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# OVERCOMING POSNER

Gerard V. Bradley\*

OVERCOMING LAW. By *Richard A. Posner*. Cambridge: Harvard University Press. 1995. Pp. x, 597. \$39.95.

Richard Posner<sup>1</sup> aims to “overcome” that “law” that is “a professional totem signifying all that is pretentious, uninformed, prejudiced, and spurious in the legal tradition” (p. 21). By “legal tradition” he mostly means, as the subjects treated in *Overcoming Law* (hereinafter *OL*) show,<sup>2</sup> some recent academic theorizing about Law — its nature, substance, purpose — and about some of our laws.

*OL* contains many previously published but revamped essays, to which Posner has added a few new chapters and an introduction.<sup>3</sup> The book is not, however, a “potpourri or an encyclopedia”; it is meant to be read “consecutively,” as a coherent whole (p. ix). The

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1. Richard Posner is Chief Judge of United States Court of Appeals for the Seventh Circuit.

2. Half of the book’s chapters are engagements with individual theorists writing today, often single leading works. There are chapters on John Hart Ely’s *Democracy and Distrust* (chapter 6); Bruce Ackerman’s work, including *We the People: Foundations* (chapter 7); Walter Berns’s *Government by Lawyers and Judges*, COMMENTARY, June 1987, at 17 (chapter 8); Robert Bork’s *The Tempting of America* (chapter 9); Morton Horowitz’s two volume study *The Transformation of American Law* (chapter 11); Martha Minow’s *Making All the Difference* (chapter 12); Drucilla Cornell’s, *Dialogic Reciprocity and the Critique of Employment at Will*, 10 CARDOZO L. REV. 1575 (1989) (chapter 13); William Ian Miller’s *Bloodtaking and Peacemaking: Feud, Law, and Society in Saga Iceland* (chapter 14); Linda Hirshman’s *The Book of “A,”* 70 TEXAS L. REV. 971 (1992) (chapter 15); Catharine MacKinnon’s *Only Words* (chapter 17); Patricia Williams’s *The Alchemy of Race and Rights* (chapter 18); Ronald Coase’s works in law and economics (chapter 20); and Richard Rorty’s philosophical writings (chapter 22). One chapter is devoted to an earlier legal theorist’s master work — James Fitzjames Stephen’s *Liberty, Equality, Fraternity* (chapter 10). Another chapter responds to feminist critics of Posner’s earlier book, *Sex and Reason* (chapter 16). Among the relatively few topical chapters are treatments of the “judicial utility curve” (chapter 3), abortion (though it is as much about Dworkinian legal theory) (chapter 5), pragmatism in law (chapter 19), the new institutional economics (chapter 21), legal rhetoric and advocacy (chapter 24), blackmail and the law of privacy (chapter 25), and homosexuality (chapter 26). In a separate chapter Posner “revisits” his book *Law and Literature* (chapter 23). There is a chapter on the legal profession in Germany and Great Britain, which really constitutes a review of two books, one about lawyers in Nazi Germany, the other about detention in WW II Britain (chapter 4). The remaining two chapters deal with the American legal profession (chapter 1) and the legal academy (chapter 2).

3. The chapters on Patricia Williams, Posner’s *Law and Literature*, blackmail and privacy, homosexuality, and legal rhetoric are new.

Introduction of the book “contains the fullest articulation to date” of Posner’s “overall theoretical stance” (p. ix).

*OL* is profitably read as an integrated work. It is a sustained effort by our most prolific defender of economic analysis of law to show that the limitations of that approach — which, Posner concedes in *OL*, are many and great — can be overcome without resorting to philosophy, metaphysics, and ethics — the whole “moral” approach to law (Parts II-III) — or without treating law and legal reasoning as autonomous disciplines (Parts V-VI). It is in philosophy and in legal reasoning that we find the “spurious,” the “pretentious,” the “prejudiced,” and the “uninformed” in the legal tradition. Posner would welcome a not-distant future in which traditional jurisprudence — a meld of the ethical and the legal — has become irrelevant (pp. 79-80).

Economics survives this purge. Posner features it in an enterprise that he calls “legal theory,” “the body of systematic thinking about (or bearing closely on) law” (p. vii). Economics is, he says, one of three keys to “legal theory” (p. viii). Posner does not aim to disturb existing practices, and *OL* contains just a handful of concrete reform proposals. The “thesis” of *OL* is that, fused together with “liberalism” and “pragmatism,”<sup>4</sup> economics can “transform legal theory,” and presumably, our understanding of Law and laws (p. viii).

I shall argue in this review essay that Posner’s roadmap is unreliable, that *OL* takes us on a journey far different from the one Posner charts for the reader. My aim is descriptive, diagnostic, and analytical — to clarify Posnerian “legal theory” and to trace its transformative effects upon our laws.

## I. LIMITATIONS OF THE ECONOMIC ANALYSIS OF THE LAW

The most arresting feature of *OL* is Posner’s compilation of the limitations of economic analysis of law. These concessions are neither surprising nor controversial. Most are obvious corollaries of recognizing, as Posner must and does, that economic analysis is a type of instrumental reasoning. Posner’s concessions, numerous and grave though they are, fail to convey the true depth and breadth of the economic analyst’s predicament. Furthermore, and oddly, Posner never steps outside the economist’s point of view, even as he details what the reader will surely regard as the deeply *immoral* implications of a strictly economic approach to law.

Among the implications of “typical” economic thinking, Posner finds “torture and gruesome punishments, enforcing contracts of

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4. On no coherent reading of *OL* can Posner mean to present either “liberalism” or “pragmatism” — or, for that matter, economics — as an ethical system.

self-enslavement, permitting gladiatorial contests" (p. 23). Economics typically implies "abolishing all welfare programs and other forms of social insurance" (p. 23). Economics has no theory of distributive justice. For example, *if* beggars are initially assigned the right to go door-to-door and solicit money or food, the rich might organize and buy them off, effecting a market-generated form of welfare. But there is no basis within economics to designate the beggars, rather than the begged-from, as the initial assignees of rights over begging (p. 23).

Posner also admits that economics cannot answer the question whether we should maximize the wealth of the United States or of the entire world (p. 22). The same scope question arises, Posner continues, with respect to the treatment of foreigners, animals, the profoundly retarded, trees, Jews in a Christian society, and fetuses.<sup>5</sup> This set of questions is about who is to be considered a "member of the community" and "therefore a person whose welfare must be considered" (p. 190).

How did economics come to this perilous state? Let us start with Posner's basic economics. His economic project imagines that individuals base decisions on "the costs to be incurred and the benefits to be reaped from alternative courses of action" (pp. 15-16). This assumption — that human beings are intelligent calculators of costs and benefits — is essential to economic models of behavior, even though the assumption that humans always behave "rationally" is not. "[T]he models hold as useful approximations even when the assumption [of rationality] is false" (p. 17).

The prototypical "economic" choice need not be and often is not conscious so "there is no paradox in referring to rational choice by animals" (p. 553). Posner does not consider this economics to have any proper — i.e., limited, exclusive — subject matter. He applies it well beyond familiar economic problems dealing with markets and prices.<sup>6</sup>

Now, economic reasoning is a type of instrumental reasoning. No type of instrumental reasoning can be put to human use without some normative choice, or at least without positing some end or goal. Economics neither generates nor judges in any noninstrumental — e.g., moral — sense the goals and objectives to which it might identify the most efficient means. Just as "[n]othing in eco-

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5. See pp. 190-91. Posner refers disparagingly to philosophy's inability to distinguish computers from talking apes and retarded infants. See p. 191. Some philosophers may have that difficulty, although on the whole, the economists seem to be worse off.

6. This seems to be the substance of Posner's dispute with Ronald Coase. See pp. 406-25. Coase would evidently limit economic analysis to conventionally understood market phenomena. See p. 415. Posner is famously committed to a wider application of economic reasoning to "nonmarket" behavior, such as surrogate motherhood and sexual behavior in general.

nomics prescribes an individual's goals" (p. 16), so too economics does not settle social goals. You can ask, and economics will help tell you, the most efficient way to produce poisonous gas, as well as to build a hospital. Economics will not ask and cannot tell you why you should.

The economist, *qua* economist, cannot proscribe goals or rule out a priori *any* means. Take Posner's own wealth-maximization criterion. That goal, along with the techniques of economic analysis, generate certain *nonmoral* evaluative judgments: this allocation of resources is inefficient, that is counterproductive. Posner realizes that slavery and child labor, for example, *may* be the most efficient ways to maximize wealth. Mutilating a handful of criminals a year probably is a more efficient deterrent than warehousing thousands for years. Whether these potentially efficient uses of scarce resources ought to be adopted by persons is a question economics does not consider.

These leading characteristics of economics as a type of instrumental reasoning — its incapacity to identify goals and moral indifference to apt means — are what I call economic reasoning's "passive vices." They are not minor, and in that sense, *passive*, shortcomings, for they establish the proposition that economic reasoning cannot settle what anyone, on any occasion, should, all things considered, do. They are *passive* vices because they do not obscure the distinctions that a healthy moral theory needs in order to reach an "all things considered" decision. One can imagine this economics peacefully coexisting with moral philosophy. In this construal, economics is the great middle part of the public policy story. Economics is a useful module, one which needs to be jump-started each morning, guided by a pilot who knows the destination and who minds the rules of the road. In the "passive" story, economics could be — would have to be — complemented and regulated by moral philosophy.

Let us turn to economics' "active vices." An example lays one such vice bare. Posner implicitly concedes that the beggar's need is, from the economic standpoint, indistinguishable from the surplus of the begged-from. The two realities — need and surplus — are, in the economic calculus, represented by a single variable — that of desires, interests, or "preferences." This commensuration permits the calculations that make economic analysis possible. Once the need of the beggar and the desire of the rich not to be begged from are treated as units along a common metric, moral discrimination between them is impossible. Bentham thought beggars should be locked up because of the emotional distress that their begging caused passersby (p. 23). These "mental externalities" could provide an economic justification, Posner concedes, for discrimination

against minorities. Economics thus becomes “a potential menace to basic liberties” (p. 23).

Posner illustrates this potential by comparing the distress of “conservative[s]” at the thought of people committing homosexual acts to the liberty interest homosexuals have in performing such acts. Many people, he says, “derive utility from laws to repress homosexual activity” (p. 571). Should that “utility be weighed equally with the utility” of homosexuals “in deciding whether repressive measures are efficient” (p. 571)? Discounting the “utility” of repressing others’ conduct would carry Posner “outside the boundaries of economics as they are generally, even generously, understood today” (pp. 571-72). He says at one point that it would carry him into moral and political philosophy (p. 23). Surely so, but note that economics itself gives rise to the dilemma precisely by treating very different realities — the choice to engage in sodomy and the revulsion felt by those aware of that choice — as “units” of the same thing. This is an “active vice” because you cannot think your way out of the problem, once economics so sets it up. Practical reasoning, equipped with blunt and clumsy tools that economics affords here, can scarcely do an intelligent job without setting up its project differently.

The “active vices” of economic thinking tend to obscure the distinctions that practical reasoning needs to guide people to reach the right conclusions. Another example is provided by the recent chess match between Garry Kasparov and a super computer named “Deep Blue.” Commentators wondered whether the closeness of the match — Kasparov eventually won — indicated that computers have “minds” or whether people do not. The question arises precisely because of the assumption that, since there obviously is some kind of “thinking” in no recondite or technical sense, which people and machines do about equally well, people and machines — or at least their “minds” — are the same. The assumption is unwarranted. There is a lot more to the mind than the type of mathematical thinking characteristic of chess playing. Only someone flirting with reductionist accounts of human reasoning could get worried about the chess machine.

Posner’s analytical field is defined by “rationality,” in the economic sense, wherever it is found. People and beavers are agents, in this economic sense. The beaver’s dam-construction compares favorably as efficient production to anything a precocious infant does. Trees are, as far as we can tell, unconscious, but they, like people and beavers, are organic substances that “know” what they need (water, nutrients) and seek it out (by spreading roots, by turning to the sun, and so on). The problem begins with identifying a particular common capacity — the refined mathematics of chess or

other forms of “rationality” as economics conceives it — and treating such limited rationality as constitutive of agency. Only a rationality wider than the limited rationality in question will notice the profound differences between people and computers and between babies and beavers. The “boundary question” — as Posner labels this class of problems — is not so much a question *not* answerable within economics. Rather, the economic answer — all active beings are agents — is deeply untrue to reality, and its practical entailments are morally calamitous.

Posner describes this problem as “economist[s]’ great difficulty getting a clear ‘fix’ on such questions” (p. 22). But economics, as he practices it, somehow finds its way of protecting the “autonomy” of producers, and of the potentially productive, all Posnerian agents. It is “equality,” and the goals of distributive justice — assisting the more or less unproductive and needy — that are off his radar screen. The problem then is not that of a perplexed economics humbly seeking rescue from contiguous, humanistic disciplines. It is that Posnerian economics supplies bad answers.

Will economics welcome the help it needs to combat its “active vices”? Not according to Posner:

[T]he use of economics to guide decision in the open areas of law ought to be discussable without immersion in the deep waters of political and moral philosophy. It is true that some people insist on treating quite narrow and technical legal questions as microcosms of the vastest social issues. They see antitrust cases as raising issues of political liberty rather than merely of efficient allocation of resources, contract cases as raising issues of human autonomy rather than merely of transaction costs, corporate cases as raising issues of democracy rather than issues concerning optimal investment, criminal cases as raising deep issues of free will and autonomy rather than the issue of how to minimize the social costs of crime. From time to time I shall be glancing at efforts to philosophize about such matters. But I think the economist can easily hold his own in these debates by showing that the most fruitful framework for analyzing this range of legal questions is an economic one. [pp. 21-22; footnote omitted]

The pleading rhetoric — “ought to be discussable”; “most fruitful framework” — is a feeble substitute for a frank and robust confrontation with the predicament that Posner is in: that economics as he envisages it would ignore, and thereafter profoundly threaten, political liberty, human autonomy, democracy, and other such ideals.

It must be emphasized that Posner never judges the various deficiencies of economics — boundary questions, gruesome punishments, and the rest — to be *moral* defects. They are not the *immoral* implications of economic thinking. They simply do not, he says, correspond to our “intuitions.”<sup>7</sup>

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7. P. 23; see *infra* Part III.

## II. POSNER'S EVASION OF ANALYTICAL JURISPRUDENCE

Posner serves up some "normative" analyses in *OL*.<sup>8</sup> He refers to such seemingly moral evaluative concepts as "progress" (p. 449) and "better" (p. 403). He says that "evaluation" of consequences is the terminal point of policy decisions (p. 463). What else could all this be, but some distinctly moral framework? Is the Posner of *OL* a closet moralist?

No. Among the important antecedents of *OL* was some critical comment in these pages<sup>9</sup> on Posner's article *The Jurisprudence of Skepticism*.<sup>10</sup> As Posner later related the substance of this criticism,<sup>11</sup> he was "taken to task for ignoring the substantial literature that treats law as a form of practical reason."<sup>12</sup> Steve Burton's short but cogent critique forcefully brought to Posner's attention the works of H.L.A. Hart, Joseph Raz, and John Finnis. Collectively, their scholarship constitutes the post-war Anglo-American analytical legal philosophy that Posner means to argue against in *OL*. These authors treat law and legal reasoning in a way very different from the way Austin, Holmes, and Posner treat them. Burton's apt criticism was that Posner had not even considered their moralistic approach to law, an approach rendered invisible by Posner's "scientific" substitute.<sup>13</sup>

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8. Posner does not use the term "normative" in any discernibly consistent sense. Most often Posner contrasts it with "positive" and its cousins, "explanatory" and "descriptive." Posner says that judges act "normatively" whenever they decide a case which cannot be decided "by reference to precedent or some clear statutory text." P. 21. Posner appears to mean that in such cases judges make rather than follow law. See p. 235. But Posner leaves no room for moral reasoning in this "normative" enterprise. He says elsewhere that "[e]conomics has value in the normative as well as the positive analysis of sex." P. 569. This is consistent with the view that economic analysis is commonly an *aid* to lawmaking.

Occasionally, Posner develops what he simply calls "normative" analyses, and sometimes he calls for economic "evaluation" of consequences. See p. 571. Two leading examples are Posner's treatment of AIDS policy and of the military ban on homosexuals. See pp. 561, 569-71. On AIDS policy he makes a forthright recommendation, but only by assuming a determinable goal — reduction of AIDS — and asking whether criminalizing sodomy is a "realistic" means of reaching that goal. See p. 561. On the issue of homosexuals in the military, Posner concedes that economics fails to provide a clear prescription. See p. 571.

Posner also laments the "relentlessly normative" quality of contemporary constitutional theory, which he identifies with worrying about the "legitimacy" of leading "individual rights" decisions. P. 171. He disputes the "normative" adequacy of Bruce Ackerman's constitutional theory, apparently equating normativity here with "legitimacy." P. 219.

Posner ordinarily describes "economic theory" as "non-normative" and "positive." P. 427. But he also speaks of "economic theory, with all its normative as well as positive baggage," and of the "normative" theory of antitrust which conforms to the dictates of wealth maximization. P. 173.

9. See Steven J. Burton, *Judge Posner's Jurisprudence of Skepticism*, 87 MICH. L. REV. 710 (1988).

10. Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988).

11. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 72 n.3 (1990) [hereinafter *POJ*].

12. *Id.* at 72.

13. Burton, *supra* note 9, at 717-18.



Posner mentioned Burton's criticism in *Problems of Jurisprudence*, (hereinafter *POJ*) but referred readers to a book that Posner — incorrectly, in my view — recommended as “illustrat[ive]” of the approach Burton recommended.<sup>14</sup> Posner confessed, in any event: “I am unable to find the content in this literature.”<sup>15</sup> Readers of

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14. *POJ*, *supra* note 11, at 72 n.3 (citing ROBERT ALEXY, *A THEORY OF LEGAL ARGUMENTATION* (1989)).

15. *Id.* at 72. That Posner had a *very* poor grasp of *what* the literature says is evidenced by, among many other signals in *POJ*, his assertion that Finnis is an intuitionist operating on Holmesian “can’t help.” *Id.* at 352. The whole basis for Finnis’s work is the contention that first practical principles, though self-evident to those who attend without obscuring preconceptions to the relevant data, are *not* intuitions — insights without data. Posner misunderstands what Hart, Raz, and Finnis mean by “practical.” He says, in reference to this literature, that “practical” reason is in “contrast to the methods of ‘pure reason’ by which we determine whether a proposition is true or false, an argument valid or invalid.” *Id.* at 71. This is certainly *not* what Hart, Raz, and Finnis have in mind. “Practical reason” is *reasoning* (pure, if you like) about what *to do*. This *includes*, but is much more than, the logical coherence that Posner seems mainly to mean by “pure reason.” “Practical reasoning” is to be distinguished from “theoretical,” or “speculative,” reasoning (again, “pure” if you like) about what *is*, not what *is to be* brought about by human action. This distinction was clear from Burton’s brief critique. It is the presupposition of Hume’s naturalistic fallacy: that no “ought” conclusion validly can be drawn from a string of “is” premises.

Posner takes up in *POJ* Hume’s dictum, and he rejects the “extreme skepticism” he thinks it entails. *Id.* at 352. Posner obviously thinks that if Hume is right, one has no alternative but skepticism. Not so. Finnis, for a notable example, agrees that one cannot deduce an “ought” from a string of “is” premises. But Finnis is no skeptic. If Hume is right (and he is), it simply means that moral truths are not valid (are not truths) due to their correspondence with what *is*.

Posner also seems to believe that the naturalistic fallacy makes what he calls “moral objectivity” impossible. The “problem of moral objectivity is that there are neither facts to which moral principles correspond (as scientific principles appear to correspond to things in nature) nor a strong tendency for moral principles to converge.” *Id.* at 236. He makes a similar point in *OL*. See p. 449. But moral principles are not true because they correspond to things already out there now in nature. What Posner means by “converge,” and why it is the consummate evidence of objectivity is not explained. In any event, Posner seems to believe that any putative moral norm worth considering must be *either* a command of nature *or* as certain and as objective as technical calculations are.

Posner makes strange attempts to show a fallacy in the “naturalistic fallacy” argument: “if a watch is not working, it ought to be fixed,” and a “police officer should not sleep on duty.” *POJ*, *supra* note 11, at 352. But his attempts fail, for here we have either a moral “ought” smuggled into our premises (i.e., police officers are persons for whom it would be wrong to sleep on duty) or in the watch case a distinctly nonmoral evaluative (i.e., functional) ought.

Posner seems to think that moral “objectivity” is possible only if moral decisions can be reduced to technical questions. This assumed criterion of moral objectivity obscures Posner’s vision. He refers to “Sartre’s imaginary ‘Pierre,’ who must decide whether to join the Resistance or take care of his aged mother.” P. 451. Pierre’s “dilemma” represents to Posner a “radical indeterminacy” in morals, common in law, for “whichever way Pierre chooses he may never know whether he chose right.” P. 451. Why cannot it be that, either way, Pierre chooses correctly? Why is the reality of two or more incompatible, morally upright courses of action a cause of despair? Is it not rather the essential precondition for free choice? The “dilemma” here is that there is great emotional difficulty associated with leaving unattended certain options, but is that not commonly the case? Couples who marry and choose to have children are obviously choosing something worthwhile, just as they realize that the commitment that marriage and parenting entails will require them to forego many other worthwhile pursuits — hobbies, career opportunities, friendships, and so on. When we focus on the foregone opportunities there is a certain wistfulness, but that does not make for a moral dilemma.

*OL* will learn even less about that philosophical alternative than did readers of *POJ*. Finnis appears nowhere in *OL*. Raz appears once (p. 465) in a laundry list of academics. Hart appears inconsequentially as party to the Hart-Devlin debate (p. 262) and in a footnote to Posner's treatment of the judicial utility function (p. 132 n.42). Posner refers readers of *OL* to his prior treatment of natural law and positivism in *POJ*. There he described "natural law" as "basic political morality."<sup>16</sup> But this is inaccurate. "Natural law" is, on all accounts, about rectitude in *all* human choosing, including (not primarily) choice by persons exercising public authority. "Natural law," in other words, is a moral system and not a mere doctrine about law or politics.

Posner is sensitive to the criticism that his account of law is reductionist (p. 15). But he misunderstands the criticism. Burton was saying that Posner's legal theory leaves no room for unrestricted practical reasoning that is all instrumental — technical, scientific — reasoning. Posner thinks that Burton's charge was that Posner's particular — i.e., economic — type of instrumental reasoning is too narrow. Economics, according to Posner, "far from being reductionist," is "the instrumental science par excellence" (pp. 15-16). Posner admits that instrumental rationality may not be the only tenable conception of rationality (p. 553 n.2), but where one would expect some reference to the classical tradition of practical reasoning — a reference, say, to able contemporary natural theorists like Finnis and Robert George — Posner refers the reader to a chapter of Robert Nozick's *The Nature of Rationality*.<sup>17</sup> What Posner means to recommend in that difficult chapter is not stated, nor is it clear upon reading Nozick. Nozick does not, in any event, defend anything like the perspective that Burton tried to bring to Posner's attention.

In the climactic moment of *OL*, Posner concedes that his "epistemological defense" of liberalism — in sum, his essentially amoral analytical framework — has been criticized "by philosophical realists and Catholics, among others."<sup>18</sup> The realist view holds that

16. See *POJ*, *supra* note 11, at 230.

17. See p. 553 n.2 (citing ROBERT NOZICK, *THE NATURE OF RATIONALITY* ch. 5 (1993)).

18. P. 451. Of course, Catholics are philosophical realists; at least a realist epistemology is necessary to sustain the Church's teaching, emphasized often by Pope John Paul II, that there are universally binding exceptionless moral norms.

The most troubling aspect of *OL* is Posner's recurring caricaturization of the Catholic Church when he should be engaging in counterarguments. Even so, Posner nowhere cites, much less explains, a single Church document, even in the area of sexual morality. He nowhere cites Finnis, a Catholic who is arguably the world's leading legal philosopher. Posner recommends to readers Ronald Dworkin's discussion of religious views on abortion, a portion of *Life's Dominion* that is largely about Roman Catholic teachings. See p. 188 n.38. Unfortunately, this part of *Life's Dominion* is so completely inaccurate that only someone with the slimmest familiarity with Church teaching could recommend it. See Gerard V. Bradley, *Life's Dominion: A Review Essay*, 69 N.D. L. REV. 329 (1993). Dworkin's ideologi-

“there *are* objective truths about science, morality, politics, and law, which we can find by the light of reason” (p. 451). Posner responds: “I shall not try to discuss” this view, because “it belongs to the domain of indeterminate high theory” (p. 451). Posner distinguishes and unconvincingly refutes a criticism by Alasdair MacIntyre, a learned and critical philosopher who eventually became a Catholic and has identified himself most conspicuously with Thomism. Posner does not mention any of the vast McIntyrian corpus, save a little-known one-page fragment (p. 451).

Posner early in *OL* gives readers the impression that his project’s success hinges upon a stable resolution of the boundary question.<sup>19</sup> Now he says that “the idea of the self . . . the ‘real me,’ is itself a construct” (p. 534). He continues: “I shall not try to solve the mystery of who this ‘we’ is who ‘constructs’ our various public selves” (p. 535). Posner’s pragmatic counsel on the issue of abortion is: muddle through it.<sup>20</sup> Of Dworkin’s “law as integrity,”

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cal explanation of Church teaching that abortion is always wrong — basically it is a rhetorical instrument wielded by the clerical ruling class — is congenial to Posner.

Posner says in *OL* that “traditional preoccupations” of jurisprudence will be “increasingly irrelevant.” P. 79. Those still so preoccupied resemble “medieval canonists” engaged in “hermetic discourse” that befits “a profession that seeks to justify its privileges by pointing to the high obscurity of its thoughts.” P. 80. Posner elsewhere compares lawyers’ intellectualization of their activity to

the relation between clerisy and laity in the medieval Church. Like many clerics, professionals practice “unworthy arts to raise their importance among the ignorant,” including “an affectation of mystery in all their writings and conversations relating to their profession . . . and a demeanor solemn, contemptuous and highly expressive of self-sufficiency.”

P. 58 (quoting JEFFREY LIONEL BERLANT, *PROFESSION AND MONOPOLY: A STUDY OF MEDICINE IN THE UNITED STATES AND GREAT BRITAIN* 89 (1975)).

Posner squarely invites the reader to choose between religion — with which he has identified much of the “moralistic” rival he should be arguing against — and reality:

When Cardinal Bellarmine refused to look through Galileo’s telescope at the moons of Jupiter, whose existence seemed to refute the orthodox view that the planets were fixed to the surface of crystalline spheres, he was not being irrational. He was just refusing to play the science game, in which theories are required to conform to observations, to “the facts,” rather than the other way around. Bellarmine’s game was faith. It is a common game in our society as well, taking many forms, the cosmological one being astrology. Another game of faith today is “political correctness.” If you show a player in that game a sheaf of scientific reports purporting to show that the races or the sexes differ in their potential for doing mathematics, the player will refuse to read them; the empirical investigation of racial and sexual differences is rejected in that game, just as the empirical investigation of planetary motion was rejected by Bellarmine.

P. 7. Posner is grotesquely wrong on the facts here. Bellarmine, a leading theologian of the day, was on friendly terms with Galileo. Bellarmine accepted Galileo’s invitation to look through the telescope in April of 1611, and thanked Galileo for the opportunity. There was, twenty-three years later, a sharp, regrettable, and on both sides unnecessary disagreement between the Church and Galileo. See E. McMullin, *Bellarmino, Robert*, in *DICTIONARY OF SCIENTIFIC BIOGRAPHY* 587 (C. Gillispie ed., 1970). But it was not part of a “faith game,” swinging free from observable reality, as Posner implies. Has Posner ever wondered why science has thrived in the Christian West? Or considered how Galileo, who lived and died a Catholic, came to *be* such a great scientist?

19. See *supra* text accompanying note 5.

20. See p. 404. Posner may think that the positive law — specifically, the first sentence of the Fourteenth Amendment — confines the effects of this uncertainty to unborn children. If

Posner dismissively remarks: "I get nothing out of such high-falutin' prose" (p. 403).

Posner states clearly his "prediction," which he devoutly wishes to come to pass, that "traditional jurisprudence" will become irrelevant (p. 79). He believes, it seems to me, that entirely material developments — in the law market, computer technology, accountancy, engineering — will displace the moralistic approach to law. Posner evidently hopes and trusts that information — refined and organized, to be sure — about stuff, including people, will make morality obsolete (see pp. 79-80).

The "active vices" of economic reasoning have had their way. Remember that the "passive" story, which Posner can easily be heard to recite, especially in the Introduction, imagines some non-economic determination of *ends* and *ethically suitable* means, matters upon which economics confesses its incompetence. The "boundary questions" seemed to be raised in this context.

Consider, now, what Posner says about "muddling through" abortion. He still says that the "economic approach" cannot answer the question whether abortion should be restricted; pragmatism is brought in to round out the approach (p. 404). Pragmatism, however, does not answer the question any more than economics does. Pragmatism, in Posner's hands, simply asserts *that* abortion is an area "where a lack of common ends precludes rational resolution" (p. 404). Pragmatism's counsel is simply to wait — "until a consensus of sort based on experience with a variety of approaches to abortion emerged" (p. 405). We have heard Posner say that economic — i.e., rational — analysis needs posited ends to get going, and we thought he would deploy "pragmatism" and "liberalism" to generate those ends. But Posner's pragmatism, if not liberalism, does not generate ends and goals either. Posnerian pragmatism seems now to serve the outcomes generated by economics.

It's time to consider these curious aides to economics: pragmatism and liberalism.

### III. LIBERALISM AND PRAGMATISM

Let us start with liberalism. Posner is pretty clear about what it comprises: the "neutrality principle" — the liberal state is "neutral about substantive values"<sup>21</sup> — and the "harm principle" — the state

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so, he is quite mistaken. The Amendment, it may be assumed, guarantees some rights but *only* to "persons born and naturalized in the United States, and subject to the jurisdiction thereof." U.S. CONSR. amend. XIV, § 1 (emphasis added). Obviously, without some stable account of "personhood," newborns and others with various deficiencies may be characterized as "subpersonal" beings, the results of failed attempts at genuinely *personal* reproduction.

21. See p. 449. This is very hard to square with most of the rest of what Posner says about constitutional judging. See pp. 171-255. According to Posner, in the end a judge must decide

may justifiably curtail liberty only to prevent palpable “harms” to third parties (pp. 23-24). Posner does not say that these two elements of liberalism are implied or entailed by our positive law; he thinks much of our law is paternalistic — that is, illiberal (p. 25). Posner says in one place that he is simply taking his “stand” here on “issues of political and moral philosophy” (p. 23). More in harmony with the central tenets of *OL*, he says that our “liberal intuitions” are strong. We cannot be talked out of them.<sup>22</sup> Standard liberal types — explorer, maker, free-thinker, scientist — “are types I [Posner] like,” though he quickly adds that “[t]his ideal has no “solid grounding in pragmatism or anything else” (p. 29). Posner clings to the harm principle of “classical liberalism” — “whether rightly or wrongly” (p. 24).

This is the language of distinctly nonmoral “can’t helps.” We find ourselves holding the “neutrality” and “harm” principle — except that Posner allows that “we” are erratic liberals, for we cling to a number of paternalistic policies. There is no anterior set of moral principles from which liberalism is derived, nor within which we might develop and apply these “intuitions.” So, Posner offers no argument directly for our liberalism. He submits that none is needed: “[U]ngroundedness is characteristic of many of our mostly firmly held norms (p. 190). “We reason from our bedrock beliefs” — against slavery and infanticide — “not to them” (p. 191).

Is there anything that warrants our liberalism? Posner holds that by liberalism’s consequences we shall know its value. It is very successful in practice. He says that the “strongest states” — Britain in the nineteenth century, the United States in the twentieth — have been “liberal” (pp. 24-25). Well, the Third Reich, decidedly illiberal, gave the allies a pretty good contest in the Second World War. A hardly liberal Japan gave the United States a run for its money in World War II, and a still illiberal Japanese society is very productive economically. Besides, the liberalism that Posner aims to defend so pragmatically — consisting of the neutrality and harm principles — has only partially been realized in the United States, beginning only in the late 1960s. Victorian Britain hardly subscribed to liberal tenets, as James Fitzjames Stephen eloquently testified.

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open cases on instinct, not analysis, on the basis of his or her own values that, like everyone else’s, are “can’t helps.” P. 192. Posner means to rule *out* of public decisionmaking “comprehensive doctrines,” and he does so by supposing that we, including judges among us, hold “bedrock” convictions without supporting theories. But treating value judgments as “can’t helps” does not save them from nonneutrality, even if one holds that “imposing” them is somehow inevitable. The exercise becomes the entirely nonneutral one of imposing values one cannot rationally defend.

22. “There is no intellectual procedure that will or should force us to abandon them.” P. 23.

Posner claims that the twentieth century "is rich with evidence that communal alternatives to liberalism, whether fascist or socialistic, are monstrous, nonviable, or both" (p. 27). Here is a criterion different from raw intuition. I agree that "fascistic and socialistic" alternatives are not preferable to liberalism, but that hardly exhausts the alternatives. Besides I would defend that judgment ethically; Posner cannot do so. Posner says he will defend liberalism "pragmatically" by comparing its consequences with consequences of such alternatives as "social democracy and moral conservatism" (p. 29). But he relies on the flimsiest anecdotal evidence, and the anecdotes are not even true.

Posner asserts that "liberalism creates the conditions that experience teaches are necessary for personal liberty and economic prosperity" (p. 24). He has in mind spheres of privacy and free markets: "Liberalism fosters the exchanges of information that are necessary to scientific and technological progress, enlists uncoerced citizen support, maximizes productive output, encourages and rewards competence, prevents excessive centralization of decision-making, weakens competing loyalties to family or clan, and defuses sectarian strife" (p. 25).

Maybe, up to a point, but it seemed that Posner intended liberalism to alleviate the deficiencies of a strictly economic legal theory. Posner concedes now that liberalism "is no more successful than economics in dealing with boundary issues" (p. 27); it is "not a complete philosophy of government and law"; and it is "in tension with democracy" (p. 25). Posner's liberalism heads off the chaos produced by the economists' mental externalities only by bald stipulation. Where is the needed supplement or corrective to economic reasoning? Does Posner's pragmatism, if not his liberalism, provide a solid grounding for identifying who or what is part of the community — for prohibiting slavery, infanticide, gruesome punishment?

Posner is anxious to distinguish his brand of pragmatism from the leading post-modernist brand — what he calls "the excess of pragmatism" (p. 317). Post-modernists like Richard Rorty and Stanley Fish are "not merely antimetaphysical, which is fine, but also antitheoretical" (p. 317). Posner is certainly not inclined to the dreamy, glib, leftist political rhetoric of Rorty. Though resolutely antimetaphysical, Posner does not question external reality as such. Posner is no solipsist.

Posner's pragmatism is distinctly a *via negativa*. It "is not in the business of supplying foundations" (p. 29). It is conceived to engender doubt about "foundations," and is "especially dubious" that "analytic philosophy [or] legal reasoning can be used to establish

moral duties or legal rights.”<sup>23</sup> The pragmatist is “suspicio[us] of propositions” not provable by scientific methods — like the maxims of common sense and “the claims of metaphysics and theology.”<sup>24</sup> Posner’s pragmatists are hard-headed scientific types. They do not ground claims about things as ethereal as the propositions that it is always wrong to kill infants and that slavery is wrong regardless of its efficiency. Pragmatism, it seems, is what we call not worrying about the limits of economic analysis.

Posner’s “pragmatic jurisprudence” “plants no trees” but clears away “underbrush” (p. 405). It “signals an attitude, an orientation, at times a change of direction” (p. 405). The pragmatist is anti-dogmatic, anti-metaphysical, and skeptical about “truth with a capital T,” but “respect[s] those lower case truths we call facts” (p. 377). The pragmatist is well-informed, open-minded, empirical, forward-looking, practical, experimental. Pragmatism connotes a determination to “use law as an instrument for social ends” (p. 405; emphasis added). Evidently, we cannot resolve to evaluate pragmatism by its consequences. We are pragmatists when we evaluate other things — like liberalism — by their consequences, and not by their truth.

Posner specifically addresses the relation between pragmatism and economics — “the most highly developed instrumental concept of law” (p. 403) — particularly in light of the criticism that the latter’s defenders have failed to ground it in some ethical tradition. The criticism is that economics needs an enveloping ethical theory to humanize it. Posner responds: “The criticism is sound as observation but not as criticism” (p. 403). He adds: “Pragmatists are unperturbed by a lack of foundations” (p. 403). Posner identifies the observation as the idea that law should maximize wealth (p. 403). He says that the relevant ground for criticism is whether an

23. P. 9. I can only suppose that Posner means moral bases for legal rights, since he does not seem to question that legal texts — the United States Code or the Constitution — establish some legal rights.

24. P. 9. Posner seems to think all metaphysics is a matter of faith-based statements about very elusive realities, if metaphysics refers to any real thing at all. Not so. The central plot device of the movie *Toy Story* is metaphysical. When Buzz Lightyear first appears among Woody the Cowboy, Mr. Potato Head, Bo-Peep, and the other toys in Andy’s bedroom, his speech and demeanor mark him as somehow different. At first he seems just a bit more earnest than the others, slightly out-of-place, like the kid who studies during recess. It is soon apparent that the problem is in his self-understanding. Just before the characters deliver lines that identify the precise anomaly, the eight-year old metaphysician next to me at the theater blurted it out: “He doesn’t know he’s a toy!” Buzz Lightyear thought he was really a space ranger. The rest of the movie is about Buzz coming to grips with the reality that he is not a Space Ranger, or any other person. He is really just a toy. Toys are not persons.

The “reallys” signify elements in a deep structure common to things that can be studied but not altered by human thought. This is metaphysics, which takes its name from the prosaic reality that Aristotle’s book after *The Physics* was about such things. Aristotle did not give it a title. We call it *The Metaphysics* — meaning after *Physics*.

economics of wealth-maximization is the "best" approach for the American legal system to follow (pp. 403-04). Just so, but we are trying to settle what it here means to say "best." Posner means that it "fits" us, just where we are at, but economics, he seems to concede, does *not* fit us. Pragmatism sounds like a way of saying that that deficiency no longer troubles us, or at least not Posner.

Posner's pragmatism, I submit, expresses the implications of economic analysis of law, and very, very little else. There is absolutely nothing in Posner's pragmatism that impedes — in the slightest — the unfolding of whatever "normative" conclusions emerge from economic analysis of law. The pragmatist is interested in the consequences — palpable, real, testable, observable consequences — of legal reform proposals (p. 290). So, too, the economist: "Economics imagines the individual not as 'economic man,' but as — a pragmatist" (p. 16). Law and economics, according to Posner, "epitomizes the operation in law of the ethic of scientific inquiry, pragmatically understood" (p. 15). He is convinced that "[m]odern economics can furnish the indispensable theoretical framework for the empirical research that law so badly needs" (p. 19).

Now, when we hear Posner saying that "[t]he economic approach cannot be the whole content of legal pragmatism" (p. 404), we hear an emphasis upon "whole." When economic analysis is unsuitable, pragmatism serves to *prevent* recourse to noneconomic thought, even if just to criticize the implications of economics. Pragmatism does *not* supplement economic reasoning. It is not the hero of the "passive" story. Pragmatism instead cuts off would-be rescuers, like moral philosophy, at the pass. Pragmatism is the bodyguard of economics, protecting *its* autonomy against harm from competing practical visions.

#### IV. POSNER'S "CAN'T HELPS"

My hypothesis is that "liberalism" and "pragmatism" are dummy outfits fronting for economics. If that is true, it would seem that *OL* is self-refuting, for Posner seemed to allow in his Introduction that economics alone is inadequate, and even disastrous. Let us test my hypothesis a bit.

Pragmatists do not deny that slavery is wrong. Posner the pragmatist does not say: "Let us have slavery!" The pragmatist would "disconnect[] the whirring machinery of philosophical abstraction from the practical business of governing our lives and societies" (p. 463). Pragmatism does not upset the practices that appear to rest on the now-shaken foundations but aims to show that their "validity depends on the evaluation of their consequences" (p. 463). But this is viciously or vacuously circular. The "practice" that rests on the foundationless conviction that slavery is wrong is the prohibition of



slavery. Is that consequence a thing of value? I think so, and would argue for it. Posner seems to think so, but would not argue for it.

Moral reasoning and the conclusions people reach on the basis of it pop up in *OL* as “facts” about people’s attitudes, much like “mental externalities.” Some practices “revolt us.” Posner remarks that “[o]ur primary motives for not killing children are indeed biological and sentimental” (p. 191). The pragmatist does not enter into the moral discourse of ordinary citizen’s deliberations about abortion or slavery or infanticide. Posner tersely says: “The statement that it is wrong to torture children . . . is merely a descriptive statement about our morality, not a normative statement” (p. 36).

Posner appropriates — “gets a fix” on — what we hold to be morally true by assimilating those truths to economics. But his translation of moral truths into pragmatically conceived “facts” dramatically alters the entity translated. The move is a simple factual mistake — we *do* reason to conclusions like, “slavery is wrong.” The move is also intrinsically naive and empirically unavailable. Posner thinks we can go from counting just so many “revulsions” to a social consensus that, say, “slavery is wrong.” We cannot. Let me explain.

If “we” are agreed not to have “slavery,” slavery cannot be just the name of something we abhor. How would “we” know that “we” are referring to the same thing when we find ourselves simultaneously abhorring something? Ralph abhors broccoli, Billy might abhor politicians, Jane might abhor how women are treated within the family, and Mary might abhor Barney the dinosaur. Even if they express this feeling at about the same time, there is no consensus. If they all shout “yes” at the same time, they still have not approved or agreed to anything, unless there is a proposition identifiable as that to which “yes” is their response.

Posner supposes that “we” refer to the same thing as “slavery.” So, slavery is a proposition or at least a definite something. What is it? The “slavery” “we” condemn is, presumably, not merely a practice in which people work on cotton farms, or where people of dark complexion work for light-skinned people, or a system of outdoor work below the Mason-Dixon line. These were features of the “history of Negro slavery” that Posner says makes people very upset (p. 305), but they are all accidental features of that “slavery” that we condemn. Posner soundly remarks that legal analysis runs amok when it treats “slavery” promiscuously as a metaphor (p. 212), using it to condemn situations like anti-abortion laws, which are, Posner says, significantly different. He says that this confuses the essence of a thing and its attributes. It may. But he has veered to the other extreme, into a strict nominalism that is itself incapable of a stable account of “essence” and “accident.”

When people say "slavery is wrong," they have a description of "slavery" in mind. The essential or defining feature is, I submit, its morally decisive aspect or aspects. Is it, as the abolitionists alleged, interference with slaves' freedom of conscience? Does slavery violate principles of just labor relations?<sup>25</sup> Is slavery wrong because it treats persons as property, as commodities? If so, we now have a good reason to reject any other public policy that possesses the same characteristic. The answer to this question will be, I submit, a distinguishing immorality of slavery.

"Slavery" just cannot be distinguished as a something about which we might hold evaluative views on Posner's account of morals. The sterility of Posner's account is most apparent in his comments on self-enslavement, which, as he implicitly concedes, economics suggests should be legal (p. 23). He reduces "slavery" to a "name" we give to some phenomenon "that we abhor," but not to "outwardly rather similar things" like joining the army, becoming a Catholic priest, or being sentenced to prison (p. 304). Well, why is not the priesthood prohibited by the Thirteenth Amendment? Posner says — can only say — that it is a form of "involuntary servitude" we happen not to abhor (p. 304). The question remains, how do we *distinguish* it from the disapproved kind?

Posner is entangled in his own web when discussing *Griswold v. Connecticut*.<sup>26</sup> He calls *Griswold* the "first of the sexual liberty cases" (p. 186). He attributes this "national embarrassment" of a case to the "sectarian" pressure of a single interest group — the Catholic Church.<sup>27</sup> He grounds his rejection of the Connecticut law not in any theory of constitutional interpretation, but in "instinct," an "imperative felt need for intervention" (p. 192). What triggered the feeling? He asserts that the only practical effect of the law was to deprive lower-class women of effective birth control (p. 204). Is this the feeling-triggering effect? But feelings, unlike propositions and supporting arguments, are essentially private and incommunicable.

Is *Griswold* authority for invalidating all "embarrassing" laws? Posner says the law invalidated in *Griswold* was an "embarrassment" just *like* the embarrassment of

a law forbidding remarriage, or limiting the number of children a married couple may have, or requiring the sterilization of persons having genetic defects, or denying the mothers of illegitimate children paren-

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25. Some anti-abolitionists claimed that slaves were treated better by their masters than northern wage laborers were treated by the captains of industry.

26. 381 U.S. 479 (1965).

27. See pp. 193-94. Of course, the Catholic Church, neither in 1965 nor now, holds that its teaching on contraception is "sectarian." The Church teaches that it is a moral truth accessible to unaided reason. POPE PAUL VI, *Humanae Vitae*, in 5 THE PAPAL ENCYCLICALS, 1958-1981, at 223-24 (Claudia Carlen Ihm ed., 1981).

tal rights, or forbidding homosexuals to practice medicine, or forbidding abortion even when necessary to spare a woman from a crippling or debilitating illness, or requiring the tattooing of people who carry the AIDS virus, or — coming closest to *Griswold* itself — requiring married couples to have a minimum number of children unless they prove that they are infertile. [p. 194]

Is this a laundry list of things Posner just happens to dislike, with no internal relation save the existential one of being *Posner's* “can’t help”? Posner might be asserting that there is a common intelligible feature in all these “embarrassments.” What is it? Is it not a common moral defect? Whatever it is, it serves as a premise from which each of the negative conclusions can be drawn. If so, then *Griswold* is not just a “can’t help” case.

Posner’s professed aim is to embed his economic reasoning in a world populated by lots of fixed moral points. Why not take the direct route? Why not connect to “our intuitions” through a philosophical or practical commitment to democracy as, simply, popular decisionmaking?

Posner is deeply reserved in his commitment to democracy, if he is not actually antidemocratic. Democracy disperses power and thus enables “people to enforce their dislike of other people’s self-regarding behavior” (p. 25). In “its practical operation ignorance is pervasive, selfishness is salient, and at times a disinterested malevolence is at work” (p. 26). Our representatives are little better than the people they represent. “Our statute books overflow with vicious, exploitive, inane, ineffectual, and extravagantly costly laws” — and there would be more if our “democracy were more populist” than it is (p. 26). To show that the *vox populi* is an uncertain guide, Posner even invites the reader to imagine some Hitler-style demagogue leading us to do away with civil liberties (p. 219).

Posner says that liberals, like him, want to limit the scope of democracy through separation of powers and judicial review. Since the latter is the nonpopulist element, it must be the deep solution to the problems of democracy. Now we have come face-to-face with law, particularly constitutional review by courts. It is time to examine, explicitly and in detail, the role of economics in Posner’s theory of law.

## V. LEGAL THEORISTS AND LEGAL THEORY

Nothing in what I have said or will have to say about Posner casts any doubt on the truth that economics provides an invaluable service to the legal enterprise by identifying likely consequences — costs and benefits — of proposed courses of action. Posner’s comment on rent control laws nicely exemplifies the value of this service:

The beneficiaries are plain to see: they are the tenants when the rent-control law is adopted. The victims are invisible: they are the future would-be tenants, who will face a restricted supply of rental housing because landowners will have a diminished incentive to build rental housing and owners of existing apartment buildings will prefer to sell rather than rent the apartments in them. Economics brings these victims before the analyst's eye, literature, and the type of legal scholarship that imitates literature, does not.<sup>28</sup>

Posner's recurring criticism of academic legal reformers, and it is generally sound, is *not* that when they recommend adopting, say, rent control laws they make a mistake in calibrating its costs and benefits. It is, rather, that they simply ignore the consequences of the measures they recommend. Of Drucilla Cornell's Hegelian proposal to outlaw employment at will, Posner says that although it is "not . . . demonstrably wrong . . . it is irresponsible, because if adopted it might very well impose immense social costs — and costs born mainly by workers themselves, the intended beneficiaries of the proposal — that she has not [even] considered" (p. 311). So, John Hart Ely has a "weak sense of fact" (p. 205); the "essential facts" concerning the subject of Martha Minow's book "are missing" (p. 295); Patricia Williams is "careless about facts" (p. 377), "blur[s] the line between fiction and truth" (p. 375), and her feelings on race, like Catharine MacKinnon's on pornography, have "far outrun the facts" (p. 367); Rorty has a "deficient sense of fact" (p. 444).

Posner makes a related criticism of academic lawyers — that they do not possess the social scientific expertise that their subject matter requires. Thus, Morton Horwitz's psychologizing is "irresponsibly amateur" (p. 283); "[c]onstitutional lawyers know little about their proper subject matter — a complex of political, social, and economic phenomena. They know only cases" (p. 208); Minow is not the expert she needs to be in labor and finance markets (p. 294).

The more politically left of these writers — notably Williams, MacKinnon, Horwitz, and Rorty — come under Posner's indictment for Utopianism. They would reform a world they know nothing about. They seem to think that the world is infinitely malleable, just so much flexible clay to be molded per the theorists' creative design. This is, for Posner, the post-modernist corruption of pragmatism. He rightly scorns it.

Posner is right that many policy proposals stand or fall on their probable consequences. The right answer to many questions de-

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28. P. 381 (footnote omitted). Posner thinks it a "good thing" that places like Santa Monica and New York City have rent control — "not for the people of those cities but for the rest of us, who can judge from these national experiments whether rent control has the effects that economists predict or those the Left predicts." Pp. 107-08.

pends upon what, in reality, works. But that is no concession to the emerging thesis of *OL*. The criticism of economics in law is *not* that economic analysis is fanciful, unbelievable, or useless. It *is* very useful. The criticism is, as Posner seemed to be saying in the Introduction, that economics is radically incomplete, and dangerous without an enveloping, regulating morality and metaphysics.

But Posner's main target in *OL* is . . . philosophy! — broadly construed to include all metaphysics and ethics, particularly the allegedly "Catholic" contention that there is an objective, categorical, and universal morality that can be known to be true. A very interesting thing about Posner's chapters criticizing legal writers is that almost none defends or presupposes "philosophy" in this sense. They do not traffic in Truth — with a capital T — or metaphysics. Bork is no metaphysician. He is almost as hostile to judicial philosophizing as Posner is. Ackerman is a genuine liberal, as Posner would seem to be. Ely is a process theorist, as were Henry Hart and Herbert Wechsler. Dworkin, whose work *is* deeply philosophical and concerned with legitimacy, is no genuine natural lawyer. These writers are basically deep conventionalists when it comes to morals. They take their bearings from the conscience and traditions of the American people — our time-tested "can't helps." What does Posner find so deeply objectionable in their work?

They all believe in some nonnegligible autonomy of law. Posner indicts them for believing that the Constitution is an "algorithm for deciding all cases" (p. 77); that law can be so "impersonal that the values, personal experience, and social and political opinions of the judge do not affect judicial outcomes" (pp. 20-21); that judging is a "logical manipulation of principles" (p. 405); that judges achieve "demonstrably correct" results on a routine basis (p. 20).

Now, I have never encountered any writer, including those criticized by Posner, who held these views. Law is *not* mathematics or geometry. No academic writer of my acquaintance has ever proposed that law be made, even by judges, oblivious to consequences. Law and legal reasoning are, many have held, distinctive, nonarithmetic somethings. Many writers, including those in this wing of Posner's gallery, consider legal reasoning to be a restricted, integrated analysis that filters a judge's personal convictions about correct or sound public policy.

Nevertheless, Posner sharply *denies* the "autonomy of law" — the supposition that law possesses an "internal logic" and that it is independent of contiguous social scientific disciplines. "Economic analysis of law almost by definition denies law's autonomy" (p. 18). If there is no such thing as "legal reasoning," what is Posner's idea of "legal theory"? Posner has cast aside the whole moral philo-

sophical approach to law, and with it, much contemporary jurisprudence. Again, what is his "legal theory"?

Posner's legal theory is *professedly* part pragmatism, part liberalism, and part economics. We now fear that this compound distills down to economics. We are wondering what stands between economics and the whole of our social world, at least that very considerable part of it governed by law. Does law, if not legal reasoning, serve as a barrier? Does theory? Does "legal theory"?

What is law? Posner is not entirely skeptical about law's determinacy. He allows that when a statute or judicial precedent plainly governs a case the judge should apply it. Posner agrees that judges make law sometimes, in the law's open areas, but he does not doubt that, once decided, the instant case is recognized as law because of its source, its judicial pedigree. Posner does not, for example, say that a law that is economically perverse is no law at all.

Posner presupposes most of what "positivism" is classically understood to be about. Positivism is basically the effort, initiated by Bentham and Austin, to develop the conceptual tools necessary to do a sort of legal anthropology. What, descriptively, is treated as law in a given community? To answer this question, positivists would count the revealed Word of God as law if that is what the society being studied adhered to. Posner assumes something like a sources thesis for identifying what counts as law. But all this is implicit. It is not what he has in mind when he talks about "legal theory."

Posner has some notion of intrasystemic authority: the "judicial game," according to Posner, includes "at least a qualified adherence to rules laid down in legislation and in previous cases" (p. 21). This game, he cautions, can be justified in pragmatic and economic terms, even if not conducted entirely as a pragmatic, economic exercise. Posner says that the judge should not articulate "substantively rational" — i.e., economically sensible — rules "whenever" he thinks the received law is not rational. This is "[s]omething, but perhaps not much" (p. 21) of a Dworkinian element in an institution — the law — that is "justified" by economic and pragmatic values.

Law is, for Posner, not methodology. Law is a "subject" (p. 324). But what is the "subject"? Is it just so many propositions of law, disconnected points of light on the legal landscape? What could a theory of them be?

It appears that, for Posner, some propositions contained in law will stand fast against economics, at least until legislators begin to behave "rationally" — i.e., economically. But how many depends upon a judge's way of interpreting language, for Posner recommends economic reasoning in the law's open areas. How transpar-

ent will the Posnerian judge take language to be, especially in the superintending — superior to statute — realm of constitutional interpretation?

Posner rejects all the theories of constitutional interpretation that he considers. He declares against both “top down” and “bottom up” theories (pp. 172-75). He rejects outright the possibility of a “middle way” between “judicial activism” and “strict constructionism” in constitutional interpretation (p. 199). Posner seems to believe that if there is no reliable “technique” for interpreting the Constitution — like “cryptography, or translation, or reading a chest X-ray for signs of pulmonary disease” — there is little more to “constitutional ‘interpretation’ ” than the “reading of palms” and the “interpretation of dreams” (p. 199). There surely is no such “technique.” So, Posner thinks his “instinctual” method of interpretation is as well-grounded as any other.

Posner expressly compares the problem of constitutional interpretation to that of interpreting a work of music, suggesting once again that there is no distinctly legal point of view. A capsule criticism of Bork’s work: “[O]riginalism is neither the inevitable nor even the natural method of interpreting a given body of texts, or even the method of interpretation that is natural or inevitable for conservatives to follow” (p. 240). Except that the question concerns only a theory of constitutional interpretation, not a general theory of textual interpretation, and the criteria of aptness need not be naturalness or inevitability.

Posner sums up his views on interpretation as follows:

One cannot choose among . . . interpretations on semantic or conceptual grounds. Choice must be based on which interpretation seems best in a sense that includes but also transcends considerations of fidelity to a text and a tradition. The interpretive question is ultimately a political, economic, or social one to which social science may have more to contribute than law. [p. 207]

Law, on this flexible view of interpreting it, would be pretty permeable to “social science.”

What is “theory”? Facts are necessary but insufficient to intelligently answer the questions that law faces. As Posner says, “[a] taste for fact . . . will turn to gall if unaccompanied by a taste for theory” (p. 427). Facts alone do not constitute genuine knowledge. Facts remain undetected among an undifferentiated mass of phenomena in the absence of a “theory.” Theory guides the search for “significant” facts (p. 427). The type of theory Posner has in mind, he often says, is a non-normative or positive theory — economics is a prime example — that lights up the important features of the featureless — nontheoretically considered — landscape. We want theory, says Posner, “not to describe the phenomena being investigated but to add to our useful knowledge” (p. 430).

Posner cautions, however, that we must be “pragmatic about theory” (p. 431). “It is a tool rather than a glimpse of ultimate truth, and the criteria of a good tool is its utility” (p. 431). What distinguishes the useful theory? The “purpose of theory,” he says, is to “add to our useful knowledge, mainly of causal relations” (p. 430). Posner’s “overall theoretical stance,” then, stresses “facts” that are organized “theoretically” into “social sciences” and radically depreciates the role of evaluative criteria.

What, finally, can “legal theory” be? Posner says that as subject, not method, law is amenable to study by people in other disciplines, like economics and political science (p. 324). His “legal theory” is an “effective instrument for understanding and improving law, and social institutions generally” (p. viii). What’s this? Nonlawyers doing “legal theory”? Legal theorists lighting up “social institutions generally”? Perhaps the best summary of what Posner thinks is necessary to do “legal theory” is this: “a taste for fact, a respect for social science, an eclectic curiosity, a desire to be practical, a belief in individualism, and an openness to new perspectives” (p. viii). There is nothing distinctly “legal” about this list. Anyone might be a Posnerian legal theorist.

The subject matter of *OL* — “legal theory” — is fast disappearing from view. Apart from undeniably clear legal enactments, it has disappeared into economics.

## VI. POSNER’S “LEGAL THEORY”

Let us examine a featured constructive proposal in *OL* — stated in a chapter entitled “What do Judges Maximize?” — and Posner’s general conception of the Rule of Law. Does Posner’s “legal theory” explain them or transform them?

### A. *Free Will and the Rule of Law*

Posner is frank in *OL* about the basic point of criminal law, and it is through the criminal law, as Posner understands it, that we can appreciate Posner’s brief comments on the “rule of law” itself (p. 20). Criminal law does not aim to “punish” the “guilty” and to protect the “innocent.” Those are my scare quotes, though they might as well be Posner’s. For my — and, I suspect, the reader’s — account of criminal law traffics in what Posner calls “imaginary entities” like “mind,” “intent,” and “free will.”<sup>29</sup> Criminal law treats people as agents who are morally responsible for their bad acts.

29. Posner’s casualness in handling metaphysical concepts is most evident concerning free choice. He refers to the idea of free will — one of the law’s “so-called metaphysical balloons” — more than once in *OL*. See pp. 397, 398, 445, 462. Posner’s insouciance is consistent with what most likely is his view that free will is not real, even if muddled talk about it will not stop.



Posner rejects this moralistic approach root and branch. The “principal social concern behind criminal punishment is a concern with dangerousness rather than with mental states” (p. 397). The aim is to leave “harmless” — *not* “innocent” (a moral category) — people alone (p. 27). What prompts this view?

We can easily dispose of one Posnerian apology for treating criminals as dangerous objects rather than as autonomous agents. He says that juries do not peek into the defendant’s mind to see what this object “intended” (p. 397). Yet, juries routinely and reliably infer from certain probative evidence what a person chose to do. Posner does not consider the common case of trial on evidence including a defendant’s confession to the police, or statement to some nonpolice personnel, to the effect: “I really wanted to kill that s.o.b., and I did.”

It is reasonably clear that Posner just does not believe in “free choice” or “intention” at all.<sup>30</sup> He is convinced that though we cannot now predict with great success what people will do, some day we shall very likely be able to so predict. It is “cause and effect” all the way down.<sup>31</sup>

Posner finds utility in retaining traditional moral language. It is now not so much that jurors cannot understand what a criminal was doing, but that it is somehow better that jurors not try to:

The connected concepts of intention and free will, applied for example in the setting of criminal punishment, support the idea that people are different from other dangerous things, from rattlesnakes for example. . . . Thus, although free will and intention have little if any place in the science game, they may have a place in the judicial game. [p. 398] If we understand a criminal behavior, we are unlikely to accord him much dignity and respect. [p. 382]

Posner’s criminal law is a “utility-maximizing instrument of social control” (p. 270), similar not to our criminal justice system but to our practice whereby noncriminally dangerous people are detained to protect others — what might be called the “social hygiene game,” the public health “quarantine game,” or the “zoo game.”

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30. See pp. 382, 397-98; POJ, *supra* note 11, at 166-67. Posner *opposes* getting inside the defendant’s mind to see what he chose to bring about *to* the capacity for judgment: “When we succeed in looking at the world through another’s eyes, we lose the perspective necessary for judgment. We find ourselves in a stew of rationalization, warped perception, and overmastering emotion.” P. 381. According to Posner, “the internal perspective — the putting oneself in the other person’s shoes — that is achieved by the exercise of empathetic imagination lacks normative significance.” P. 381. Here is another example of Posner’s unpredictable use of “normative.” See *supra* note 8.

31. A telling manifestation of this faith is Posner’s inability to distinguish regularities in the conduct of an upright, well-integrated person — what some call “character” — from the compulsions of an addict and the instinct of a sparrow. See POJ, *supra* note 11, at 173-74. In *OL*, Posner states at one point: “To understand another person completely is . . . to understand the person as completely as a scientist understands an animal, which is to say as a phenomenon of nature rather than as a free agent.” P. 382.

The same society “plays” all these “games” and also the “judicial game.” How would Posner explain that? How is it that, if people are “cause and effect” all the way down, we make these distinctions, so that restraint is criminal punishment here, civil commitment there, etc.? Why then do we sustain a judicial game in which imaginary entities like free choice and guilt “support the idea” that people are not rattlesnakes? Has not Posner implied that people are just misunderstood rattlesnakes?

Posner has not made any progress in his effort to explain, if not justify, our “intuitions” against gruesome punishments and torture. In the “utility-maximizing social control” game that he substitutes for our system of criminal justice, such practices would have their proper place. Posner can redescribe some of the raw behavioral substance of criminal justice in economic terms, but not very much of it, and the redescription ultimately fails. Posner simply is not talking about our criminal justice system at all.

Posner says that “a major goal” of *OL* “is to nudge the judicial game a little closer to the science game” (p. 8). It is no comfort, then, that Posner considers the entire “rule of law” to be “a system of social control” (p. 20). The rule of law, for him, is valuable because it is a system of social control operated “in accordance with norms of disinterestedness and predictability” (p. 20) — a phrase that aptly describes the scientist’s management of laboratory animals.

### B. *The “Judicial Game”*

Posner asks, “What Do Judges Maximize?” and devotes the thirty-five pages of Chapter Three to answering the question. The question initially posed is about “a theory” of the “behavior” of the “‘ordinary’ appellate judge” (p. 109). This focus away from the “extraordinary” “judicial titan” to the ordinary judge “exemplifies the pragmatist’s interest in the world of fact, for most judges are, in fact, ordinary” (p. 109). Posner adds the qualifying claim that as “ordinary” folks, his subjects are not “truth-seeking,” a proposition for which he cites another writer’s assertion that “most judges” have been “plucked” from a deserved “intellectual obscurity.”<sup>32</sup> But even intellectually obscure people can and do seek truth. They often have little trouble finding certain truths, like the truths that slavery is wrong and that it is wrong to punish the innocent.

The ordinary federal judge’s relative insulation from ordinary self-interest makes them interesting puzzles to Posner. No matter what they do — short of high crimes or misdemeanors — they

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32. P. 110 n.3 (quoting Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 *DUKE L.J.* 191, 221 (1991)).

make the same money, and generally enjoy much the same power, prestige, and perks. What makes their behavior such a challenge to economic analysis of law, then, is that the quality and quantity of the work they do is not instrumental to what ordinarily counts as an incentive, as a benefit worth expending the resources of time and energy for. The question is, why do they do much work at all?<sup>33</sup> This is a challenge not only to “economic analysis of law” but, Posner says, “more broadly to the universalist claims of the economic theory of human behavior” (p. 112).

Posner implicitly eliminates the possibility that even “ordinary” judges find their work intrinsically worthwhile, that the work is its own reason for doing it, in the sense that knowledge and excellence in work are intelligibly worthwhile just in themselves. For allowing that there are such basically valuable things — just in themselves and *not* as means to some further end — would force Posner out of his entirely instrumental, technical conception of rationality. Posner stipulates out of the model a “desire to promote the public interest” (p. 118). Why? It would be inconsistent with “treating judges as ‘ordinary’ people.”<sup>34</sup>

Posner finds the most promising avenue of explaining judges’ behavior in analogies to voting in elections. The “consumption value” of voting depends on making “a deliberate choice of whom to vote for” (p. 123). Posner realizes that this explains at most that judges cast *a* vote. Why do they “vote for one side rather than another, or to vote for one interpretation of a statute or legal doctrine rather than another, or to adopt one judicial philosophy . . . rather than another?” (p. 126). Posner has yet to explain why federal judges work hard rather than play golf in Scottsdale. They could golf in Scottsdale — a lot — and get all the “consumption value” advanced so far by voting in cases. Voting is not what consumes them. What takes so much time, Posner must realize, is the crafting of opinions to justify and to explain votes.

We seem to have moved on, in any event, to a different question, a question something like: Why does Judge *X* become a strict constructionist? Posner rules out the possibility that Judge *X* comes to “strict constructionism” because it is true, valid, or sound, either philosophically or based upon a controlling enactment — like the Constitution (p. 127). Posner finds the analogue of his choice: “the choices we make watching dramatic or cinematic performances” (p. 127).

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33. “Most” federal appellate judges work “quite hard — often at an age when their counterparts in private practice have retired and are living in Scottsdale or La Jolla . . . . Their utility function must in short contain something besides leisure and the judicial salary.” P. 117.

34. P. 118. Posner says that views on the public interest “affect” judicial preferences “but only insofar as decisions expressing those views enhance the judge’s utility.” P. 118.

The judge brings to bear on his spectatorial function not only a range of personal and political preferences but also a specialized cultural competence — his knowledge of and experience in “the law.” And if he is an appellate judge he will consult with his professional colleagues before making up his mind.

Of course few legal cases have the rich ambiguities of *Hamlet*. Many cases involve puzzles soluble with the technical tools of legal analysis — here the judge is like the reader of a detective story. The jury as factfinder performs a similar function. It is a different kind of spectatorship from the one I am stressing here, that of the appellate judge asked to decide not where truth lies but which party has the better case. But in either case the choice, like that of the theater audience, is a disinterested one; the judge’s or jury’s income is not affected by it. A further point is that the less informed the tribunal is, the more “dramatic” the trial must be to hold the “audience’s” attention. It is not surprising that Anglo-American trials, historically dominated by juries, are more dramatic than Continental trials, historically dominated by professional judges. [p. 128]

Are we now trying to explain the judge’s or jury’s decision at trial? Posner does not explicitly shift the focus. Even so, we have not progressed in our search for the cause of judicial diligence: they can take a particular view of *Hamlet* without producing the lengthy opinions that take so much of their time.

So why *do* judges write lengthy opinions? According to Posner, they do so in order to maximize the “pleasure of judging” (p. 131). Posner then addresses an obvious objection to his explanation of judges as maximizers of such psychic satisfaction. Why do judges act so, well, judicial? Why not sock it to the irritating litigant or the irksome colleague, and affirm racial, class, or gender solidarity? Why, in other words, if judges maximize “pleasure” do they engage in what would appear to be so much self-denial?

The pleasure of judging is bound up with compliance with certain self-limiting rules that define the “game” of judging. It is a source of satisfaction to a judge to vote *for* the irritating litigant, *for* the lawyer who fails to exhibit proper deference to the court, *for* the side that represents a different social class from that of the judges. It is by doing such things that you know you are playing the judge role, not some other role; and judges for the most part are people who want to be — judges. [p. 131]

This is hard to fathom. It is like saying that everyone seeks pleasure, but that some people — let us call them “stoics” — get pleasure by denying themselves pleasure.

The claim is more peculiar still. The judicial game’s “raw materials” are “the ugly realities of life”: “hatred, disease, crime, betrayal, war, poverty, bereavement, despair” (pp. 133-34). The pleasure-seeking judge seeks out this world. The “judicial game” — which transmutes these ugly things into intellectual problems of

rights and duties — “comfort[s]” judges by insulating them from, in Posner’s example, thinking themselves killers when they uphold the death penalty (pp. 133-34).

Posner recognizes that no ordinary person would seek pleasure by seeking out repugnant things and then scrambling to shield oneself from them once found. Why bother in the first place? Posner says that self-selection and the careful screening “of judicial candidates” assure that most lawyers who become judges will, nevertheless, be people who do. On this view, we surely should wish for an explanation of these features of the judicial task — features commonly called the “rule of law” — and not of the pleasure curve of judges who might want to play by that rule. The more traditional — and accurate — view of judging supposes precisely that these distinctive features are there to assure, as much as possible, that *despite* the normal human biases, proclivities, and frailties of the judges — their “utility curve” if you like — litigants get roughly equal justice.

Posner does not suggest that anyone would have created a judicial system in order to satisfy this highly unusual pleasure curve. He does not quite ask us to believe that the U.S. Supreme Court was created, and is sustained by, a commitment to judges’ pleasure. Besides, Posner says that “many cases” cannot be decided by reference to extant, conventional legal materials (p. 131). I suppose many can. On Posner’s view, they present no opportunity for choice at all — either for or against *Hamlet*. Why do judges do any work on these cases? Finally, Posner “doubt[s] that *any* judge subjectively experiences his job” in the way he models it in the chapter. He confesses: “I don’t” (p. 110 n.4).

#### CONCLUSION

What is left standing in “legal theory” between the economic juggernaut and the awful consequences Posner sketched in his Introduction? Moral philosophy has been swept aside, along with legal reasoning, the fruits of their inquiries strewn about like so many derelict facts. Economics has taken their measure, assimilating them under collaborating descriptions like “mental externality.”

Posner says that even “if there are no deep, metaphysical realities of the sort that religious and philosophical thinkers” have long believed in, we are not facing the abyss (p. 457). “There are,” he explains, “mid-level social scientific theories and empirical methodologies whose utility is not undermined” by metaphysics’ demise (pp. 457-58). Yes, but if all there is are highly organized information and technical operations performable upon it — engineering, psychology, military science, and the like — who or what will do the necessary work of integration?

Posner does not bring this precise question to the surface. But economics — the “instrumental” science par excellence, queen of the social sciences — is, when *OL* has run its course, the only answer that Posner can possibly offer.