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# Problems with Richard Posner's The Problematics of Moral and Legal Theory

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## PROBLEMS WITH RICHARD POSNER'S *THE PROBLEMATICS OF MORAL AND LEGAL THEORY*

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### I. INTRODUCTION

Immanuel Kant tried to formulate a theory of morality independent of both anthropology and a reliance upon God as the creator and enforcer of one's moral beliefs. To this end, Kant employs the use of Reason to guide human affairs. Kant divides reality into the noumenal world, the world of *a priori* noncorporeal essences, and the phenomenal world, the world of sensations. By seeking to base morality on Reason, Kant is attempting to divorce morality from the phenomenal world, which is to say from a world where our beliefs are dependent upon our perceptions and thus can vary from person to person. For Kant, if morality remains stuck within a world of contingent perceptions, then morality becomes nothing more than a matter of personal taste. To avoid this, Kant argues for locating morality in the ineffability of the noumenal world. This is not to say, though, that by attaching morality to that which cannot be experienced directly Kant is falling back upon a religious basis for his foundations of morality. Kant is not a natural law theorist, as, for example, St. Thomas Aquinas is, in that he does not believe that our morality is divinely inspired.<sup>1</sup> Kant also does

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1. It is not that Kant does not believe in God, only that God cannot serve as a source of moral authority. The reason for this is to avoid the possibility that anything which God commands would automatically be right, a position which would

not believe that our morality is historically conditioned or dependent upon one's culture. Rather, for Kant, morality is something humans give to themselves through employing Reason to understand relations both between the noumenal and phenomenal worlds<sup>2</sup> and among human beings.<sup>3</sup> It is the relations among human beings that forms the focus of Kantian morality. By starting with the concepts of "good will" and "duty," Kant derives his famous Categorical Imperative, which states: "I ought never to act except in such a way that *I can also will that my maxim should become a universal law.*"<sup>4</sup> Because the Categorical Imperative is derived using Reason, it transcends, at least according to Kant, the personal predilections and biases of the individual moral agent. In other words, by utilizing the Categorical Imperative in making moral decisions, the Kantian moral agent can act in a way such that his or her choices imply the universal assent of all other rational agents. Thus, Kant's use of Reason provides a means by which to settle disputes between contested moral positions.

In his new book, *The Problematics of Moral and Legal Theory*,<sup>5</sup>

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obviate the need for Reason in human affairs. Kant does not seem particularly concerned with respecting the religious beliefs of non-Christian cultures, even with acknowledging their validity. Thus, it seems hard to believe that his appeal to Reason is based on a desire to be cross-cultural, though that is how his arguments have been used by many commentators today. Furthermore, because both God and Reason are ineffable, it is not clear that there is a necessary difference between the two other than to say that for Kant morality must inspire agreement by the moral actor, whereas this is not the case with religion.

2. See IMMANUEL KANT, *CRITIQUE OF PURE REASON* (1872).

3. See IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON*; IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* (H.J. Paton trans., 3d ed., 1956) [hereinafter *GROUNDWORK*].

4. KANT, *GROUNDWORK*, *supra* note 3, at 70, italics in the original. There are several formulations of the Categorical Imperative in the *Groundwork of the Metaphysic of Morals*. This is the first and the most simple, in addition to being the most well known.

5. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999) [hereinafter *PROBLEMATICS*]. This book is an expansion of a series of lectures of the same name that Posner gave as part of the 1997 Oliver Wendell Holmes Lectures at Harvard Law School. The lectures have since been reprinted in the *Harvard Law Review*. See Richard Posner, *1997 Oliver Wendell Holmes Lectures: The Problematics of Moral and Legal Theory*, 111 *HARV. L. REV.* 1637, 1637 (1998) [hereinafter *Holmes Lectures*]. I will discuss passages from the lectures to the extent that they elaborate upon points made in the book, but will keep the book as the focus of this review. Deference should be given to the book, though, as it came after the lectures and thus should be taken as Posner's final, or at least most recent, word on the subject.

Practically anyone who is familiar with Richard Posner is aware of how immensely prolific he is. While it would certainly be an interesting inquiry, I will

Richard A. Posner, Chief Judge of the United States Court of Appeals for the Seventh Circuit and senior lecturer at the University of Chicago Law School, disputes the idea that moral philosophy can be used to solve differences of opinion. Posner contends that the Kantian project of attempting to resolve moral disputes through moral reasoning is fundamentally and fatally flawed. However, Posner goes a step further to say that not only is it impossible to derive the transcendent moral principles upon which Kant's argument depends, but that as a result judges should not rely upon moral arguments in deciding how to rule on a particular case.<sup>6</sup> Posner supports his position by making a distinction between academic moral philosophers and what he terms "moral entrepreneurs."<sup>7</sup> While Posner accepts the influential role that moral entrepreneurs play in shaping public morality, he rejects the contention that academic moral philosophers can have a similar effect. Instead of moral theory, Posner argues in his book that judges should incorporate social science into their method of adjudication.<sup>8</sup> By understanding the potential effects of given judicial deci-

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not look for consistencies and contradictions in Posner's many books and articles; such would be beyond the scope of a book review. I will also not be examining the many opinions that Posner has written in his capacity as a judge. I admit that it would be useful to try to determine if Posner "practices what he preaches," but there is certainly enough in the book itself to comment upon. (In response to a criticism of his Holmes lectures, Posner somewhat facetiously challenges Ronald Dworkin to find just one case in which the outcome was based upon moral argumentation in the over 1500 opinions that he [Posner] has written. See Richard A. Posner, *Reply to Critics of the Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1796, 1806 (1998)) [hereinafter *Reply*].

6. Posner's *Holmes Lectures* inspired a series of criticisms from well-known philosophers and legal theorists (Ronald Dworkin, Charles Fried, Anthony T. Kronman, John T. Noonan Jr., and Martha C. Nussbaum) published collectively in the same Harvard Law Review issue as Posner's lectures. See generally Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718, 1718-95 (1998). These criticisms, for the most part, focus either on trying to demonstrate that theoretical argumentation is necessary for resolving moral disputes or that academic moral philosophers have in fact had an impact upon the "real world." They may have some relevancy when the debate is limited to philosophical inquiry, or "musings" as Posner would likely call them, but lose much of their force when turned to the realm of law, the main thrust of Posner's argument. Consequently, I will not focus a great deal on the moral/philosophical critiques of Posner, but instead will take him at his own terms and explore the feasibility of his analysis to judicial decision-making.

7. POSNER, PROBLEMATICS, *supra* note 5, at 7.

8. This desire to draw from social science is a sentiment new to the book and not present in the *Holmes Lectures*, where Posner asserted that "judges more than law professors want to preserve the autonomy of law, not make law the handmaiden of other disciplines, especially one as remote from the understanding and

sion, the pragmatic judge can create the “best” results for society. However, in making these decisions, the judge is constrained by existing laws and the morality contained therein. Drawing from Holmes, Posner argues that the only time judges should bring moral concerns into their decision-making process is when they feel a clear moral “outrage” against the position taken in the law which they are considering overturning.<sup>9</sup>

I want to argue that Posner is drawing an untenable distinction between morality and social science. Despite Posner’s claims that judges can exclude morality from their decision-making process, this claim is based upon an overly narrow view of the ability of judges to parse issues when faced with a morally contentious case. Judges cannot escape making moral decisions, not so much because each possible decision has some sort of moral impact and rests upon a set of moral assumptions as Dworkin and Nussbaum among others have claimed,<sup>10</sup> but rather because morality is sometimes the only thing they have left to fall back upon. Even in those cases where the claims of efficiency that Posner trumpets do have relevance to the case, moral concerns must often also be brought in. Social science can offer guidance in achieving the goals that society sets, but it can offer no guidance in setting those goals in the first place. While Posner wants to leave these questions to the political process to resolve, this is a false hope—judges cannot avoid moral determinations as to the goals of society due to the very nature of their role as interpreters of law. Thus, Posner is forced, at least implicitly, to draw upon moral argumentation in his theory of adjudication.

I will construct my argument as a “contentious narration” of Posner’s book. By this I mean that I will present Posner’s argument roughly as it unfolds in *The Problematics of Moral and Legal Theory*, but will question each stage of the argument as it moves along. By gradually conceding to Posner various points for the sake of argument, I will show both the strengths of his argument and the assumptions he makes which undermine later portions of his reasoning. I will start by explaining and questioning the distinction

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affections of the average American as philosophy.” *Holmes Lectures*, *supra* note 5, at 1701. The hostility that Posner directs toward academia in the *Holmes Lectures*, though, is certainly centered on philosophy and does not necessarily preclude his later valuation of social science.

9. See POSNER, *PROBLEMATICS*, *supra* note 5, at 147.

10. See Dworkin, *supra* note 6, at 1729-30; Martha Nussbaum, *Still Worthy of Praise*, 111 HARV. L. REV. 1776, 1787-88 (1998).

Posner draws between academic moral philosophers and moral entrepreneurs. After resurrecting at least partial validity for moral theory, I will argue that social scientific analysis provides no better guidance than does moral theory for how judges should decide a case. From there, I will move to a discussion of the inescapability of moral arguments for judges, despite the importance of considerations of efficiency. I will conclude by suggesting that Posner may have some Kantian sympathies himself.

## II. THE SEDUCTION OF MORAL ENTREPRENEURS

Posner begins *The Problematics of Moral and Legal Theory* by noting his own long history of interest in the relation between morality and law, specifically his attempts to demystify this relationship. To this end, he claims that his current book is the third part of a trilogy that contains *The Problems of Jurisprudence* and *Overcoming Law*.<sup>11</sup> Posner notes that when judges look outside of the law for help in how to decide a particular case, they face a stark opposition of choices between moral philosophy on the one hand and pragmatism on the other.<sup>12</sup> As Posner defines them, moral philosophy, *a la* Kant, seeks “a moral order accessible to human intelligence and neither time-bound nor local, an order that furnishes objective criteria for praising or condemning the beliefs and behavior of individuals and the design and operation of legal institutions.”<sup>13</sup> Posner defines morality, the basis of this moral order, as “the set of duties (not necessarily just to other people—the duties could run to animals as well, or, importantly to God) that are designed to check our merely self-interested, emotional, or sentimental reactions to serious questions of human contact. It is about what we owe, rather than what we are owed ....”<sup>14</sup> Contrastingly, pragmatism asserts that when faced with a decision-making situation, one should turn to a combination of “policy, common sense, personal and professional values, and intuition and opinion, including informed or crystallized public opinion.”<sup>15</sup> When the methods of pragmatism fail, one should turn to science instead of moral philosophy.<sup>16</sup> In short,

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11. POSNER, *PROBLEMATICS*, *supra* note 5, at vii. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990); RICHARD A. POSNER, *OVERCOMING LAW* (1995).

12. POSNER, *PROBLEMATICS*, *supra* note 5, at viii.

13. *Id.* at 3.

14. *Id.* at 4.

15. *Id.* at viii.

16. *Id.*

moral philosophy offers nothing not only to adjudication and jurisprudence but also to anyone “engaged in a normative enterprise, quite without regard to law.”<sup>17</sup>

In drawing the battle lines against moral philosophy, Posner concedes that all legal disputes have some fundamental grounding in morality, only he argues that this grounding is in fact so basic that it can be of no assistance in actually deciding the case. For example, there may be a basic prohibition against murder in all societies, but this moral universal is either tautological, in that it defines murder as any *unjustified* killing, or helplessly abstract, in that it shifts the debate to unresolvable questions of when killing is justifiable and when not.<sup>18</sup> By asserting that “there are no *interesting* moral universals,”<sup>19</sup> Posner rejects the Kantian project of a transcendent morality that lies at the heart of what he considers to be moral philosophy.<sup>20</sup> Posner, though, does not make much of an attempt to justify this statement, but essentially takes it as a given that morality is merely a feature of one’s social environment. Part of this is a definitional problem. In effect, Posner defines moral issues in such a way that they only exist when they are unresolved: “By moral ‘issues’ I mean *contested* moral questions. When there is no contest, when everyone agrees on what’s right, there is no issue and the need for theory does not arise.”<sup>21</sup> This, though, is to put the cart before the horse. For Posner, universal moral agreement is a sign not of a successful moral argument, but rather of a moral principle so basic that it need not be questioned. This position forecloses the possibility that the consensus could have been achieved through moral argumentation. On the other hand, if moral dispute exists, then it would seem according to Posner that this is a sign that a resolution of this dispute is inconceivable. While Posner may be correct that certain basic principles, such as that murder is wrong, are unhelpful in deciding complex moral issues, this does not lead to the conclusion that a dispute over moral outcomes necessarily results in the impossibility of their resolution. Implicit in Posner’s argument is also the idea that the diversity of moral positions in the world today, many of them contradictory,

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17. *Id.*

18. *Id.* at 6.

19. *Id.*

20. *Id.* at 16. In the Holmes Lectures, Posner refers to moral theory as being “like failed scientific theory.” Posner, *Holmes Lectures*, *supra* note 5, at 1657.

21. POSNER, *PROBLEMATICS*, *supra* note 5, at ix, n. 3.

demonstrates the victory of moral relativism over moral realism, at least from an empirical standpoint.<sup>22</sup> If people are unwilling to abandon their moral positions because of the existence of reasoned argument, then the moral philosopher would seem to be at a loss of purpose. Furthermore, there does certainly seem to be a resonance with Posner's non-universalization position to anyone who has ever been in a passionate argument about moral principles and failed to walk away with a changed mind.<sup>23</sup>

Indeed, it is the inability of moral arguments to change minds that Posner makes the crux of his argument against academic moral philosophers, whom he also calls "academic moralists."<sup>24</sup> The source of the failure of academic moralists lies in what Posner sees as the motivation for moral behavior in the first place, namely the moral sentiments. Moral sentiments refer to those emotional reactions like pity or disgust that one experiences in certain situations and then translates into moral approval or disapproval.<sup>25</sup> Because moral sentiments are not object-specific, they are, unlike moral principles, universal.<sup>26</sup> A further argument for the universality of moral sentiments comes from Posner's claim that they are instinctual in origin and thus common to all human beings.<sup>27</sup> However, the lack of specificity of moral sentiments also means that they are useless in determining how to act in a given situation.<sup>28</sup> For example, someone from a Western culture may experience repulsion at the idea of female circumcision, but this moral sentiment may not be experienced by the Ethiopian either performing or undergoing the procedure. Yet, this repulsion or lack thereof cannot be unproblematically translated into a moral argument that will convince the other side of the moral invalidity of its position. "A moralist cannot persuade you by the methods of reason to one morality or another, but he can *offer* you a morality that you can accept or reject for reasons of pride, comfort, convenience, or advantage,

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22. *Id.* at 63.

23. Then again, as Charles Fried points out, virtually everyone has at some point in their life changed their mind as a result of listening to moral argumentation. Charles Fried, *Philosophy Matters*, 111 HARV. L. REV. 1739, 1748 (1998).

24. POSNER, PROBLEMATICS, *supra* note 5, at 5.

25. *Id.* at 6.

26. *Id.*

27. *Id.* at 37. Peter Berkowitz gives a further discussion of Posner's reliance on evolutionary biology. Peter Berkowitz, *Reduction and Betrayal*, NEW REPUBLIC, Aug. 23, 1999, at 38, 42.

28. POSNER, PROBLEMATICS, *supra* note 5, at 38.



though not because it is 'right' or 'wrong.'"<sup>29</sup> This confirms Posner's point about the impossibility of resolving moral disputes through reasoned moral argument. But if all that academic moral philosophers can offer are reasoned moral arguments,<sup>30</sup> then their usefulness for public morality falls away. In other words, Posner argues, academic moralists are unable to fulfill the very goals that they see as being the purpose of their enterprise.<sup>31</sup>

What I have been saying, though, should not be interpreted as suggesting that Posner rejects the existence of morality or its importance in shaping the beliefs that people have. Posner, who limits his criticism to moral philosophy *per se*,<sup>32</sup> does certainly believe that individuals hold moral positions and even that these positions can change, only that these changes occur not as the result of moral reasoning, but rather through appeals to the moral sentiments.

If you want to turn a meat eater, especially a nonacademic one, into a vegetarian, you must get him to love the animals that we raise for food; and you cannot argue a person into love. If you want to make a person disapprove of torturing babies, show him a picture of a baby being tortured; don't read him an essay on moral theory. An academic moral argument is unlikely to stir the conscience, incite a sense of indignation, or engender feelings of love or guilt. And if it does, one has only to attend to the opposing moral arguments to be returned to one's starting point.<sup>33</sup>

It is this appeal to moral sentiments that separates, at least for Posner, the moral entrepreneur from the academic moralist. The moral entrepreneur appeals to a mix of self-interest and emotional appeals "that bypass our rational calculating faculty and stir inarticulable feelings of oneness or separateness ... from the moral community that the moral entrepreneur is trying to create. They teach us to love or hate whom they love or hate."<sup>34</sup> Posner cites as examples of moral entrepreneurs, in a grouping probably never before seen in history, Jesus Christ, Jeremy Bentham, Adolf Hitler,

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29. *Id.* at 31.

30. Posner claims that a distinction between moral theory and moral reasoning, while it may conceivably exist, is not relevant to his project. *Id.* at 16.

31. *Id.* at 39-40.

32. *Id.* at 29-30.

33. *Id.* at 52. One could also potentially be turned to vegetarianism for health reasons, though this would be to adopt the scientific methodology that Posner advocates.

34. *Id.* at 42.

and Catherine MacKinnon.<sup>35</sup> These people have all changed the moral beliefs of others because of the effectiveness of their emotional appeals. This impact, Posner contends, is absent among academic moral philosophers. Academic moralists can offer interpretations of and help explain what past moral philosophers have argued and what the dimensions of current moral debates might be, but they can never provide definitive reasons for the adoption of one moral position over another.<sup>36</sup> Thus, academic moral philosophy, to the extent that it is of any value at all, can only stimulate people to further moral reflection, far from the goal held by academic moralists of resolving moral disputes. "At its best, moral philosophy, like literature, enriches; it neither proves nor edifies."<sup>37</sup>

In addition to his epistemological arguments against academic moral philosophy, Posner bolsters his claims with scientific evidence as well. In discussing the possibilities for moral progress, Posner contends that moral sentiments are to a large extent dependent upon the material conditions in which one finds oneself and not upon an objective ordering of moral principles.<sup>38</sup> For example, if Hitler had succeeded in his plans for world domination, then we likely would have a different set of moral beliefs today.<sup>39</sup> However, Posner asserts, the failures of Nazism were due not to the weakness of its moral foundations but rather to the inadequacies of an excessively centralized form of government.<sup>40</sup> Following from this, Posner cites the Oliner and Oliner study<sup>41</sup> on the motivations among those in Germany who rescued Jews during World War II to suggest that moral sentiments derived from one's social circumstances had more to do with the propensity to rescue than did education level, and hence, presumably, the amount of moral theory to

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35. *Id.* at 42-43.

36. *Id.* at 49.

37. *Id.* at 32. It is odd that Posner analogizes between moral philosophy and literature, as literature often makes the type of emotional appeals that would be more appropriate for a moral entrepreneur. Posner later suggests that at its worst, moral philosophy increases skepticism of morality in general among those who study it because they learn the rhetorical tricks whereby any moral position can be supported by reasoned argument. *Id.* at 73.

38. *Id.* at 23-24.

39. *Id.* at 25.

40. *Id.* Posner does later state that he has no problem with making a moral objection to Nazism, but that this objection does not lead to the conclusion that moral universals exist which Nazism somehow violated. *Id.* at 89.

41. See generally SAMUEL P. OLINER & PEARL M. OLINER, *THE ALTRUISTIC PERSONALITY* (1988).

which one had been exposed.<sup>42</sup> Empirically, then, moral philosophy seems to have been least effective precisely when it was most needed. A related trend can be seen in the decline of appeals to morality among modern people and an increased reliance upon individualism, a trend fostered by material factors like wealth, privacy, urbanization, and occupational commitments.<sup>43</sup>

When turning his scientific eye to academic moral philosophers themselves, Posner notes that were they really desirous of increasing their impact, academic moralists would increase their teaching load at the expense of writing articles that they themselves admit have a very tiny readership.<sup>44</sup> By turning to internal conversations amongst themselves, moral philosophers lose touch with the very reality upon which they are commenting.<sup>45</sup> If academic moralists have any effect at all, it is only within the narrow field in which they have chosen to specialize and not on the public as a whole.<sup>46</sup> Furthermore, the professionalization of academia and the tenure process has encouraged moral philosophers to take fewer risks in advancing controversial moral positions: "The academic cocoon is not a nurturing environment for moral courage and imagination."<sup>47</sup> This is why, Posner argues, few moral entrepreneurs have been professors.<sup>48</sup> In an odd way, though, the very inability to reach resolution through moral argumentation guarantees the propagation of the profession because it ensures that there will always be a diversity of perspectives from which to argue and on which articles and books can be based.<sup>49</sup>

42. See POSNER, PROBLEMATICS, *supra* note 5, at 69-70.

43. *Id.* at 74.

44. *Id.* at 69.

45. *Id.* at 80.

46. *Id.* at 82.

47. *Id.* at 81.

48. *Id.* at 83-84. As proof of his point, Posner notes that when Martha Nussbaum made a list of moral philosophers whom have had an impact on contemporary morality, none of them (Cicero, Rousseau, Locke, Marx, etc.) were academics with the exception of Amartya Sen, who is an economist and not a philosopher. *Id.* at 83. Posner counters Nussbaum's claim that these people would have been academics were they alive today by asserting that had they become academics, their imaginative vision would have been squelched. *Id.* at 84.

Nussbaum makes her argument for the effectiveness of at least some moral philosophers. Nussbaum, *supra* note 10, at 1780-82. This argument is echoed by Charles Fried's claim that Posner cannot ignore the effects that Rawls, Dworkin, and especially Marx, Hegel, and Kant have had on contemporary moral debates. Fried, *supra* note 23, at 1747.

49. See POSNER, PROBLEMATICS, *supra* note 5, at 88-89.

Upon closer examination, though, Posner's distinction between the moral entrepreneur and the academic moralist becomes untenable. In short, a moral entrepreneur is really just a successful academic moralist. Posner imagines an academic world in which moral philosophers have sat in their ivory towers for so long that they have somehow purged themselves of all emotional beliefs or the need to tie their arguments to those emotional beliefs. While others have leveled this critique as well, it is certainly not universally valid. The fact that Posner considers MacKinnon, who has staked out undeniably passionate but also well-reasoned stances on several feminist concerns, to be an "outstanding example"<sup>50</sup> of a moral entrepreneur only goes to show that academic moral philosophy can become morally effective if it has some resonance among its readers.<sup>51</sup> It is not enough for Posner to assign the title of a moral entrepreneur to MacKinnon because of her "polemical skills" and her "passion."<sup>52</sup> It is a misleading rhetorical move to label someone a moral entrepreneur just because her arguments have had an effect on their readership. There are certainly many examples of issues on which academics write passionately, but fail to qualify in Posner's eyes as a moral entrepreneur because they have not formulated arguments which have had widespread appeal.<sup>53</sup>

Furthermore, the fact that convincing arguments on certain moral issues have not yet been presented, even if one were to concede Posner this point, does not preclude the possibility that they will be presented in the future. For example, if someone were to argue effectively for one side of the abortion debate or the other,

50. *Id.* at 43.

51. As Posner points out, MacKinnon is not exactly a "traditional" moral philosopher in that she embraces radical feminism and, due in part to the passion she shows for her beliefs, had difficulty obtaining tenure. Indeed, Posner points to MacKinnon's inability to get tenure as a further sign that she is a moral entrepreneur and not an academic moralist. *Id.* These problems aside, however, MacKinnon clearly operates more in the academic realm than in the realm of politics that Posner seems to desire of his moral entrepreneurs.

52. *Id.*

53. In the *Holmes Lectures*, Posner notes that people do not have the same level of confidence in moral claims as they do in science as a reliable guide in one's daily life. Posner, *Holmes Lectures*, *supra* note 5, at 1680. For example, Posner claims that we fly in airplanes without really knowing how they work but do not blindly follow Kantian moral directives. *Id.* While this assertion anticipates Posner's later embrace of social science, it seems to me like comparing apples and oranges. As I will show, social science lacks a dimension to human experience that morality needs to fill.

such that there was a mass public movement to the corresponding position, then one can imagine Posner referring to that person as a moral entrepreneur. That there has not been such an argument made leads Posner to conclude that moral philosophy can offer nothing to this debate.<sup>54</sup> However, it is an exceedingly myopic view to suggest that just because he, Posner, has trouble being convinced by moral arguments about abortion that these arguments can have no effect on others. For example, Posner admits that Amy Gutmann and Dennis Thompson find moral weight in Judith Jarvis Thompson's analogy between being required to carry a pregnancy to term and a person being forced to use life support to keep someone else alive.<sup>55</sup> While Posner may be perfectly justified in critiquing this analogy, that does not defeat its effect on others.<sup>56</sup> Furthermore, by making *post hoc* critiques in the way he does, Posner closes off the possibility that convincing moral positions will arise through moral argumentation. I am certainly not making the claim that all moral arguments will be convincing, but without allowing for an arena for moral argumentation, an arena in which many if not most moral arguments will fail, one forecloses the opportunity for any convincing moral arguments to be made at all.<sup>57</sup> Inevitably, some moral arguments will have at least local effectiveness, if not the universal acceptance for which Posner assumes they all strive.

The fact that moral argumentation is not conclusive does not mean that it is invalid if it helps contribute to a larger meaningful debate either by supplying a means of identity formation or by providing counter-arguments against which people can clarify their own moral positions. It is hardly necessary that all moral argumentation be directed universally. In fact, there are many schools of

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54. *Id.* at 55.

55. *Id.* at 57. Judith Jarvis Thompson's argument asserts that because we would not require a healthy person to be hooked up to a life-support machine for the purpose of keeping alive a famous violinist with a kidney disease, by analogy we also should not force a woman to be "hooked up" to her fetus in order to keep it alive. See generally Judith Jarvis Thompson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

56. Amy Gutmann and Dennis Thompson were probably already convinced about the acceptability of abortion, but they clearly believed this argument would be convincing to others as well. See generally AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 85 (1996).

57. Posner, of course, would see this as a small loss, since he is working under the assumption that moral arguments are inherently incapable of being convincing. Hence, there is no reason not to eliminate them entirely.

thought, ranging from communitarianism<sup>58</sup> to certain forms of critical legal theory,<sup>59</sup> that argue that morality should be specific to different social groups. In other words, society can function smoothly even if different segments of society maintain different moral positions. Posner might counter that these philosophical claims become problematic when one turns to the law, where there can be only one law which applies equally to all if it is to be considered fair. This review is not the place to consider whether or not law can be imbued with the flexibility that would be required to accommodate contradictory moralities. Certainly, though, such variation does exist to some degree in the fact that different states may have different laws on issues of moral significance. Just imagine if states were allowed again to determine if abortion was to be legal or illegal. In such a situation, it would be easy to conceive of different arguments working in different states depending upon the cultural demographics of that state. For example, religious arguments might work more effectively in the South than they would in New England. If morality can be varied so easily by locale, then Posner's claims lose their resonance, since the threshold for moral entrepreneurship is greatly lowered. Moral arguments would not need to convince the entire population to have an effect, just a meaningful segment of it. It would be hard for Posner to claim that moral academic moral philosophy could not have at least this limited effect, though I suppose that if groups were defined narrowly enough one could run into the problem of "preaching to the converted."<sup>60</sup>

Finally, people can advance moral positions through the way in which they structure critiques that are supposedly "neutral." Indeed, Posner, who perhaps views himself as a Socratic gadfly, seems

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58. E.g., CHARLES TAYLOR, *SOURCES OF THE SELF* (1989); MICHAEL WALZER, *SPHERES OF JUSTICE* (1983).

59. E.g., Robin West, *Jurisprudence and Gender*, *FEMINIST JURISPRUDENCE* 493, 493 (Patricia Smith ed., 1993); Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women*, *CRITICAL RACE THEORY* 357, 357 (Kimberlé Crenshaw et. al. eds., 1995).

60. Posner echoes this sentiment in the *Holmes Lectures*, where he asserts that "[a]cademic moralism is not really about making us better; it is about manning the ramparts and rallying the troops who defend the groups into which we are divided." Posner, *Holmes Lectures*, *supra* note 5, at 1693. If moral argumentation is focused on the formation of identity, then the political purposes to which these arguments may or may not be put cease to be of primary importance. However, in that Posner in this book is interested in the usefulness of moral argumentation for jurisprudence, I am willing not to pursue this point further.

perfectly happy debunking the moral arguments that others give, while not realizing that in so doing he is himself engaging in moral argumentation. Posner may respond that because he does not propose his own replacement morality he is not really engaging in moral argumentation.<sup>61</sup> However, Posner reveals his moral stance through his choice of which moral arguments to critique. At least Socrates could be viewed as an equal-opportunity questioner because he professed to know nothing. It is hard to imagine Posner making such a claim. Posner spends the first half of his second chapter critiquing legal theorists like Jürgen Habermas,<sup>62</sup> Ronald Dworkin,<sup>63</sup> and Leo Katz,<sup>64</sup> in the second half of the chapter, Posner discusses various Supreme Court cases, arguing either that they were not in fact moral decisions (*Roe v. Wade*,<sup>65</sup> *Brown v. Board of Education*<sup>66</sup>) or that they unnecessarily incorporated moral concerns into their holdings (the VMI case;<sup>67</sup> *Romer v. Evans*<sup>68</sup>). Both the

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61. I will later argue that Posner cannot in all cases escape making moral decisions in his role as a judge.

62. POSNER, *PROBLEMATICS*, *supra* note 5, at 98-107. Posner critiques Habermas for maintaining the notion that moral problems can be resolved through discourse. This argument follows fairly clearly from the criticism of academic moralism I have already discussed.

63. *Id.* at 94-98, 115-18. Posner critiques Dworkin for attempting to apply abstract moral reasoning, in the Kantian sense, to legal disputes. Given that Posner wants to divorce judicial decision-making from moral deliberation, it is not surprising that he would object to Dworkin's call for judges to be moral actors.

64. *Id.* at 121-29. Posner critiques Katz for engaging in "goofy" moral casuistry that is based upon unrealistic hypothetical situations that twist moral dilemmas beyond recognition.

65. 410 U.S. 113, 113 (1973), discussed in POSNER, *PROBLEMATICS*, *supra* note 5, at 134-36. Posner contends that the Supreme Court went to great lengths to rest this decision guaranteeing a right to an abortion on professional competence about the viability of the fetus.

66. 347 U.S. 483, 483 (1954), discussed in POSNER, *PROBLEMATICS*, *supra* note 5, at 136-39. Posner contends that the decision to end segregation of schools was not based upon moral imperatives of integration or questions of respect for blacks, but rather on psychological findings that being educated in segregated schools damaged the self-esteem of the black students. One could counter, though, that this is only important if one maintains the basic moral position of the inherent worth of blacks as human beings and the corresponding virtue of respect. Posner would respond to this claim by asserting that he takes for granted certain basic moral beliefs that need to be shared by anyone participating in the legal system. POSNER, *PROBLEMATICS*, *supra* note 5, at 137.

67. *United States v. Virginia*, 518 U.S. 515, 515 (1996), discussed in POSNER, *PROBLEMATICS*, *supra* note 5, at 165-73. The Court here held that teaching by the "adversative method" was not sufficient justification for excluding women from the Virginia Military Institute. Posner argues that because the number of women who would want to attend VMI, as there had been a substitute program just for women established by the state, was small, the Court overstepped its bounds in concluding

theorists and cases that Posner critiques are instances of the assertion of a liberal position. If Posner had wanted to seem more even-handed in his debunking, he should have also chosen theorists and cases dear to the hearts of conservatives to critique.<sup>69</sup> Instead, he advances his own moral position by tearing down all that would stand against him. Consequently, Posner is in fact engaging in moral argumentation, only he does it indirectly rather than make explicit moral claims that could consequently be themselves critiqued.

### III. THE UNCERTAINTY OF SCIENCE

For the sake of argument, let us concede that moral reasoning is of little use to judges in deciding how to resolve a legal dispute. What means should a pragmatist judge use instead? First of all, it should be pointed out that a pragmatist judge is not necessarily beholden to judicial precedent. “[P]ragmatist judges always try to do the best they can do for the present and the future, unchecked by any felt *duty* to secure consistency in principle with what other officials have done in the past.”<sup>70</sup> In other words, the pragmatist judge looks to what the impact of a particular decision will be more than to the principles upon which it supposedly rests. This is not to say that precedent is to be ignored completely in judicial decision-making, only that it is to be one factor among many.<sup>71</sup> Indeed,

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that a serious harm worthy of redress was being committed. *Id.*

68. 517 U.S. 620, 620 (1996), discussed in POSNER, PROBLEMATICS, *supra* note 5, at 173-82. The Court found that a Colorado referendum barring state and local governments from passing laws allowing homosexuals to bring equal protection claims was unconstitutional. Posner argues that while he himself has no problem with homosexuality, it is still a moral issue that should be left to democratic processes to regulate, which it had been in this case. Thus, the Supreme Court again overstepped its bounds in striking down the referendum. POSNER, PROBLEMATICS, *supra* note 5, at 174-75.

69. For example, Posner’s loose use of precedent could very easily lead him to critique originalist decisions like those of Justice Scalia and Justice Thomas, but for whatever reason, Posner chooses not to go down this path. In the *Holmes Lectures*, Posner does offer a stringent criticism of John Finnis’s over-reliance on orthodox Catholicism in critiquing homosexuality. Posner, *Holmes Lectures*, *supra* note 5, at 1686. Posner also critiques Robert Bork’s stance on originalism in a separate article. Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1365 (1990). *The Problematics of Moral and Legal Theory* would have been much more balanced if some of these critiques had found their way into the book.

70. POSNER, PROBLEMATICS, *supra* note 5, at 241.

71. For a further discussion of Posner’s view on the role of precedent and of history in general in adjudication. See Richard A. Posner, *Past-Dependency, Pragmatism and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHIC. L. REV.



precedent can often be a very important factor because of the continuity that it provides to the legal system.<sup>72</sup> “The pragmatic judge may not ignore the good of compliance with settled rules of law.”<sup>73</sup> To allow judges complete freedom to decide cases unfettered by precedent would in many cases result in nothing less than judicial tyranny.<sup>74</sup>

However, Posner, as with most legal theorists, is not especially interested in cases where the legal precedent is fairly straightforward, leaving little dispute as to how the judge should resolve the case.<sup>75</sup> Rather, Posner is interested in the “hard” cases, where there are unsettled questions of law and where it is reasonably conceivable that the judge could decide the case either way or with different rationales. When confronted with these circumstances, courts can and ought to “treat the Constitution and the common law, and to a lesser extent bodies of statute law, as a kind of putty that can be used to fill embarrassing holes in the legal and political framework of society.”<sup>76</sup> This stance would certainly leave many originalists aghast, but Posner stands by this central implication of a pragmatic theory of adjudication.<sup>77</sup>

In cases without clear legal precedent, Posner believes that judges should turn to social science to give them guidance into the probable effects of a given decision. If pragmatic judges are to decide cases on the basis of the impact that their decision will have, then, at least according to Posner, social science provides the best means of determining what that impact will be. Posner asserts that the value of social science comes not from its being “true,” a claim which indeed Posner cannot make because of his desire for a non-moral means of adjudication, but for the ability of social science to

573, 573 (2000); Ryan Fortson, *What is History Good For? A Commentary on a Talk by Richard Posner*, 1 STAN. J. LEGAL STUD. 11, available at [www.law.stanford.edu/sjls](http://www.law.stanford.edu/sjls) (last visited Mar. 3, 2001).

72. POSNER, PROBLEMATICS, *supra* note 5, at 242. In addition to providing continuity, past cases are also repositories of knowledge that can be useful for understanding the issues in the current case. *Id.*

73. *Id.* at 263.

74. *Id.*

75. Indeed, as a counter-argument to Dworkin’s claim that all judicial decisions are moral, Posner argues that were a Constitutional amendment passed outlawing abortion, the Supreme Court would be forced to obey this amendment, but could not be said to be acting according to moral precepts in so doing. *Id.* at 135-36.

76. *Id.* at 258.

77. *Id.* at 257-58.

help us “predict, understand, and to a limited extent control our physical and social environment; [social science] yield[s] knowledge that makes a difference (the pragmatic criterion of knowledge).”<sup>78</sup> It is for this reason that Posner begins his final chapter, titled “Pragmatism,” with the claim that he is “interested in pragmatism as a disposition to ground policy judgments on facts and consequences rather than on conceptualisms and generalities.”<sup>79</sup> However, it is actually in the third chapter, on “Professionalism,” where Posner locates much of his discussion of the usefulness of social science for adjudication. In this chapter, Posner turns his focus from judges per se to the legal academics who are to provide the social scientific studies upon which judges can rely in making their decisions. In this sense, Posner’s discussion of social science can be viewed as a continuation of and rejoinder to his critique of academic moralists in the first chapter. Through his discussion of pragmatism and social science, Posner seeks to reorient academic legal scholarship toward endeavors that he believes will be of real usefulness to judges. “Academic lawyers can be more helpful to the judiciary by developing and analyzing empirical data bearing on the law than by operating as a shadow judiciary of kibitzers and scolds.”<sup>80</sup> The inability to cloak their arguments in legal and moral jargon might frighten some academics, but Posner asserts that it is a necessary step in achieving true professionalism.<sup>81</sup>

Posner contrasts what he terms “good professionalism” with “bad professionalism.” Bad professionalism rests upon an “obscurantist style of discourse,” “impermeability of professional knowledge,” selective membership, underspecialization, lack of hierarchy, an “altruistic pretense,” and limited internal competition.<sup>82</sup> These characteristics create a mystique around the given profession that protects its privileged position by erecting various walls that make the profession immune to criticism, either because outsiders do not have access to or are unable to understand the discourse that is taking place.<sup>83</sup> Against this obscurantism, which has infected law to no small degree,<sup>84</sup> Posner argues for a turn to scientific

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78. *Id.* at 14.

79. *Id.* at 227. Presumably, the last phrase is a swipe at moral theorists and those judges who would use moral principles in their theory of adjudication.

80. *Id.* at 194 (citation omitted).

81. *Id.* at 204.

82. *Id.* at 187-89.

83. *Id.* at 186-87, 189-90.

84. *Id.* at 190-200. Posner also argues that this bad type of professionalism

methodology, which will reduce the bad professionalism of law because it will be interdisciplinary and understandable by a wide range of legal scholars.<sup>85</sup> Social scientific inquiry,<sup>86</sup> then, would result in the type of good professionalism that yields academic legal scholarship useful to the judiciary. In order to accomplish this, scholars should view law not as a conceptually independent discipline, but rather as “merely a transitional phase in the evolution of social control.”<sup>87</sup> This perspective underlies the importance of being able to study laws and their effects from a neutral scientific standpoint. Posner adopts this position from Holmes.<sup>88</sup> However, whereas social science was relatively crude in Holmes’ time about one hundred years ago, it has now progressed to the point where reliable conclusions can be drawn from social science studies.<sup>89</sup> Consequently, if legal academics conducted more social science research, then judges would have more information about the likely effects of their decisions on the public.

At least, this is what Posner would have you believe. While there may be some merit to his critique of moral theory, Posner’s reliance on social science is equally misplaced. Namely, social science does not provide any more certainty about the appropriate outcome of a case than does moral theory. Thus, even if one agrees with Posner’s critique of the Kantian project and the inability of moral arguments to resolve legal disputes definitively, which for the most part seems like a reasonable critique, this does not necessarily mean that social science can provide the definitiveness that moral arguments lack. Posner, following from my earlier description of a pragmatist judge, may respond that social science is not after certainty but rather just intended to offer the judge assistance in evaluating the effectiveness of a potential decision. However, this hope is misguided because judges, in their role as decision-makers, cannot separate the empirical from the evaluative; in

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has also crept into non-legal segments of the professional world, such as the military, business, and medicine. *Id.* at 200-03.

85. *Id.* at 194.

86. In placing such an emphasis on social science, Posner does not want to limit the form of acceptable inquiry to sociology. He is open to all types of scientific inquiry that focus on the relationship between law and society. *Id.* at 212-15. Indeed, he places particular emphasis on economics, consistent with his earlier works, like *An Economic Analysis of Law*, which helped establish the law and economics movement.

87. POSNER, PROBLEMATICS, *supra* note 5, at 207.

88. *Id.*

89. *Id.* at 211, 217.

the end, the judge must act. If Posner wants to dismiss entirely moral argumentation as a source of judicial decision-making, then he must place something in its stead, which is the role he gives to social science. With that in mind, social science in general must be examined as to its suitability for helping judges escape what Posner sees as a morass of moral considerations. Social science fails in this task. In the rest of this section, I will offer an internal critique of social science methodology as it relates to providing judges with the information necessary to determine the effects of a possible legal decision. There are three aspects to my critique: (1) all social science research is itself inescapably based on non-objective presumptions; (2) social science research is rarely even seen by its own practitioners as definitively conclusive; and (3) it is not clear that social science research is of much help to judges anyway. In the subsequent section, I will offer an external critique of the viability of social science for resolving legal dilemmas.

(1) Posner's turn from morality to social science is implicitly based on the notion that social science can provide the objectivity that morality supposedly lacks.<sup>90</sup> At first glance, this turn may seem to be a valid one, as an often stated goal of science is objectivity, whereas those who reject the Kantian moral project do not believe such a goal to be obtainable through moral argumentation. However, closer examination shows that this is a false objectivity. Any scientific inquiry makes presumptions about what counts as valid knowledge and what questions to ask when it structures its research. This can take place on several levels. On the broadest level, the nature of scientific inquiry itself has changed over time through different scientific paradigms. The most well-known proponent of this idea is Thomas Kuhn, who argues in *The Structure of Scientific Revolutions*<sup>91</sup> that the basic presumptions upon which science operate evolve over time but are never any closer or further away from some abstract truth.<sup>92</sup> For example, take the orbit of the Earth around the Sun. Before Copernicus, people believed the Earth to be the center of the universe. This dictated a certain type of scientific inquiry, affecting not only the types of scientific questions

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90. If asked, Posner might respond that he is not interested in objectivity, given his claim not to be interested in truth. *Id.* at 8. However, because Posner wants to exclude moral concerns from adjudication, it would be hard to claim that he is after something other than objectivity.

91. See generally THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (ed. 1970, 1974 reprinting).

92. *Id.* at 170.

asked but also our understanding of what it means to be a human being. Following Copernicus's theories and Galileo's popularization of them, all of this changed. Not only did our understanding of astronomy change, but so did the nature of scientific inquiry as well as views on the relationship between man and the universe. However, these new understandings are just as true to us as was the belief that the Sun orbited the Earth to those before Copernicus and Galileo. This example may seem a bit silly because the question is one where there is broad agreement both on what type of data to collect and on what this data shows. Often ignored in this example, though, is the broader change in human understanding the change in paradigms has created. At a more discipline-specific level, though, this issue becomes quite important. Within academics, the type of inquiry conducted by a professor of economics is quite different than that conducted by a professor of political science, history, or sociology. The differences in these types of inquiry are based upon different sets of presumptions, paradigms if you will, that each discipline brings into its research methodology.<sup>93</sup> These presumptions shape not only the subject matter of what is studied, but also the types of questions that one asks in conducting relevant and credible research. Even within a discipline, there can be, and invariably are, disputes as to what the boundaries of that discipline should be.

Largely, though, the need to limit the scope of one's inquiry will require the falling back upon a certain basic set of presumptions which are rarely stated explicitly. As discussed above, Posner critiques lawyers and legal academics for suffering from various aspects of professionalism, but in his reliance upon social science, Posner ignores the fact that these same bad characteristics have long been part of academia as well, resulting in a similar lack of objectivity. One need only look at the core readings for different academic disciplines to realize the often radically different presumptions to which they turn when beginning a research project. This specialization may be unfortunate, and Posner does seem to

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93. For example, political scientists may look at the different congressional factions that contributed to the passage of a law, whereas a legal scholar may be more interested in the effect of the law on the population. To take an unrelated but perhaps clearer example, one could define an apple as either a protective and nourishing covering for seeds that promotes reproduction of the species or as an edible source of sustenance for animals that eat it. The definition depends totally upon the context in which you are studying and defining the apple.

favor interdisciplinary approaches to law,<sup>94</sup> but it cannot be glossed over so quickly. Posner seeks contributions from such diverse fields as sociology, evolutionary biology, and cognitive psychology, but does not acknowledge that these fields may reach wildly different conclusions.<sup>95</sup> Every research project must start from somewhere, and within academia this often means starting from the presumptions of the discipline to which one belongs. Because these initial presumptions differ from discipline to discipline, often in contradictory ways, Posner cannot obtain the neutral objective standpoint he desires from his turn to social science.

(2) Putting aside the differing approaches of different disciplines, there is not always agreement upon how either to collect or interpret results from within the same discipline. Posner seemingly imagines a world in which academics never disagree with each other or have disputes over methodology. As any perusal over leading academic journals in any discipline will reveal, this world simply does not exist. The uncertainty generated by academic squabbles is manifested in a couple of different ways. The first concerns disagreements over proper methodology. As suggested above, the conclusions that one reaches are dependent upon the questions that one asks in the first place. This can be seen in contrasting poll results that can be obtained by framing differently questions which are ostensibly on the same subject.<sup>96</sup> Most methodological questions are obviously much more complex than this, and vary from discipline to discipline, but it should be clear that there are sufficient disputes in what research questions to ask as to render certainty in conclusions highly unlikely. Assuming a methodology can be agreed upon, there may still be disputes as to how to interpret

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94. POSNER, *PROBLEMATICS*, *supra* note 5, at 212.

95. *Id.* at 211.

96. *E.g.*, HERBERT ASHER, *POLLING AND THE PUBLIC: WHAT EVERY CITIZEN SHOULD KNOW*, 44-60 (4<sup>th</sup> ed. 1998). In his chapter "Wording and Context of Questions," Asher discusses how the way in which a question is framed can yield significantly different results. For example, in response to the question "Would you say that traffic contributes more or less to air pollution than industry?," 45% blamed traffic and 32% industry. *Id.* at 53-54. However, when the question was phrased "Would you say that industry contributes more or less to air pollution than traffic?," 57% blamed industry and only 24% blamed traffic, drastically different responses than before. *Id.* (citing a study in Michaela Wanke, Norbert Schwarz and Elisabeth Noelle-Neumann, *Asking Comparative Questions: The Impact of the Direction of the Comparison*, 59 *PUB. OPINION Q.* 345, 345 (1995)). Differences can also be found according to the order in which questions are asked. *See id.* at 55-59.

the data. To take an example from the humanities that can be analogized to social science, even if all classicists agreed upon the ancient Greek text that makes up Plato's *Republic*, this would not stop there from being multiple translations of the very same text, often quite different.<sup>97</sup> This is not to mention the multiple interpretations that can then be offered of any given translation. By extension, with the results of social science research, there can be disputes both about how to interpret the data and about how others have interpreted research findings. These debates take place continuously within both primary and secondary literature, almost always without a definitive resolution. Yet, Posner wants to rely upon these studies to provide guidance to pragmatic judges. How is a judge who has no training in social science research, nor the time to obtain sufficient training, supposed to choose which study to follow when academics cannot agree amongst themselves?

(3) Most social science research is not only inconclusive, but also of little help to judges. This can be seen in research Posner himself has conducted. Posner concludes his chapter on academics and social science with a summary of a study that attempts to compare variance in rates of tort litigation between the United States and England on the basis of economic and sociological, as opposed to legal, variables.<sup>98</sup> Posner sets up his study by looking at a wide range of variables (accidental death rate, urbanization, population density, education level, household income, liability insurance coverage, cultural factors,<sup>99</sup> and number of lawyers per capita) to examine which factors are most determinative of levels of tort litigation.<sup>100</sup> Posner admits that these variables are often intertwined, making it difficult to isolate one factor conclusively.<sup>101</sup> After examining various correlations, Posner concludes that the data

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97. Compare PLATO, *REPUBLIC* (G.M.A. Grube trans., Hackett Publishing Company 1992) with PLATO, *THE REPUBLIC OF PLATO* (Francis MacDonald Cornford trans., Oxford University Press 1941).

98. Richard A. Posner, *Explaining the Variance in the Number of Tort Suits across U.S. States and between the United States and England*, 26 J. LEGAL STUD. 477, 477 (1997).

99. This is determined using a dummy variable, meaning that a simple yes/no answer is substituted for an empirical statistic. In this case, "cultural factors" are limited to the region from which the tort victim comes, showing only that people from one region of the country are unlikely to sue people from another region of the country. POSNER, *PROBLEMATICS*, *supra* note 5, at 220.

100. These determinations are made by controlling for the other factors and isolating the chosen variable. *Id.*

101. *Id.*

suggests a causal relation between urbanization and accidents,<sup>102</sup> which results in a rise in tort litigation. There also seems to be a correspondence with regard to level of education and gender, though these are left underanalyzed by Posner.<sup>103</sup> However, Posner admits that these findings cannot be carried over to his studies of England.<sup>104</sup> When Posner does try to predict the number of tort suits per capita in England based on his U.S. studies, he arrives at a surprisingly low predicted number in comparison to the actual number of suits.<sup>105</sup> Rather than attributing this result to differences in the legal system or some other unexamined causal factor, though, he concludes that the difference must be based on undefined "cultural factors."<sup>106</sup> In essence, Posner is using a critique of methodology to mask undesired results, a trap into which it is easy for empiricists to fall. This further weakens the usefulness of social science for adjudication.

Posner argues that his study "suggests the feasibility and fruitfulness of an approach to understanding the legal system that employs the methods of social science."<sup>107</sup> It suggests to me the opposite. First of all, he is unable, by his own admission,<sup>108</sup> to reach a convincing conclusion. It is hard to imagine that he would want judges, whose decisions have a definite impact on at least the parties at trial if not society in general, to act on tentative findings. More importantly, it is hard to conceive of a possible legal dispute before a judge for which Posner's study would be in the least bit useful. If Posner wants to show that social science can provide meaningful guidance to judges, then in his illustrative example of social science research he needs to choose a study that has some bearing on justiciable legal disputes. That Posner conducted this study himself is even more damning. A comparison of rates of litigiousness in the United States and England does not fulfill this qualification unless Posner wants somehow to suggest that judges

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102. Posner can only arrive at this conclusion, though, by making a questionable substitution of rates of alcohol consumption for the number of accidents. *Id.* at 221-22.

103. *Id.*

104. *Id.* at 222.

105. *Id.* at 224.

106. *Id.* at 225.

107. *Id.* at 226.

108. Posner asserts that his conclusions about England should be taken "with a grain of salt, in view of the many limitations of my study and the many reasons to believe that the legal and social traditions of England are far less congenial to litigation as a mode of social control than traditions in the United States." *Id.* at 225.



should dismiss or otherwise curtail tort claims based on identifying characteristics of the litigants. More broadly, though, it would be hard to structure research agendas in anticipation of court cases. Not only is there no guarantee as to which cases will actually be brought to court, but cases are often so fact-specific as to render empirical studies tangential at best. Social science research takes a long time to conduct and analyze, which would extend the length of trials even longer than currently exists.<sup>109</sup> This is a systematic problem with the application of social science research to adjudication and not limited to the study just discussed. Thus, Posner's pragmatic project is fundamentally flawed because social science can provide no greater certainty to judicial decision-making than can moral argumentation.

#### IV. THE INESCAPABILITY OF MORAL CHOICES

By suggesting that "hard" cases can be resolved through social scientific research, Posner misconstrues the problem. "Hard" cases are difficult not because there are disputes about methodology or about the effects of a potential decision; rather, they are so contentious because these are the cases that determine the goals and directions of society and there are valid arguments on both sides as to what the proper outcome should be. In other words, even if you could come up with a reliable study that was uncontroversial and relevant to a justiciable question, the study could not determine the goals of society. Indeed, these goals need to be determined prior to inquiring into the findings of social science research. For example, Posner mentions that when anti-trust laws were first passed, it was unclear if the goal was "to promote economic efficiency or to reduce the power of big business."<sup>110</sup> As Posner notes, "[i]t is hard to do both."<sup>111</sup> However, Posner ignores the fact that when faced with anti-trust cases, judges were forced to make a decision as to which goal to foster.<sup>112</sup> One could probably come up with research to provide guidance supporting either the efficiency or the curtailment of power interpretations, but Posner provides little advice

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109. It is even possible to imagine that trials would involve competing social science experts, which would complicate matters even further.

110. *Id.* at 228.

111. *Id.*

112. Posner argues that confusion over interpretation of these laws continued in the courts until the 1980s, when the efficiency goal was widely accepted. *Id.* at 228-29.

as to how to go about choosing which study to follow and implement. The choice of which body of social science research to adopt cannot always itself be decided on scientific grounds but must in many situations rest upon underlying moral principles. In other words, even if social science can occasionally be a useful tool for adjudication, there is no reason to believe that it can supplant moral theory as a means to understand the underlying principles behind cases and findings.

To some degree, Posner admits that this is a limitation of pragmatism. "Pragmatism will not tell us what is best; but, provided there is a fair degree of value consensus among the judges, as I think there is, it can help judges seek the best results unhampered by philosophical doubts."<sup>113</sup> I am not convinced, though, that there is a great deal of value consensus among judges. Indeed, if there were, then Posner would not need to be so worried about appeals to moral arguments, which he claims to be ineffective anyway, because these appeals would be all the same. Perhaps because he is a judge himself, Posner places a great deal of faith in the ability of judges to arrive, for the most part, at the appropriate outcome.<sup>114</sup> He argues that "American appellate courts are councils of wise elders meditating on real disputes, and it is not completely insane to entrust them with responsibility for resolving these disputes in a way that will produce the best results in the circumstances."<sup>115</sup> It is unclear, though, why this trust is to be granted for pragmatic concerns about implementation of policy but not for moral arguments about what the goals of society are or ought to be in the first place. Throughout much of his book, Posner turns his criticisms not to judges but to the academics who are supposedly to advise these judges. However, it is judges who must decide when and how to use social science research because it is they who face the "hard" cases with their competing moral claims.

When faced with competing moral claims, Posner argues that judges should leave the resolution of these issues to the public. The only time that judges should act counter to public opinion is when they feel great moral "outrage" at the injustice being done,

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113. *Id.* at 262.

114. This is probably in part due to his view that "[m]ost American judges are pragmatists rather than ideologues." *Id.* at 119.

115. *Id.* at 257. This passage comes at the end of a discussion of the stringent screening process that appellate court judges go through in being appointed to the bench.

where “governmental action inflicts severe and seemingly gratuitous injury.”<sup>116</sup> If one concedes Posner’s claim about judges sharing common values, then it is reasonable to conclude that they would experience outrage against the same situations and occurrences, thus lessening the fear that this move on Posner’s part leaves too much to the discretion of the judges. Indeed, if a large number of judges, whom Posner sees as wise advisors on what is best for the public, do in fact experience outrage, then it is probably a good sign that the law should be overruled or changed. However, Posner oversimplifies the possible ways in which judges can differ in what they see as inspiring moral outrage. In his discussion of the *Romer v. Evans*<sup>117</sup> case, in which the Supreme Court struck down a Colorado referendum forbidding state and local governments from passing laws protecting the equal protection claims of homosexuals, Posner suggests that the Justices “may have been moved by the analogies between hostility to homosexuals and other, now discredited hostilities, notably anti-Semitism.”<sup>118</sup> Posner goes on to question whether or not this analogy is appropriate.<sup>119</sup> Apparently, though, a majority of the Supreme Court found the analogy valid enough to influence, at least in Posner’s mind,<sup>120</sup> their overruling a publicly passed referendum. In a later discussion of gay marriages, Posner argues that a Supreme Court decision legalizing them would be too radical to be accepted.<sup>121</sup> One could choose here to analogize between laws against gay marriages and anti-miscegenation laws, with a corresponding sense of outrage. Whether or not one is sympathetic to either set of analogies depends on one’s moral beliefs about the issues and positions to which they relate. Thus, in arguing that the Supreme Court overstepped its bounds in *Romer*, Posner is not only attempting to defer to the public, but taking a moral position at the same time. This leads to uncertainty as to the appropriate outcome. In the end, Posner is forced to admit that he “cannot pretend that outrage or even self-

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116. *Id.* at 147-48, 171.

117. 517 U.S. 620, 620 (1996).

118. POSNER, PROBLEMATICS, *supra* note 5, at 176.

119. *Id.*

120. Posner does not provide any evidence to show that this analogy was crucial to the decision of the Justices, and there is no evidence from the opinions themselves that it was, though the inference is not an unreasonable one.

121. *Id.* at 249-50. As Posner points out, when the Supreme Court outlawed anti-miscegenation laws, most states had already removed them from their books. *Id.* at 251. However, this should not matter for the “outrage” argument.

restraint furnishes much in the way of guidance to courts grappling with difficult issues."<sup>122</sup>

As has been seen, the choice of which social science research to adopt also rests upon a moral choice. Furthermore, choosing to appeal to social science research at all can at times be a moral decision. Posner's heavy emphasis on efficiency often times ignores the possibility that there are some basic principles of the American democratic system that trump any claim to efficiency. For example, in discussing the right to court-provided counsel for the indigent, Posner argues that it might be more efficient, in terms of deterring crime, to eliminate the automatic right to counsel.<sup>123</sup> This argument is based on the idea that requiring all indigent accused to receive government-funded counsel encourages legislatures to limit funding to public defenders in order to keep the deterrent effect to potential criminals steady by reducing the resources that a public defender can spend on each individual case. This results in a system of criminal justice where there are frequent convictions of innocent persons. When there is seen to be little difference in conviction rates between the innocent and the guilty, the deterrent effects of prison time are reduced. In place of the current understanding of rights, Posner favors a system where there is not an automatic right to counsel but instead limits on the resources of prosecutors.<sup>124</sup> Under such a system, prosecutors would only pursue their strongest cases, which are likely to be those in which the accused is actually guilty.

While there may be some logic behind Posner's argument, it ignores the importance of the right to counsel in the public understanding of the principles of American democracy. Posner considers rights to be an example of "civic religion"<sup>125</sup> akin to Platonic forms; they are "universalized and eternalized,"<sup>126</sup> being called upon to serve "as trumps that take every trick no questions asked, rather than as tools of government subject to the usual trade-offs and amenable to the usual methods of social scientific inquiry."<sup>127</sup> Posner also points to the historical development of differing conceptions of rights as evidence that they should not be placed in the

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122. *Id.* at 148.

123. *Id.* at 161-64.

124. *Id.* at 163.

125. *Id.* at 158.

126. *Id.*

127. *Id.*

sacred position often reserved for them.<sup>128</sup> However, the notion that rights are contingent and not, in the Kantian sense, abstract and derivable through rational argument does not diminish their importance to a view of the goals of society. Even though it is a relatively recent development, the right to counsel is important to current conceptions of American democracy. To argue that it should be disregarded out of concern for efficiency ignores the value of certain aspects of life that are not easily quantifiable. Thus, there is a tension between on the one hand Posner's emphasis on efficiency and social science in general and on the other hand more subjective aspects of human experience like rights and similar moral concerns. By choosing to make social science the center of his theory of adjudication, Posner is not being neutral, as he seems to assume he is being, but rather he is making a choice as to which aspects of human experience are valuable and which are not. This is by definition a moral decision. Maintaining the requirement that the indigent be provided with legal counsel fosters a view emphasizing the importance of the individual in American democracy. Efficiency, in this instance, is only a mask for saying that the broader societal concern for lower crime rates is more important than the interest of the accused in a chance at justice and the belief that they are not being treated arbitrarily.<sup>129</sup> This is fine, but Posner should be upfront about the underlying principles and broader social implications of his arguments.

## V. CONCLUSION

As I have suggested throughout this review, Posner's emphasis on social science comes from a desire for certainty in theories of adjudication. This can be seen toward the end of the book when Posner distinguishes pragmatism from postmodernism, using Duncan Kennedy and Stanley Fish as exemplars of the latter.<sup>130</sup> Posner

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128. *Id.* at 159-61.

129. Posner may counter that by allowing public defenders to choose to whom they will devote their resources, those who are actually innocent will have a greater chance of being acquitted because more attention will be paid to their case. This would in effect be an efficiency argument in favor of the accused. However, Posner could get the same results by advocating that more money be budgeted to hire public defenders, something Posner claims that courts are unwilling to do. *Id.* at 162.

130. Posner closes the book by suggesting three reforms for legal academia: law school education should be shortened from three years to two except for those interested in a teaching career; law reviews should be more open to doctrinal

objects to both of them because of the value they place on indeterminacy, for Kennedy the indeterminacy of ideological debate and by extension of policy debate<sup>131</sup> and for Fish the indeterminacy of the law in general.<sup>132</sup> Because of the value that Kennedy and Fish place on indeterminacy, they can be said to reject the Kantian project of finding certainty through moral argumentation, though this is not a connection that Posner makes. However, in seeking to find certainty, Posner reveals himself to be a Kantian as well, only of a different stripe. Posner merely replaces moral argumentation with social scientific research, not realizing the unavoidable subjective components of what he makes the core of his pragmatic theory of adjudication. Just like Kant, Posner tries to establish a means of decision-making that is independent of the biases of the decision-maker and hence not just a matter of taste. In a way this is reassuring. It would be rather disconcerting to have judges openly profess the contingency of their decisions. In an academic vein, though, it is a misplacement of faith to believe that social science can provide the certainty that is missing in moral argumentation.

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scholarship and possibly peer reviewed; and the American Law Institute should initiate several internal reforms, including placing nonlawyers in positions of power. *Id.* at 281-309. These reforms are all aimed at increasing the quality of scholarship from which judges can draw in deciding their cases.

131. *Id.* at 266-67.

132. *Id.* at 279.

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