. 2). Nelson asserts that New York was “the obvious state to investigate” because of its noted economic influence on the rest of the country and because of the presence of major “legal players” there (pp. 1–2). However, he notes that “until other scholars examine in detail California, Texas, and at least one southeastern state, the conclusions about New York law set forth in the pages that follow should serve as preliminary hypotheses about more general, nationwide developments in the law” (p. 2).
difference in this period. Yet these contributions are not without their problems. Most notably, Nelson overstates the power, coherence, and originality of the ideology of legalist reform. In so doing, he underestimates the persistence of white supremacy in American life and law.

In Part One, Nelson compares the conservative and reform agendas of the 1910s, 1920s, and 1930s. In the early twentieth century, an elite, conservative group that was committed to "protecting property and preserving conventional morality" dominated the New York legal regime (p. 26). In line with the Supreme Court of the Lochner Era, New York courts struck down legislation that was perceived to threaten economic liberty and the status quo distribution of wealth (pp. 27–41). New York judges sculpted private law doctrines of trespass, conversion, and fraud in favor of elites and promulgated procedural rules that maintained economic inequality. In the area of private morality, these same judges attempted to impose "conventional Puritanical moral values" on immigrants and the poor by promoting Prohibition, applying criminal sanctions for improper sexual behavior, and restricting access to divorce (pp. 41–54).

Nelson notes that the conservative agenda was supported by a classical legal ideology centered on nineteenth-century convictions about the impropriety of redistributing wealth through the law (pp. 27–28). By the 1920s, however, this classical ideology was giving way to a new, reform-minded approach, animated by the philosophical and political ideals of "preventing exploitation and providing opportunity" for all (p.

---


5 For a description of the Lochner Era Court, see HALL, supra note 3, at 226–46.

6 For example, Nelson reveals that New York courts supported strict rules of discovery, prohibiting the "limitless examination and discovery of . . . books and papers" or "the right to roam at will through the books of the defendant" (p. 36). Nelson quotes Love v. Charles H. Brown Paint Co., 185 N.Y.S. 428, 429 (App. Div. 1920), and Klink v. Hershon, 181 N.Y.S. 459, 460 (App. Div. 1920). As Nelson writes, "The effect of restrictions on the production of books and documents was, of course, to help elite individuals and large entities that routinely kept them" (p. 36). According to Nelson's account, these judges consciously ruled in support of the elite classes. This portrayal of twentieth-century judges is similar to Morton Horwitz's description of the nineteenth-century bench. See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 1–30 (1977). Horwitz writes: "By the middle of the nineteenth century the legal system had been reshaped to the advantage of men of commerce and industry at the expense of farmers, workers, consumers, and other less powerful groups within the society." Id. at 253–54. By contrast, Peter Karsten criticizes the prevailing view of what he calls "economic determinism," PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA 1–22 (1997), arguing that "[w]ith a tiny handful of exceptions, nineteenth-century jurists did not create any new rules favoring Capitalists" and "were not cut off from the egalitarian reform impulses, the child-centered culture, or the 'Christian civilization' around them," id. at 5.
Cardozo, elected Chief Judge of the New York Court of Appeals during the tenure of Progressive governor Alfred E. Smith, spearheaded this new understanding, conceiving of law as a humane science to be deployed by judges when precedent conflicted or was ambiguous (pp. 23–25). Nelson argues that Cardozo and his compatriots on the bench promoted the legalist reformation by expanding the police power, ruling in favor of employees in labor disputes, and tinkering with common law doctrines to support the "underdogs" in American life (p. 63). Particularly in contract law, Nelson observes, the creation and deployment of doctrines such as substantial performance, promissory estoppel, unconscionability, and impossibility aided the urban New York business community (pp. 77–92). Nelson makes it clear that the "underdogs" from the legalist reformers' perspective included the poor working classes as well as entrepreneurs and businessmen of Jewish and Catholic backgrounds who had been left out of the white, Anglo-Saxon, Protestant business establishment. Importantly, Nelson notes that the legalist reformers of the 1920s were not seeking a modern-day concept of equality for all, but instead were paternalistically deploying classic Progressive Era values of "charity" and "mercy" to benefit those less fortunate (p. 26). Their actions, however, paved the way for more expansive definitions of equality and liberty.

In Part Two, Nelson explains the various areas of mid-century legal reform. Nelson notes that despite the growing power of the legalist reform ideology, its accomplishments remained limited in the early twentieth century, in part because of continuing conservative resistance and in part because of the failure of legalist reform leaders to develop a coherent guiding philosophy (pp. 115–16). The legalist ideology took on a renewed significance, however, during and after World War II, when the rise of Nazism in Europe turned the eyes of Americans toward redefining notions of liberty and equality in the United States. Outraged by the Nazi Party's treatment of Jews, New Yorkers sought to offer greater equality to religious and ethnic minorities (pp. 122–23). Although most New York courts refused to grant a broad right to equality, Nelson argues that they did uphold a generous standard of religious liberty, which in turn enabled Jews and Catholics, "the two largest groups seeking equality" (p. 161), to build houses of worship even in hostile Protestant neighborhoods (pp. 154–61). Courts in this era essentially "advanced the goal of equality even while denying the right" (p. 161). The granting of some form of equality was premised on the notion that minorities should assimilate to the majority's ways of life, rather than retain their distinctive traditions. This approach was repeated in the economic context, in which New York courts sought to promote upward mobility for Jews and Catholics by opening the business world to entrepreneurs and by supporting legislation for education and suburban housing (p. 168).
At the same time that the courts in New York were beginning to uphold the notion of equality in diverse areas like zoning, education, and tort, they were also protecting individual liberties in new ways. Between World War II and the 1970s, judges largely revoked prohibitions on private sexual behavior (p. 200). The New York Court of Appeals made it more difficult for police and prosecutors to bring gay men to trial for private, consensual sexual acts. In a similar way, the courts in New York loosened restrictions on prostitution. Nelson notes that they were essentially “pursuing a policy of decriminalization” by “construing legislation narrowly and holding evidence of guilt insufficient to sustain convictions” (p. 209).

Nelson observes, however, that the courts’ focus on individual liberties was greatly to the detriment of social responsibility and gender equality. For example, the new focus on protecting male sexual liberties had resoundingly negative effects in the area of rape law (p. 216). For the most part, the courts refused to recognize anything but stranger rape as a legitimate offense, leaving women who were raped by their husbands or acquaintances without recourse. “[I]n protecting the rights of men,” Nelson admits, “the judges inevitably trampled on the rights of women” (p. 221). What Nelson calls “the new sexism” reified the stereotypical roles of the sexes but removed any male duties associated with those roles (pp. 233–34). The courts excused men who impregnated unmarried women, while condemning unmarried pregnant women and their children (p. 234). Similarly, in cases of marital separation, men who beat their wives were forgiven, while women who sought schooling or careers outside the home were punished (pp. 236–37). Despite these drawbacks, Nelson asserts, the changes in legal ideology overall “tended to undercut the hierarchical values on which the classical legal order had rested” (p. 240).

In Part Three, Nelson argues that the legalist reformation continued to be effective even during the 1960s and 1970s, when the different strands of the ideology clashed (pp. 287–88). In what Nelson calls the “postreformation era,” key reform concepts remained salient, in particular the notion that judges should protect minorities against the oppressive will of the majority (p. 288). The legalist reformation was now so ensconced in the political framework that it was almost invisible. New voices — like those of feminists, African-Americans, and Latinos — were entering the debate in larger numbers, embracing a legalist approach to reform but refusing to accept the assimilationist notion of equality. These new voices, according to Nelson, “argued for their demands in legalist reform language before judges who could respond only within a legalist reform conceptual framework” (p. 319). In a closing salvo, Nelson concludes that the legalist reformation, however limited, came in the late twentieth century to influence the national legal framework as well as international approaches to law and
politics, as nations around the world turned to the United States for a model of democratic governance and the rule of law.\(^7\)

Nelson's book is a remarkable achievement, exhaustively researched and carefully argued. It summarizes developments in New York state law over the course of the twentieth century and ties these developments to national and international trends. Undoubtedly, it is a major contribution to twentieth-century American legal history, as well as to New York legal history. However, Nelson at times overstates the power, coherence, and originality of the ideology of legalist reform, failing to portray accurately the ways in which this ideology has fallen short of its promise.\(^8\) His omissions present methodological problems, but more importantly they hide the ways in which the legalist ideology was predicated on racial exclusion. Some of the victories of legalist reform came at the cost of racial exclusion, furthering white supremacy over equality and liberty.

In general, Nelson is convinced that the ideology of legalist reform at least provided the framework for liberty and equality for all, even if it did not at first deliver them. For example, Nelson argues that the legalist ideology reflected new attitudes about religious and ethnic oppression during World War II, encouraging new levels of respect for notions of equality. He trumpets the assimilationist process of postwar suburbanization, noting that through generous government lending policies and incentives to build, urban Catholics and Jews were able to move out of the city and to buy homes in "ethnically and religiously integrated communities" (p. 168). This portrayal of the post-World War II era is a familiar leitmotif throughout the book: the legalist reform ideology gradually doled out the privileges of equality, opportu-

\(^7\) Nelson argues that the influence of the legalist reformation began to spread outside the borders of the United States in the aftermath of World War II, when Americans imposed the tenets of the ideology on the defeated Axis powers (p. 370). He notes that "especially after its role in the successful rebuilding of Japan and the Federal Republic of Germany, the legalist reformation became attractive to many citizens of the world in its own right" (p. 370).

\(^8\) Questions about the influence and scope of ideologies have animated the field of American history for several decades. The most well-known of these debates centered on Republicanism, which Bernard Bailyn and Gordon Wood posed as the dominant ideology of the revolutionary era. See Bernard Bailyn, The Ideological Origins of the American Revolution (1967); Gordon S. Wood, The Creation of the American Republic, 1776–1787 (2d ed. 1998). Bailyn and Wood were responding to a literature that had posited Lockean liberalism as the dominant value of this era. More recently, many historians have begun to question the power of any one ideology in general, proffering instead a notion of ideological pluralism. They argue that residents of the colonies in the revolutionary era drew on liberal and republican ideals, with a fair deal of Christianity, among other values, thrown in. See, e.g., James T. Kloppenberg, The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse, 74 J. AM. HIST. 9, 20 (1987). As applied to Nelson's argument, the notion of ideological pluralism could explain how reformers could hold the values of equality and white supremacy in tandem.
nity, and liberty to all as the twentieth century wore on. Nelson thus portrays the expansion of these core American principles as evolutionary and foreordained, following a straight—if gradual—path toward freedom for all, not only in New York but also across the country.

Yet Nelson’s evidence cannot sustain this argument, especially because he essentially leaves African-Americans out of his history until the 1960s and 1970s, despite the fact that they were a significant portion of the population of New York throughout the twentieth century. A reader certainly cannot expect a historian to address all possible events and players in a discrete historical account, but when making an argument about the extension of principles of equality and liberty to all Americans, leaving out a discussion of the application of the law to African-Americans and other key racial minorities is problematic. This omission is more glaring given the striking examples of postwar racism that Nelson fails to mention in his account. White Americans may have altered their hostile attitudes toward Jews and Catholics, but they also interned Japanese-Americans during the war and turned on Latinos and African-Americans in violent race riots in many major cities, including New York. Similarly, the process of postwar suburbanization may have increased opportunities for white ethnics, but it greatly disadvantaged all other minorities. As numerous scholars note, federal government policies of mortgage lending were blatantly racist, providing opportunities for homeownership to very few African-Americans and Latinos in particular.

---

9 As Nelson argues, “[w]hatever its failings, the ideology of the legalist reformation offers to all people the prospect of liberty, equality, and opportunity” (p. 288).

10 By 1960, New York City’s black population already was the largest of any city’s in the country, representing 13.98% of the city’s total population. HOWARD DODSON, CHRISTOPHER MOORE & ROBERTA YANCY, THE BLACK NEW YORKERS: THE SCHOMBURG ILLUSTRATED CHRONOLOGY 290 (2000).


13 The Federal Housing Administration and the Home Owners Loan Corporation (HOLC), both New Deal creations, typically “red-lined” any minority or even racially diverse neighborhood, indicating that it was a bad credit risk. KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 195-218 (1985); THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT 43-44 (1996) (noting that “[f]ederal housing policy legitimated systematic discrimination against African Americans in housing”). Even neighborhoods with “a tiny African American population [were] rated ‘D,’ or ‘hazardous’ by federal appraisers, and colored red on the HOLC Security Maps.” Id. at 44.
which the government set up its policies, and the fact that the courts upheld them, greatly disadvantaged these minority groups. Furthermore, suburban residents themselves put a premium on keeping racial minorities out of their midst. White developers in New York refused to allow African-Americans to buy homes in new suburban developments, while residents of the five boroughs of New York City organized to keep African-Americans and Puerto Ricans out through legal measures and violence.

Not only is the extension of liberty and equality to racial minorities more tenuous and contingent than Nelson supposes, but also it is oftentimes based on the very exclusion that these ideals would seem to counter. In *American Slavery, American Freedom*, historian Edmund Morgan famously argues that the development of revolutionary concepts of freedom and equality was predicated on the existence of slavery. White slave owners in Virginia used race as a tool to gain the support of poor whites, who could feel an allegiance with the otherwise hostile elite classes because of their joint superiority over slaves.

In the mid-nineteenth century, Irish and other European immigrants were offered, and eventually embraced, power over racial minorities as a means of asserting their own (white) equality and dignity. A similar story played out in the twentieth century. In the post-World War II era, white ethnics were offered what were essentially the privileges of whiteness: liberty, equality, and economic opportunity. As Nelson fails to note, for a significant period of time these same privileges were withheld from African-Americans and other racial minorities in New York, despite legal rhetoric to the contrary.

---

14 One of the most well-known of the new suburban developers, William Levitt, “publicly and officially refused to sell to blacks for two decades after the war. Nor did resellers deal with minorities.” JACKSON, supra note 13, at 241.

15 CRAIG STEVEN WILDER, A COVENANT WITH COLOR: RACE AND SOCIAL POWER IN BROOKLYN 175–218 (2000). As Wilder notes, “White residents began a decade-long, violent campaign throughout the five boroughs to control nonwhite homebuyers with fear and force. Every borough saw firebombings, cross burnings, and other terrorist acts.” Id. at 215. For a detailed study of grassroots organizations of white homeowners in Detroit, see SUGRUE, supra note 13, at 231–58.

16 To his credit, Nelson does note the contingency of the ideology of legalist reform as it applied to women. He argues convincingly that women were in many ways worse off under the law in the 1950s than they had been in the 1920s, as the New York courts primatized men’s liberty over women’s equality (pp. 233–39). Yet Nelson does not bring this same critique to bear on questions of race within the reform ideology.


18 Id. at 338.

19 See, e.g., IGNATIEV, supra note 4, at 96–107; ROEDIGER, supra note 4, at 133–56.

The fact that the ideals of legalist reform were predicated on exclusion even in the postwar era may better explain why, in the 1960s, the assimilationist mindset that Nelson presents fell apart. Nelson argues that the new voices in the mix — African-Americans, feminists, and Latinos, among others — were simply not willing to follow the old assimilationist path. Perhaps the guiding factor, however, was not so much their unwillingness to assimilate but the unwillingness of white Americans to allow them to do so. Viewing this era with a more critical eye reminds the reader of the persistence of white supremacy in American life and law.

Undoubtedly, the ideals of liberty, equality, and economic opportunity have improved the lives of many people in the United States. Yet to ignore their darker side is to be lulled into the assumption that these ideals are colorblind and impartial. On the contrary, such ideals have served in the past as a legitimating discourse, upholding the very systems of hierarchy and domination that they seem poised to strike down.21 In recounting the larger narrative of historical change, it is important not to downplay the Janus-like nature of these perennial American ideals. These limitations aside, The Legalist Reformation is a notable achievement that provides a much-needed synthesis of twentieth-century state law and legal thought. Hopefully, the complexities of race within this paradigm will encourage other historians of the law to engage seriously with Nelson’s admirable work and to provide new approaches and arguments for the role of law and ideology in the twentieth century.

21 The most extended critique of “rights talk” has come from Critical Legal Studies (CLS) scholars, who argue that the idea of “rights,” backed up by liberal legal ideology, has served to deceive people into accepting the world as it is rather than pushing for systemic change. See, e.g., Mark Tushnet, An Essay on Rights, 62 TEX. L. REV. 1363, 1363–64, 1384–86 (1984). Although most proponents of Critical Race Theory agree that “rights talk” can be deceptive, they argue that CLS scholars have overstated the legitimating power of rights discourse and ignored other forms of racial oppression. See, e.g., Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 103, 107–19 (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995). Kimberlé Crenshaw argues that “[f]or blacks, the task at hand is to devise ways to wage ideological and political struggle while minimizing the costs of engaging in an inherently legitimating discourse.” Id. at 119.