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## Book Reviews

### SHOCKING THE CONSCIENCE: PRAGMATISM, MORAL REASONING, AND THE JUDICIARY

**THE PROBLEMATICS OF MORAL AND LEGAL THEORY.** By Richard A. Posner.<sup>1</sup> Harvard University Press. 1999. Pp. 310. \$29.95.

*Daniel A. Farber*<sup>2</sup>

“The fox knows many things, but the hedgehog knows one great thing.” So holds a proverb made famous by Isaiah Berlin. Richard Posner began his career as a hedgehog, his “one great thing” being economic efficiency. But Judge Posner has now become one of most fox-like of modern thinkers, with books on topics as diverse as literature, sexuality, aging, and jurisprudence. In each field he has shown sufficient mastery to call into question his own assertion that “there is a limit to how brilliant you can be and want to go to law school.” (p. 293)

In *Problematics*, Judge Posner takes up the question of the role of moral reasoning in judging.<sup>3</sup> He concludes that its role is somewhere between slim and nil. Consequently, moral philosophers have almost nothing to say of relevance to judges (and little enough for anyone else). (pp. 3, 310) In particular, moral

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2. Henry J. Fletcher Professor and Associate Dean for Faculty and Research, University of Minnesota Law School. Thanks to Don Dripps, David McGowan, Mike Paulsen, and Suzanna Sherry for helpful comments.

3. Important portions of the book, along with responses from distinguished commentators and a reply from Judge Posner, appear at 111 Harv. L. Rev. 1637, 1637-1823 (1998). I also benefitted from a number of the contributions to Morris Dickstein, ed., *The Revival of Pragmatism: New Essays on Social Thought, Law, Culture* (Duke U. Press, 1998).

theory has nothing to teach judges about even “such morally charged subjects as abortion, affirmative action, racial and sexual discrimination, and homosexual rights.” (p. x)

Posner calls on constitutional scholars to abandon “what passes as theory in jurisprudential circles” and devote their attention to the “real world” aspects of constitutional law. (p. x.) But this does not mean that he views judging, in constitutional cases or elsewhere, as value free. Instead, he says, where precedent and other legal texts run out, judges “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.” (p. viii) Endorsing a position he attributes to Holmes, he maintains that “while the political process is ordinarily the right way to go,” sometimes “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.” (p. 142)

One alternative to Posner’s approach is formalism, which seeks to make judging value-free. Having dealt with this approach elsewhere, Posner does not give it much attention in this book. Nor will I in this review.<sup>4</sup> Yet another alternative is to provide some more systematic account of morality that would assist judges. I will focus on Posner’s rejection of this alternative and on his explanation of his own preferred approach.

Like his other work, *Problematics* is a dazzling display of Posner’s stylistic powers and intellectual range. It stumbles, in my admittedly non-expert opinion, in attempting too hasty a treatment of some philosophical issues, though its skepticism about the legal relevance of high-level moral theory seems well-justified. It also overstates the roles of policymaking and of emotional outrage in constitutional cases. In that respect, however, it is a useful counter to the current obsession with textual and historical fidelity at the expense of real world utility. Finally—my most serious criticism—Posner seems drawn by his desire to be hard-headed into occasional insensitivity toward certain moral values. Posner’s work as a judge shows that he himself is not insensitive to these values, but they seem oddly shortchanged in his theoretical account.

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4. I also will not deal with certain aspects of this book, such as his call to make the third year of law school optional. (pp. 287-89)

## I. WHAT CONSTITUTIONAL LAW SHOULD *NOT* INVOLVE: MORAL ARGUMENT

Posner is skeptical of the utility of moral reasoning for two reasons: because as a moral relativist, he doubts that any significant moral truth exists, and because in any event moral argument is too inconclusive to lead anywhere, particularly in legal disputes.

At the outset, it is important to be clear about just what Posner is criticizing—and more importantly, what he is not. He makes it clear that he does not reject the existence of moral values; (p. 50 n.78) moral skeptics and moral relativists “have the same moral emotions as everyone else and differ only in not thinking that moral disagreements can be bridged by moral reasoning.” (p. 142) Nor, despite his rejection of “moral reasoning,” does he reject all forms of reasoning about morality, though he does reject what he calls academic moralism. Specifically, he does not believe that moral decisionmaking is purely a matter of unreasoned personal convictions that can never be subject to useful discussion. Although his positive remarks about moral discussion are scattered throughout the book, taken together they actually leave a significant role for deliberation about moral or ethical issues. (He defines morality to include only “duties to others” as opposed to ethical reflections on how best to live. (p. 4)) As he sees it, moral agreement may be possible on specifics even among people who disagree about broad principles.<sup>5</sup> (p. 153 n.133) Moral philosophy can also enrich our perspectives by articulating moral systems and thereby giving people choices about how to live or helping them to discover or articulate their own implicit commitments. (pp. 31-32) Finally, Posner believes, moral judgments can sometimes be educated by immersion in facts. (p. viii) Morality is in large part emotional, but “emotion is not pure glandular secretion”; it is “influenced by experience, information, and imagination, and can thus be disciplined by fact.” (p. 260) So he leaves room for reasoned discussion of morally charged problems.

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5. Posner recognizes some scope for constructive discussion about morality. There is room, he says, for argument about whether moral codes are adaptive in terms of society's goals (though the goals themselves may be culture specific). (p. 6) Although they cannot resolve moral disagreement, moral philosophers may provide other useful services. Moral theory may also dispel errors when legal analysts take philosophical positions. Posner also concedes that “philosophy, in the form not of moral theory but of careful analysis of difficult concepts, can be helpful in clarifying certain legal issues, such as intent, responsibility, and . . . causation.” (p. 120)

What, then, does he mean when he says he rejects the use of moral reasoning or moral argument in law and more generally? What he seems to mean is that fundamental moral issues are simply not open to useful discussion. One of my colleagues thinks the fetus is a person and abortion is murder; another thinks that the fetus is not a person and abortion laws oppress women. Posner believes that there is no "right answer" to this problem (at least, not one definable in secular terms<sup>6</sup>). Even if in some sense a right answer did exist, he contends, no convincing way would exist for us (in particular, for judges) to identify it.

Posner is a moral relativist of sorts, arguing that "morality is local, . . . there are no *interesting* moral universals." (p. 6) Admittedly, some rudimentary principles (such as don't kill your friends indiscriminately) may be universal to all human societies. But meaningful moral principles are local. (p. 6) "[T]he morality that condemns the traitor, adulterer, etc., cannot itself be evaluated in moral terms. That would be possible only if there were precise, and hence operational, transcultural moral truths." (p. 9) Morality is relative not only between but even within societies. A person who murders an infant is immoral within our society. Posner says he would consider the person who advocates baby killing "lunatic, a monster, or a fool," but would "hesitate to call him immoral, just as I would hesitate to call Jesus Christ immoral for having violated settled norms of Judaism and Roman law or Pontius Pilate immoral for enforcing that law."<sup>7</sup> (p. 10) Similarly, it is "vacuous" to complain that the subjects of female genital mutilation have no effective choice, because the "moral code of these societies is not founded on principles of freedom, autonomy, or equality, and there is no

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6. Posner's treatment of religion seems inconsistent. At times, he seems to limit his scope to secular arguments; at others, he criticizes the inability of philosophers to rebut religious positions. On the one hand, he says his concern is with "the type of moralizing that is or at least pretends to be free of controversial metaphysical commitments, such as those of a believing Christian, and so might conceivably appeal to the judges of our secular courts." (p. 15) On the other hand, as evidence of the futility of moral argument, he stresses the impossibility of the secular moralist convincing various kinds of religious believers. (p. 55) But the secularist may never have a convincing argument against religion's "controversial metaphysical claims." He may be no more able to convince the religious fundamentalist that the earth is billions of years old than that homosexuality is morally acceptable. Yet, Posner clearly thinks the age of the earth is a matter of objective fact, not opinion.

7. Posner's view is exemplified by his discussion of suttee, the "immolation—nominally, at least, voluntary—of the widow on her husband's bier," as practiced in nineteenth century India. (p. 10) As a British colonial administrator, he says, he would have banned the practice, because he would have found it "disgusting, not because I found it immoral." (pp. 10-11)

privileged standpoint from which to argue that it should be." (p. 22) True, people could call moral codes they dislike immoral, but "this is name-calling, rather than appealing to a common set of premises from which persuasive arguments could be derived by logical or empirical means." (p. 23) In short, he tends toward what he calls "a kind of existential morality . . . in which people take responsibility for their actions without the comfort of supposing that they are acting in accordance with universal moral norms[.]"<sup>8</sup> (p. 29) (This kind of existentialism sounds good in theory, but the fact that Hannibal Lecter could claim to be following it gives me pause.)

Posner's version of moral relativism is hard to assess, partly because of his unsystematic presentation, but mostly because it is not clear how he intends it to be taken. On one reading, he is making a strong philosophical claim: it is just a fact that morality, which consists of the moral judgments people make about their own behavior, is subjective rather than objective. But if this is what he means, his admittedly evocative remarks are too far from presenting a fully developed philosophical argument to make criticism fruitful.<sup>9</sup> (As is often the case in philosophical argument, simply trying to pin down the meaning of critical terms is often extraordinarily difficult—a philosopher can play more tricks with the word "objectivity" than a tax lawyer can play with "income.") In any event, this reading would leave us with the puzzle of why someone who is so avowedly skeptical about substantive moral reasoning would have such extraordinary confidence in other types of philosophical arguments that command no greater degree of consensus.

Another, perhaps more plausible reading is also available. Although he does sometimes seem to be arguing in favor of the truth of a philosophical position, at other times, Posner seems merely to be presenting a viewpoint on morality, not in the expectation that it could be proved true, but in the hope that it will be found attractive. He sometimes seems to view philosophical

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8. Having adopted this stance, would one not be drawn to consider other people as the kinds of beings who are also capable of this existential nobility? It may be wrong to treat such beings as merely a means to increasing total social utility. Moreover, we might give special protection to activities that develop the capacity to make such existential choices, and limit the government's power to interfere with the most fundamental choices, those that do the most to define the self. There seems to be lurking here the possibility of the kind of concept of human dignity that Posner seems determined to resist.

9. For a critique of Posner's earlier discussion of these topics, see Eric Rakowski, *Posner's Pragmatism*, 104 Harv. L. Rev. 1681 (1991).

positions themselves as being in a sense subjective.<sup>10</sup> On this reading, the question is not whether Posner's own views of morality are "true" (whatever that adjective means as applied to a philosophical theory), but whether they offer an attractive way of life, or perhaps, whether they offer a compelling if unprovable account of the meaning of morality. If this is what Posner intends, however, I am yet to be convinced. Part III discusses why I find his moral theory unsatisfyingly thin. More generally, I find his moral skepticism empty for the reason that Dworkin gives for dismissing most philosophical skepticism: "The only kind of skepticism that counts, anyway, is the really disturbing kind, the chilling internal skepticism that grips us in a dark night, when we suddenly cannot help thinking that human lives signify nothing, that nothing we do can matter when we and our whole world will in any case perish in a cosmic instant or two."<sup>11</sup> But this kind of skepticism seems wholly alien to Posner's thought: his skepticism simply doesn't run this deep.

What sends Posner down the path toward moral relativism? His background in economics may be part of the explanation. Economists are used to viewing personal preferences as arbitrary—simply one of the givens in an equation. Merely because this is convenient for building economic models does not necessarily mean an economist should adopt it in other contexts, but there may be an impulse in that direction. More importantly, I think, Posner is repelled by the rhetoric of those espousing universal moral philosophies. This rhetoric is too often characterized by a complacency about privileged access to moral truth, a lack of interest in how the world looks from other viewpoints, and a willingness to rest on comfortable abstraction rather than grappling with social realities or tragic choices—in short, by a fuzzy haze obscuring tough decisions. It would not be hard to find examples in the work of academic philosophers where sermonizing takes the place of hard thinking about policy issues. It is quite another thing, however, to show that these flaws are incurable.

Posner's moral relativism may offer support to his skepticism about the potential role for moral reasoning in judicial deci-

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10. For instance, he speaks of the useful function that moral philosophers might play in self-discovery, so that a person might discover from reading philosophy that he has actually been a utilitarian all along; Posner also speaks of the aesthetic grounds that Nietzsche may have had for adopting his own views of morality.

11. Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 *Phil. and Pub. Aff.* 87, 129 (1996).

sions, but the two seem largely independent. Even if he is right that the full range of moral disagreement in our society is too broad to allow meaningful discussion, judges are concerned with a much smaller spectrum of opinion. For instance, some people may want their society to destroy itself rather than enduring, which Posner calls the Masada complex. (p. 46) This complex is undoubtedly rare among judges and their most significant audiences. In our society, at least, judges and key portions of the public can be assumed to value liberal democracy, economic prosperity, and the rule of law. Given this degree of initial consensus, meaningful moral argument may well be possible. In an earlier book, speaking of a dispute about an aesthetic matter, Posner said he would prefer to take one side than the other, because it was the side with the better arguments. These arguments, he added, "may not be valid *sub specie aeternitatis*—may be no more than arguable. But within the cultural community from which the debaters are likely to be drawn, they are stronger arguments than the contrary arguments."<sup>12</sup> Within the American legal community, the same may be true of many moral disagreements arising in litigated cases.

But of course, we know as a simple fact that *some* moral disagreements cannot be so resolved. In our society, reasonable people may well agree about the moral importance of the choice whether or not to have a child—virtually no one would think that the government can properly compel a woman to have an abortion without at least some extraordinarily powerful justification. We all know, however, that agreement runs out when the question is whether to ban abortion instead. In principle, perhaps moral reasoning could produce consensus on issues such as abortion rights; in practice, we know it won't. Judges will have to look elsewhere to decide cases of this kind.

Posner is right, I believe, that there is little practical urgency to questions about whether our moral and political views have some deep coherence, or about whether they are merely our opinions or lay some claim to objective truth. Yet, though logically convincing answers to these questions seem unavailable, it seems to be impossible to silence the urge to think about them.<sup>13</sup>

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12. Richard A. Posner, *Cardozo: A Study in Reputation* 64 (U. of Chicago Press, 1990). But perhaps Posner's skeptical impulses have hardened in the meantime. Indeed, they may have hardened even since 1995, when he spoke of the "continuity of legal and moral discourse." Richard Posner, *Overcoming Law* 252 (Harvard U. Press, 1995).

13. Pragmatism can be used (or perhaps abused) as an excuse to dismiss such questions, but I think this is a mistake. Pragmatism clearly means that our practices do not

(If humans have a language instinct, as some linguists suggest, perhaps we also have a philosophy instinct, that makes us ask possibly unanswerable questions about the meaning of life.)

It is a tribute to the compelling nature of these philosophical problems that Posner cannot help himself from addressing them, even while protesting that the whole venture is misguided. His difficulties in addressing them are also a tribute to their intellectual intractability. If we wait for a solution to these philosophical problems before getting on with our lives, we will be waiting a long time. Unlike Posner, I believe that philosophers like Rawls are engaged in a worthy quest, and that something important would be lost in our culture if we ceased to struggle to understand the nature of justice. But I think Posner is right that moral philosophy is unlikely to have any direct payoff in answering the hard questions faced by courts.

It is at least faintly ridiculous to suppose that what the administration of justice most needs is for judges to read Kant on their lunch breaks. The reason is not just that their professional training leaves them unprepared for this task, or even that Kant might be wrong. It is also that most philosophy is too far removed from the concrete issues that confront judges, and trying to address those issues in terms of philosophical theory would only be a distraction.<sup>14</sup>

## II. WHAT CONSTITUTIONAL LAW *SHOULD* INVOLVE: POSNERIAN PRAGMATISM

In rejecting the argument that judges should be moral philosophers, one argument that Posner does not make is that this role would be illegitimate. Because judicial review has been seen as an anomaly,<sup>15</sup> much debate has taken place about when it is legitimate for judges to strike down statutes.<sup>16</sup> On the whole,

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need foundational justifications to establish their legitimacy. But it does not mean (or at least I believe it should not mean) that we must abandon any effort at deepening our understanding of the human condition—although it might suggest that this enterprise, too, will succeed best with the use of practical reason rather than deductive logic. If the point of pragmatism is to make sense of our lived experiences, it should include among those experiences our drive to grapple with the fundamental perplexities of life.

14. It is difficult to say anything useful in the abstract about how to solve hard cases (otherwise, they wouldn't be hard). I have tried to illustrate the process, however, in Daniel Farber, *Eco-Pragmatism: Making Sensible Environmental Decisions in an Uncertain World* (U. of Chicago Press, 1999).

15. I am not sure that it should be, since nearly all democracies these days have judicial review in some form or another, Britain being in this respect an outlier.

16. For an excellent overview of constitutional theory and thoughts about criteria

Posner considers the issue of legitimacy to be a red herring: "if law meets 'the functional requirements of a complex society' by providing a reasonably predictable, adaptable, and just framework for peaceful social interactions, where 'just' means nothing more pretentious than consistent with durable public opinion, who is going to raise an issue of legitimacy *about the framework*, that is, about the law itself?" (p. 106) Rather, Posner views legitimacy as a matter of convention—a judicial decision is illegitimate if it "rested on arguments that the legal culture ruled out of bounds for judges." (p. 106) As we will see, he sees a definite role for the judge's personal values in decisionmaking.

Posner has some noteworthy general remarks about the craft of judging. "It is immensely useful," he says, to "strip away the conventional verbiage in which the issues come wrapped" and instead consider "the actual interests at stake, the purposes of the participants, the policies behind the precedents, and the consequences of alternative decisions." (pp. 208-09) But the "social interest in certainty of legal obligation requires the judge to stick pretty close to statutory text and judicial precedent in most cases and thus to behave, much of the time anyway, as a formalist." (p. 209) He adds that a part of every decision should be conventional legal reasoning, defined as "reasoning with reference to distinctive legal materials and arguments that can be brought to bear on the case and to the law's traditional preoccupations, for example with stability and the right to be heard and the other 'rule of law' virtues." (p. 262) Moreover, in areas of the law where the use of clear rules is appropriate, borderline cases can sometimes be resolved only through somewhat arbitrary formalistic means.<sup>17</sup> (p. 124)

Still, though conventional legal reasoning is part of the judge's role, for Posner it is only one part. He views courts, "at their best," as "councils of wise elders meditating on real disputes," adding that "it is not completely insane to entrust them with responsibility for resolving these disputes in a way that will produce the best results in the circumstances rather than resolving them purely on the basis of rules created by other organs of

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for theory selection, see Richard H. Fallon, *How to Choose a Constitutional Theory*, 87 Cal. L. Rev. 535 (1999).

17. In practice, Posner's positions on the bench, at least in statutory cases, differ little from those of his formalist colleague Frank Easterbrook. See Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study* (forthcoming, Northwestern University Law Review, 2000). This may confirm Posner's view of the irrelevance of theory.

government or by their own previous decisions.” (pp. 257-58) The consequence, he cheerfully concedes, is that courts will treat the Constitution and to a lesser extent statutes “as a kind of putty that can be used to fill embarrassing holes in the legal and political framework of society.” (p. 258) All this is the worst form of heresy to formalists.

Normative considerations play several roles in this process. First, in applying a rule or filling a gap, the judge may take into account consensus moral values. “Morality is a pervasive feature of social life and is in the background of many legal principles.” (p. 137) Everyone agrees that criminals should not profit from their crimes; hence, the wills statute should not be interpreted to allow a killer to inherit from his victim. (p. 140)

Second, the judge may consider the social consequences of his decision. For instance, in the *VMI* case,<sup>18</sup> Posner argues, the Court should not have interfered with the all-male military academy. In his view, “the Court had no basis either theoretical or empirical for thinking that the admission of women would not impair VMI’s educational program disproportionately to the slight harm to women of being excluded from the school,” taking into account the small number of women involved, the modest harm to them individually, (p. 171) and the unlikelihood that the case would serve as a precedent for excluding women from other institutions. (p. 169) Considering how little we know about education theory, judges should “tolerate continued experimentation and diversity in public education.”<sup>19</sup> (p. 173) Posner applauds the transformation of antitrust law into a form of applied economics as “a success story of which all branches of the law and allied disciplines can be proud.” (p. 229) But at least in constitutional law, Posner is wary of this kind of social engineering without a firm empirical backing: judges should consider “their ignorance of the consequences of a challenged governmental policy that is not completely outrageous a compelling reason for staying the judicial hand in the absence of sure guidance from constitutional text, history, or precedent.” (p. 182)

Third, in some cases, the judge’s conscience simply will not allow him to stomach the action of another branch of government. If judges are carefully chosen from diverse portions of so-

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18. *United States v. Virginia*, 518 U.S. 515 (1996).

19. For a critique of his discussion of *VMI*, see Deborah Jones Merritt, *Constitutional Fact and Theory: A Response to Chief Judge Posner*, 97 Mich. L. Rev. 1287, 1288-91 (1999).

ciety, this action—which verges, he admits, on civil disobedience—sends an important message to the populist branches of government.<sup>20</sup> (p. 143) He is unconcerned about the fact that this is a partially emotional decision, remarking that anger “founded on a responsible appreciation of a situation need not be thought a disreputable motive for action, even for a judge; it is indeed the absence of any emotion in such a situation that would be discreditable.” (p. 260) Although deferential to the other branches of government, the pragmatic judge “does not throw up his hands and say ‘sorry, no law to apply’ when confronted with outrageous conduct that the framers of the Constitution neglected to foresee and make specific provision for.” (p. 258) For example, a pragmatist judge wouldn’t stomach a life sentence without parole for a sixteen-year-old who sold a single marijuana cigarette. (p. 258) The wise pragmatic judge, however, does not rely only on his own personal opinions, but checks them against those of some broader community, whether local or worldwide. (p. 259) Posner calls this the “outrage” school of constitutional thought, a school he identifies with Thayer, Cardozo, Frankfurter, and Harlan. (p. 147) (A moral philosopher might think something more systematic than educated outrage is called for, but we saw in Part I that Posner thinks nothing more systematic is available.)

None of these positions is shockingly novel, and there is much to be said in their favor. There are also familiar arguments against each of these positions (from formalists, in particular), and I will not canvass those objections here.<sup>21</sup> What makes Posner’s statement of these views seem, if not shocking, at least brutally candid is his willingness on occasion to cut loose from conventional legal reasoning. Apropos of the marijuana cigarette case, for example, he says that if he found relevant evidence of original intent, he would “think it a valuable bone to toss to a positivist or formalist colleague,” but he himself would put no weight on this evidence, not feeling himself “duty-bound to maintain consistency with past decisions.” (p. 259)

If there is a common thread in recent constitutional thought, it is a stress on fidelity: fidelity to the framers, fidelity to the constitutional text, or fidelity to tradition. And along with

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20. It is unclear whether other government official (or private citizens) would, by the same reasoning, also be entitled to engage in similar forms of civil disobedience.

21. For a critique of Posner’s constitutional theory, see Jeffrey Rosen, *Overcoming Posner*, 105 *Yale L. J.* 581, 583-96 (1995).

this emphasis on fidelity is a distrust of any true creativity on the part of judges. Posner will have none of this. Not that he would ignore the past: “[i]n many cases the best the judge can do for the present and the future is to insist that breaks with the past be duly considered.” (p. 261) But even these cases, the pragmatic judge “lacks *reverence* for the past, a felt duty of continuity with the past.” (p. 261) Such a sense of duty would be “inconsistent with the forward-looking stance and hence with pragmatism.” (p. 261) Because of this forward-looking stance, Posner is in a sense closer jurisprudentially to a Brennan than to a Harlan (though his substantive positions are obviously closer to Harlan’s)

In this respect, Posner is a refreshing counterweight to the current obsession with judicial constraint and fidelity to authority. But I think he goes too far in rejecting respect for the past (including original intent) as an independent factor in decision. Constitutional law is largely a matter of governance, but it is also an important part of our national identity and culture. The Court needs to provide a convincing interpretation of our constitutional history, telling a believable story about how it is carrying forward the project of American constitutionalism begun by the Framers. Thus, as with individuals, continuity with the past is not simply a prejudice; it is a way of maintaining and redefining national identity.<sup>22</sup> Maintaining some connection with the American past is therefore an important part of the Court’s institutional role. Posner might respond, however, that judges need no reminder of the need to respect the past, whereas the current jurisprudential climate discourages them from attending to the needs of the present and the future. Similarly, while I think that moral outrage can be more mediated by reason than Posner does, his willingness to admit to an emotional dimension of judging is a welcome relief from the dry impersonality of so much of the current Court’s opinions and so much legal theory.

### III. THE MORAL PROBLEMATICS OF POSNERIAN THEORY

Much of what Posner says about constitutional law is related to his moral views in only a negative way. His rejection of moral theory eliminates any constraint that a theory of legiti-

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22. See W. James Booth, *Communities of Memory: On Identity, Memory, and Debt*, 93 Am. Pol. Sci. Rev. 249 (1999).

mate political authority (as opposed to prudence) might place on judicial policymaking. What fills this space, however, has no necessary connection with his moral relativism. In this sense, the moral and constitutional portions of the book are largely independent of each other. But both discussions do strike similar and sometimes jarring chords. In particular, Posner's discussion sometimes seems oddly oblivious to notions of human dignity and to the related inherent value of the rule of law. The result sometimes resembles some form of moral tone-deafness.

We might begin with his remarks about the Nazis. Posner adopts a deliberately clinical tone on this subject, perhaps in a desire to avoid what he considers conventional sentimentality. He tells us, for example, that "[o]ne reason for the widespread condemnation of the Nazi and Cambodian exterminations is that we can see in retrospect that they were not adaptive to any plausible or widely accepted need or goal of the societies in question." (p. 21) Similarly, he describes Nazism as "a failed experiment in social organization by limited, violent, and dangerous people who didn't share our values"—adding that, since this description seems "inadequate to our anger," he has no objection to "the employment of moral terminology to denote degrees of indignation." (p. 89) So might speak the Vulcan Commander Spock on the starship *Enterprise*. The human members of the crew would properly respond, I think, that the precisely appropriate description of the Nazis is that they were evil. It is not a word that seems to be part of the vocabulary of Posner's moral theory, or rather, I suspect, it is one that he feels a need to avoid.

Similarly, in discussing Holmes's views of criminal law and eugenics, Posner writes that "the maintenance of a moral veneer in the law's dealing with the people subject to it, especially anti-social people subject to it, offers a first line of defense against excesses of official violence. It is not healthy to treat even disgusting criminals as animals. . . ." (p. 209) But Holmes is excused from understanding this principle because "it is a lesson of totalitarianism, which did not yet exist in 1897"—this lesson being that "[e]xcluding a class of human beings from the human community can become a habit and spread from criminals to ne'er-do-wells to the sick and the aged and the mentally disturbed or deficient . . . and finally to nonconformists and to members of unpopular minorities." (p. 209) Posner concludes by asking, "[d]o I have to explain, perhaps by reference to moral philosophy, why these would be bad results in the conditions of

our society?" (p. 209) We seem to be left to infer that, apart from this slippery slope of which Holmes was unaware, he would have been reasonable to exclude some of the people listed above from the human community—and that maybe excluding all of them from humanity would be O.K. except for the peculiar "conditions of our society." Something has gone seriously wrong when theoretical commitments lead a humane and decent person to make remarks of this tenor. Somehow, the idea that certain actions are an affront to human dignity seems to have slipped out of his grasp.

Something is also off-key about Posner's discussion of due process. He suggests that perhaps "the rule of law should not extend all the way to the margins of society." (p. 198) This is a reference to an earlier discussion of criminal procedure. That discussion takes off from the assertion that the propertied men who adopted the Bill of Rights fought for the procedural protections "a society needs in order to make property and political rights secure against abuse by government"; in contrast, the rights created by the Warren Court were those "that criminals, and members of an underclass or lumpenproletariat most likely to be mistaken for criminals by overzealous police or prosecutors, want or need." (p. 161) "For the most part," he adds, "enforcement of these rights undermines property rights and personal security by making the punishment of criminals less swift and certain."<sup>23</sup> (p. 161) For this reason, Posner questions whether counsel should be provided to the indigent, and at least thinks it is just as well that the general quality of indigent counsel is poor. (pp. 161-64)

True, Posner has some concern about convicting the innocent, but only because doing so reduces the disincentive to commit crimes. (The disincentive to commit a crime is diluted since you might be punished anyway even if you don't commit the crime.) (p. 163) But a little thought shows that this is actually a minor issue, which shouldn't give Posner much pause, at least if there are substantially more innocent people in the population than guilty ones. For example, we could convict more innocent people than guilty ones, and still leave deterrence relatively untouched, though we would admittedly be wasting

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23. The assumption is plainly that being mugged and being falsely arrested should be regarded as in some sense equivalent harms, from the point of view of those designing legal rules. The view that the law is as responsible for harms it fails to prevent as for those it imposes seems questionable.

some penological resources.<sup>24</sup> (In fact, there is an irony lurking here: deterrence is most undermined by the conviction of the innocent when the guilty are a relatively high part of the relevant sub-population.<sup>25</sup> On this theory, since crime is more prevalent among the poor, we should probably provide better lawyers to them than to the rich.) As to why other constitutional protections such as freedom from unreasonable searches and seizures have no value as to the indigent, Posner is silent.

In his capacity as a judge, Posner undoubtedly gives the rights of the indigent the same weight as those of the wealthy. Having read a number of his judicial opinions, I am confident that he would be just as disturbed by the wrongful conviction of an indigent person as of an investment banker, and that he would be as affronted by an unjustified strip search of one as the other.<sup>26</sup> But his theory seems to leave him no way to express the notion that the Constitution protects the rights and dignity of all alike.

Again, we need to ask why Posner chooses this path. Why is he so anxious to repress references to human dignity or basic rights, when in practice he is seemingly sensitive to these values? Part of his reaction to contemporary moral philosophy and its vocabulary, as I've discussed earlier, seems to be aesthetic, but

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24. An illustration may help demonstrate why deterrence is little affected by convicting the innocent. Suppose that of 100,000 people, 95% are innocent and 5% are guilty. Suppose also that in a given year 10,000 people are convicted, of whom only a quarter are truly guilty. Under the hypothetical, the odds of being punished if you are innocent are only about 8% (7,500 out of 95,000), while the odds of being punished if you are guilty are 50% (2,500 out of 5,000). So even in this extreme case in which most of those punished are innocent, the effect on deterrence is not substantial, because the guilty still face much higher risks of conviction.

25. As shown in the previous footnote, the effect on deterrence is small when the rate of criminality in a population is low. In contrast, it is significant when guilt is widespread, because unless an even higher percentage of the convicted are actually guilty, the innocent have no incentive to refrain from crime. Consider, in contrast with the previous footnote, an example in which the rate is very high. Suppose that in some subpopulation, three-quarters of every 100,000 people are criminals, and that a quarter of the 10,000 convictions annually involve innocent defendants (so the percentage of innocents among the convicted is much smaller than in the previous example). Then the odds of being punished if you are guilty are 10% (7,500 out of 75,000), while the odds of being punished if you are innocent are also 10% (2,500 out of 25,000). Hence, the criminal justice system has no deterrent effect at all. The lesson is that the higher the percentage of the guilty in a subpopulation, the more important it is to avoid convicting the innocent, so as to avoid undermining deterrence.

26. See, e.g. *Johnson v. Phelan*, 69 F.3d 144, 152-55 (7th Cir. 1995) (Posner, J., concurring in part and dissenting in part) (arguing that cross-gender monitoring of nude prisoners is unconstitutional); *United States v. Marshall*, 908 F.2d 1312, 1331-34 (7th Cir. 1990) (Posner, J., dissenting), aff'd, *Chapman v. United States*, 500 U.S. 453 (1991) (protesting unwarrantedly harsh sentence for LSD seller).

no less significant for that reason. His concern about the rhetoric of legal theory is also intensely practical. Posner is afraid that instead of confronting the plight of real people, we will immerse ourselves in abstractions; rather than looking out at the world, we will stare into our navels. This is a genuine risk, and one that is realized all too often in constitutional scholarship. This hypertrophied moral conceptualism is an intellectual tumor that Posner would like to remove. But as with certain tumors, it is doubtful that we can excise every trace of these moral conceptions from the legal mind without fatally impairing vital functions.