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Richard A. Posner

The Problematics of Moral and Legal Theory.

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The Problematics of Moral and Legal Theory ('PMLT') has two main aims. The first is negative: to criticize academic moral theorizing, or 'academic moralism' (5), as practiced both by moral philosophers and by those legal scholars attempting to give moral advice to judges. The second aim of PMLT is positive: to defend (or at least assert) a model of judging that Posner terms 'pragmatism' (227). The book is valuable: Whether academic moralism is pointless, and judges should be pragmatists, are matters that (at least on a certain view of academic and judicial motivation) themselves bear academic debate, and PMLT will certainly invigorate that debate. But the particular arguments advanced by Posner are inconclusive and, more damagingly, may be internally inconsistent.

'Academic moralism' is 'applied ethics as formulated by present-day university professors such as Elizabeth Anderson, Ronald Dworkin, John Finnis, Alan Gewirth [and others] ... Some defend a complete moral system, such as utilitarianism or the ethics of Kant, and others specific applications of moral theory, for example to the moral and legal debates over abortion, euthanasia, and surrogate motherhood' (5). In short, it is substantive moral theory as opposed to, say, metaethics or descriptive jurisprudence. PMLT also draws a distinction between academic moralism and 'moral entrepreneurship', which latter activity Posner does not mean to criticize: 'Moral entrepreneurs [such as Jesus, Bentham, or Hitler] ... [use] emotional

appeals that bypass our rational calculating faculty and stir inarticulable feelings of oneness with or separateness from the people ... that are to constitute, or be ejected from, the community that the moral entrepreneur is trying to create' (42).

PMLT's case against academic moralism appears to consist of three main claims: (I) *moral relativism* ('I believe that the criteria for pronouncing a moral claim valid are given by the culture in which the claim is advanced rather than by some transcultural ("universal") source of moral values' [8]); (II) *non-convergence*, i.e., the failure of academic moral philosophers to agree upon universal moral truths ('Every move in normative moral argument can be checked by a countermove' [53]); and (III) *inertness*, i.e., the failure of a given academic moral theory to motivate action by persons who do not already share a pretheoretical commitment to the purported truths of the theory ('The ambition of the academic moralist is to change people's moral beliefs to the end of changing their behavior [but this] ambition is unrealistic' [38]).

Posner's central argument for moral relativism is the historical and cultural contingency of moral beliefs: different societies have held radically different views about matters that academic moralists take to be covered by universal moral laws, such as slavery, abortion, infanticide, and human sacrifice. But PMLT fails to do the metaethical work needed to show that the diversity of moral belief implies relativism; if, for example, universal moral laws are those propositions that all persons under sufficiently idealized conditions would assent to, the fact of actual disagreement (given that actual human deliberation is non-ideal) is consistent with moral universalism. Posner is somewhat more persuasive in arguing for nonconvergence; he identifies continuing disagreements among moral philosophers and shows how some famous philosophical scholarship (such as Judith Thomson's article on abortion) is vulnerable to counterarguments. But the argument is hardly conclusive: first, there could be some matters (not themselves matters of general consensus within our society) on which academic moral philosophers do agree, and Posner's survey of the scholarly terrain is not sufficiently comprehensive or impartial to persuade otherwise; second, academic moralists might not have reached agreement about particular moral assertions, but still have attained some consensus about the viability (internal consistency) of various moral theories; third, academic moralism is still arguably a very young field, given the relative novelty of crucial tools like quantificational logic. Posner is right that 'twenty-five hundred years is a long time to be standing at the starting gate' (83) — that we should not expect eventual convergence given 2500 years of nonconvergence — but if the appropriate time period is, say, 100 years, the hope of some eventual convergence seems less starry-eyed.

PMLT's argument for *inertness* concedes that a person can be motivated to take 'altruistic' actions (31), actions adverse to her self-interest. It also concedes, apparently, that a person can be motivated to take an action which is both inconsistent with her self-interest, and supported by an idiosyncratic

moral view (rather than by the consensus moral views of the society in which the person lives). The existence and motivational force of idiosyncratic moral views is what Posner terms 'pluralism' (28). Why, then, insist that academic moralism lacks motivational force? Part of the argument seems to rest on a collectivist and nonrational view about moral motivation, namely that altruistic actions (even idiosyncratic ones) are supported by the norms of some group to which the actor belongs. Part of the argument is empirical: Posner points to a few studies of the factors that motivate rescuers, such as the German and Polish rescuers of the Jews from the Holocaust. But PMLT concedes that '[s]ystematic evidence concerning the edifying effects of moral philosophy is hard to come by' (69), and if so it is hard to see why Posner should be so confident about inertness. Both the underlying motivational theory, and the specific claim, would not yet seem to meet Posner's own standards for factual (paradigmatically, scientific) truth.

Even leaving this point, there is some question whether Posner's case against academic moralism is self-defeating. If academic moral claims lack motivational force, then how can Posner's (moral?) critique of academic moralism motivate academic philosophers to cease their theorizing? Posner might have a good answer to this objection — he might be able to say that the critique is not a moral critique, or that it is but properly appeals to a culturally relative and consensually accepted moral truth, e.g., the immorality of wasted effort — but the issue merits fuller treatment.

Turning from moral philosophy to the work of judges, PMLT grants the Dworkinian/Razian point that the activity of judges is not wholly constrained by promulgated legal texts. Some 'hard cases,' unresolved by statutes and other legal rules will arise; the judicial task includes both 'applying rules and making rules' (98). How should judges make rules? *Pragmatism* is Posner's answer. 'Pragmatist judges always try to do the best they can do for the present and future, unchecked by any felt *duty* to secure consistency in principle with what other officials have done in the past' (241). What, in particular, are the criteria by which judges should evaluate the goodness and badness of the consequences of their decisions? Posner's answer (like Oliver Wendell Holmes') is apparently this: '[w]hile the political process is ordinarily the right way to go, every once in a while an issue on which public opinion is divided so excites the judge's moral emotions that he simply cannot stomach the political resolution that has been challenged on constitutional grounds' (142). In short, pragmatism is a consequentialist and (within consequentialism) a democratic account of adjudicative rule-making.

Note that pragmatism does not follow from Posner's case against academic moralism. These non-pragmatic views of how judges should 'make rules' are equally consistent with the claimed absence of universal moral laws, the claimed nonconvergence of academic moral discourse, and its claimed motivational inertness: (1) *free-form judging* (the judge should make whatever rules he thinks are morally correct, including nonconsequentially justified rules if he is a nonconsequentialist); and (2) *nondemocratic consequentialism* (the judge should make whatever rules he thinks are consequentially justifi-

fied in light of the moral goals he accepts, without reference to the goals that the democratic process has adopted or would adopt). PMLT does not attempt to make a substantial argument for pragmatism as against free-form judging or nondemocratic consequentialism, nor is it clear how Posner could do so consistent with his own views about academic moralism.

The conflict, here, is with nonconvergence and inertness rather than relativism. Posner could say — and indeed does say — that pragmatism is true for us, rather than being universally true. 'I would not like to leave the impression that I think pragmatic adjudication is the right way for all courts to go; to think it is would be to fall into the fallacy of jurisprudential universalizing' (264). But no actual consensus in favor of pragmatism exists; at best it is true 'for Americans' in the sense that it follows from other culturally-relative moral laws and values that *are* consensually accepted. In short, Posner's argument for pragmatism — if he is presenting one — would have to be that pragmatism rather than free-form judging or nondemocratic consequentialism is the best interpretation of American political culture. But why think that the community of academic (legal) scholars will converge on that claim; or that academic scholarship on the issue (convergent or not) will motivate nonpragmatist judges?

Perhaps the answer is that PMLT (in its positive portion, its defense of pragmatism) is not a work of academic scholarship. Rather, it is an attempt at moral entrepreneurship on Posner's part — an attempt to motivate his fellow judges to become pragmatists, not through rational argument but through stirring and emotionally appealing rhetoric (as in the rhetorically powerful statement, against nondemocratic views of adjudication, that 'sophisticates aren't always right, and judges in a democratic society must accord considerable respect to the deeply held beliefs and preferences of the democratic majority when making new law' [251]). Posner could deflect objections about the incompetence of scholars as moral entrepreneurs by pointing to his special prestige as a prominent judge and public intellectual. It is far from clear that Posner would actually accept this characterization of PMLT — at one point he seemingly urges judges to *ignore* moral entrepreneurs (141) — but it is the only characterization that saves the case for pragmatism from internal inconsistency. Which leaves a final question: Taken as an attempt at moral entrepreneurship, is PMLT successful? We'll have to wait and see, since the book was only just published; perhaps hitherto nonpragmatist judges will be moved by Posner's prose to become more consequentialist and democratic in their judging. For myself, however, I was left quite cold.

Matthew D. Adler

(School of Law)

University of Pennsylvania