

REDUCTION AND BETRAYAL

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REDUCTION AND BETRAYAL

by Peter Berkowitz

The Problematics of Moral and Legal Theory
by Richard A. Posner
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I.

Richard posner, Chief Judge of the U. S. Court of Appeals for the Seventh Circuit and a senior lecturer at the University of Chicago Law School, is the author of over 1,500 judicial opinions, and the author, coauthor, or editor of more than two dozen books on myriad facets of the law. It is not only this staggering output over the last thirty years or so that accounts for his reputation as perhaps the leading legal thinker of his generation. Posner's preeminence also stems from his penchant, primarily in his scholarly writings, for bluntly repudiating conventional wisdom, for calmly reaching counterintuitive conclusions about law and public policy, and--what is especially galling to many of his many critics--for doing all this with a constantly illuminating intelligence, with plain-spoken and pointed prose, and with a reasoned respect for the rule of law and the institutions and the individuals that secure it.

Posner is above all associated with the "law and economics" movement. Its origins are to be found in certain seminal articles that the economist Ronald Coase and the legal scholar (and now federal judge) Guido Calabresi published in the early 1960s; but no work contributed more to its rapid ascent than Posner's *Economic Analysis of Law*, which appeared in 1973. The premise of "law and economics," as Posner puts it, is that men and women "act as rational maximizers of their satisfactions." It holds that much of the actual workings of our legal system, when rightly analyzed, can be seen to be driven by a concern with economic efficiency. It seeks to demonstrate that attention to questions of efficiency yields unexpected but valuable suggestions for the reform of legislation and adjudication. Recently it has come to emphasize the importance of empirical research and quantitative analysis to the

understanding of how law and legal institutions actually operate. And it contends that efficient results are generally produced by allowing individuals to decide for themselves as much as possible what they want and how much they will pay for it.

Thanks to the influence of the "law and economics" movement, it is impermissible today for legal scholars to assume that new legislation is sound merely because it reflects good intentions, or that a judicial decision is rightly reasoned so long as it has been transparently derived from precedent and the logic of inherited case law. In explaining why it is important to examine the actual consequences flowing from every public policy, statute, and judicial holding, and the variety of costs--sometimes unintended and perverse--of their implementation, "law and economics" has made a lasting contribution.

But the contribution has not come without controversy, or cost. For the practitioners of the economic analysis of the law tend to be crusaders. And the crusading spirit threatens the scholarly spirit. The one true method that inspires the crusaders has a tendency to constrict the imaginative sympathies and to sap the skeptical energies that otherwise bring into focus the full range of experiences and imperatives that organize--and disorganize--human affairs. The crusaders do not believe only in economics; they believe also in economicism. It is not enough for them to insist that economic analysis is a valuable or even an indispensable approach to the problems of law. They aspire to conquer the whole realm of social inquiry with their axioms, to convert all who study human affairs to the authentic form of knowledge.

It is certainly true that at times Posner and his scholarly allies acknowledge limits to what can be learned from the economic analysis of law. In their more guarded moments, they say that economics can show how to make the legal system more efficient, but not whether efficiency should triumph over other principles and goods. "What economists can say, which is a lot but not everything, is that if a society values prosperity (or freedom, or equality), here are policies that will conduce to the goal and here are the costs associated with each. They cannot take the final step and say that society ought to aim at growth, equality, happiness, survival, conquest, stasis, social justice, or anything else." In their more enthusiastic moods, however, Posner and some of his followers do indeed write as if efficiency is all, because all principles and all goods, including justice, are reducible to it.

What is so impressive about Posner--and so exasperating, and so exhausting-- is that he does not merely assert the sovereignty of economics. In his many writings he has tried to explain virtually the entire known continent of legal doctrine and case law in economic terms. So, for example, racial discrimination is bad because it is socially inefficient, and laws forbidding it are best understood as rational expressions of the desire to maximize individual satisfaction by preserving peaceful social relations. Our decisions about sex should be seen as based on the "best estimate of the nature, magnitude, and probability of the consequences of the alternatives among which one can choose in an effort to maximize one's utility." Baby markets ought to be established because they would be the most effective way to distribute infants to those best able to care for them. And so on. Once you get the hang of it, you can

redescribe all human affairs in economic terms, and interpret all moral and political dilemmas as market problems. The really urgent question is whether something precious gets lost in the re- description.

Advocates of the economic approach to law will brush off such fears, insisting that economics is only a tool or a model. The purpose of its simplifying assumptions and its theoretical analyses, they say, is not to portray the world as it really is or to tell people how they ought to live, but to provide useful predictions about how individuals can satisfy their wants, whatever they happen to be. And the time is ripe to ground law in this kind of analysis, they might add, because ordinary citizens increasingly concur with social scientists and academic philosophers that reason is powerless to rank our desires or to instruct us as to which wants we should want. In the circumstances, economic analysis can seem like an excellent means for analyzing social life and urging reforms without invoking contentious moral criteria. As the economists say, economics is value-neutral.

Yet the costs, as economists also say, include those that are unintended. Leaping into the void created by the contemporary estrangement from philosophical reason, economic analysis has tended to sanction the void and to reinforce the belief that human beings are nothing more than complicated calculating machines. Such judgments about the moral life may not be part of the economist's mandate, but they do seem to be insinuated by the economist's method. Like other professions, economics has its occupational hazards: the daily practice of making simplifying assumptions about human affairs heightens the likelihood of thinking and acting and inducing others to think and act as if human beings were precisely this simple. Perhaps this cost is avoidable. Just as coal mining does not invariably cause lung cancer, so too economic analysis, which invites us to reconceive every act of courage, generosity, or love as a reflection of an atypical individual utility function, need not coarsen habits of thought and wither the moral imagination. But it helps.

II.

Over the years, Posner has replied in a variety of ways to anxieties about the moral implications of the economic approach, but essentially he has stuck to his guns, pursuing the quest that he launched a quarter of a century ago for a "utilitarian theory of justice"--for a theory that explains the whole of morality in terms of simple pleasures and pains, and also in terms of the rules of social cooperation for maximizing the former and minimizing the latter. Of late, however, Posner has adopted a new approach to vindicating economic analysis. Instead of concentrating on showing the sweep and the power of economics, he has turned to exposing what he believes to be the poverty of the claims to guide law by other disciplines. Economics may have its flaws, but they are as nothing, in Posner's view, compared to the deficiencies that disfigure the pretenders to the throne.

In the contest to provide advice to lawmakers and judges, the most influential rival to "law and economics" has been analytic moral philosophy, particularly the strain that takes its inspiration from Kant. These professors typically begin by positing abstract premises about the self and society. From these premises, which they treat either as self-evident or as so widespread and uncontroversial as to be inescapable for reasonable persons, they seek to derive individual rights and moral duties as well as the proper scope of state action. Occasionally, as in the case of Ronald Dworkin, they claim to be able to infer the substance of American constitutional law.

In the fall of 1997, Posner launched an all-out attack on analytic moral philosophy. The attack was made at Harvard Law School, in the Oliver Wendell Holmes Lectures. Posner, who is an avid admirer of Holmes, made much of the date of his assault. For a hundred years earlier, across the Charles River at Boston University Law School, Holmes delivered a lecture that was to become the most cited law journal article of all time. In "The Path of the Law," which Posner with justice calls Holmes's "greatest essay," Holmes challenged the orthodoxy of his day. In its most extreme form, the orthodoxy proclaimed that law was a deductive system of fundamental moral propositions. In fact, said Holmes, law and morality represent distinct domains that on occasion may overlap but in reality have different origins and purposes.

In order to protect the integrity of each, Holmes continued, they must be kept analytically distinct. Whereas morality concerns conscience and universal principle, law is the study "of what courts will do in fact, and nothing more pretentious." In reaching judgments, what courts will do in fact is to engage, often surreptitiously, in a process of "weighing considerations of social advantage." Holmes thought that the surreptitiousness was a mystification. Courts should do their weighing of social advantage right out in the open; and the science that enabled courts to weigh social advantage accurately, Holmes casually announced, was economics.

For Posner, these observations are the beginning of wisdom about the law. In his Holmes Lectures, he wasted no time in sallying forth against the pretensions of academic moral philosophy to guide law or life. Derisively branding academic moral philosophy "academic moralism," Posner declared it "incapable of contributing significantly to the resolution of moral or legal issues or to the improvement of personal behavior." And turning the conventional wisdom on its head, Posner argued that a far more fruitful approach to the study of morality would be the approach exemplified by the unsentimental Nietzsche, who searched for the actual or effective amoral intentions and even immoral intentions that undergird morality.

Posner offered several reasons for the parochialism and the impotence of academic moral philosophy. First, and rather brusquely, he asserted that there are no transcultural or transcendent moral truths, and therefore no solid basis from which morals could be derived. Second, he claimed that the realm of morality is much narrower than academic moral philosophers suppose: many principles that they put forward as universal and moral are

better understood as locally generated, contingent rules of social cooperation. Third, moral philosophy as it is practiced in the academy is, in his view, incapable of inspiring human behavior. Its abstract and technical arguments do not reach our motivations and cannot overcome our narrow self-interest or our deep-seated moral intuitions; the sharp and persistent disagreements among academic moral philosophers--from conservative natural law theorists to radical social democrats--furnish effective rationalizations for any and all preferences or principles; and the careerism fostered by the professionalization of philosophy in the academy is incompatible with the freedom of spirit that is necessary to produce illumination and inspiration in the realm of ethics.

Once one overcomes the mystifications promulgated by academic moral theory and understands that morality is best conceived of functionally, in the spirit of evolutionary biology, as the set of general rules of conduct that experience and reason recommend as conducive to self-preservation and the satisfaction of desire, one can see, or so Posner argued, that legal reasoning can flourish without recourse to moral theory. To prove his point, Posner examined a variety of cases including euthanasia, abortion, racial segregation, and affirmative action. Regarding each of these cases, he argued that where the legal materials fall short of providing a clear answer to a concrete controversy, courts have not availed themselves, and in reaching their decisions have had no need to avail themselves, of moral philosophy.

Posner's lectures were published in 1998 in the *Harvard Law Review* along with the animadversions of distinguished critics--Ronald Dworkin, Anthony T. Kronman, Charles Fried, John T. Noonan, and Martha C. Nussbaum. His critics differed among themselves on the success of his criticism of academic moral philosophy, but for the most part they found the spirit of the lectures disagreeable, and they expressed their disapproval in dour tones. Dworkin could scarcely contain his indignation, conveyed in the insulting title of his long response: "Darwin's New Bulldog." Fried frowned at Posner's "display of dyspepsia" and "diatribe against moral and political philosophy." Kronman solemnly declared the analysis "depressing," awash in "cynicism," and "despairing from start to finish." Nussbaum grimly proclaimed that Posner's one-sided and relentless criticism of "reason's pretensions," and his defense of "an implausibly mechanistic picture of human personality," made his lectures an "occasion for sadness." Noonan was the exception among the critics: he criticized Posner for putting too much faith in science and the theory of evolution, but he found Posner's discussion "candid" and "courageous," and his indictment of academic moral philosophy marked by "comprehensiveness and clarity."

Whatever their differences about the status of academic moral philosophy, the critics were united in believing that philosophical reflection about morality, or the reasoned quest for knowledge about enduring standards of justice, survived Posner's broadsides. Indeed, the critics agreed on three central notions: that philosophical reflection about morality, rightly

understood, is an inherent good; that it is inescapable in practical life and cannot be altogether banished from legal thinking; and that the rejection of morality's claims to universality is itself a moral position, and a decidedly unattractive one.

But Posner did not give an inch. He seemed invigorated by his exposure to "the fires of hostile criticism." In responding to Kronman's charge that his analysis was "permeated by pessimism" and "despairing from start to finish," he was almost impish:

Dworkin asks us to imagine that there are many people who, though not philosophers or even intellectuals, have "a yearning for ethical and moral integrity" or "want a vision of how to live." Such people, he claims, "might well ask themselves, for example, whether their views about abortion presuppose some more general position about the connection between sentience and interests or rights." The picture is of people standing around waiting to connect with Dworkin, who speaks in just those lofty terms. I don't think there are many people like that; very few people outside the academy talk in the highfalutin' style of academic moralism or can understand arguments couched in that style; how many even know what "sentience" means?

Needless to say, barbs do not refute arguments; but Posner's retort to Dworkin does insinuate a fine doubt about the relation between academic moral philosophy and the people whom such philosophy is meant to enlighten.

In fact, though he was not particularly impressed by the possibility, Posner did not rule out that great works of moral philosophy might edify and inspire. More modestly--and more offensively, to his interlocutors--he adamantly reaffirmed in his reply that the work produced by professional philosophers could not so edify and so inspire. He drew additional support for his assessment of the feebleness of academic moral philosophy from the very responses of his critics: in seeking to illustrate the power of moral philosophy to influence politics and guide lives, his critics could do no better than appeal to Aristotle, Cicero, Rousseau, Burke, or Marx, long-dead philosophers who, in any case, as Posner relished pointing out, were not professors.

Posner continued to insist uncompromisingly that law and morals are distinct, and that when it comes to hard cases judges need not have recourse to academic moral theory. Only one of his critics, Posner noted, even attempted to show how moral reasoning influenced judicial decisions. That critic was Dworkin, who argued that in *Brown v. Board of Education* the Supreme Court found an anti-caste principle in the Equal Protection Clause of the Fourteenth Amendment that prohibited laws that discriminated on the basis of race, because they depended on the assumption that some individuals are inferior and therefore less deserving of respect from the law than others. To this, Posner replied that one does not need academic moral philosophy to find the anti-caste principle embodied in the Equal Protection Clause or to apply it to the circumstances of *Brown*. Moreover, the Court in *Brown*

invalidated the principle of separate but equal in education on empirical grounds, contending that by injuring their self-esteem and diminishing the value of their education, segregation in the schools deprived black children of the equal protection of the laws.

Nor did it take sophisticated moral theorizing, Posner continued, to extend the holding in *Brown*, which concerned education, to the elimination of racial segregation in other domains. Whatever might have been true eighty-five years earlier, when the Reconstruction Amendments were drafted and ratified, by the 1950s the social meaning of legalized segregation--the stigmatization and the subordination of blacks--had come to be well understood by everybody. It did not take a professor to see that the doctrine of separate but equal was inconsistent with the plain meaning of the Fourteenth Amendment's guarantee of the equal protection of the law, and that it was rightly, without appeal to moral theory, struck down by the Court.

III.

In his always stimulating, frequently brilliant, occasionally laugh-out-loud funny, and at a few crucial junctures resolutely obtuse new book, Posner revises and elaborates the arguments of his *Holmes Lectures*. His theme remains "the demystification of law and in particular the freeing of it from moral theory, a great mystifier," but he goes beyond his original discussion in two important ways. First, he elaborates at length the sense in which he considers himself a pragmatist, devoted to the principle that the value, the meaning, and the truth of ideas and acts should be judged in terms of their practical consequences, and not derived from formal theories or abstract speculation; and second, he declares that it is sociology that is the science most useful to the law.

According to Posner, pragmatism--as it was developed by Charles Sanders Peirce, William James, and John Dewey, and is today most closely associated with the postmodern liberalism of Richard Rorty--throws into sharp relief the impotence of academic moral philosophy, and also provides the orientation that ought to guide judicial reasoning in cases where traditional legal materials do not yield determinate results. As for sociology, Posner argues that it illuminates the norms and the shared meanings on which many judicial decisions turn. He demonstrates the further utility of sociology by showing how the universal trend toward professionalization that was detected by Weber--the claim of an occupation to be based on specialized, socially valuable, knowledge-based skills that are acquired through a long and well-regulated education or apprenticeship--can account for both the deterioration of moral philosophy in the academy and the steady improvements in the quality of the bar and the bench.

One should not be misled, however, by Posner's affirmation of pragmatism or by his new enthusiasm for sociology. His interpretation of morality has not changed. As always, he tends to reduce ethics to the non-moral and the subrational. As always, he strives to vindicate the

economic analysis of law: his pragmatism affirms economics as the master science, and his sociology provides some of the factual knowledge that economics authoritatively interprets.

According to Posner, the alternatives presented by pragmatism and moral philosophy represent the "starkest choice." Whereas moral philosophy promises to derive from abstract theory the right answers to concrete moral dilemmas, pragmatism is a "method, approach, or attitude." It is a manner of studying the world, not a body of dogmas or a problem-solving algorithm. It is what judges should turn to, or really what they should do, when they confront difficult questions of law. Posner's "type of pragmatist" believes that

is a sense that takes in the analytic methods, empirical techniques, and findings of the social sciences (including history).

There is much to admire in such a commonsensical view of the judge's task. Indeed, it would be hard to quarrel with this notion of practical reason in robes, were it not for the paradoxical antithesis between pragmatism and moral philosophy on which Posner is determined to base it. For built into common sense, and embedded in our personal and professional values, partially constituting intuition and opinion, including public opinion, are convictions about virtue, justice, and the good. And at least some of our enduring convictions suggest that virtue is not only useful but its own reward; and that the demands of justice transcend our local beliefs and practices; and that the good is a proper object of aspiration for all who share our humanity. To insist that systematic empirical inquiry on the one hand, and reflection on virtue, justice, and the human good on the other hand, represent the "starkest choice"--indeed, to believe that they represent a choice at all, rather than integral elements of a larger, more complex, and elusive whole--is itself a choice more dogmatic than pragmatic.

Contrary to the pragmatist's principle that theory must submit to experience, Posner's stark choice owes more to a rigid theory about the world than an immersion in the density of experience. Consider his treatment of altruism, which is so marred by faulty thinking that it is hard to believe that it was generated by the same man who effortlessly roots out and exposes the sophistries of other scholars. He begins reasonably enough, declaring that "a good deal of moral and immoral behavior is explicable without regard to moral categories." But with great alacrity, and with next to no argument, he jumps from this reasonable proposition to the highly contentious one that altruism, like all moral behavior, ought to be explained *entirely* without regard to morality. That is a vaster, and vastly more dubious, claim.

A part of the problem lies in the distortions of ordinary human experience that follow from Posner's account. Thus he concedes that altruism, or

helping behavior not motivated by the promise of a reward or the threat of a punishment ... is something that can be and often is motivated by love or by some dilute form of it such as compassion or sympathy. And love and its cognates are not moral sentiments. The injunction to love thy neighbor is an appeal to duty, not to emotion.

But surely such a concession is based on a false dichotomy between love and morality. Love is not love if it knows no duties to the beloved.

Another part of the problem springs from Posner's skewed presentation of the claims of moral philosophy. He seems to believe that by observing the considerable limits of moral argument to change opinion, he has scored big against the claims of moral philosophy to provide authoritative standards that can guide human life: "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, though not because it is 'right' or 'wrong.'" One hardly knows where to begin in responding to the many misleading implications packed into this short statement.

For a start, Posner confuses rhetoric with reason, as if the rationality of a principle were measured by the number of people who can be brought to affirm it or by the manner in which the majority of individuals come to hold it. Posner also denies categorically what his argument allows him at most to conclude generally and for the most part. The fact that many people cannot be moved by reason to change their moral beliefs does not mean that no individuals can be moved by the force of the better argument; and in no way does it imply that reason is unable to discern right from wrong. Moreover, and once again simplifying the experiences that he is supposedly explaining, Posner overlooks that one can take pride in doing the right thing for the right reasons, that comfort and convenience may be morally relevant, that advantage can be understood as what enables one to perform one's duties reliably and well.

Yet the core of the problem with Posner's effort to reinterpret altruism and the whole of the moral life in non-moral terms is that it is based on an appeal to evolutionary biology--an appeal that is not only sketchy and difficult to falsify, but also, despite Posner's avowed pragmatism, theory-driven in the extreme:

Or voting, giving to charities, and refraining from littering may illustrate other instincts, or they may illustrate no instincts at all. (With the exception of "continuous," the italics in that peculiar paragraph are mine.)

Whatever the case may be concerning Posner's hypotheses about the prehistory of our instinctual preferences, and however he might justify the odd anthropomorphism that allows him to talk of the capacity for deception on the part of our genes, in these sweeping

speculations it is certainly not the voice of experience speaking. Indeed, it is not even science holding forth. Posner's invocation of evolutionary biology belongs to a grand and (as Posner's own language indicates) highly conjectural natural history of mankind.

It is important to be clear about the actual structure of Posner's argument. He does not turn to evolutionary biology as a result of conclusions won from a careful inspection of the claims of all, or some, moral philosophy. It is instead his assumption of the truth of evolutionary biology that impels him, before examination, to reject out of hand every claim ever made on behalf of universal moral principles. Such rejectionism is manifestly unreasonable in that it invests hypotheses with the aura of certainties and treats merely plausible inferences from these questionable starting points as if they were necessary and definitive explanations of human conduct. Posner is entitled, of course, to his flights of speculation. But it is illicit and unacceptable for him to treat these flights as if they provided a granite foundation that reasonably invalidates all other forms of interpretation of the human condition.

IV.

When posner keeps his eyes trained on the pretensions of academic moral philosophy, he proves himself a thinker of an altogether higher order. Indeed, the value of Posner's pragmatism--as well as the dogmatism that drags it down--can be observed in his critical discussion of an influential article by the moral philosopher Judith Jarvis Thomson. In "A Defense of Abortion," which appeared in 1971, Thomson argues by means of an analogy that has become famous among specialists in ethics and moral philosophy. A woman forced to carry her fetus to term, Thomson contends, is like a person involuntarily connected by tubes to a famous violinist for nine months. If the tubes connecting the person and the violinist, who are strangers to each other, are removed, the violinist will die of kidney disease. Thomson argues that though separation will cause the violinist's death, the law, which does not recognize a duty to rescue, would not force the person, or the involuntary rescuer, to remain connected to the violinist. So too, Thomson reasons, the law ought not to compel the mother to remain connected to her fetus for nine months, even if the fetus is regarded as a human being.

Academic moral philosophers have found Thomson's analogy to be decisive. In a recent book, for example, the political theorists Dennis Thompson and Amy Gutmann have declared that it "should convince even people who perceive the fetus to be a full-fledged person that to permit abortion is not obviously wrong in the case of a woman who becomes pregnant through no fault of her own (for example, by rape)." But Posner is not impressed:

And if these swift and sharp appeals to common sense and basic considerations of law were not enough to eviscerate Thomson's analogy, Posner identifies a final, fatal flaw: that the analogy obscures the difference between letting die, which is what the involuntary rescuer

does when he removes the tubes that connect him to the violinist, and killing, which, as Posner's precise technical discussion makes clear, is what a doctor does in the various medical procedures for aborting a fetus.

In view of the stunning inadequacies of the reasoning that underlies Thomson's analogy, the question becomes why academic moral philosophers, whose professional responsibility is to reason rigorously about right and wrong, have overwhelmingly embraced it as a justification for a woman's right to abortion. Posner's unkind answer is that academic moral philosophers are mental provincials, rationalizers of the moral intuitions of a narrow community of like-minded secular intellectuals. They are all but unable to conceive that any morally respectable person could wish to prevent a woman from aborting a child that she did not want; but, as Posner dryly observes, "an appreciable number of people, not certifiably insane, feel differently, and moral philosophy has no resources for resolving the disagreement."

Why, in Posner's view, is academic moral philosophy of such little help? In part, of course, because of what he takes to be the inherent weakness of all moral philosophy. Yet this is not the end of the matter. Posner argues that the moral philosophy made in the academy is particularly feeble because of the pressures produced by, and the perks that accompany, the professionalization of academic life. The publishing and the pandering often necessary to acquire tenure; the comfort, the insularity, and the lack of accountability that routinely accompany tenure; the narrowness of specialization and the cultivation of technical jargon that frequently catapult one to the top of the discipline--all these realities conspire to produce writings that are hermetically sealed to the general reader and inattentive to the passions and interests of the ordinary citizen.

But Posner is also concerned with the inner effect that moral philosophy has on those who make a profession of it. It is a caricature, to be sure, but Posner's hilariously taxonomic summary of the morality of liberal academics requires one to ponder seriously whether self-righteousness, credulity, and conformism constitute the *deformation professionnelle* of the academic moralist:

The moral codes of academic philosophers tend in fact to be at once nonstandard and hackneyed, predictable, and seemingly unexamined. The liberals favor abortion rights a outrance, women's rights, greater equality of incomes, and a mild socialism. They disapproved of Soviet-style communism, but very quietly, with maybe a soft spot for East Germany, or Cuba, or Yugoslavia--or even Mao's China. They are internationalists, multiculturalists, environmentalists, sometimes vegetarians. They are against capital punishment, and so it might be said of them unkindly that they pity murderers (and penguins, and sea otters, and harp seals) more than fetuses. They support the theory of evolution when the question is whether creationism should be taught, but reject it when the question is whether there is a biological basis for any of the differences in attitude or behavior between men and women. They want to regulate cigarette smoking out of existence but to permit the smoking of marijuana. They argue for abortion by analogizing mother and fetus to strangers (Thomson's analogy) but against surrogate motherhood by emphasizing the bond between mother and newborn. They are for the strongest possible public measures of safety and health but against requiring people who are infected by the AIDS virus to disclose the condition to people whom they might infect. They believe that people are prone to wishful thinking, cognitive dissonance, rationalization, hyperbolic discounting (shortsightedness), false consciousness, and all sorts of other cognitive disabilities that make market choices and folk beliefs lack authenticity; but they do not consider the effect these disabilities are likely to have on the power of academically directed moral deliberation to engender moral improvement. They are secular (or deist) and therefore consider sexual practices morally indifferent and fear the Religious Right. They are politically correct, and they vote Democratic.

Evolutionary biology hypothesizes that altruism derives from the evolutionary imperative of inclusive fitness--the drive to maximize the number of copies of one's genes by maximizing the number of creatures carrying them weighted by the closeness of the relation. The inclusive fitness of a social animal like man is greatly increased by his having a proclivity to help his relatives, so it is plausible that this proclivity evolved as an adaptive mechanism. In the prehistoric era in which our instinctual preferences were formed, people probably lived in small, isolated bands, so most of the people with whom they dealt were people with whom they had continuous dealings. It may not have been essential, therefore, to be able to discriminate between intimates, with whom one had relations based on trust as a result of blood ties or reciprocal dealings, and those others-- call them "strangers"--with whom one did not have repeated face-to-face interactions. Conditions today are different. We interact a great deal with strangers. But the genes are easily fooled when confronted with conditions to which man did not have a chance to adapt biologically because they did not exist in prehistoric times. That is why a pornographic photograph can arouse a person sexually or a violent movie frighten the audience, why people are more frightened of spiders than of cars, and why men do not clamor to be allowed to donate to sperm banks. Voting, giving to charities, and refraining from littering, in circumstances in which there is neither visible reward for these cooperative behaviors nor visible sanctions for defection, may illustrate an instinctual, and as it were biologically mistaken, generalization of cooperation from small-group interactions, in which altruism is rewarded (and thus reciprocal) and failures to reciprocate punished, to large-group interactions in which the prospects of reward and punishment are so slight that cooperation ceases to be rational.

I would not be surprised to be described as a complacent optimist, a Pollyanna who revels in the fall of communism, the discomfiture of collectivists, the worldwide triumph (however brief it may prove to be) of free markets and commercial values, and the wealth, freedom, diversity, opportunity, and dazzling technological advances powered by that triumph. The pessimist is Kronman, because he believes that moral philosophy, which he agrees is in a sorry state, is essential to civilization. I do not believe that.

I find it difficult, despite the fame of Thomson's analogy in moral- philosophy circles, to take this "reasoning" seriously. To begin with, we can have no settled or reliable intuitions concerning her hypothetical case, because it is far outside our experience; it belongs to science fiction. In the second place, a woman normally is not immobilized by being pregnant. Third, the fetus is not a "stranger" to its mother in the ordinary sense of the word, which is the sense it bears in the analogy. The law punishes the neglect of a child by its parents, even if the child was the result of a rape; and Thomson does not suggest that she disapproves of such punishment or thinks it anomalous that the parents do not have the same legal duties to other people's children as they do to their own. Fourth, it is by no means obvious that the law should not impose a general duty to rescue strangers when the rescue can be effected without mortal peril to the rescuer. The laws of many European countries and now of several U.S. states do impose such duties; the objections to them are of a practical character unrelated to the morality of refusing to be a good Samaritan.

she has in fact no prejudices whatever, no obstructive dogmas, no rigid canons of what shall count as proof. She is completely genial. She will entertain any hypothesis, she will consider any evidence. It follows that in the religious field she is at a great advantage both over positivistic empiricism, with its antitheological bias, and over religious rationalism, with its exclusive interest in the remote, the noble, the simple, and the abstract in the way of conception.

the judge or other legal decision-maker thrust into the open area, the area where the conventional sources of guidance run out (such sources as previously decided cases and clear statutory or constitutional texts), can do no better than to rely on notions of policy, common sense, personal and professional values, and intuition and opinion, including informed or crystallized public opinion. Pragmatists also believe, however, that intuition and opinion and the rest can sometimes be educated by immersion in " the facts." I have put this term between quotation marks to signal that it is to bear a wider meaning than in the law of evidence. It

No wonder Posner concludes that the effective function of academic moral philosophy is to forge "a community of believers" by fortifying the convictions of the faithful.

The most troubling, and the most philosophically significant, of Posner's criticisms of academic moral philosophy is that expertise in the moral- reasoning profession may actually make one less moral. Posner cites the work of Samuel and Pearl Oliner, whose book, *The Altruistic Personality: Rescuers of Jews in Nazi Europe* (1988), indicates that education (and religion) had no statistically significant effect on the propensity of Germans and Poles during

World War II to rescue Jews, and the work of Michael Gross, whose *Ethics and Activism: The Theory and Practice of Political Morality* (1997) suggests that in Nazi Germany the more education one had, the less likely one was to become a rescuer.

Posner has an explanation for these disturbing findings. Interestingly, it resembles a criticism of sophistication and learning that Rousseau memorably advanced, but with a moral intention very different from Posner's, in the *Discourse on the Arts and Sciences*. Expertise in the art of moral reasoning, Posner also argues, furnishes an argument for every inclination and occasion; it enables you to devise elegant justifications for evading your obligations and it enhances your ability to gracefully reconceive your desires as your rights and other people's responsibilities. Yet Posner and Rousseau part ways when it comes to the purpose of criticizing expertise in moral reasoning. Whereas Rousseau's aim was to protect the morality "engraved in all hearts" from the pretensions of sophisticated self-deceivers and learned hypocrites, Posner's aim seems to be to refute the claims of the professors as part of a larger effort to search out and destroy any and all pretensions on the part of conscience or reason to declare what is just and good.

While such a view of morality may not be good for the moral philosophers, Posner certainly thinks that such clarity about morality is good for law. In contrast to its effect on moral philosophy, professionalization, according to Posner, has had by and large a beneficial impact on the bar and the bench. By demystifying law, by making adjudication more uniform, and by compelling judges to recognize the true grounds of legal reasoning, professionalization has created an opportunity to ground law in science and empirical inquiry, particularly in such successful disciplines as economics, psychology, and evolutionary biology. In a highly informative discussion of the transformation in recent decades of administrative law, Posner demonstrates how public choice theory--the application of the general principles of economics to politics--has improved regulation of hazards to safety, health, and the environment.

What is needed now, Posner concludes after a powerful analysis of pragmatic adjudication in a range of fields of law, is for law professors to turn away from their fruitless dalliance with moral theory and to make themselves useful to judges and to society as a whole by collecting and analyzing the data that can provide a firm base of knowledge--the lack of which, in Posner's view, is what makes hard cases hard. Genuine professionalism would mean "overcoming law," or replacing the practice we now know as law with a more rational and effective form of social control.

V.

Posner makes a strong case for reconceiving law as social science or policy science; and his polemic against academic moral philosophy provides many guilty pleasures. Unfortunately, while both parts of his argument can be detached from Posner's sovereign and highly questionable view that morality is best understood in non-moral and subrational terms, each

part betrays a tendency to overreach and to ratify it. And this larger failing suggests that an analysis of the institutional possibilities and constraints on courts, however persuasively it may counsel against welcoming academic moral philosophy into the courtrooms and the judges' chambers of America, can itself yield little insight into the nature of morality.

Moreover, demonstrating that academic moral philosophers often delude themselves about their capacity to solve moral dilemmas, and that they exhibit a habit of dressing up their heartfelt convictions as necessary truths of a universalizing moral reason, will not suffice as a reason to desist from philosophical reflection on morality. Neither is moral philosophy retired by the perfectly unimpeachable observation that self-knowledge is scarce, and that hypocrisy is rampant, and that conduct that is justified in moral terms can in principle always be redescribed and often compellingly explained in non-moral terms. Experience itself--the god of the pragmatists-- continually compels us to search for a justice that goes beyond our will and transcends the particular values of our community. The voice of this experience stubbornly refuses to be silenced.

All this has a bearing on Posner's criticism of moral philosophy and on his proposals for the reform of law, because the path of the law and the path of justice are intertwined in such a way that disrespecting the claims of one impairs the integrity of both. The incorrigibility of justice's claims can be seen by returning to Posner's quarrel with Thomson's abortion analogy. By his own lights, his criticism was not intended to destroy the case for the legal protection of abortion. Indeed, by dispassionately showing that what is at stake in abortion is the killing of an unborn child, and that there are powerful arguments both for protecting the lives of unborn children and for protecting the right of women to control their own bodies, and that science is powerless on its own terms to decide whether abortion should be protected or prohibited, Posner's analysis points to the inescapability of moral judgment, if not for courts then at least for those who (apparently like Posner) have an interest in understanding.

Of course one could go about life in an unthinking daze. And in the case of abortion, the courts may act properly when they avoid reaching a decision on moral grounds. Owing to technological developments and changing mores, however, pregnant women--along with the fathers of their unborn children, their parents and friends, and indeed their fellow citizens-- frequently face a choice that implicates elemental beliefs about duty, justice, and the sanctity of human life. For the many people who cannot help but make a choice, abortion poses the sort of devastating question, the sort of fundamental or "foundationalist" question, that is occasionally confronted in moral and political life; that causes intuitions to run aground, and convictions to buckle under the burden, and principles to tire and to falter.

One response is to ignore such questions. Another response is to dismiss them, in the haughty manner of many contemporary thinkers, by claiming that they are poorly formed or uninteresting. But these responses, one would think, are not available to the true pragmatist. For the questions surrounding abortion are not placed there by idle intellectuals spinning

sophistries. They are thrust upon us by the rude realities of everyday life. They cry out for clarification and reflection, though life, in its impatient rush, often demands immediate answers, however inadequate they may be. To ride roughshod over the questions about duty, justice, and the sanctity of human life that inhere in the debate over abortion is a betrayal of pragmatism's great principle, which is that our actions and ideas must give voice to--not suppress or distort--the intricacies of our experience.

It is a tribute to the natural eclecticism of his mind that Posner believes that he has found an ally for his type of pragmatism in Nietzsche. The problem is that Posner takes from Nietzsche a lesson about morality and philosophy diametrically opposed to the lesson that the great German immoralist intended to teach. Contrary to Posner's reading, Nietzsche demonstrates that what makes the quarrel with academic moral philosophy truly urgent is the need to defend philosophy's good name, its exalted and indispensable task.

Certainly Nietzsche detested the "academic moralism" of his day, and he would have been second to none in excoriating that of our own--but not for the reason that Posner supposes. He thinks that Nietzsche can be seen as an enemy of morality, or as a critic of conventional ethics who preferred his own favored code--warrior morality or the will to power--on aesthetic grounds. Yet both ways of seeing Nietzsche are wrong. It is true that Nietzsche delighted in portraying the spirit of liberal democracy or bourgeois ethics as herd morality or slave morality, but the grounds of his opposition are all-important. He attacked it with stinging eloquence and savage brilliance in order to vindicate a view of virtue, justice, and the good in which the love of truth was the highest love and the peak of human excellence.

This is why Nietzsche, in his first *Untimely Meditation*, brands David Strauss a *Bildungsphilister*, a cultural philistine, and derides him for believing that one can embrace the Darwinian account of man and still affirm Christian morality. It is why, in the first section of the first essay in *On the Genealogy of Morals*, he proclaims that the only motivation that he will tolerate for explanations of human conduct that reduce man to mechanistic forces or biological impulses is the proud, magnanimous determination "to sacrifice all desirability to truth, *every* truth, even plain, harsh, ugly, repellent, unchristian, immoral truth.--For such truths do exist." It is why, in *Beyond Good and Evil*, he connects virtue, freedom, and self-knowledge in the crowning thought that "the noble soul has reverence for itself."

If you wish to understand a philosophy, Nietzsche instructs, look to the "moral (or immoral) intentions" out of which it has grown. Indeed, such attention to a thinker's intention shows just how decisively Posner parts ways with Nietzsche. Posner is bent on cutting philosophy down to size in order to show that the human soul is much less than it seems. Nietzsche, so as to bring to light the soul's forgotten grandeur, aimed to restore an understanding of the "masterly task and masterfulness of philosophy."

In his campaign to vindicate pragmatism as a flexible and open-ended process of inquiry, Posner lobbies relentlessly for a narrow, fixed, and final vision of the universe. His pragmatism does not invite one to greet the world with curiosity and wonder. Instead it stipulates a dour and inviolable mechanistic universe--what Hobbes posited explicitly and knowingly as matter in motion and nothing more, and what his heirs in the social sciences have affirmed implicitly and uncritically. Surely there is much in the varieties of human experience that counsels against this dismal interpretation of the human condition, however breezily it is advocated.

There is much in the pragmatist tradition that counsels against it, too. For William James, pragmatism is "a mediator and reconciler." It is neither anti-metaphysical nor materialist, and it recognizes that our experience regularly gestures toward first principles and truths that we do not make. It does not mock or repudiate our theories, it "unstiffens" them and thereby makes them more adequate to their task, which is the organization and the evaluation of experience. Pragmatism, as James understood it, is a friend of truth because

James goes so far as to say that pragmatism, because of its principled openness to the varieties of human experience, "widens the field for the search for God." From the Jamesian standpoint, then, you might say that the problem with Posner's pragmatism is that it is not nearly pragmatic enough.

It is a great accomplishment of pragmatism that it quickens our appreciation of the costs and the benefits of our ideas and our actions. And it is a heavy cost of Posner's brand of pragmatism that its view of human nature and of man's place in the world rigidly restricts the range and the character of the costs and the benefits that we are allowed in good conscience to take into account in assessing our ideas and evaluating our actions. It is one thing to stress the importance of attending to consequences, and it is quite another to insist that the only meaningful consequences are those that are amenable to economic analysis, or capable of mathematically precise measuring and weighing, or available for collection and examination by the latest innovations in social scientific method.

A pragmatic evaluation of Posner's pragmatism would explore the consequences for us of its tendency to deny, to depreciate, or to redescribe beyond all recognition the intimations of the heart, the still small voice of conscience, the stern demands of justice--that "echo of the infinite" and that "hint of the universal law" which Holmes, at the end of his greatest essay, allowed could be discerned in the "remoter and more general aspects" of the path of the law. To lose sight of such experiences and such imperatives, it should be said plainly, is no small cost, since what is at stake is our feeling for, and our understanding of, our own humanity.

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