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# BOOK REVIEW

## POSNER'S PROBLEM WITH MORAL PHILOSOPHY

BRIAN E. BUTLER<sup>†</sup>

*The Problematics of Moral and Legal Theory*. Richard A. Posner.  
Belknap Press of Harvard University Press, 1999. Pp vii-320.

### I. POSNER'S ELIMINATION OF MORAL PHILOSOPHY FROM ADJUDICATION

In *The Problematics of Moral and Legal Theory*,<sup>1</sup> Judge Richard Posner argues that moral philosophy is useless for the practice of law and, furthermore, has had a pernicious influence on the legal profession. Posner sees his book as an "extended homage to Holmes's ideas about morality and law."<sup>2</sup> In particular, Posner sees his argument as following Holmes's warning that the similarity between moral vocabulary and legal vocabulary should not be taken to mean that they are similar endeavors.<sup>3</sup> Posner professes to argue "not only that moral philosophy has nothing to offer judges or legal scholars so far as either adjudication or the formulation of jurisprudential or legal doctrines is concerned, but also that it has very little to offer anyone engaged in a normative enterprise."<sup>4</sup> Moral philosophy is portrayed as a "great mystifier" and it is claimed that the legal domain should be freed from its influence. The

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1. Richard A. Posner, *The Problematics of Moral and Legal Theory* (Belknap 1999) (hereinafter *Problematics*).

2. *Id.* at vii.

3. As David Luban notes, Posner's approach could be read as an elaboration of Holmes' epigram: "The life of the law has not been logic: it has been experience." David Luban, *The Posner Variations (Twenty-Seven Variations on a Theme by Holmes)*, 48 *Stan L Rev* 1001, 1004 (1996). But first, there might be more to law than its "life." Second, as Kant noted long ago, experience without some type of conceptualization is blind—a realization that Posner should take more seriously.

4. *Id.* at viii.

pointed conclusion is that moral philosophy is “useless in the resolution of concrete legal issues.”<sup>5</sup>

The book offers both a “strong” and “weak” version of his argument as to the uselessness of moral theory.<sup>6</sup> The strong version is the claim that “moral theorizing does not provide a useable basis for moral judgments . . . and cannot make us morally better people in either our private or public roles.”<sup>7</sup> This claim is summed up in the bald-faced statement that “there is nothing to academic moralism.”<sup>8</sup> The strong claim, while intriguing, will not be the subject of this review. It is a global claim that extends well beyond the legal domain. For the purposes of this book review the weak claim is much more germane. The weak version of his attack on moral philosophy is the claim that regardless of whether or not moral theorizing can provide a basis for some moral judgments, it should not be used for making judgments in the legal domain. It is this “weaker” claim that this review will investigate. Of course, because the stronger claim necessarily implies the weaker claim, if it can be shown that moral philosophy is in some sense useful for legal judgments, then the strong claim must be false as well.

## II. THE DOMAIN OF MORAL PHILOSOPHY

To understand Posner’s conclusion, a characterization of what he is attacking is in order. What exactly is “moral philosophy” according to Posner? To understand this requires an investigation into both what Posner means by “philosophy” and what he means by “moral.” First, in Posner’s world “[p]hilosophy is the field of residual speculation, and it is continually losing subjects to specialized fields.”<sup>9</sup> Second, philosophy is seen by Posner to be a “weak academic field.”<sup>10</sup> But these methods of characterizing philosophy are unhelpful and interminably vague. The combination of the two claims adds up to “philosophy is a weak residual field of speculation.” If Posner wants to be

5. *Id.* at x.

6. The terminology “strong” and “weak” is Posner’s. The choice could be seen as unfortunate because the “weak” claim is still inescapably overbroad. It would be better, perhaps, to describe them as very broad versus more narrowly tailored.

7. *Id.* at 3.

8. *Id.* at 12.

9. *Id.* at 85. This claim is empirically false. In fact, any specialized field becomes just more fodder for the philosophy mill. Furthermore, this characterization might just show that Posner is running upon such a strong assumption of the legitimacy and centrality of empirical investigation/experimentation that he is unable to see the specific tools and aims of “philosophy” as a specific and unique domain of inquiry.

10. *Id.* at 88. Once again, this claim is not true to experience. Philosophy as a discipline is the strongest in Darwinian terms. It has survived the longest of all the academic disciplines and has shown an ability to reinvent itself in the face of threats to its survival.

seen as attacking anything but straw men he must do better than this. All he tells us about philosophy is that it is the domain where empirical research has not been applied in full force. But this ignores the possibility that philosophy brings to the table tools different in kind and import than the empirical sciences but useful none-the-less.

Posner's definition of morality is hardly more helpful. Morality, according to Posner, is "the set of duties to others . . . that are supposed to check our merely self-interested, emotional, or sentimental reactions to serious questions of human conduct."<sup>11</sup> It is described as the "domain of duty."<sup>12</sup> It is also described as always at the very least implicitly uniformitarian in that it has "pretensions to universality."<sup>13</sup> Morality is further described as a theory of how we should or ought to behave that tries to get at the underlying truth about our moral obligations. The moral philosopher seeks to identify a "phenomenon that exists independently of theory."<sup>14</sup> The quest of the moral philosopher is one of "discovery," not "justification."<sup>15</sup> Moral philosophers attempt to "deduce" answers to contemporary moral questions from the great texts of the philosophical tradition "without having to investigate contemporary social conditions."<sup>16</sup> The moral philosopher, according to this description, aims for moral claims that are "logically and empirically unassailable" and has failed in his or her enterprise if the conclusions reached do not live up to this standard.<sup>17</sup> So, the moral philosopher is a modern-day Platonist who looks for absolute universal truths outside of theory from which we can deduce, with certainty, the nature of the duties we owe one another. This is an exceedingly narrow and anachronistic definition.

If Posner stood true to the definition he gives of moral philosophy there would, in effect, be no real target for the criticisms raised in *Problematics*. Among the people Posner lists as practicing moral philosophy are Jürgen Habermas, Ronald Dworkin, John Finnis, Alan Gewirth, Frances Kamm, Thomas Nagel, Martha Nussbaum, John Rawls, Joseph Raz, Thomas Scanlon, Roger Scruton, and Judith Jarvis Thompson. Ronald Dworkin is singled out as a "high rationalist with a weak sense of fact."<sup>18</sup> It is hard to understand how

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11. Id at 4.

12. Id at 41.

13. Id at 92.

14. Id at 17.

15. Id at 16.

16. Id at 48.

17. Id at 16.

18. Id at 253. A problem here might be that Posner has too strong a substantive ontology. That is, he has too strong a sense of fact without the underlying understanding of the epistemological issues involved that accompanies a full understanding of the domain of philosophy. This is, roughly, the claim that Ronald Dworkin makes in his response to Posner's earlier article that was developed into *Problematics*; "in spite of

these various theorists offer a consistent picture of moral philosophy as a discipline. Every one of them would dispute some of Posner's characterizations of moral philosophy. Some would reject almost all of the claims Posner attributes to them. For instance, Dworkin's theory is much more influenced by Wittgenstein and linguistic philosophy than by Platonic aspirations. Furthermore, although Nussbaum argues for a very strong sense of the shared aspects of human existence, she doesn't rest her argument upon any absolute foundations and is acutely aware of the inevitability of tragedy and contingency. If the positive characterization of moral philosophy combines with the list of moral philosophers to give a somewhat obscure and anachronistic definition of the moral philosopher, the characterization of what theorizing is not included under the rubric of moral philosopher is slightly more helpful (and telling).

The moral philosopher is, in Posner's definition, distinct from the "moral entrepreneur."<sup>19</sup> Moral entrepreneurs are much like a philosopher yet different because, according to Posner, they persuade with something other than rational argument. Moral entrepreneurs work through "charisma" rather than rational persuasion. Posner gives Catharine MacKinnon as his prime example of such a moral entrepreneur. A very similar version of an "anti moral philosopher" is the edifying philosopher who does not offer reasoned arguments but rather gives us different vocabularies that we can "try on for size."<sup>20</sup> This characterization of the moral entrepreneur and others of the genre is interesting. First, it shows an unquestioning dogmatism as to the nature of reasoning. Exactly what criteria is being used to identify reasoned from charismatic arguments? Of course it might be thought that Posner is actually ruling out the use of "reason" altogether, but this would be wrong. Posner allows for reasoning in relationship to policy choices, for example. His argument here must rest upon an implicit picture of philosophical reasoning—if so it should be made explicit. Posner should be sensitive to such problems. In *Overcoming Law*,<sup>21</sup> he criticizes Wechsler for falling into the very same trap of having too substantive a view of what correct reasoning must look like. His critique is also much too certain as to the nature of reasoning offered in philosophical argument. What is it about MacKinnon's arguments that keep them from being well reasoned in his opinion? And why does he not think he needs to substantiate this claim? While

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his assurances to the contrary, Posner may himself be in the grip of a substantive, noninstrumentalist moral theory that he does not fully acknowledge or perhaps even recognize." Ronald Dworkin, *Darwin's New Bulldog*, 111 Harv L Rev 1718 (1998).

19. Id at ix.

20. Id at 32.

21. Richard A. Posner, *Overcoming Law* 73 (Harvard 1995).

it is easy to find this accusation being made in legal scholarship, the nature of the "reasoning" missing seems to be taken for granted (it sometimes appears to be an ability to ignore opposing arguments). It is a very dubious proposition when somebody shows so much certainty as to the nature of the philosophical discipline. What assumptions is Posner smuggling in to the concept of "reason(s)" or "philosophical" argument? We do not know because nowhere does Posner play out or support the assumptions necessary to sustain his critique. Leaving these assumptions implicit may be a shrewd move in an adversarial contest, but legal scholarship demands more explicit characterization of what counts for reasons or philosophical argument.

Even if Posner's characterization of the moral entrepreneur as not using rational persuasion is questionable, many arguments that do include rational persuasion seem not to qualify as moral philosophy either. First, Posner treats much theory as valuable. His examples of valuable theory include economic theory and evolutionary biology.<sup>22</sup> Second, he highlights a distinction between what he terms policy concerns and moral concerns (allowing for the legitimacy of policy concerns). Moral philosophy forms, therefore, a small and distinct subset of normative reasoning, much of the rest of which is left intact by Posner's critique. That is, not all normative reasoning is to be labeled moral philosophy. Political theory, for example, is a type of normative reasoning that is not necessarily moral philosophy.<sup>23</sup> Furthermore, moral theory is not the same as dealing with "ethical" issues, which are defined as the set of attempts to answer the question "How shall I live?"<sup>24</sup> Posner further argues that theorists like Nietzsche and Weber also practice a type of theory that is to be distinguished from moral philosophy proper. Others in this group of theorists who are acceptable because they are not moral philosophers include Annette Baier, Gilbert Harman, Richard Rorty and Bernard Williams. There are many problems with Posner's distinctions. For example, it is unclear whether a philosopher who answers the question "How shall I live?" with a description that includes duties we owe to others is to be categorized as practicing "ethical" or "moral" philosophy.

Moral philosophy is, according to Posner, also different from the tools that many philosophers in academic philosophy departments use to analyze arguments. For example, it is argued that moral reasoning is different from pointing out logical mistakes in moral argument, which he accepts as "a

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22. Posner, *Problematics* at 14 (cited in note 1). These are, of course, two domains of theory that others would find pernicious or diversionary as well.

23. *Id.* at 4.

24. *Id.*

legitimate therapeutic task of philosophy.”<sup>25</sup> This exclusion ensures that most of the philosophers plying their trade in contemporary philosophy departments will be spared his critique. So, what the “weak” claim that moral philosophy does not help for making legal judgments comes down to is the very narrow conclusion that a weak residual field comprised of speculation as to what duties we have, that can be deduced with certainty from some discoverable universal phenomenon, and that exists independently of theory, should not be used for legal judgments.<sup>26</sup> No theorist subscribes to this caricature of moral philosophy.<sup>27</sup> The philosophers he lists can shrug off their inclusion in the set as a misunderstanding of their thought. If the set was not narrow enough to begin with, Posner carefully eliminates any potentially difficult examples of useful moral philosophy by labeling philosophical practitioners who have had influence in the legal realm “moral entrepreneurs” or “ethical philosophers.” He also excludes historically important philosophers from other eras because they are not “academic” philosophers. Once again, the definitions are questionable at best. As Charles Fried states, Posner really is not entitled to limit his target so severely.<sup>28</sup> One wonders whether any philosopher who had influence in the legal field, and whose argument rested on the existence of duty, would just be conveniently labeled a “moral entrepreneur” to avoid facing a more difficult fight. So, even before we have heard his reasons for eliminating moral philosophy from the legal toolbox we have to admit that under this characterization it seems to be a pretty impotent area of inquiry. It hardly seems a worthy target for Posner’s ire. Because the field Judge Posner includes in his critique is so narrow and insignificant there must be something else going on. Why does Posner feel that moral philosophy, even so narrowly described as he would have it, is deserving of such an all-out hostile attack?

### III. WHY IS MORAL PHILOSOPHY USELESS FOR LEGAL ANALYSIS?

How does Posner argue for his “weak” conclusion that moral philosophy should not be used in making legal judgments? His argument rests upon three distinct types of “evidence.” His first type of evidence is his observation that

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25. *Id.* at 16.

26. Posner’s argument is more Cartesian than the arguments offered by the philosophers he is attacking. For a critique of arguments like Posner’s and their conceptual problems see Michael Moore, *Moral Reality*, 1982 *Wis L Rev* 1061, 1106.

27. Of course even if there was a group of philosophers that did ascribe to this stance there still would be no reason to follow Posner’s definition of moral philosophy, creating a new term for those who did not share these traits and were formerly thought of as moral philosophers.

28. Charles Fried, *Philosophy Matters*, 111 *Harv L Rev* 1739, 1740 (1998).

there is no consensus with regard to moral principles from which answers to contested moral questions might actually be derived. As an example to support this claim he refers to "moral pluralism" within the United States.<sup>29</sup> He sees this as evidence that moral philosophy cannot help a judge arrive at a better decision. In fact, he thinks that moral philosophy actually entrenches disagreement rather than helps to overcome it. This argument comes close to committing the fallacy of argument from ignorance. It does not follow from the lack of consensus on contested social issues at this moment that it might not be arrived at through reasons developed in the next instant. If we accepted this type of argument then the existence of a moral controversy would damn all our tools of analysis equally, for none of them have solved the problem (hence the controversy). This lack of consensus might give reason to actually increase moral/philosophical speculation in order to discover solutions to contemporary moral dilemmas. Seen in this light the lack of consensus is certainly not a knockdown argument against moral philosophy. In addition, this argument suffers from selection bias. Posner only highlights the moral controversies that are raging today. What of earlier moral controversies, such as slavery? How do we know that moral philosophy, in the sense of arguments finding/supporting claims of objective duties to another human being, did not have a strong influence in the fight against slavery? We know such arguments were used. Were they effective? Any argument pro or con would be exceedingly speculative and counterfactual. Posner certainly has not carried his burden by just asserting moral philosophy's uselessness without acknowledging convergence upon moral beliefs in the past.

His second type of evidence rests upon a set of conclusions relating to the efficacy of moral reasoning on human behavior. According to Posner "academic moralism has no prospect of improving human behavior. Knowing the moral thing to do furnishes no motive, and creates no motivation, for doing it."<sup>30</sup> He thinks that the moral philosopher believes that once the ought of duty is established philosophically this recognition will, in itself, furnish sufficient impetus to do it. He also claims that "the analytical tools employed in academic moralism . . . are too feeble to override either narrow self-interest or moral intuitions."<sup>31</sup> Posner equates the faith that contemporary moral philosophers have in the motivational force of reason with Socrates' claim that

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29. Posner, *Problematics* at 28 (cited in note 1).

30. *Id.* at 7.

31. *Id.*



people do bad things only out of ignorance. He asks rhetorically “[w]ho believes that, and on what evidence?”<sup>32</sup>

But this is surely beside the point when confronted with the weak argument that moral philosophy should not be used to make legal judgments. The whole justice system apparatus can “realign” the incentives artificially so they correspond with the duty the judge discerns. All that the moral philosopher’s argument has to do is help make the judge’s decision; it does not have to be the motivational spring of the participants or those in society at large.<sup>33</sup> Once the judge makes the decision based, at least in part, upon reasoning developed in moral philosophy the justice system can bring other motivational forces to play in society. The reasons given for the decision need not be directly related to the incentives used to make people act in the way desired. So, the second argument is a red herring. Even if moral philosophy has little motivational force it does not follow that it is useless as a tool to help make legal decisions. In fact, the lack of motivational force combined with the legitimacy of the duties identified by moral philosophy explains the need for just such an artificial source of motivation as the justice system can provide.

His third type of evidence is the claim that the influence of moral philosophy on legal thought is “pernicious” because “it is deflecting academic lawyers from their vital role . . . of generating the knowledge that the judges and other practical professionals require if they are to maximize the social utility of law.”<sup>34</sup> In other words, spending time reading and discussing moral philosophy is a misallocation of intellectual resources that should be used in more helpful areas of inquiry such as the social sciences. This might very well be true. Anybody who spends time around a law school should be astounded at the lack of empirical research going on and the amazing reliance upon a few simplistic analytical tools to make sense out of momentous legal decisions and troubling social issues. Both academics and judges should be more informed, and more influenced, by social science. But this doesn’t prove the conclusion that Posner asks us to accept—that moral philosophy should not be used in making legal judgments. As Anthony Kronman puts it, to refute the strong version of Posner’s argument “all one needs to believe is that under certain conditions and within certain limits reason can be an improving force in moral

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32. Id at 74. Dworkin, states that in arguing in this manner “Posner . . . offers nothing but a bit of a priori psychological rationalism.” Dworkin, 111 Harv L Rev at 1727 (cited in note 18).

33. Posner admits that a moral philosopher can actually influence a judge. In *Overcoming Law* Posner writes “[a]lthough Bork derides scholars who try to found constitutional doctrine on moral philosophy, it should be apparent by now that he is himself under the sway of a moral philosopher, by the name of Hobbes.” Posner, *Overcoming Law* at 244 (cited in note 21).

34. Posner, *Problematics* at xi (cited in note 1).

life.”<sup>35</sup> Transposing the same language to the weak version, all one needs to believe is that under very narrow conditions moral philosophy could help make a better legal decision. All Posner’s misallocation argument proves is that it might be the case that moral philosophy should be used in a way that leaves plenty of room for the social sciences.

So, neither the lack of instant solutions to contemporary social problems, the purported lack of motivational force moral philosophy carries, nor the need for more scientific expertise actually proves the weak claim against moral philosophy that Posner states is the central conclusion of his book. Once again, there must be something more going on than is explicitly admitted. Why does Judge Posner float such an ineffectual argument against such an inconsequential target? What would he really want to see put in place of moral philosophy in the legal toolbox?

#### IV. POSNER’S SOLUTION TO THE MORAL PHILOSOPHY PROBLEM

The question becomes what should the person without the comfort of moral philosophy, which Posner thinks ultimately serves as an escape from more empirical characterizations of law, use to help decide tough legal controversies? Posner, in answer to this question, contrasts the pragmatist with the moral philosopher.<sup>36</sup> The pragmatist, in Posner’s version, believes that moral philosophy is a set of methods that “don’t work in any domain.”<sup>37</sup> In addition, the pragmatist is described as having “a disposition to ground policy judgments on facts and consequences rather than on conceptualisms and generalities.”<sup>38</sup> The pragmatist uses the past as a repository of information but always is “forward looking” and emphasizes consequences. Consequences are, according to Posner, issues of a factual nature. This is important because “there are no convincing answers to contested moral questions unless the questions are reducible to ones of fact.”<sup>39</sup> The pragmatist turns to the social sciences rather than moral philosophy. Ultimately, the pragmatic judge “wants to come up with the best decision having in mind present and future needs, and so does not regard the maintenance of consistency with past decisions as an end in itself but only as a means for bringing about the best results in the present case.”<sup>40</sup>

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35. Anthony T. Kronman, *The Value of Moral Philosophy*, 111 Harv L Rev 1751, 1755 (1997).

36. I will avoid the question of whether the shift between “pragmatist” and “pragmaticist” has any real meaning.

37. Posner, *Problematics* at viii (cited in note 1).

38. *Id.* at 227.

39. *Id.* at 10.

40. Richard A. Posner, *Pragmatic Adjudication*, 18 Cardozo L Rev 1, 5 (1996).

This is hardly a groundbreaking aim—and disagreement over such professed aims would be probably very hard to find. Even the great counterfactualist Kant argues consequences when the grounding of the categorical imperative is at issue (of course what counts as a consequence is, in itself, an important philosophical issue). Even a person, say a moral philosopher, who argued that there is a duty to maintain consistency with past decisions would probably back that conclusion up with the claim that such a strategy would bring about the best results in the particular case presented. All this is consistent with the empirical fact that there have been many self-professed pragmatists. Amazingly enough, they have all disagreed upon central aspects of their beliefs though propounding their conclusions under the same terminology. This really isn't too surprising because to be a pragmatist one doesn't have to subscribe to much that is controversial. As David Luban puts it "if legal pragmatism is *only* eclectic, result-oriented, historically minded antiformalism, it turns out to be a remarkably uncontroversial doctrine. It stands free of philosophical controversy only because it stands free of *all* controversy, and it avoids controversy by saying very little."<sup>41</sup> Of course Posner must have some conception of what his use of the word pragmatism means beyond "the best results in the present case"—but what is it?

Posner offers a sustained look at the judicial pragmatist in *Overcoming Law*.<sup>42</sup> There he describes the judicial pragmatist as someone who "debunks all pretenses to having constructed a pipeline to truth."<sup>43</sup> The pragmatist adopts a forward-looking approach that is practical, progressive and instrumental rather than essentialist.<sup>44</sup> He or she emphasizes the "social over the natural."<sup>45</sup> The pragmatist advocates "the primacy of consequences in interpretation . . . and a critical rather than a pietistic attitude toward history and tradition."<sup>46</sup> Finally, when discussing the pragmatism of the philosopher Richard Rorty, Posner writes that pragmatism seeks to free us from preconceptions based on "philosophical" thinking, in a way that "disconnects the whirring machinery of philosophical abstraction from the practical business of governing our lives and our societies."<sup>47</sup> But once again the definition of what a legal pragmatist holds to, like the definition of moral philosopher, is really a negative one consisting of what he or she is not.

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41. David Luban, *What's Pragmatic about Legal Pragmatism?*, 18 *Cardozo L Rev* 43, 45 (1996).

42. Posner, *Overcoming Law* (cited in note 21).

43. *Id.* at 2.

44. *Id.* at 4-5.

45. *Id.* at 7.

46. *Id.* at 252.

47. *Id.* at 463.

Turning to pragmatism does not really solve the problem as Posner framed it. First of all "pragmatism" as a stance is such a flexible concept as to be virtually limitless.<sup>48</sup> Second, a look at the philosophers or judges traditionally labeled pragmatic shows that usually (if not always) the term serves as a cover for a more substantive position. The invocation of pragmatism as a stance should be regarded with suspicion. Because pragmatism is such a flexible concept it can be used in service of many idols. For instance, John Dewey used the term pragmatism to front for a political/social vision centered on democratic hopes. Certainly one could imagine another pragmatist with directly contrary aims (perhaps economic efficiency). Indeed, it is not too hard to describe Plato as a pragmatist. Peirce sought to use the term as a description of the scientific process while attaching it, contrary to more modern versions of pragmatism, to a picture of future convergence towards more accurate description/prediction. William James used pragmatism in an Emersonian manner to overcome hardened orthodoxies. In the contemporary scene Richard Rorty uses pragmatism to further his left-wing democratic vision of social solidarity. With such a wide set of pragmatists it is hard to see just exactly of what the core of such a stance really consists. It seems that pragmatism only works if there is an aim smuggled into the works. As Rosenfeld puts it "mere legal pragmatism only proves attractive when set against a background of widespread consensus on relevant values."<sup>49</sup> Trotting in the pragmatist in the face of contemporary social controversy promises no guarantee of resolution without some underlying substantive choices. How these underlying choices are made, and with what reasons, are questions that cannot be avoided through the subterfuge of labeling the judge making the decision a pragmatist.<sup>50</sup>

## V. POSNERIAN ARGUMENT—THE PERILS OF A LEGAL MIND

Several aspects of Posner's style of argument in *Problematics* are troubling. First, Posner seems to think that his opinion is of such authority that his mere assertion carries convincing weight.<sup>51</sup> While his accomplishments in the field of law are immense, this success should not be used as a license for assuming that

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48. Posner has admitted such a problem. In *Pragmatic Adjudication*, Posner describes pragmatism as a "vague term." Posner, 18 Cardozo L Rev at 2 (cited in note 40).

49. Michel Rosenfeld, *Pragmatism, Pluralism and Legal Interpretation: Posner's and Rorty's Justice Without Metaphysics Meets Hate Speech*, 18 Cardozo L Rev 97, 108 (1996).

50. Another problem is that the contemporary pragmatist Richard Rorty uses pragmatism to avoid what he thinks is an uncritical idolization of science—directly contrary to what the pragmatist of a Posnerian type would do. Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S Cal L Rev 1811, 1814 (1990).

51. This tendency to merely assert conclusions and then suppose them proven is noted by Tibor R. Machan. See Tibor R. Machan, *Posner's Rortyite (Pragmatic) Jurisprudence*, 40 Am J Juris 361, 365 (1995).

bald-faced assertion should be taken as proven. He certainly would not argue we should fall for the culture of personality, this goes directly contrary to the scientific ethos he finds so admirable. If it is not sheer dismissal of those with conflicting opinions, and I am inclined to look for other reasons for such a style of argument, the strategy boils down to an allocation of the burden of proof.<sup>52</sup> The form of argument (when made explicit) goes like this: "I assume X, and unless you prove not X, then X will be taken as proven." There is no real reason to accept such a shift unless reasons are given for placing the burden on one side or the other. I do not find any reasons given.

Not only does Posner place the burden of proof squarely upon moral philosophy, but also the standard of proof that moral philosophy is held to is raised immensely when compared with other theoretical disciplines. Posner expects moral philosophy to present deductively certain arguments that have perfect motivational force in order to be considered legitimate. In Charles Fried's words, he wants moral argument to be eliminated from legal adjudication unless it leads to "unambiguous, inescapable answers embedded in a complete theoretical structure right away, every time."<sup>53</sup> As Fried rightly states, very few arguments have this set of qualities.<sup>54</sup> As philosophers have known at least since Hume, all arguments in scientific disciplines are contingent and, therefore, cannot live up to the same criteria. For instance, in quickly dismissing Duncan Kennedy's claim that policy arguments can be manipulated to support any position, Posner writes, "Kennedy is wrong. Although one can always *argue* both sides of an issue of policy, the arguments for one side may fall completely flat."<sup>55</sup> Notice the different level of scrutiny to which policy arguments are subject. All Posner needs to state to satisfy himself of the usefulness of policy arguments is that one side of the argument "may" fall flat. This is clearly a very low burden of justification. The only answer that seems plausible is that Posner thinks he is holding moral philosophy to its own promises. But the falsity of any such claim has already been established—it is hard, if not impossible, to find any moral philosopher promising such an absolute result.

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52. There is evidence that Posner finds it all too easy to dismiss a theorist holding an opposing point of view with what amounts very closely to name calling. For example Gerald V. Bradley lists a few of the one line dismissals Posner offers as follows: "John Hart Ely has a 'weak sense of fact'; the 'essential facts' concerning the subject of Martha Minow's book 'are missing'; Patricia Williams is 'careless about facts'; 'blur[s] the line between fiction and truth', and her feelings on race, like Catharine MacKinnon's on pornography, have 'far outrun the facts'; Rorty has a deficient sense of fact." (Citations omitted). Gerald V. Bradley, *Overcoming Posner*, 94 Mich L Rev 1898, 1916 (1996).

53. Fried, 111 Harv L Rev at 1750 (cited in note 28).

54. Id.

55. Posner, *Problematics* at 267 (cited in note 1).

Posner's arguments make sense in light of the self-congratulatory story that the American legal academy puts forth as the official view of Twentieth Century progress in legal thought. A caricature of past legal thinkers as believing in law as a deductive science is put forward in order to create an easy target to show off our analytical skills and progression toward real informed and enlightened positions. For instance, in *Social Science in Law*, by John Monahan and Laurens Walker, the first chapter describes the Nineteenth Century in American law as "dominated by the belief that a single, correct legal solution could be reached in every case by the application of rules of logic to a set of natural and self-evident principles."<sup>56</sup> Once past thought is so characterized, any relief from the deductive model seems like a great accomplishment. But Langdell aside, a search for a "new Langdellism" to disabuse of its deductive pretenses is bound to be futile (though Grant Gilmore in *The Ages of American Law* does characterize Posner as a theorist in the Langdell-like deductive mode).<sup>57</sup> We have surely "progressed" far enough to avoid thinking of Holmes and the American legal realists as modern versions of Machiavelli running to rescue us from an army of theorists that fetishize deductive certainty.<sup>58</sup> Trying to find new proponents of deductive certainty in the legal realm to disabuse of their naïve Platonism is bound to be futile.

Even worse, Posner's argument falls into just the motivational trap he rightly identifies as possibly affecting moral philosophy when it is applied to the world at large. That is, even if his argument is well-reasoned it might not have enough motivational power to change anyone's actions in the legal profession. His argument might not be able to make people better legal practitioners of whatever sort. As his analysis of the motivational power of science puts it, argument does not motivate—results do. So what the bulk of *Problematics* should have consisted of is data from the social sciences being used to solve contemporary legal issues that relate to social controversies. If this had been the case then the prestige of science, and its usefulness for law that Posner identifies, would be vindicated. That it has not been vindicated may show us something about the social sciences.

Finally, the whole debate is framed poorly. The debate is framed in the form of "either X or Y, but not both," and this form creates a false dilemma. Why is the question one of empirical science or moral philosophy, and not

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56. John Monahan and Laurens Walker, *Social Science in Law: Cases and Materials* (Foundation Press 1985). For an argument that Blackstone, probably the single most important influence on early American legal thought, cannot be read as making this type of claim see Albert W. Alschuler, *Rediscovering Blackstone*, 145 U Pa L Rev 1 (1996).

57. Grant Gilmore, *The Ages of American Law* 108, 146 n11 (Yale 1977).

58. Compare Jerome Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, 17 Cornell L Q 568 (1932).

some of both? Why is the impression one of a zero-sum game? A good pragmatist along the lines of William James at least would want to settle for plural tools unless it was quite certain that the influence of one of the purported tools was pernicious. That is, the tool would be eliminated only if it had no “cash value.” Otherwise, wouldn’t the best strategy be to clearly understand both the limits and the virtues of a conceptual domain? It is just not the case that the social sciences and moral philosophy are one-to-one competitors. In fact, they are better seen as complementary endeavors rather than competitors.

This way of thinking is a clear example of both the virtues and vices of the adversary system. Posner writes as if he is going to determine the outcome of a duel to the death between two archrivals. He employs many tactics to promote the victory of his choice in the battle, social science. He defines moral philosophy in such an extreme manner that one would be hard pressed to find any advocate of the position. He then shifts the burden of proof to the other side without making such a shift explicit. And to ensure this will help social science to victory he places a much higher burden of justification upon moral philosophy. Moreover, as discussed above, he employs a number of red herrings to divert attention from the main issue. But this picture of the issue is wrong-headed. All of these strategies might be laudable for the advocate of one side to use in the trenches of the adversary system—but Posner’s chosen perspective is that of judicial decisionmaking. A judge hopefully does not need to distort the set of options he or she has available in order to make a decision. It may be correct to believe that “[w]hen the stakes are high, emotion engaged, information sparse, criteria contested, and expertise untrustworthy . . . people do not simply yield to the weight of argument.”<sup>59</sup> But does this really point to less need for moral philosophy? The toolbox does not need to be so impoverished. Moral philosophy may not be the central tool, but it might just be an important one.

#### VI. “CAN’T HELPS,” SOCIAL SCIENCE, AND WHICH FACTS SHOULD MATTER?

If this were all there was to Posner’s argument, then the conclusion could be to let judges use moral philosophy as long as the use of it does not get in the way of the proper utilization of the social sciences. But Posner doesn’t stop there. He has one more Holmesian-like argument up his sleeve. He argues that moral philosophy actually makes people worse. In the extreme form he asserts

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59. Posner, *Problematics* at 104 (cited in note 1).

that “[a] person who somehow managed to become perfectly reflective about his behavior would be a kind of monster . . . One is better off surrounded by ordinary, morally unreflective people.”<sup>60</sup> Of course the contrast of extremes offered here is unfair. First, the perfectly reflective person is an extreme character who once again doesn’t reflect the aims of contemporary academic moral philosophers. Such academic philosophers are generally much less ambitious as to what they think can be the reasonable results of their investigations. The aim is usually to help raise particular aspects of human moral beliefs to the level of conscious reflection in order to submit the particular beliefs to analysis. Second, the question arises—how morally unreflective is the ordinary person? What picture of the ordinary person does Posner rely upon when making this argument? In a less extreme form of the same type of claim, he argues that the practice of moral philosophy makes one more adept at rationalizing one’s way out of moral obligations.

What Posner has in mind to put in place of conscious reflection is what Holmes called his “can’t helps,” which were values that were not so much intellectualized as those that lie below thought and conscious choice.<sup>61</sup> Holmes used the “can’t helps” in analyzing the source of at least some of his judicial decisions. Posner clearly thinks the moral emotions, as they are naturally given (the “can’t helps”), will ensure better actions than more conscious moral choices. As Dworkin puts it “unreflective’ means ‘natural’” to Posner.<sup>62</sup> And natural, here, means good or trustworthy. This is somewhat strange considering Posner himself describes his jurisprudential stance as a skeptical one.<sup>63</sup> But in any case, his main claim is that our moral beliefs or sentiments are best left non-rationalized.

It may very well be that in many situations individuals of a less reflective nature perform morally better actions. But remember we are dealing with the weak argument that moral philosophy should not be used for making legal judgments. The relevant question is whether a judge should use moral philosophy to help decide legal issues, not whether a person walking down the street should use moral philosophy to decide whether to help a stranger in need. We don’t really care whether the judge performs good acts on the street; we want a well-reasoned and fair decision. Will resting upon the “can’t helps” actually ensure better-reasoned and fairer decisions?

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60. *Id.* at 90. This, of course, echoes Bernard Williams’ arguments as developed in *Ethics and the Limits of Philosophy* (Harvard 1985).

61. See, for instance, Posner, *Overcoming Law* at 192 (cited in note 21).

62. Dworkin, 111 *Harv L Rev* at 1737 (cited in note 18).

63. For example, Posner has previously described his skepticism “as a mood or attitude.” Richard A. Posner, *The Jurisprudence of Skepticism*, 86 *Mich L Rev* 827, 829 (1988).



I believe just a momentary analysis will show that “can’t helps” are a very unreliable foundation upon which to rest legal decisionmaking. What people, and what kind of “can’t helps,” does he have in mind? Whose “can’t helps” do we actually trust? I find that there are many “can’t helps” of the unreflective kind surviving in today’s society that would be completely inappropriate to use in a court of law to decide a case. I would hope, for instance, that an aversion to people with blue eyes would not be used as a “can’t help” that decides a tax issue. But if a judge has such a “can’t help” what are we to do? Was this person with an aversion to blue eyes supposed to have been selected out of the potential judge pool by some group of people with other “can’t helps” that correspond more closely to our reasoned beliefs as to the criteria upon which a judge should be selected? The empirically certain existence of prejudice in this world offers conclusive proof that “can’t helps” can go wrong and sometimes need to be corrected.

If the “can’t helps” are not to be accepted without question, then the problem becomes how to sort the legitimate “can’t helps” from the illegitimate ones. Posner’s response would have to be that we should turn to the social sciences for guidance.<sup>64</sup> But how will the social sciences help decide this issue? And how do we even identify which of the social sciences should be valued for the information they impart? Here Posner’s strong sense of fact as a determining factor in deciding controversial social issues seems to shut down his other senses. Posner’s strong sense of fact, and faith that the answers for legal decisions will come from science, does not explain how we can get from facts to normative judgments. As the philosopher Hume taught, it is exceedingly difficult to move from an “is” statement to an “ought” statement.<sup>65</sup> While it is arguably true, as Professor Alschuler writes, that “our thought and language make complete separation of the “is” and the “ought” impossible,<sup>66</sup> it is also true that the facts offered to us by the social sciences are not self-interpreting. And it is even clearer that “[t]he process of interpretation . . . remains normative at least in part.”<sup>67</sup> Within the normative process of interpreting the facts why should we not look to moral philosophy, among other tools, to help in deciding the import of the facts provided? Here we are forced back, once again, to the arguments Posner offers against moral philosophy in general, and these are unconvincing.

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64. Though it must be admitted he allows many other types of normative analysis to be used by the judge, including “ethical philosophy.”

65. Actually Hume taught that it is impossible to get from an “is” to an “ought” but it seems better to point the point in less absolute terms.

66. Albert W. Alschuler, *The Descending Trail: Holmes’ Path of the Law One Hundred Years Later*, 49 Fla L Rev 353, 356 (1997).

67. *Id.* at 386.

## VII. CONCLUSION

This review might be read as an attempt to save moral philosophy from Posner's attack. That reading would be incorrect. First, as discussed above, there is hardly anything to save under the label "moral philosophy" because the definition Posner offers of it makes it practically non-existent. But that is just a sub-issue. This book review should be read as an attempt to make explicit some of the strategies Posner uses to battle for his own idols. In arguing for the conclusion that moral philosophy should not be used to make legal decisions, Posner attacks his target with a variety of strategies. The strategies are diverse and represent a set well chosen to convince the unwary. They also represent some standard tools that are useful when plying one's trade within an adversary system.<sup>68</sup>

First, Posner slants the debate by defining moral philosophy as a political candidate might define the stance of his or her opponent. That is, he starts with an eye toward winning the argument, not on accuracy and a fair weighing of the pros and cons. He claims that "moral philosophy" is a weak residual field comprised of speculation as to what duties we have that can be deduced with certainty from some discoverable universal phenomenon that exists independently of theory. This definition is exceedingly narrow. It does not describe what is going on in most, if not all, academic moral philosophy today. Furthermore, the definition is accompanied by exclusions that, in effect, shut out any theorist who might be shown to have influence beyond the walls of academic philosophy departments.

Second, Posner uses evidence of lack of consensus, arguable motivational impotence, and possible misallocation of resources, to push for his conclusion. As has been shown above, even if all three of these types of evidence were true to the world, they would not represent convincing reasons for excluding moral philosophy from the judge's decisionmaking toolbox. Lack of consensus proves only that the convincing argument has not been found or made. Motivational impotence, if true, is made up for by the ability of the justice system to impose external penalties. And misallocation of resources only argues for more balance, not the extremism that is shown in either the weak or, even more clearly, in the strong argument claiming that there is nothing to academic moralism.

Third, Posner's invocation of the pragmatist is unhelpful because his description of the pragmatic judge's aim as wanting to "come up with the best

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68. Whether Posner adopts these moves ironically or in the belief that they actually are convincing is an important question that cannot be answered with the evidence available. What is clear, though, is that Posner sees the virtue of being able to define his own arena within which to dispute. The problem here is that the way he defines the arena so distorts the issues as to create an essentially meaningless debate.

decision having in mind present and future needs, and does not regard the maintenance of consistency with past decision as an end in itself but only as a means for bringing about the best results in the present case”<sup>69</sup> is so bland as to be almost universally beyond reproach. This raises the suspicion that Posner’s pragmatism, like many other pragmatisms of the past and present, serves only as a mask to cover an underlying set of substantive values. Furthermore, the pragmatist can hardly promise any more certain solutions to contemporary social controversies. The problem here is that the various pragmatists might disagree as to the ends that should be pursued.

Fourth, the argumentation style that Posner adopts is troubling in terms of form. The underlying strategy seems to be to create an unadmitted shift in both the placement and the standard of the burden of proof that moral philosophy must satisfy. Not once does Posner explain why such a standard should be applicable to moral philosophy when it is plainly not applied to Posner’s own favorite types of theory. Additionally, the attempt to push moral philosophy into the standard mold of the “Langdellian deductivist bad man” is merely an effort to create an easy target that legal thinkers will find familiar and immediately suspect. Finally, another aspect of his argumentation style that distorts the issue is the way it is framed in terms of two exclusive options. It is not the case that the options are either moral philosophy or social science. In fact, the two can be seen as complementary disciplines.

Fifth and lastly, when Posner invokes the concept of “can’t helps” he shows his willingness to use red herrings to make his argument. He exaggerates the professed aims of the moral philosopher to the point of caricature. He ignores the real problem of prejudicial “can’t helps.” And then he conflates the issue of whether non-reflective people will act more morally with the actual issue, which is whether a non-reflective judge (at least with respect to morality) will come to a better legal decision.

The whole argument shows Posner to be acting as an advocate, not as an informed and balanced analyst. He argues as if social science will not flourish if moral philosophy is allowed to exist at all. But his reasons for so constricting the judge’s options are unconvincing. In other words, the set of tools available to a judge to help make decisions does not need to be so constricted. In order to follow his own reasoning he should have avoided word splitting and shown the social sciences in action solving contemporary social controversies objectively. Finally, the whole difficulty of bridging the “is and ought” gap raises its head when Posner tries to base normative decisions on the knowledge available from the social sciences. Certainly the social sciences should be

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69. Cited in note 40.

utilized more in the legal field. This is not an issue that needs to be argued, but rather just admitted. But if Posner thinks social science offers solutions to controversial social issues that have not been utilized he needs to give examples.

All this shows Posner exhibiting the vices of the adversary system and the corresponding legal education system. Judge and Professor Posner is dead right when he argues that “[c]onventional legal education puts blinders on the students, enabling them to tread doggedly a well-trodden path of professional success, and generates forms of scholarship that accept the borders of the path as the boundaries of the legal universe.”<sup>70</sup> There is a dearth of alternative thinking in the legal domain. There is also a disproportionate emphasis upon a small set of analytical tools of dubious pedigree. I agree with Posner that “[t]here is something radically incomplete about the conventional standards: They miss the vital essence of legal growth and insight. We need to move beyond Holmes not in becoming more legalistic and less eloquent, but in becoming more empirical.”<sup>71</sup> The real problem with *The Problematics of Moral and Legal Theory*, though, is that it is a book where Posner confuses an attack upon one academic field (moral philosophy) with the completely different project of the legitimization of another type of investigation (social science). Becoming more empirical in the study and practice of law does not require false descriptions of supposedly competing domains or throwing out the accomplishments and tools developed by the “weak” academic fields.

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70. Posner, *Overcoming Law* at 98 (cited in note 21).

71. *Id.* at 195.

