

The Right to Life

For several decades Richard Posner, a judge of the U.S. Court of Appeals for the Seventh Circuit, has been a prolific and often brilliant writer on law, literature, and politics. He is perhaps best known as an advocate for the use of economic standards as both a legal tool and a yardstick by which to measure judicial decisions. In clear prose and well-reasoned analysis, Judge Posner has advocated wealth creation as a reliable standard for legal reasoning along with a pragmatic view of political realities that defers substantially to prevailing practices and behaviors. Applied to politics, Posner's pragmatism comes close to views once proposed by the economist Joseph Schumpeter, not otherwise known as a reformer. Posner's position has been so forcefully and consistently stated for so long that it is surprising to read his book *Catastrophe* (Posner 2004) in which he concludes that the odds of the occurrence of one or more catastrophes are growing quickly. Among these, he includes the prospect of rapid climate change and admits that it "is to a significant degree a byproduct of the success of capitalism in enormously increasing the amount of world economic activity. . . and is a great and growing threat to anyone's idea of human welfare" (2004). On this subject conservatives, he believes, are "in a state of denial." The problem has come about, in part, because of the "scientific illiteracy of most nonscientists . . . [particularly] the people who count in making and implementing policy."

Posner believes that the dangers of one or more catastrophes are growing because of "the breakneck pace

of scientific and technological advance." As for a framework to understand our situation and to reduce the potential for disaster the "natural candidate . . . is economics," but alas, the subject of catastrophe "turns out to be an unruly subject for economic analysis." This is so, in some measure, because of the global scope of the problems and because of the long-time horizons involved that bring into question standard economic tools such as discounting. The use of discounting raises the potential for disasters that occur sufficiently far into the future that the benefits of procrastination and the costs of disaster fall onto different generations without the possibility of some offsetting benefit by the accrual of more wealth. If economics is an unsatisfactory tool, the law is little better. Posner believes that "the legal profession may even be increasing the probability of catastrophe." Improvement in this situation, in his view, will require "that a non-trivial number of lawyers" become scientifically literate, an interesting challenge. Posner further proposes other remedies such as the establishment of a science court, a center for catastrophic-risk assessment, the use of fiscal tools such as taxation and subsidies, increased regulation including the establishment of an international EPA, increased scrutiny of research projects in high-risk areas, and greater police powers to detect and control growing risks of terrorism.

Of the risks noted by Posner, only the threat of nuclear annihilation is more worrisome or immediate than that posed by rapid climate change. Americans are the largest contribu-

tors to atmospheric carbon dioxide, and we have no good policy and still little inclination to reverse that fact. Worse, there remains a robust denial industry led by an administration that considers the fantasies of science-fiction-writer Michael Crichton superior to the decades of patient, peer-reviewed, and increasingly consensus science of the U.S. Academy of Science, the Intergovernmental Panel on Climate Change, and the many scientists who study climate for a living and must live by the rigors of evidence, fact, logic, data, and peer review. For this dereliction that willfully puts posterity in jeopardy we have, as yet, no suitable words. But they will come.

The evidence is coming clearer and clearer that if we fail to control CO₂ levels in the atmosphere very soon, we could pass the point at which climate change tips over into some uncontrollable state. This will not be global warming, a nice sounding thing on cold days above 40° latitude, but planetary destabilization with rising sea levels, spreading diseases, rapid ecological changes, severe heat waves and droughts, more-severe storms, economic disruption, political turmoil, and resource wars. Serious scientists now talk about "tipping points" and the end of civilization (Flannery 2006).

One can quarrel with a few of the details in the large and growing body of scientific evidence about the reality of climate destabilization, but no longer with the overall conclusion that the combustion of fossil fuels is the major cause forcing climate destabilization and that at some point we will tip climate into a new

state that could very well jeopardize civilization itself. The energy status quo, in other words, risks the end of all that has gone before—truly the end of history. Already the human costs are very large. The World Health Organization estimates that 150,000 people are presently killed each year by climate-change-driven weather extremes. As climate change worsens, that number will rise. So too the number of climate anomalies: temperature extremes, severe storms, the likelihood of drought and heat waves, spreading diseases, rising sea levels, and the number of ecological refugees. Katrina-scale storms, amplified by warmer sea water, will become more common, perhaps even a kind of normal occurrence.

Genocide was the word coined to describe the willful destruction of entire ethnic groups. But we have none to describe the effects of willful actions the consequences of which are the death of millions of nameless victims in the future. The effects of our present use of coal, oil, and natural gas will kill into the far future, but we cannot know exactly who or how. We do know, however, that the number will be very large and that they will die in storms, or heat waves, or of strange diseases, or in scarcity-driven violence, or in any of a thousand other ways.

We have, also, no word by which to describe our bovine obtuseness in the face of calamity at this scale. Scientists have been warning us at least since the late 1970s in evermore insistent terms. Energy experts have also been warning us that we face not only the end of the era of cheap oil on the one hand, but also great opportunities to radically increase energy efficiency and develop solar energy on the other. No one can ever legitimately plead that they did not know that calamity lay ahead or that we had good possibilities to avert it.

The fact that we can predict with a general certainty wrongs in the future raises a difficult problem for the law and the politics by which some

principles become law. The U.S. Constitution mentions posterity only in the preamble and not thereafter. In the more than two centuries since, no significant case law has developed around the issue of posterity, leaving future generations substantially without standing in the courts and without protection against the violence knowingly perpetrated on them by previous generations. It might be argued that each generation benefits from the progress bequeathed by earlier generations and suffers the effects of, say, soil loss or the loss of biological diversity accidentally incurred. On balance, we presume that each generation benefits more than it loses from the actions of its predecessors. It is an open question how much earlier generations understood the effects of their actions or had the means to control them. In any event, the scale of costs imposed from one generation to the next was contained locally or regionally, and losses were repairable in a matter of decades or centuries. The intergenerational costs of climate change, however, are another matter. They are global, permanent insofar as we measure time, and now thoroughly studied and well understood. We can neither plead ignorance of the facts in the case nor can we say that time will heal the problems in a meaningful way for future generations. And neither can we make a plausible case that we had no other choice, given the large and well-documented evidence of the potential for energy efficiency and renewable energy. We will stand before whoever is able and willing to judge as a generation that willfully and unnecessarily imposed egregious wrongs on all future generations, depriving them of life, liberty, property, and the benefits of civilization for which we are trustees. We are utterly and wholly in the wrong, but the law as presently constituted conveniently lets us off the hook because it does not embrace the rights of posterity.

It is time for a course correction in our politics and law to improve

our prospects and those we leave to posterity. The first step is to understand more clearly our own ecological history. American civilization was built on the simple facts of ecology and geology: our pioneering forefathers stumbled on the last and greatest reserve of stored carbon left on Earth. Our soils were some of the richest anywhere, and our supplies of coal and oil were vast. Like yeast, cells feeding on sugar in a wine vat, we prospered by feeding on that carbon, depleting soils and oil alike, and redistributing it upward into the atmosphere. Our great good luck gave rise to the sense of self-congratulation and the belief that we were God's favored on Earth. From there it was a short step to doctrines of manifest destiny and a foreign policy built on the idea of American supremacy. Access to abundant carbon also led to the excess now apparent in over consumption, an epidemic of fatness, urban sprawl, energy inefficiency, and a host of collateral problems. Access to the energy of soils and fossil fuels did something else to us: it made us dumb. Some believe that high energy use destroys the capacity to internalize information, that is to say it makes people stupid and we do not need much encouragement in that direction. In combination with the arts of commercial seduction finely honed by the likes of Edward Bernays, father of the modern advertising industry, we eagerly fall prey to all manner of delusions, frauds, and deceptions. Even George Bush now says that we are addicts of cheap carbon and rather like an addict our behavior tends to be dictated by the ancient reptilian brain making us more deranged and violent—until reality kicks in.

Second, we need to understand more fully our own political principles drawn from the Enlightenment of the eighteenth century and translated to American soil by a group of brilliant men that we call the founders. They wrestled with the perplexities of liberty and a workable democracy, albeit with far less at stake.

Among the fundamental principles written into the U.S. Constitution is the necessity to check ambition and power by clearly demarcated countervailing power. James Madison explained why in *The Federalist Papers*, number ten. We are now living through his nightmare in which legislative, judicial, and executive power have been unified in the hands of a faction within a single party. If and when power would be so joined in a few hands, Madison thought the American experiment in self-government would come to an end. It is a great deal worse that he could have known. In addition to executive, legislative, and judicial power, the Republican Party of Bush/Cheney/Rove also controls the military, the Central Intelligence Agency, the Federal Bureau of Investigation, the National Security Agency, and a good bit of the press. The founders of the U.S. experiment in democracy had no clearer and more forcefully stated original intention than to avoid the tyranny that would result from a single party or person controlling the country. The whole point of the revolution they fought was to throw off a far less tyrannical authority than presently exists.

Freedom of the press was particularly important for Madison and the founders. Without access to information, Madison believed that politics would degenerate into "either a farce or a tragedy or perhaps both." In the first edition of *Media Monopoly* in 1983, Ben Bagdikian lamented that we were down to 50 major media outlets. When he wrote the updated version in 2004, the number of outlets was 5, one of which is FOX News (an oxymoron). The homogenization of news, the competition for market share, and corporate ownership mean that news is increasingly indistinguishable from entertainment and is censored. For instance, when the Millennium Ecosystem Assessment, the work of hundreds of scientists worldwide, appeared in the spring of 2005, it was not reported on any of

the major news channels, but Terry Schiavo's plight was, and so too that of Michael Jackson. The fact that the natural systems on which we depend were dying did not matter to the people who define the "news," but short-term market share did and that called for sensationalism and the cultivation of public greed.

Third, it is time to better understand our recent history. Under Democrats and Republicans alike government has grown larger, more intrusive, less manageable, less accountable, less competent, and less proficient at doing what good governments ought to do. It has grown only in power, assertiveness, secrecy, violence, and brazenness. It is a mistake to call this conservative. It is certainly not the principled conservatism of the kind once proposed by Edmund Burke, Richard Weaver, Russell Kirk, or even Barry Goldwater, which never took a firm hold in the United States. But that is not news. Clinton Rossiter (1982) once opined that genuine conservatism was done in by twin forces of democracy (too much, too fast) and industrialism that created a "one-way ticket to social nonconformity, financial mediocrity, and political suicide." True conservatism, as a result, "withered and died" long ago and descended into anger, stereotyping, sloganeering, myth-making, and "frightening simple-mindedness." Written in 1982, those words were a harbinger of what was to come. Of late, the cause of conservatism and the energies of conservatives have been moving America toward a police state, ostensibly to keep us safe, further our status as an empire, and to some to fulfill our destiny.

Similarly, liberalism of the sort we associate with Franklin Roosevelt or John F. Kennedy is moribund, or as optimists would have it, dormant. But like conservatism, a full-blown liberalism did not take a firm hold in America either. History, again, conspired against us so that nothing like a robust left ever developed in American

politics. Franklin Roosevelt, still despised in some circles for introducing Social Security, was the best friend capitalism ever had, and he was a lot closer to pragmatic and creative conservatism than to socialism. Consequently, our sense of the public and commonwealth is shriveled and so too our awareness of better solutions for what ails us than those provided only by the unfettered free-market. As a public, we are more remarkable for the ideas we do not and cannot discuss than for those that we actually talk about. Compared with most countries, political discourse in the United States is pathetically limited and censured by an increasingly centralized press.

The upshot is that we have failed to do what our grandchildren and theirs will someday regard only as overwhelmingly obvious and necessary. American politics, not to put too fine a point on it, has of late been hijacked by extremists whose goal is to divide the country and exploit that division toward the end of establishing a corporate-driven authoritarianism. Whatever other religious or political values might have been involved, it clearly has resulted in the largest transfer of wealth from the middle and poor classes to the extremely wealthy in history. Beginning with the Gingrich "contract with America," it was a con job through and through sponsored by a few who had a lot to gain by public befuddlement and extreme polarization. From 1970 to 2000, an estimated \$3 billion was spent to take control of the airwaves, creating a network of broadcasters, commentators, think tanks, and news outlets to control the public conversation. This effort has distracted the public from the heist underway in which "more than half of the income lost by the bottom eighty percent was captured by the top one-quarter of one percent" (Kuttner 2006).

The real fault line in American politics is how we orient to, say, the seventh generation from ours when the full weight of our present behavior

bears down on them. The real issues run from present to future, which is to say at right angles to liberalism—conservatism. One can be either a good conservative or good liberal and be concerned about that long-term future. These are not competing positions, but reverse sides of the same coin, and a mature and responsible political perspective will have elements of both. At our best, Americans are a pragmatic people who aim to solve problems, while at our worst, we have been driven by ideologues and demagogues. More than conservative versus liberal, the true geometry of our politics is our orientation to the far horizon.

Fourth, it is time to get to the root of what ails our politics and imperils our future: the death grip money has on our democracy. We have, as Will Rogers once noted, the best Congress money can buy. The solution is straightforward: remove money from politics entirely. No amount of tinkering will do. No reform will solve the problem that is simply the pervasive and increasingly corrupting power of money flowing through the political system like heroin through the veins of an addict. Because it favors the wealthy and thereby undercuts the principle of equality, the idea that the expenditure of money in political campaigns is a form of free speech protected by the First Amendment is ludicrous in a true democracy. It is time, for our sake and for that of our posterity, to separate money and politics in the same way the founders intended to separate church and state. The upshot is that all elections ought to be federally financed, period. The corollary is that no elected or appointed official after leaving public office can ever hold a paid position with any regulated industry. If they face financial destitution as a result of their public service, let us publicly pay them better. It is time for those serving the public to do the public's business and that of no other.

Fifth, facing calamity, it is time to join forces and to find common ground.

In recent years, no issue in the United States has been more contentious than that of abortion. But whatever one's opinion in the matter, I plead a larger case: the right of future generations to life, liberty, property, and perhaps even a modicum of happiness. My argument is that the case for the right to life has been drawn far too narrowly and deserves consideration at a wider scale and over a longer-time horizon. Those who defend the right of the fetus to life ought, by the same principle, to be willing to defend the lives of all children, which requires unequivocal access to the basics of medical care, good education, adequate shelter, clothing, and nutrition. Logically, they ought to be for a ban on assault weapons that are useful only for killing people, and against the death penalty. They ought to be opposed to the war in Iraq, which has killed, by one estimate, over 100,000 innocent men, women, children, and an unknown number of fetuses. Supporters of the right to life ought to be strongly supportive of the U.S. Endangered Species Act, which extends the principle to comembers of the biotic community. And, they ought to be supportive of measures necessary to protect the interests of those living in the future, say, seven generations from our own.

Like the fetus, future generations have no defenders other than those now living who are willing to speak and act on their behalf. In contrast to the fetus they exist only in prospect and even that prospect can be aborted or radically crippled by the indifference or dereliction of the present generation. And in contrast to the individual fetus, future generations pose a collective challenge both to the law and to our moral sensitivities. We must imagine their lives at a scale for which we are unaccustomed and must summon the intellectual acuity to know how to act effectively to defend their interests. In other words, it is within our power to grant or to withhold life.

Finally, our politics suffer for want of large visions at a time of cataclysmic possibilities. Albert Einstein (Calaprice 2005) once proposed that

A human being is part of a whole, called by us the universe, a part limited in time and space. He experiences himself, his thoughts and feelings, as something separated from the rest—a kind of prison for us, restricting us to our personal desires and to affection for a few persons nearest us. Our task must be to free ourselves from this prison by widening our circles of compassion to embrace all living creatures and the whole of nature in its beauty.

Aldo Leopold, similarly, wrote that the achievement of “a land ethic would change the role of *Homo sapiens* from conqueror of the land-community to plain member and citizen of it.” Both products of the early and middle years of the twentieth century regarded our diminished sense of community as part of the unfinished business of human advancement. And both regarded this development, not as a burden so much as growth in our human stature justified on grounds of altruism and self-interest.

It is time to expand our political horizons in ways commensurate with the extent of our effects on the future and the community of life. It is time to adopt the right to life writ large enough to grant standing to our posterity whose lives, liberty, and property are imperiled by our actions. The principle involved draws from our own revolutionary experience: *No generation and no nation has the right to alter the biogeochemical cycles of Earth or impair the stability, integrity, and beauty of natural systems, the consequences of which would fall as a form of intergenerational remote tyranny on all future generations.* This wording draws from Thomas

Jefferson and the generation that threw off the arbitrary authority of a King, Aldo Leopold's description of a morally and ecologically solvent land ethic, and hundreds of contemporary ethicists and scientists who have wrestled with the darkening shadow our generation casts onto succeeding generations and the opportunities we have to lighten that darkness.

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