

The Problematics of Moral and Legal Theory

(by Richard Posner,

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Both this book and the law review article that preceded it record Richard Posner's 1997 Oliver Wendell Holmes Lectures at Harvard University. Few people will read these lectures and be left cold; you will either love Posner's attacks on the sterility of moral theory generally — and on academic moralists in particular — or you will find them infuriating and overly polemical. This reviewer falls into the former group.

Richard Posner is the Chief Judge of the US Court of Appeals for the Seventh Circuit, making him, after the nine justices of the Supreme Court, one of the most senior judges in America. He has served on this Seventh Circuit court since 1981, becoming Chief Judge in 1993. But he is not only a judge. He is also one of the most prolific legal scholars ever, having written some 30 books and 330 articles. His most obvious contribution has been in the law and economics movement, where his influence has been nothing short of massive; he has applied the insights of that movement to a seemingly never ending range of legal topics — competition law, torts, contracts, judges' behaviour, AIDS, the regulation of sex, and much else. Posner also has an interest in moral theory, jurisprudence and law and literature.

While the law and economics movement may itself tend towards reductionism (firstly by making assumptions about people's motivations in terms of their engaging in self-interested maximization of their own utility based on a set of more or less stable, internally consistent preferences and secondly by more or less explicitly equating utility to wealth maximization), Posner himself is no reductionist in his approach to law. He thinks no single approach, and that includes law and economics, can ever fully capture law's complexity. No, Posner is better understood as an iconoclast. He writes his own judgments — unlike the preponderance of American judges whose clerks do it for them. None of his judgments contain footnotes. Nor does he exhibit the trait of desiring to please, a trait not uncommon amongst lawyers, legal academics, even judges.

It is as iconoclast, as non-conformist, that Posner wrote these Oliver Wendell Holmes Lectures, and it is in that spirit that they are best read. Taken in that way, they are a delight — a delight made more satisfying still by the evident horror and insistence of self-importance of the eminent worthies who reply to Posner (pages 1718 to 1795 in the *Harvard Law Review*, as will be all following page references). What, after all, can be more horrifying to professional academic moralists and philosophers than to be told that moral theorizing provides no solid basis for moral judgments (and *a fortiori* for legal and judicial judgments)?

The lectures are delivered in two parts. In the first part (pp. 1638-1693) Posner argues that "moral theory does not provide a solid basis for moral judgments" (p. 1639). In the second part (pp. 1693-1709), he makes what he says is the weaker claim that "even if moral theory can provide a solid basis for some moral

judgments, it should not be used as a basis for *legal* judgments” (p. 1639, italics in original). Before commenting on the substance of Posner’s two claims let me reiterate that both parts are filled with one delightful aperçu after another, all thoroughly enjoyable to read. In the brief compass of this review I can only give a few of my personal favourites. Firstly, on academic radicals, Posner writes:

An example of failed moral entrepreneurship in the legal academy is Duncan Kennedy, a more proficient scholar than [Catharine] MacKinnon but a less impressive personality, and one handicapped in the moral entrepreneurship sweepstakes by his early receipt of tenure from Harvard Law School. It gave him a status that makes his rebellious posturings faintly ridiculous; he is that oxymoron, the ‘tenured radical’. (p. 1667 — but see too the biting remarks Kennedy makes about Ronald Dworkin in fn. 98 which Posner concurs in)

Posner refers to the many moral and political philosophers who seek to extract from canonical texts overarching concepts that can be used to deduce answers to contemporary moral questions as “textmongers” (p. 1671), and sums up their attitude in four words — “What Plato would allow” (p. 1671, borrowing the phrase and sarcasm from Jeremy Waldron). He then hits the mark when taking aim at that modern day icon of Academe, John Rawls.

If you don’t like this “strikingly lugubrious creature” [namely Rawls’ original position person described in fn. 72] or if you don’t feel that your genes are something you rented from a common pool, you’re not going to be persuaded otherwise by Rawls. (pp. 1673 -1674 — and see fn. 77 and p. 1675 for further criticisms)

After that, Posner suggests what most of us have long suspected, that knowledge of “moral philosophy has little to do with moral behavior” (p. 1683). What it does do is give one tools to rationalise the moral sentiments one happens to have:

Moral philosophers pick from an à la carte menu the moral principles that coincide with the preferences of their social set The better read you are in philosophy or literature, and the more imaginative and analytically supple you are, the easier you will find it to reweave your tapestry of moral beliefs so that your principles allow you to do what your id tells you to do. (pp. 1684, 1685)

And finally here is my favourite passage of all:

The personal codes of academic philosophers tend to be hackneyed and predictable. The liberals favor abortion and women’s rights and greater equality and a mild socialism. They disapproved of Soviet-style communism, but very quietly, with maybe a soft spot for East Germany or Yugoslavia. They are internationalists, multiculturalists, environmentalists, and sometimes vegetarians. They are against capital punishment, and so it might be said of them unkindly and perhaps unfairly that they pity murderers more than fetuses. They are for the theory of evolution when the question is whether creationism should be taught but against the theory

of evolution when the question is whether there is a biological basis for differences in behavior between men and women. They want to regulate cigarette smoking out of existence, but they want to permit the smoking of marijuana. They are for the strongest possible public measures for safety and health, but they are against quarantining people who are infected by the AIDS virus. They are secular, consider sexual practices morally indifferent, and fear the religious right; they are, in short, 'PC', and of course, they vote Democratic.

Other moral philosophers hold the opposite of each of these positions. They pity fetuses, but not sea otters or harp seals. They are against multiculturalism — unless it is religious. They object strenuously to governmental efforts to discourage cigarette smoking and alcohol imbibing but are vigorous supporters of the 'war against drugs' [In short, the modern moral philosopher] either thinks Left and lives Right, or he thinks Right and lives Right. (pp. 1685-1686, 1688, internal footnote omitted)

As I said, these lectures are amusing, biting, perceptive and entertaining. Indeed if the last of these is your criterion for choosing what to read — and I admit few people read law review articles and legal books with that in mind — then this is as good as it gets. Posner's puncturing of the preening, self-aggrandizing academic moralists who so visibly (albeit only implicitly) proclaim their own altruism is a pure delight.

That said, these lectures are more than just enjoyable and entertaining in form; they are largely correct in substance too. Part I especially, Posner's basic view of the status of morality (*i.e.*, his theory *about* morality), is one with which this reviewer not only agrees,¹ but is also one to which the evidence from the external, causal world overwhelmingly points. One can quibble with Posner's definitions of, and distinctions between, moral relativism, moral subjectivism, moral scepticism and emotivism. But his main point (that moral realism is terribly unconvincing, that there is no mind-independent moral realm in anything remotely like the same way there is a mind-independent causal world beyond the senses, that morality boils down to people's moral sentiments projected out on to the world) is spot on. As Posner puts it, "morality is local Any meaningful moral realism is . . . out, and [a form of] moral relativism . . . is in" (pp. 1640, 1641).

From this foundation it is a short step to Posner's main point that "there is 'nothing to' academic moralism" (p. 1645), academic moralism being his term covering the writings of all academic philosophers who "want the law to follow the teachings of moral theory" (p. 1640).

At this point it is crucial to note that Posner does *not* deny that people have moral sentiments *nor* does he deny that particular moral standards become (for a while) established in all societies. Of course morality exists, and is real, in those senses. But in those senses morality is contingent; the sentiments may be partly socially inculcated and partly genetically programmed and the prevailing social code may be responsive (in part at least) to the existing material conditions and levels of technology. But that's as much as one can say. Dworkin and the rest of the academic moralists are wrong in asserting we can discover 'higher,

¹ For a book length argument coming to the same basic conclusions Posner does in Part I, see my *A Sceptical Theory of Morality and Law* (Peter Lang, New York, 1998).

non-contingent, objectively right' answers to moral issues. No such answers are 'out there' or logically deducible or inherent in the meaning of language or able to be teased out from prevailing moral intuitions or in any other way able to be given the higher, privileged status the academic moralists desire. There are no moral universals in any meaningful or helpful sense. Moral realism is terribly unconvincing if one starts with any sort of acceptance of the modern, scientific world-view at all. (Indeed Posner's three pages on the differences between science and morality, fact and value (pp. 1678-1680), and particularly his perceptive point (p. 1680) that, when pushed, moral realists end up (paradoxically) having to adopt the arguments of postmodernist, deconstructionist, scientific relativists, must not be missed.)

Nor is Posner against all theory, even all normative theory. Theories which tell us the best means to achieve our desired ends can be useful, successful, even beautiful. Hypothetical 'ought' judgments, then, are clearly not the object of Posner's scorn. (It is clear that Posner accepts a Humean theory of human motivation (see pp. 1664-1665, 1675 and 1680), one I too find most persuasive.) The sort of theorizing he rubbishes is theories of morality, of what the content of our moral obligations should be — namely, theories specifying our proper ends, those laying down how we should behave. This is the essence of academic moralism and it yields, says Posner, no refutable predictions and no observable data that could refute them. It is this sort of moral philosophy (*not* all moral philosophy) that draws his ire.

I confess to a visceral dislike (no doubt reciprocated) of academic moralism. A lot of it strikes me as prissy, hermetic, censorious, naive, sanctimonious, self-congratulatory, too far Left or too far Right, and despite its frequent political extremism, rather insipid The ambition of the academic moralist is to change people's moral beliefs and thus change their behavior. It is not a realistic ambition There isn't even any evidence to believe that academic moralists have moral insight superior to that of other people. (pp. 1640, 1664, 1688)

Part I of Posner's lectures, therefore, is a pithy, provocative compendium of the case against moral realism and all the academic moralizing and theorizing that relies (implicitly or explicitly) on moral realism in fact being true. For a short, comprehensible, powerfully argued explanation of why it is most unlikely that the status of moral evaluations is anything other than subjective and relative to one's time and place, and why the writings of academic moralists who suppose otherwise are sterile, you will not find better than this. So on substantive as well as enjoyment grounds I wholeheartedly recommend Part I of these lectures.

Part II of the lectures takes up what Posner calls his weak claim "that even if moral theory can provide a solid basis for some moral judgments, it should not be used as a basis for *legal* judgments" (p. 1639, italics in original). Although I agree with many of the specific points Posner makes in this half of the lectures and again commend the way in which it is written, I fear that here he has overstated his case. Or rather, given what Posner argues in Part I, it seems to me that it is not really open to him to make this sort of weak claim in the way he does.

The thrust of Part II amounts to this: When judges go outside the typically legal sources (*viz.*, statutes, regulations, past decisions, authoritative texts) to

decide cases, as they regularly must do in the US — Posner says this is much less regularly required of judges in the UK, which strikes me as a tad optimistic — to what *should* the judges appeal? Not to the moral theory of academic moralists, says Posner, even if, *ex hypothesi* and *mirabile dictu*, all of the preceding claims in Part I were wrong-headed.

And there's the problem. If we suppose that Dworkin-type (or any other type), moral realist claims *be* true, what precisely is the 'it' that Posner says should not be used as a basis for legal judgments? Posner correctly tells the reader (p. 1697) that moral theory does not (in any helpful sense) denote all 'ought' reasoning. And we can all agree that *some* sort of 'ought' judgment has to be made by judges in situations where the typical legal sources provide no firm guidance (call it Hart's 'penumbra of doubt' if you want). But if, *ex hypothesi* and contrary to Part I, we are *really* to suppose that theories of morality — those that tell us how we should behave — have a solid basis, why shouldn't judges pay attention to them? What does it matter that there are other means-end 'ought' evaluations that might (and sometimes do) provide the judge with a basis for resolving the case? Surely *if* moral realism be correct and *if* moral theories based thereon *can* provide a solid basis for some moral judgments, then judges can and should, at least sometimes, use these 'higher', 'objective', 'real' moral truths to decide cases. At any rate Posner in Part II does not provide any reasons I can see, given the assumption specified, for why judges should not.

What Posner does, in my view, is implicitly to assume in Part II that the case he made in Part I has convinced the reader. (As I said, I think it *is* a convincing case Posner makes in Part I, but that becomes beside the point due to the way Posner sets out his Part II claim on p. 1639.) Grant the truth of the academic moralists' underlying position, in other words, and you substantially — perhaps fatally — diminish the force of all the assertions made in Part II. Confusingly, Posner seems to see this point when he says, "If the argument in Part I is correct, it is unlikely [that moral theory would] be a better place to look [for answers to legal questions]" (p. 1694).

Accordingly, I think Part II reads better, and is better understood, as a straightforward follow on from Part I. Forget all talk of Part II involving any "weak form" of his thesis. Better by far to read Part II as Posner's claims for what follows for judges having to make social policy decisions (without the guidance of the typical legal sources) *if Part I is in fact correct*. On that supposition, that moral realist views are highly implausible, to what should judges appeal?

On this reading, which accepts the arguments of Part I, we know that moral sentiments are tied to nothing more eternal than the feelings people happen to have. No doubt they are causally related to the society one happens to have been born into and that each society, at any particular time, will have established moral standards. This being the case, *should* judges appeal to morality, to these moral sentiments and standards, when a decision cannot be justified by reference to the standard legal sources?

Certainly it makes little sense for judges to appeal to moral theory of the academic moralists' variety given its (if Part I be correct) highly unpersuasive and implausible tenets. Posner in Part II is correct about that. And I think he is also correct that many times practical, consequentialist considerations will be

relied upon by judges. But that still leaves open the question of whether judges in the penumbra of doubt should *ever* rely on either *a*) their own moral sentiments, or, what will sometimes give distinct results, *b*) the prevailing, admittedly contingent moral standards that happen to exist and to be widely accepted within the society? If Posner's answer to this question be no, it is not overly convincing.

First off, his claims that there are other 'ought' evaluations besides the moral ones and that 'ought' evaluations can be made by judges without all-embracing, Part I type moral theorizing (see p. 1697 *ff.*) are true, but do not foreclose judicial reliance on either *a*) or *b*) above. In fact, Posner concedes that widely accepted moral views (that is, *b*) are used by judges (see p. 1704). Secondly, his argument that judges will tend (as a matter of fact) to duck controversial moral issues (which he elaborates by reference to euthanasia, abortion, segregation and affirmative action cases (see pp. 1700-1707)) seems to rule out reliance on *a*), but only if we treat reported judgments (what judges *say* they are doing) as necessarily indicating judges' real reasons for deciding cases (what judges *think* they are doing). Surely it would be naive to equate the former and the latter in all cases. Even where a judge in fact decided a case on the basis of his own moral sentiments, and nothing more, powerful institutional grounds would exist for his not writing the judgment in those terms, for ducking the controversial moral issue on the face of the judgment.

Anyway, Posner himself concedes in his conclusion that he himself sometimes relies on *a*):

Some constitutional and other legal issues cannot be resolved [on consequentialist considerations or on the basis of institutional competence], and then the judge has two choices. One is to say that if public opinion is divided on a moral issue, judges should refuse to intervene, should leave resolution to the political process. The other is to say, with Holmes, that while this is ordinarily the right way to go, every once in a while an issue on which public opinion is divided will so excite the judge's moral emotions that he simply will not be able to stomach the political resolution that has been challenged on constitutional grounds, and would feel immoral in rejecting the challenge

I prefer the second route. (p. 1708)

It is a tribute to Posner's honesty that he soon thereafter goes on to say:

The legal profession, and in particular judges and other lawyers who want to expand the power of the judiciary, resist the idea that there is an irreducibly discretionary, in the sense of unruled, a 'subjective', element in constitutional adjudication. They resist in part for reasons of professional pride and self-interest, but also because one's moral intuitions or (in Holmes's phrase) 'can't helps' don't seem to be very heavy counterweights to democratic preference as reflected in the actions of the political branches. Hence the appeal of moral philosophy, which seems to offer the hope of arming judges to *prove* that those actions are 'wrong' and have to be prevented. (pp. 1708-1709, italics in the original, internal footnote omitted)

Anyone who can cut to the honest gist of the matter in that way, who can cover such difficult issues so lucidly, and who in passing can toss out lines such

as, "So Dworkin and his allies are the Taliban of Western legal thought" (p. 1695), deserves to be read. If you read nothing else on legal and moral philosophy, read these lectures, the responses they prompt, and Posner's final reply.

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