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Judge Posner's Jurisprudence of Skepticism

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JUDGE POSNER'S JURISPRUDENCE OF SKEPTICISM

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The Jurisprudence of Skepticism[1] is perhaps the most interesting philosophical account of the nature of law and the judicial process written by a sitting judge in many years. As a leading professor before assuming the bench, Richard A. Posner had developed a rich economic theory of law.[2] The coherence of Professor Posner's social-scientific web of beliefs,[3] however, seems to have been challenged by recalcitrant experiences in the actual judging of cases. In particular, Judge Posner needs, but does not find, guidance in the law. The resulting frustration leads to a sweeping philosophical skepticism about law, coupled uncomfortably with assurances that judicial practices are stable and deserve respect.

This essay suggests that there is an instructive incompleteness in Judge Posner's transition from scientific observer to legal actor. His legal skepticism should be understood as a legacy of his days as an inquiring economist, observing and forming beliefs about law and the judicial process from the academy. His affirmation of judicial practices stems from his new respect for practical reason,[4] which seems to result from the experience of performing judicial duties. This essay

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1. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988). Subsequent references will be bracketed in the text.

2. *See generally* R. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986); R. POSNER, THE ECONOMICS OF JUSTICE (1981).

3. The metaphor of a web of beliefs is spun out in S. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 132-43 (1985), and in W. QUINE & J. ULLIAN, THE WEB OF BELIEF (1970).

4. On law as practical reason in the recent literature, see, *e.g.*, J. FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980); J. RAZ, PRACTICAL REASON AND NORMS (1975); Burton, *Law as Practical Reason*, 62 S. CAL. L. REV. (1989) (forthcoming); Farber & Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615 (1987); Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835 (1987); Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 24-36 (1986); Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO. L. REV. 45 (1985).

will argue that a more complete assimilation of the practical perspective of the legal actor would undercut Judge Posner's arguments for legal skepticism.[5]

I. JUDGE POSNER'S TWO PERSPECTIVES

Judge Posner's essay relies on two very different perspectives. From a scientific perspective, he seriously doubts that law exists, that the law guides judges, and that legal reasoning is a cogent activity. From the practical perspective, by contrast, he affirms that most judicial decisions are reasonable. As will be seen, distinguishing between these two points of view is an important first step toward a sound nonskeptical understanding of the law.

The starting point for Judge Posner's jurisprudence is in the philosophy of science. He opens the essay by defining two methods of "exact inquiry" that are employed by the sciences as ways of acquiring beliefs (p. 830). One method of exact inquiry is logical deduction. It is used in law, according to Judge Posner, to answer easy questions. But it is of little interest because such questions are not often litigated (p. 832). The other method is empirical observation. It involves systematic empirical inquiry through experimentation leading to verification or, at least, falsification (p. 836). Posner laments that neither scientific method plays a significant role in legal reasoning. Therefore, "[l]egal reasoning is not a branch of exact inquiry . . . although continued progress in the economic analysis of law may compel a modification of this conclusion eventually" (pp. 858-59).

Two kinds of legal skepticism flow from this conclusion. First, Posner advances a familiar epistemic skepticism: many legal questions are indeterminate by the methods of legal reasoning (p. 853). Answers to these questions turn on the "policy judgments, political preferences, and ethical values of the judges" (p. 828). Second, and more disturbing, Posner advances a perhaps misnamed "ontological skepticism": the law does not exist because it is not an observable entity (pp. 828-29, 879-82, 891). The law is not a thing or set of concepts that guides judges or anyone else (pp. 881, 882). Law, therefore, is "simply the activity of judges" (p. 891). Attempts to discern predictable regularities in judicial behavior, like the behavior of rats or comets, is about all that there is to talk about (pp. 879-83).

These two skepticisms depend directly on Posner's conception of

5. Other recent responses to legal skepticism include S. BURTON, *supra* note 3, at 188-93; R. DWORKIN, LAW'S EMPIRE 76-85 (1986); Burton, *Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules*, 91 YALE L.J. 1136 (1982); Kress, *Legal Indeterminacy*, 77 Calif. L. Rev. (forthcoming 1989); Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1986).

exact inquiry, which is an orthodox positivist conception of the scientific ideal (pp. 830-37, 879-82). That ideal prizes the values, among others, of objectivity and determinacy in the formation of beliefs about the world. *Objectivity* requires scientific inquiry to restrict its concerns to objects of inquiry that have the capacity to lead all reasonable human observers to the same conclusions about those objects (pp. 832, 834, 856, 857, 866). Judge Posner's ontological legal skepticism is a special case of his general doubt about the existence of entities that cannot be exactly observed (pp. 829, 866-71, 880-82, 891). The law indeed lacks the sensible existence needed to lead all observers regularly to the same conclusions about it.[6] *Determinacy* requires a successful scientific inquiry to produce results that can be replicated and that are not consistent with incompatible explanatory theories.[7] Posner's epistemic skepticism follows mainly from the unavailability of experiments validating the truth of legal claims (pp. 858-61). The law, of course, cannot be reduced (without remainder) to empirically ascertainable facts (pp. 858-61).[8]

Posner accordingly believes that "the methods of exact inquiry are rarely usable by judges deciding cases" (p. 840). Rather, judicial reasoning is mainly a branch of practical reason (p. 859). Posner defines *practical reason* as "the methods that people who are not credulous — who have inquiring minds — use to form beliefs about matters that cannot be verified by logic or exact observation" (p. 838). In his view, "it includes anecdote, introspection, imagination, common sense, intuition, . . . empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent, custom, memory, induction, . . . [and] 'experience' " (p. 838). Judges resort to this grab-bag of methods when, as is often the case, the more reliable methods of exact inquiry are not adequate. Posner assures us that "[p]ractical reason can answer most of the legal questions that logic cannot answer" (p. 840).

Rejecting a scientific approach to judging is not surprising for a sitting judge, whose point of view is not that of an observer. In this

6. This does not mean that members of a community do not regularly come to the same conclusions about how the law applies. Many observers have noted the amazingly high levels of agreement among lawyers, judges, and others about what the law permits or requires in the situations in which it claims to govern. *E.g.*, sources cited in S. BURTON, *supra* note 3, at 96. Posner agrees. He defends his two skepticisms, however, by confining his attention to cases that come before courts because members of the legal community "are not much interested" in questions that are not litigated. Posner's sweeping skepticisms about law, however, are highly implausible if one takes into account all applications of law, which might include each decision by a motorist to stop at a red light. That lawyers are not much interested in situations where the law works unproblematically is not a good reason to dismiss such situations when claiming that the law does not exist and cannot be known.

7. Judge Posner appeals to the value of determinacy at 832, 853, 859, 863, 891.

8. Burton, *supra* note 5, at 1147-52.

case, however, it is very surprising in light of this judge's famous academic history. Posner's endorsement of practical reason, understood to encompass both the point of view of an actor and ways of reasoning that differ from those of the sciences, is a new development in his thinking. He thus acknowledges his formerly strict logical positivism and, at the same time, abandons it (pp. 839, 866, 888-89, 890). He assures us that there are good answers to many ethical and legal questions independent of the verifiability of those answers by scientific means (pp. 839-40, 874, 889). And he claims that, by contrast with the methods of exact inquiry, including economic analysis, practical reason comprises "our principal set of tools for answering questions large and small" (pp. 838-39). These are important revisions to a formerly scientific web of beliefs about law.

As will be seen, however, shifting to the practical point of view has implications beyond those outlined in *The Jurisprudence of Skepticism.* Posner's skepticisms, like those expressed in some Critical Legal Studies,[9] depend on the scientific criteria of objectivity and determinacy. The undefended premise is that these orthodox scientific standards are among the necessary criteria for the existence and identification of the law. Posner's arguments for legal skepticism fail if scientific criteria do not govern law and judicial practice at all.

II. Scientific and Practical Discourses

Different intellectual discourses, or "language games," define conceptually different worlds of inquiry (with points of crossover in practice). Each discourse proceeds on its own assumptions, in its own language, guided by its own rules, and under its own standards of success. Scientific and practical discourses are distinct in these ways. Law is not a science to be understood or criticized in scientific terms. Rather, law is a practical project to be understood and criticized in practical terms from the outset of the inquiry. Therefore, scientific criteria like Posner's do not govern law and judicial practice.

Consider, for example, the familiar distinction between "analytic" discourses, like mathematics, and "synthetic" discourses, like the empirical sciences. Ordinary mathematics proceeds in terms of number, equality, proof, transitivity, infinity, recursion, and the like, reflecting

9. Posner recognizes this similarity but is intent on distinguishing his skepticism from that of radical skeptics in the Critical Legal Studies movement. Posner, *supra* note 1, at 827. His claims that the law does not exist and cannot be known by the methods of exact inquiry, *see infra* notes 12-15 and accompanying text, and his denial of the cogency of legal reasoning, do seem to be as sweepingly nihilistic as the strongest of skeptical claims in Critical Legal Studies. However, his claim that practical reason yields reasonable decisions in a wide range of cases is decidedly to the contrary.

the entities, relationships, and modes of existence that are recognized within the mathematical world. This discourse requires rigorous warrants for making inferences at every step, and a successful proof must be replicable by any competent mathematician at any time or place. Empirical sciences, by contrast, use a language of hypotheses, data, measurement, probability, statistical significance, and the like, in part reflecting their interest in a different set of entities, in different kinds of relationships, and with different modes of existence. The rules of this discourse require experimentation and are far more concerned with excluding the prejudices of the inquirer. The conceptual difference between the two discourses explains why it obviously is a mistake, for example, to criticize a mathematical claim for lacking empirical support.

The difference between analytic and synthetic discourses (hereafter called "scientific discourses") is taken for granted in a culture, like ours, that has been heavily influenced by logical positivism and related modernist developments. Despite his announced break with logical positivism on other matters, the same distinction marks Posner's two branches of exact inquiry, which he calls "logic" and "empirical inquiry," and which undergirds his legal skepticism. In philosophical circles, however, logical positivism generally is ridiculed despite (or because of) its continuing influence in the wider culture. It failed as a philosophy of science. More important for present purposes, it failed to confine all legitimate knowledge to the scientific. Yet that is just what Posner tries to do when advancing his two skepticisms.

As the analytic and synthetic have their respective discourses, it is now widely appreciated that practical matters — ethics, politics, and law — have a different and appropriate discourse outside of the sciences altogether. Both kinds of scientific knowledge are produced from the human capacity to form beliefs about how things are. Analytic statements, on the other hand, express beliefs about the logical or mathematical worlds, in which mathematical or logical concepts have regular relationships that are known by analysis or calculation. Synthetic statements express beliefs about the empirical world, in which objects and events are supposed to obey scientific laws that can be known and tested by observation and measurement. But we also have a capacity to act intentionally on reasons for action and, within limits, thereby to change the empirical world in which we live. This is the capacity for practical reason. It is not directed to the formation of beliefs about how things are. Rather, it concerns how things ought to be.

The capacity for practical reason is the converse of that used in the

sciences to form beliefs. For example, the human mind makes representations of the world, as when we say that "the cat is on the mat." Sometimes we say, *"it is the case that* the cat is on the mat," thereby expressing a belief. That descriptive representation is true if, indeed, the cat is on the mat. The representation can be changed if the cat is not on the mat. By contrast, we sometimes say, *"it ought to be the case that* the cat is on the mat." That prescriptive representation can be true whether or not the cat is on the mat. If the cat is not on the mat, we can act by getting a cat and putting it on the mat! Thus, we have the capacities both to change our representations to bring them into conformity with the empirical world and, within limits, to bring the empirical world into conformity with our representations.

A practical discourse is prescriptive in that it concerns how our world ought to be in respects that can affect the conduct of our lives. It has a distinctive vocabulary that (not coincidentally) tracks the normative language of the law: rights, duties, permissions, prohibitions, principles, responsibilities, and excuses are among the recognized concepts. Its rules require claims to knowledge to be supported not by proof or experimentation, but by rational argument about what someone ought to do. Most important, valid claims to practical knowledge must satisfy criteria that are appropriate to a discourse directed to action, not criteria imported from discourses directed to the passive formation of beliefs.

Among the distinctive criteria of practical knowledge are normativity, impartiality, and good judgment, not the counterpart scientific criteria of objectivity, neutrality, and determinacy.[10] As used here,

10. Many major moral philosophies in their most salient respects can be understood to hold themselves responsible to something like these criteria of practical knowledge. Aristotle's ethics, for example, uphold norms that are implicit in the *telos* of human nature, urge impartiality through the cultivation of the virtues, and seek practical wisdom as the manifestation of good judgment. ARISTOTLE, *Nicomachean Ethics,* in THE BASIC WORKS OF ARISTOTLE 927 (R. McKeon trans. 1941). Kant's very different ethics nonetheless respond similarly to the criteria of normativity (the categorical imperative), impartiality (universalization), and good judgment (right action). I. KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS (H. Paton trans. 1958); I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (J. Ladd trans. 1965). Bentham's distinctive ethics require normativity as the greatest good, impartiality through the pleasure principle with everyone counting for one, and good judgment by way of consequentialist or means-ends rationality. J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J. Burns & H.L.A. Hart eds. 1970).

More recent analytical philosophy supplies a meta-ethical dimension that also is responsive to the same criteria of practical knowledge. Among the main topics of much recent moral philosophy are "ought" statements, universalizability, and normative justification on the balance of reasons for action. *See generally,* PRACTICAL REASONING (J. Raz ed. 1978); R. HARE, THE LANGUAGE OF MORALS (1953); J. RAZ, *supra* note 4; G. VON WRIGHT, PRACTICAL REASON (1983). The analytical effort is compatible with Aristotelian, Kantian, and Benthamite ethics because it is on a third dimension in a matrix where the criteria of practical knowledge are on one dimension and the various substantive moral theories are on the second.

normativity refers to the guidance of action by standards of conduct that are claimed to prescribe what someone ought to do.[11] *Impartiality* refers to the exclusion of *ad hominem* considerations, such as advantage to self, friends, or groups with which one identifies, from an assessment of reasons for action. *Good judgment* refers to action on the balance of reasons as well as possible under the circumstances, without certain knowledge of the rightness or goodness of what we do. These criteria supplant both objectivity and subjectivity, neutrality and bias, and determinacy and indeterminacy because they are inappropriate dichotomies within a practical discourse.

In practice, of course, scientific and practical elements are combined in human endeavors. An empirical scientist takes action when embarking on a project, executing a research plan, publicizing the results, or incorporating the results into applications. The practice of science, as such, includes some of these actions as needed to pursue true beliefs. Conversely, the ethical or legal actor might form beliefs when deciding what to do. Since no one ought to do something that is impossible, beliefs about what is possible in human action are relevant in practical deliberations. A judge, moreover, may make findings of fact, identify general propositions of positive law, gauge the social consequences of a decision, and at times predict what the judges of another court would do. Such beliefs, however, are formed as needed to act properly in a case. Significantly, we can be warranted in forming beliefs ancillary to action on weaker evidence (*e.g.*, a preponderance) than would be required when claiming scientific knowledge.

The conceptual distinction accordingly is maintained to distinguish the capacities for pursuing scientific and practical goals. Keeping an eye on the goal of a project helps to sort out relevant from irrelevant considerations. For example, a scientist who forms a private theoretical belief that a nuclear explosion is possible should have appropriate reasons for the belief, but *just by forming the belief* incurs no important ethical obligations. The reasons for belief primarily will involve facts within the domain of nuclear physics. The *acts* of expressing that belief, such as building a device and detonating it, surely do attract serious ethical obligations. Such acts should be supported by appropriate reasons for action, which will involve moral principles. Moreover, a judge who invalidates the death penalty on constitutional grounds *by that act* is not responsible for representing any part of the empirical world correctly. Her reasons for action might, however, require *beliefs* about the deterrent or discriminatory effects of capital

11. The claim, of course, need not be valid. Thus, iniquitous laws can be norms. *See* J. RAZ, THE AUTHORITY OF LAW 28-33, 153-59, 233-62 (1979); *infra* text accompanying notes 24-28.

punishment that, in turn, depend on scientific criteria. The conceptual distinction between practical and scientific endeavors, reflected in the difference between prescriptive and descriptive uses of language, helps to disentangle what-is-a-reason-for-what and thereby aids clear understanding and criticism.

For these reasons, it should not be doubted on scientific grounds, as Posner urges when advancing his ontological skepticism, that the law exists in a mode appropriate to its practical nature. Some beliefs themselves are more secure than any proofs which might be offered by philosophy or science in their defense. It seems only with reference to reasons for action that we can understand that (at least some) motorists stop at red lights because the lights are legal reasons for stopping, or that a judge enters a default judgment because the defendant's dilatoriness is a legal reason for doing so. The law exists ontologically insofar as there are such legal reasons for action, which are the primary entities recognized by a legal discourse. Posner's essay does not even consider the law as a provider of reasons for action. His starting point in the philosophy of science excludes such entities at the outset of his inquiry, guaranteeing a skeptical conclusion before the relevant arguments are even examined.

Similarly, it should not be doubted on scientific grounds, as Posner does when advancing his epistemic skepticism, that we can have practical knowledge of the law. Scientists have the luxury of suspending belief — for decades or centuries — if the available evidence is inadequate to warrant true beliefs. They often do so pending further inquiry. The criteria of scientific knowledge consequently can be rigorous and even impractical. Legal actors, by contrast, typically have no option to avoid action; they must act on the best available alternative. The best course of action then must be judged on the balance of reasons under the circumstances, which typically include limited time and resources for deliberation. The law would be self-defeating if it were not possible to act lawfully on a practical basis.

One should no more want to mix up practical and scientific discourses in legal theory than to order a person forthwith to obey the law of gravity. As I have shown at length elsewhere,[12] law is a practical matter. It is a form of social organization through the systematic institution of supreme authoritative standards of conduct. The law represents a possible organization of social relations and a commitment to bring it into empirical being by lawful action. Each application of the law brings the empirical world — notably, human behavior

12. Burton, *supra* note 4.

— into conformity with the law in some respect. Jurisprudential questions about the existence and identification of the law are questions about its practical role as a guide to conduct by judges and other persons.

Posner thus glimpses something valuable when he emphasizes the importance of social vision and imagination to a judge who must act (pp. 829, 849-57, 863). The social vision he endorses, however, is that of an individual judge, to be acted on when the methods of the exact sciences run out, subject to minor constraints. *The relevant social vision is represented by the legal standards and precedents which constitute the law that judges have a duty to uphold.*[13] The traffic laws, for example, represent a complex set of coordinated actions to be taken by motorists in response to various colored lights and signs with various shapes. To a remarkably large extent, motorists take those actions and thus actualize that part of the normative organization of society represented by the traffic laws. Other laws, like those prohibiting the sale or use of cocaine, represent a part of the normative organization of society but are notoriously ineffective, as evidenced by the common sale and use of cocaine. The empirical world is brought into conformity with such laws, if at all, when legal sanctions are imposed on violators.

Posner's jurisprudence of skepticism, by seeking scientific answers to practical questions, renders invisible the social vision represented by the law. Judges consequently would be freed to act on their own social visions. For example, in Posner's hands, the doctrine of precedent becomes merely a way of acquiring information when judges deliberate in a case (pp. 843-48). He defines precedents simply as "things that go before," (p. 845), recognizing only the fact and chronology of judicial decisions and excluding their normative significance. He thinks it only reasonable for anyone choosing a course of action to consult past experience, and judges are no different from anyone else in this respect. The "anecdotes" that are legal precedents, however, are of no greater significance for a judge's decision than the track record of a brand of automobile is for a potential buyer's selection (pp. 844-47).

Judge Posner in effect denies that precedents are presumed to have been decided correctly, that consistency or equal treatment requires like cases to be decided alike, and that precedents are in any important sense *binding* on judges. But he never argues against the conventional view that a legal precedent is an authoritative legal reason for a similar

13. *See* S. BURTON, *supra* note 3, at 101-22. Posner sees statutory interpretation in a similar way, but otherwise seems generally to disconnect the judge from any duty to apply the law by denying that there is any such thing. *See also* R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 198-222 (1985).

case to be decided in the same way — that *a relevant precedent is binding in just the sense that it supplies (prima facie)*[14] *a mandatory reason for action by judges.* Again, this practical understanding seems to have been excluded at the outset of Posner's inquiry when it should at least have been a target of his argument.

The mistake of taking up a scientific discourse is further revealed by the main virtue Posner claims for his unusual understanding of precedent and his legal realism.

> Consistent with my view that precedent is more significant as information than as authority, I predict that a careful study would show that judges who know more about a particular field of law are less deferential toward precedent than equally able (and no more "restrained") judges who know less about the same field. . . . Th[is] hypothes[is] illustrate[s] a distinctive aspect of the approach to jurisprudence set forth in this article: that it has explanatory and predictive potential. [p. 846]

The "significance" of precedent is ambiguous as between the scientific and the practical. Whether judges in fact treat precedent variably is distinct from whether they are legally required to follow it. The former question concerns part of the empirical significance of precedent while the latter concerns its practical significance. The study that Posner proposes to verify his theory of precedent, of course, would be an empirical study. He cannot successfully contest the practical understanding of precedent with that bare empirical claim, no matter how many empirical studies support it, any more than proof that cocaine is sold in New York shows that selling cocaine is lawful there.

The "distinctive aspect" of Posner's approach to jurisprudence is its claim to social scientific falsifiability. It is as though he supposes that the law exists, if at all, in a way that can be found, discovered, or observed, and therefore known scientifically or by rough approximation thereto. When it turns out that the law cannot be thus known, Posner reaches specious conclusions when he should reconsider his starting point. His scientific discourse — like that of many strands in legal realism and related modernist discourses — at the outset excludes the possibility that the law is to be understood from the perspective of legal actors through a practical discourse. It is not at all surprising for a judge to be frustrated in failing to find scientific an-

14. Posner does not see how judges can reason from a precedent at all "unless the outcome of the new case can be deduced from the prior case *and* the prior case cannot be reexamined." P. 845. This treatment of overruling assumes that the mere logical possibility of interpretation or overruling deprives the precedent of any binding force in a highest court. A precedent, however, is binding *"prima facie"* in that, all else being equal, one ought to follow it in similar cases. Overruling itself is an act that requires justification. The presence of such justification is sufficiently unusual in American practice that overruling requires exceptional reasons to override *stare decisis.*

swers to practical questions; it is surprising for a judge to look for such answers in the first place.

III. Practical Reason in Contemporary Jurisprudence

H.L.A. Hart's 1953 inaugural lecture as Professor of Jurisprudence at Oxford University[15] introduced the methods of analytic philosophy into jurisprudence. He thereby enhanced greatly the philosophical quality of the venture. Hart sought to elucidate the legal concepts embedded in our culture by analyzing how the members of a legal community use language. He highlighted a most salient feature of legal discourse — that it employs a vocabulary of rights, obligations, justifications, and excuses. Holmes, like Posner, had ignored this normative language of the law, seeking to "substitut[e] a scientific foundation for empty words."[16] Hart thought that these uses of language revealed a crucial feature of our concept of law — its role as a provider of reasons for action.

Consider Hart's famous treatment of legal obligation[17] in light of the distinction between scientific and practical discourses. He set up the gunman situation in which *A* orders *B* to hand over *B*'s money, and threatens to shoot him if he does not comply. According to a coercive model of law, Hart suggested, legal obligation is to be found in the gunman situation writ large. Hart objected that we would misdescribe that situation in saying that *B* had an obligation; rather, we would say that *B* was *obliged* to hand over his money. The latter, Hart continued, "is often a statement about the beliefs and motives with which an action is done. . . . But the statement that someone *had an obligation* to do something is of a very different type."[18] Statements of obligation, Hart suggested, presuppose the existence of social rules that provide standards of conduct, deviations from which are met with insistent and strong social criticism as such. The normative vocabulary of the law, especially "right" and "duty," is used to draw attention to the rules, which are regarded by those who accept them as reasons for conforming their conduct and justifications for criticism of deviations by others.[19] Hart thus treated law with attention to the

15. H.L.A. Hart, *Definition and Theory in Jurisprudence,* in Essays in Jurisprudence and Philosophy 21 (1983).

16. O.W. Holmes, *Law in Science and Science in Law,* in Collected Legal Papers 229 (1920).

17. H.L.A. Hart, The Concept of Law 79-88 (1961).

18. *Id.* at 80-81 (emphasis in original).

19. On social rules, see *id.* at 54-60.

practical point of view, from which legal rules guide conduct. Legal rules do not, by his account, predict, describe, or explain anything.

Hart's successors, despite large and deep differences on many points, agree that the law is to be understood within a practical discourse. In *Law's Empire,* Ronald Dworkin recognizes the importance of both the internal point of view of the participant in a legal practice and the external point of view of a sociologist or historian.[20] Both perspectives in his view are essential and must embrace or take account of the other:

> The participant's point of view envelops the historian's when some claim of law depends on a matter of historical fact: when the question whether segregation is illegal, for example, turns on the motives either of the statesmen who wrote the Constitution or of those who segregated the schools. . . . The historian's perspective includes the participant's more pervasively, because the historian cannot understand law as an argumentative social practice, even enough to reject it as deceptive . . . until he has his own sense of what counts as a good or bad argument within that practice. . . . This book takes up the internal, participants' point of view.[21]

John Finnis similarly insists that the law is an object of inquiry that is constituted by human actions, practices, habits, dispositions, and discourse. It can be fully understood in his view only by understanding their point as conceived by participants.[22] For Finnis, moreover, a philosophy of law requires the philosopher to take up the point of view of practical reasonableness to construct good law.[23]

Joseph Raz has done more than anyone else to work out the analytical implications of law as practical reason.[24] Indeed, he believes that a "legal system can be conceived of as a system of reasons for action."[25] Raz insists that many of his statements *qua* theorist, like many statements of the law by teachers and practitioners, are "detached normative statements," or statements from the legal point of view.[26] Such statements can be understood as we understand the Christian who says to his Orthodox Jewish friend, who is about to eat some pork fried rice unwittingly: "You ought not to eat that." This is

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20. R. DWORKIN, LAW'S EMPIRE 11-14 (1986).

21. *Id.* at 14.

22. J. FINNIS, *supra* note 4, at 3.

23. *Id.* at 3-18.

24. *See generally* J. RAZ, *supra* note 4; J. RAZ, *supra* note 11; J. RAZ, THE CONCEPT OF A LEGAL SYSTEM (2d ed. 1980); Raz, *Authority, Law, and Morality,* 68 THE MONIST 295 (1985).

25. J. RAZ, THE CONCEPT OF A LEGAL SYSTEM *supra* note 24, at 212.

26. J. RAZ, *supra* note 4, at 175-77; J. RAZ, *supra* note 11, at 155-57; *see also* H.L.A. HART, ESSAYS ON BENTHAM 153-55 (1982) (discussing Raz's idea). Nonpositivists also recognize the importance of such legal statements. *E.g.,* J. FINNIS, *supra* note 4, at 234-37; Nonet, *In the Matter of* Green v. Recht, 75 CALIF. L. REV. 363, 374 (1987).

a fully normative statement in that it guides conduct. The Christian, however, speaks from the point of view of one who accepts the laws of Kosher without thereby endorsing those laws as right or good. Similarly, we can say that the law in South Africa requires blacks to use separate public facilities without thereby approving of any part of apartheid. The detached normative statement permits a legal theorist, teacher, or practitioner to say "what the law is" and treat the law as a practical matter without thereby endorsing it as right or good.

Judge Posner's ontological and epistemic skeptical claims are addressed to the same philosophical issues that are treated in the standard literature — in particular, that concerning the existence of legal systems[27] and the identification of the law.[28] A serious philosophical argument in defense of legal skepticism must address the arguments in that corpus of excellent work. However, that scholarly tradition is wholly neglected in *The Jurisprudence of Skepticism.* Posner consequently misses the ways in which law as practical reason contests his legal skepticism.

Judge Posner's new venture into the philosophy of law makes grand claims with profound implications for the law. A less charitable reading than mine might see skepticism about the existence and identification of the law, together with advocacy that a judge act on his own

27. The relevant literature, which must be contested to sustain an ontological claim like Posner's, concerns the conditions of existence for legal systems. Raz explains the philosophical problem as follows:

> What are the criteria for the existence of a legal system? We distinguish between existing legal systems and those which have either ceased to exist (*e.g.,* the Roman legal system) or never have existed at all (*e.g.,* Plato's proposed law for an ideal state). Furthermore, we say that the French legal system exists in France but not in Belgium, and that in Palestine there is now a different legal system from the one which was in force 30 years ago. One of the objects of the theory of legal system is to furnish criteria to determine the truth or falsity of such statements.

J. RAZ, THE CONCEPT OF A LEGAL SYSTEM, *supra* note 24, at 1; *see* R. DWORKIN, *supra* note 20, at 101-04; H.L.A. HART, *supra* note 17, at 107-14, 247-48; H.L.A. HART, *supra* note 26, at 155-62; J. RAZ, *supra* note 4, at 125-29; J. RAZ, *supra* note 11, at 28-33; P. SOPER, A THEORY OF LAW 21, 55-56 (1984). On the existence of norms as such, see, *e.g.,* H.L.A. HART, *supra* note 17, at 54-60; J. RAZ, THE CONCEPT OF A LEGAL SYSTEM, *supra,* at 60-69.

28. The relevant literature, which must be contested to sustain epistemic skepticism about the law, concerns the identity conditions for propositions of law. As Jules Coleman points out, the problem of identity involves both an epistemic and a semantic dimension. Coleman, *Negative and Positive Positivism,* 11 J. LEGAL STUD. 139, 140-41 (1982). In its epistemic dimension, the problem involves the standard which can be used to identify, validate, or discover a community's law. Proposed solutions to the problem include the ideas of a rule of recognition, the commands of a sovereign, showing legal practice in its best light as law, and the like. *See, e.g.,* J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832); R. DWORKIN, TAKING RIGHTS SERIOUSLY 14-130, 291-368 (1978); R. DWORKIN, *supra* note 20, at 176-275; H.L.A. HART, *supra* note 17, at 97-107; H.L.A. HART, *supra* note 26, at 127-61; J. RAZ, *supra* note 11, at 37-102, 146-62; J. RAZ, THE CONCEPT OF A LEGAL SYSTEM, *supra* note 26, *passim*; Lyons, *Principles, Positivism and Legal Theory,* 87 YALE L.J. 415 (1977); Raz, *Authority, Law, and Morality, supra* note 24, at 295; Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute,* 75 MICH. L. REV. 473 (1977).

social vision, as a strategic political move to do away with the traditional "fetters that bind judges"[29] in a fell swoop, clearing the decks for a new law based on principles of wealth maximization (p. 863). On this reading, Judge Posner's assurances amount to a request *to trust him* with the awesome power that our system provides to judges. Suspicion would be discouraged if Posner's arguments satisfied the highest intellectual standards. Among these is the obligation to master the existing literature within the relevant field, exposing one's views to refutation and qualification, and responding with reasons to the arguments with which one differs. Judge Posner's essay, however, invites suspicion as well as criticism.

CONCLUSION

Judge Posner's legal skepticism results from his mistaken starting point in the philosophy of science and his neglect of the main body of relevant philosophical literature. As that literature suggests, a scientific discourse is inappropriate for understanding the nature of law and the judicial process. The law is not a science in that it does not describe or predict social or official behavior. Rather, the law prescribes conduct in order to bring into existence a possible (and preferably desirable) social world. Accordingly, the nature of law and the judicial process are to be understood from the practical point of view in the terms of a practical discourse. Judge Posner's arguments for legal skepticism consequently miss their mark.

29. *See* Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359 (1975).