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Can an Old Dog Learn New Tricks

Frank S. Ravitch

BOOK REVIEW

CAN AN OLD DOG LEARN NEW TRICKS? A NONFOUNDATIONALIST ANALYSIS OF RICHARD POSNER'S *THE PROBLEMATICS OF MORAL AND LEGAL THEORY*

Frank S. Ravitch*

The Problematics of Moral and Legal Theory. By Richard Posner. Belknap Press of Harvard University Press, 1999. 336 Pp. $34.50.

I. INTRODUCTION

In *The Problematics of Moral and Legal Theory*,[1] Judge Richard Posner raises several significant issues regarding the nature of law, legal theory, and legal analysis—that while uncomfortable for many legal scholars—must be considered. Posner makes three major points in the book. First, moral theory is not useful in resolving legal disputes.[2] Second, a more empirically grounded approach is necessary to better understand law and its consequences, and to better resolve legal disputes.[3] Third, Posner's legal pragmatism is the path to good judicial decision-making and useful legal scholarship.[4]

Posner's first two points cannot, and should not, simply be dismissed despite the controversy they have engendered.[5] While he vastly oversimplifies a number

* Visiting Associate Professor of Law, Syracuse University College of Law; Associate Professor of Law, Michigan State University, Detroit College of Law (beginning July, 2002). The author would like to thank Red Schwartz, Robin Malloy, Paul Finkelman, Sam Donnelly, and Elton Fukumoto for their input, and Amy Benedict for her research assistance.

1. Richard A. Posner, *The Problematics of Moral and Legal Theory* (Belknap Press of Harv. U. Press 1999).

2. *Id.* at 1-8.

3. *Id.* at 164, 210-17.

4. *Id.* at ch. 4.

5. The controversy arose after Posner delivered the 1997 Oliver Wendell Holmes lectures, which are the basis for *The Problematics of Moral and Legal Theory*. *See* Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 Harv. L. Rev. 1637 (1998). Critical responses to the lectures were published in the same issue of the Harvard Law Review. *See e.g.* Ronald Dworkin, *Darwin's New Bulldog*, 111 Harv. L. Rev. 1718 (1998), Charles Fried, *Philosophy Matters*, 111 Harv. L. Rev. 1739 (1998); Martha Nussbaum, *Still Worthy of Praise*, 111 Harv. L. Rev. 1776 (1998); Anthony T.

of issues, the questions he raises are provocative and compelling. In the end, Posner's third point—that his brand of loosely defined pragmatism is the path to follow—falls prey to his first point.[6]

This review will analyze Posner's treatment of moral theory in Part II. It is likely that Posner is really talking about universalist normative theory (which includes much moral theory), and his criticism may be best understood as an attack on foundationalism. Part III will discuss Posner's call for increased empirical research, and use of existing empirical research, in judging and legal scholarship. This review will suggest that these are two separate issues. Posner makes an excellent point when it comes to legal scholarship, but in the context of judging, empirical research can be both helpful and problematic. Part IV will discuss Posner's conception of legal pragmatism, and suggest that he barely defines it. To the extent that he does define it—particularly with regard to economic arguments—it would seem that he is simply proposing one kind of moral theory, albeit one that he fails to recognize as moral, in place of those he dislikes. Posner's solution either falls short because it is foundationalist or because it is so indescript that it could include almost all legal theory.

II. IS "DARWIN'S NEW BULLDOG" ONTO SOMETHING?

Perhaps "Darwin's New Bulldog," the title given to Posner by Ronald Dworkin,[7] one of the main targets of Posner's criticism,[8] should be worn with pride. After all, bulldogs are capable of picking up on things that lie underneath the surface and digging them out for display or consumption. As will be seen, Posner's critique of the use of moral theory in legal discourse has something to it. Perhaps the "bulldog" has found something after all.

Still, Posner's definition of moral theory, redefined as academic moralism, is almost comically oversimplified.[9] He often seems to conflate normative theory or universalist theory with moral theory, but in the end his critique may have value beyond what he defines as moral theory. It is really a rejection of absolute answers based on supposedly universal foundations. It is in a broad sense a rejection of the "naturalness" of natural rights and natural law concepts. Moreover, it is a rejection of other foundational approaches to law such as analytic positivism and critical theory (aspects of critical theory may be considered foundationalist or antifoundationalist). As will be discussed later, the ill-defined pragmatism that Posner proposes suffers some of the same frailties as the theories

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Kronman, *The Value of Moral Philosophy*, 111 Harv. L. Rev. 1751 (1998); John Noonan, Jr., *Posner's Problematics*, 111 Harv. L. Rev. 1768 (1998). Posner responded to his critics in, *Reply to Critics of The Problematics of Moral and Legal Theory*, 111 Harv. L. Rev. 1796 (1998).

6. *See infra* Part IV; *compare* Posner, *supra* n. 1, at ch. 1-2, *with id.* at ch. 4.

7. This is a reference to Dworkin's labeling Posner "Darwin's New Bulldog" in his response to Posner's Holmes lectures. *See* Dworkin, *supra* n. 5.

8. Posner, *supra* n. 1, at 5-6, 52-53, 63, 91-98, 110-20, 132-33, 135-36, 150-55, 240-42, 252-55, 267-68 (this list is not exhaustive).

9. *See generally* Posner, *supra* n. 1, at ch. 1-2.

he attacks.[10] Yet *The Problematics of Moral and Legal Theory* is valuable because it confronts the flaws in foundational approaches to doing and studying law without empirical grounding. Posner is somewhat straightforward in his rejection of normative foundational theory:

> I claim that there are no *convincing* answers to *contested* moral questions unless the questions are reducible to ones of fact.[11]

> Every move in normative moral argument can be checked by a countermove. The discourse of moral theory is interminable because it is indeterminate.[12]

Posner defines moral theory for purposes of the book by limiting it to "academic moralism:"[13]

> My particular target is the branch of moral theory I shall call 'academic moralism.' Academic moralism is applied ethics as formulated by present day university professors such as Elizabeth Anderson, Ronald Dworkin, John Finnis, Alan Gewirth, Frances Kamm, Thomas Nagel, Martha Nussbaum, John Rawls, Joseph Raz, Thomas Scanlon, Roger Scruton, and Judith Jarvis Thomson. . . . The members of th[is] [group] think that the kind of moral theorizing nowadays considered rigorous in university circles has an important role to play in improving the moral judgments and moral behavior of people themselves, their students, judges, Americans, foreigners. . . . Some defend a complete moral system, such as utilitarianism or the ethics of Kant, and others specific applications of moral theory, for example to the moral and legal debates over abortion, euthanasia, and surrogate motherhood. All of them want the law to follow the teachings of moral theory, though not always at a close distance.[14]

Posner also argues that moral theorists who have had an impact such as Locke, Bentham, Cicero, and others, including Catharine MacKinnon, are not "academic moralists," but really moral entrepreneurs.[15] He essentially argues that these thinkers brought their ideas out into the world at times where those ideas resonated with evolving sentiments in the relevant societies.[16] One might view them as gifted salespeople of moral ideas. He also suggests that it is not the "moral" underpinnings of their theories that made them effective moral entrepreneurs, but rather their polemical skills, their passion, their appeals to self-interest, and sometimes the usefulness of their teachings.[17]

This seems a rather artificial separation when one considers that some of the individuals that Posner targets as academic moralists such as Kant and Rawls have much in common with his so-called moral entrepreneurs. He also seems to overlook the fact that not all of the moral theorists he identifies rely solely on

10. *See infra* Part IV.
11. Posner, *supra* n. 1, at 10 (emphasis in original).
12. *Id.* at 53.
13. *Id.* at 5-8.
14. *Id.* at 5.
15. *Id.* at 42-44, 80-84.
16. *Id.* at 42-44.
17. Posner, *supra* n. 1, at 42-44.

what he would call moral theory in making their "moral" arguments, and he seems to minimize the aspects of moral theory in moral entrepreneurs' teachings.[18]

This is not fatal to Posner's argument, however, because his concern about the value of academic moralism in resolving legal disputes and analyzing legal decisions can be expanded to include a concern about all foundational approaches to understanding law. That is, all approaches that claim to have found an objective basis for understanding law or legal decisions across contexts and times.[19] Even if it is not so expanded, Posner's assertion that moral theory is essentially useless for resolving concrete legal disputes has merit. It is not that this type of theory cannot be used to make judicial decisions, but rather that it does not lead to the only or best answer to a disputed legal question.[20] Moreover, most judges are not thinking about moral theory like Dworkin or Rawls when they make decisions consistent with the views of those theorists.[21] Therefore, such decisions are not made based on moral theory, but rather the application of a moral principal or even the judge's view of what is moral, and to Posner these are not the same thing as applying moral theory.[22]

Posner came under a great deal of criticism after delivering the Holmes Lectures, which are the basis for *The Problematics of Moral and Legal Theory*.[23] Ironically, much of the criticism was aimed at Posner's refutation of moral theory rather than his failure to adequately explain his pragmatism.[24] While it is understandable that scholars such as Dworkin, Fried, and Nussbaum would criticize Posner's oversimplified and brash attack on academic moralism, none of their responses adequately addressed the most salient aspects of Posner's approach; that universal normative theory is not useful in resolving concrete disputes or in understanding the phenomenon of law, and that empirical approaches might provide better insight. The reason for this is that there can be no answer from moral theory that will convince someone who believes that there are few, or no, universal moral truths that can be applied to controversial concrete disputes across times and contexts.[25] Posner argues as much:

> Academic moralism has no prospect of improving human behavior. Knowing the moral thing to do furnishes no motive, and creates no motivation, for doing it; motive and motivation have to come from outside morality. Even if this is wrong, the analytical tools employed in academic moralism—whether moral casuistry, or reasoning from the canonical texts of moral philosophy, or careful analysis, or

18. Brian E. Butler, *Book Review, Posner's Problem With Moral Philosophy*, 7 U. Chi. L. Sch. Roundtable 325, 327-28 (2000).

19. *See generally* Posner, *supra* n. 1, at ch. 1-2.

20. Allan C. Hutchinson, *It's all in the Game: A Nonfoundationalist Account of Law and Adjudication* (Duke U. Press 2000); Frank S. Ravitch, *Baselines: Judicial Interpretation and the Nature of Law* (forthcoming 2003).

21. Posner, *supra* n. 1, at 114-15. Unlike Posner, however, I would assert that the work of moral theorists might have influence on materials that the judges do use.

22. *Id.* at 114-15, 256-59.

23. *See supra* n. 5.

24. *Id.*

25. Posner, *supra* n. 1, at 7, 59-64.

> reflective equilibrium, or some combination of these tools—are too feeble to override either narrow self-interest or moral intuitions. And academic moralists have neither the rhetorical skills nor the factual knowledge that might enable them to persuade without having good methods of inquiry and analysis. As a result of its analytical, rhetorical, and factual deficiencies, academic moralism is helpless when intuitions clash or self-interest opposes, and otiose when they line up ....
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> What is more, a modern academic career in philosophy is not conducive to moral innovation or insight. And even if it were, there is so much disagreement among academic moralists that their readers (who are in any event few outside the universities) can easily find a persuasive rationalization for whatever their preferred course of conduct happens to be. Indeed, moral debate entrenches, rather than bridges, disagreement. Exposure to moral philosophy may lead educated people to behave *less* morally than untutored persons by making them more adept at rationalization.[26]

While I would not go quite as far as Posner—I have asserted that the social belief in "natural" rights might be useful in a given context, even if they are not objectively natural and are actually contingent on context[27]—I agree with Posner that universal normative theory of the kind that Dworkin sometimes argues for is not universal and by itself has little normative impact. It is bound to context. The only response that would be adequate to rebut Posner's claim is: "Here is a universal moral theory and the evidence that it is indeed universal and can be used to resolve concrete disputes." Yet the responses to Posner all rely on supposedly objective foundations that are not provable. They rely on a presumed baseline from which they cannot prove the correctness of their asserted foundations. This does not mean—as Posner suggests—that academic moralism is useless, but it does suggest that it is not useful in resolving legal disputes.[28]

What Posner prescribes instead of universal normative theory is Legal Pragmatism. This is not Pragmatism in the milieu of Peirce, Dewey, or Rorty, but rather I would assert a form of non-foundationalism. Any claim to objective foundations, and any reliance on a supposedly objective universal theory, is bound to obfuscate the real and potentially varied bases for decisions.[29] Bases that are inherently bound to social context, traditions, and the contexts and traditions of the decisionmaker.[30] In other words, there are no absolute right answers that can be discovered through moral reasoning. What Posner fails to recognize, however, is that moral theory may nonetheless be a factor that influences those making the decision, either directly, or more likely, indirectly.[31] In this context, moral theory

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26. *Id.* at 7 (emphasis in original).

27. Ravitch, *supra* n. 20, at ch. 1.

28. *See e.g.* Daniel A. Farber, *Shocking the Conscience: Pragmatism, Moral Reasoning and the Judiciary*, Const. Comment 675, 682 (1999).

29. Ravitch, *supra* n. 20, at ch. 1.

30. *Id.*

31. For example, prior decisions or legal scholarship relied upon by courts may cite to moral theorists and, of course, courts might cite directly to a moral theorist's work, or a body of law might evolve, in part, based on a moral theory. A good example of the latter might be the law of privacy as reflected in *Griswold v. Conn.*, 381 U.S. 479 (1965), and its progeny, although Posner does imply that

is not the driving source for good or right answers, but rather one potential facet of the context of the decision maker.

Non-foundationalism is not synonymous with Postmodernism and it is not the same as anti-foundationalism.[32] It rejects the notion that there are objective foundations since there is no objective basis from which to determine what is "objective."[33] This is because our context and preconceptions affect what we view as objective.[34] Moreover, non-foundationalism can be viewed as an almost purely descriptive approach focused on understanding how interpretation happens, and it does not preclude the possibility that the perception of objective foundations can be useful for a society (or the possibility that it can be destructive).[35] Non-foundationalism is often confused with anti-foundationalism, which suggests that foundations are problematic and dangerous. Posner distinguishes himself from critical theorist Duncan Kennedy and postmodernist Stanley Fish,[36] and no doubt he could distinguish himself from most non-foundationalists. However, *The Problematics of Moral and Legal Theory* is more cogent and perhaps more coherent when it is viewed from a non-foundational perspective.

Unfortunately, there is a disjunction between Posner's descriptive analysis questioning foundations and his prescriptive approach of Posnerian Pragmatism. An example of this disjunction is provided by Posner's treatment of affirmative action. Posner makes reference to affirmative action in several places in the book.[37] One would expect Posner to make no judgment about the efficacy of affirmative action in the absence of adequate empirical data, data that could not easily be controverted by other data in the field. Yet despite couching his discussion in seemingly non-foundational terms, he seems to make just such a judgment.[38]

If there is inadequate empirical support for a decision, Posner argues for judicial restraint or at the very least a decision that is cognizant of consequences,[39] and thus one in which the judge attempts to make "things better" or reach the "best results."[40] Posner argues that one exception might be when the result of such restraint would lead to outrageous results, as in Justice Holmes' famous

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body of law is not really based on moral theory. *See* Posner, *supra* n. 1, at 258-59. The cases themselves do not claim to be relying on such theory. *See e.g. Griswold*, 381 U.S. at 484-86 (relying ostensibly on a penumbra of rights emanating from the First, Third, Fourth, Fifth, and Ninth Amendments).

32. Allan C. Hutchinson, *It's All in the Game: A Nonfoundationalist Account of Law and Adjudication* (Duke U. Press 2000); Ravitch, *supra* n. 20, at ch. 1.

33. Hutchinson, *supra* n. 32; Ravitch, *supra* n. 20, at ch. 1.

34. *See e.g. id. Cf.* Hans George Gadamer, *Truth and Method* 265-307 (2d rev. ed., Joel Weinsheimer & Donald G. Marshall trans., Continuum 1989).

35. Ravitch, *supra* n. 20.

36. Posner, *supra* n. 1, at 265-73, 273-80. I would assert that neither Kennedy or Fish are non-foundationalists, although each may be an anti-foundationalist in his own way.

37. *See e.g. id.* at 139-40.

38. *Id.* at 193, 139-40.

39. This will be discussed in greater depth at Part IV *infra*.

40. Posner, *supra* n. 1, at 241-42, 249.

"puke" test or Justice Frankfurter's "shocks the conscience" approach.[41] Moreover, a judge should check his or her moral intuition against the views of a "broader community of opinion,"[42] but Posner does not define this community beyond a cite to Justice Holmes' famous dissent in *Lochner v. New York* or how it would function when one is dealing with the rights of minority groups.[43]

Yet Posner seems to assume that "non-remedial" affirmative action is inherently wrong or bad.[44] He seems to assume that the Court's definition of "remedial" and "discrimination" are correct, yet he cites no empirical basis for this, and it almost seems he is making a moral judgment based on concepts of formal equality.[45] Posner does not question his apparent baselines regarding what constitutes a "remedy," and thus he is left making broad statements that sound as though they are the result of a moral theory or at least a normative theory of formal equality that would seem to go against Posner's anti-formalist, pragmatic approach:

> There is much less discrimination and nepotism in hiring and promotion than there used to be, though a partial offset has been the rise of affirmative action in forms that constitute reverse discrimination (mainly discrimination against white males) rather than mere correction of past discrimination.[46]

> Americans today are uncomfortable with racial classifications used to allocate public benefits and burdens, yet recognize that the disaffection of blacks poses a serious social problem. Although the problem may actually have been aggravated by affirmative action, which undermines the claims of all blacks to be recognized as true equals of whites, its sudden and complete elimination today throughout the public sector (and private, if the civil rights statutes were reinterpreted as prohibiting affirmative action) could not be 'sold' to blacks as the elimination of an unjust preference. It would instead be provocative, exacerbating racial tensions, which is something that on pragmatic grounds, our society can ill afford. So neither complete acceptance nor complete rejection of affirmative action would be a practical course of action, and, fortunately, neither extreme is compelled by clear constitutional or statutory texts or precedents. When affirmative action imposes heavy costs on identified whites (as when blacks are given superseniority in firms that lay off surplus workers in reverse order of seniority), it will probably be rejected. When it is plainly necessary either as a remedy for unlawful discrimination or in order to maintain the legitimacy and hence efficacy of the government's security apparatus (as in the case of affirmative action in police forces and correctional staffs), it will probably be accepted. In between these extremes, decisions will turn on the values of the decision-makers- will be, in other words, inescapably political....

41. *Id.* at 147-49, 240.
42. *Id.* at 259.
43. The obvious question that arises is to what broader community should we look when the issue involves potentially unconstitutional or illegal oppression of an unpopular, or any, minority group.
44. Posner, *supra* n. 1, at 139-140, 193.
45. *Id.*
46. *Id.* at 193.

> To acknowledge the inescapably political character of an important class of judicial decisions will scandalize many legal thinkers. But no better solution to the issue of affirmative action is available through moral reasoning, which would *bog down in interminable debates over historical injustices, justice between generations, entitlements, reasonable expectations, rights, and equality*.[47]

Given Posner's overall approach in *The Problematics of Moral and Legal Theory*, one would not expect him to quickly jump to such conclusions. One would expect that he would carefully analyze the data that supports affirmative action policy and that opposed, while also considering the relevant legal doctrines, texts, and societal norms. He might be right or wrong in his assumptions about affirmative action, but given the issues he raises in *The Problematics of Moral and Legal Theory* one cannot simply take his word for it any more than one can take Dworkin's word that it is good policy. In many ways Posner seems to mimic the Rehnquist Court's approach to affirmative action, which is highly problematic both doctrinally and empirically because of the Court's failure to question its baseline before jumping into the fray.[48] This says nothing about the efficacy or constitutionality of the policy, but rather reflects a kind of decision-making Posner rails against.

Is this simply a case of someone not practicing what he preaches? Perhaps to a limited extent, but it is more a statement about how hard it is to escape the impact of foundational normative thinking in reaching a position on controversial issues. In many other places in the book, Posner's discussion of issues remains true to his approach. If one is to truly avoid importing moral theory, or at least

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47. *Id.* at 139-140 (emphasis added). Note that by using the superseniority example, Posner utilizes a situation that even many advocates of affirmative action would question. The implications of his broader statements, however, especially the implication of what he means by remedy for "unlawful discrimination," suggest that he has presumed a baseline (and rejected other equally plausible baselines, such as a holistic interpretation of "remedy" and "discrimination" that considers the long term impact of legal discrimination and concepts of white privilege) on moral or normative grounds that are neither obvious nor empirically supported. It is most interesting that he suggests that issues of historical injustices, etc. are to be avoided, since such issues seem directly relevant to the remedial question. This is precisely where Posner might suggest elsewhere that empirical data would be most useful in helping the decision maker to reach the "best" decision. In contrast to his empirical approach, Posner provides no basis to support the position that he is correct (or the contrary position for that matter).

48. For example, the Court has presumed a baseline of formal equality, suggesting that there is a level playing field, that we are a color blind society, and that remedying the effects of past societal discrimination (even if that discrimination was supported by law and government for hundreds of years) is not appropriate under the Equal Protection Clause, even in locations and industries where that discrimination historically pervaded. *See e.g. City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (holding City of Richmond affirmative action program violative of the Equal Protection Clause); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (same for Federal affirmative action program applying to highway construction). Yet the Court never explains why these presumptions, the first two of which at least, would seem to go against reality—empirically supported reality, are an appropriate baseline for decision. Nor does the Court explain why treating groups (or individuals) that have been historically treated differently the same is any more equality than acknowledging that hundreds of years of differential treatment can lead to massive differences—differences that could be remedied consistently with the Equal Protection Clause when law and government had such a large role in maintaining and exacerbating the differential treatment that helped spawn the differences. Thus, it is odd that Posner would presume baselines of "discrimination" and proper "remedy" that *may be* empirically unsound, and essentially discount others that *may be* more empirically sound, or at least more consistent with social reality.

foundational normative thinking, into one's decision making, one must be prepared to face the consequences. This may mean upholding policies with which one disagrees or overturning policies with which one agrees. Posner's response seems to be that there is a difference between moral theory and private moral intuition, and the latter is inescapable.[49] He makes a good point, because as Gadamer and others have noted it is quite hard to escape one's preconceptions when interpreting.[50] Since a part of our preconceptions may be tied to notions of what is right or wrong, moral or immoral, it is only natural that these things might influence a judge's decision without adequate reflection.[51]

Herein lies the problem for Posner. If empirical data may support a conclusion different from the judge's moral view, it would seem inappropriate for the judge to simply make a decision without questioning his or her baselines. If the data could support both sides in a controversial case, it would seem inappropriate for the judge to simply impose her will, this would be little different than a judge using moral theory. If a judge can use her own moral intuition, which may have been influenced by religious or moral theory, to decide controversial cases in the absence of empirical data,[52] what is wrong with moral theorists trying to influence judges even if they have had little success?

If Posner is correct about his first two points (rejecting moral theory and supporting more empirical study of law) the answer would be that it can make for exceedingly bad law, both as a matter of policy and as a matter of consistency, because moral theory can provide no correct answer to concrete and finite controversial issues. Thus, a pronouncement from a court based on moral theory and nothing more would be inherently suspect since courts bill themselves as neutral arbiters of legal disputes, not partial advocates of moral positions.[53] The way out is for the judge to get some empirical support for a decision, or to employ the tools of empirical research, which could include testing his or her baselines even if the scientific method in all its details is not applied.[54] Society is more likely to accept decisions made based on empirical approaches and data, and the judge is more likely to question his or her preconceptions when confronted with empirical data or when adopting an empirical approach to decision making.[55] This may not

49. Posner, *supra* n. 1, at 51, 60-61.

50. Gadamer, *supra* n. 34, at 265-307; Jean Grondin, *Introduction to Philosophical Hermeneutics* (Joel Weinsheimer trans., Yale U. Press 1994); William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 Colum. L. Rev. 609, 621-27 (1990); Ravitch, *supra* n. 20.

51. *Cf.* Gadamer, *supra* n. 34, at 265-307; Grondin, *supra* n. 50; Eskridge, *supra* n. 50, at 621-27; Ravitch, *supra* n. 20.

52. Of course, Posner would argue that the judge should be trying to "make things better" or reach the "best results" under the circumstances, and if his or her moral intuition is inconsistent with these goals that intuition should not dictate the outcome. Posner, *supra* n. 1, at 261-62. Also, the judge should try to check his or her moral concerns "against those of some broader community of opinion." *Id.* at 259. This may be an oversimplification of the role that preconceptions, including moral intuitions, play in the interpretive process.

53. Posner does recognize that partiality does exist in many judicial decisions, even without reference to moral theory.

54. Posner, *supra* n. 1, at ch. 3-4.

55. *Cf. id.* at 59-64.

render moral theory completely useless in the legal process, but it does suggest that it can not lead to the type of results courts claim to be striving for. Engaging us to think about this potentiality is one of the best contributions in *The Problematics of Moral and Legal Theory*, even if Posner falls prey to his own criticism in places.[56]

III. DON'T LET SLEEPING DOGS LIE: THE BENEFITS OF EMPIRICAL RESEARCH

One of the most important aspects of *The Problematics of Moral and Legal Theory* is Posner's assertion that most legal scholarship and much legal decision-making, lacks empirical support.[57] He suggests that more empirical research into the consequences of laws and judicial decisions, as well as into the nature of law and legal decision making is needed to better ground judicial decisions and legislative action, and to make legal scholarship more useful to the real world of law:[58]

> The courts capacity to conduct empirical research is limited, perhaps nil. But their assimilative powers are greater. I would like to see the legal professoriat redirect its research and teaching efforts toward fuller participation in the enterprise of social science (broadly conceived, and certainly not limited to quantitative studies) and by doing so give judges better help in understanding the social problems that get thrust on the courts.[59]

> Economics, psychology both cognitive and abnormal, evolutionary biology, statistics, and historiography have all advanced since Holmes wrote. New methods of apprehending social behavior, such as game theory, have emerged. We know more about the social world than Holmes could have known. We should be able to avoid his mistakes. No doubt we shall make our own. Prudence as well as realism suggests that the entanglement of law with morality, politics, tradition, and rhetoric may well be permanent and the path to complete professionalization therefore permanently blocked. But we should be able to go a long way down that path before reaching the obstruction. We should try, at any rate, which will require more emphasis in the legal academy than at present on economics, statistics, game theory, cognitive psychology, political science, sociology, decision theory, and related disciplines. In trying we shall be joining a great and, on the whole, a beneficent national movement toward professionalization of all forms of productive work.[60]

Posner is correct to lament the relative lack of empirical work within the legal academy. As he notes, however, there is some empirical work in law schools, and there is a great deal of empirical work about the law going on in other disciplines.[61] Admittedly, the amount of research is disproportionately low given

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56. Posnerian Pragmatism, the proposed solution to the problems raised in *The Problematics of Moral and Legal Theory*, falls prey to Posner's criticisms unless it is left unhelpfully vague. This will be discussed in greater detail at Part IV *infra*.

57. Posner, *supra* n. 1, at 164, 210–26.

58. *Id.*

59. *Id.* at 164.

60. *Id.* at 211 (footnote omitted).

61. *See e.g. id.* at 211-17.

the role law plays in the United States, but it is growing. The Law & Society movement, which Posner only references in passing, is a vibrant community of law professors and social scientists who understand the value of empirical study of the law. Posner cites many scholars active in the Law & Society movement, such as Frank Munger, Sally Engel Murray, Kim Scheppele, Richard Abel, Austin Sarat, William Felstiner, Marc Galanter, and Richard O. Lempert,[62] but he understates the substantiality of the body of work that they and other empirically inclined researchers have developed.

If there is a weakness in Posner's approach here, it is that he seems to view empirical research and the scientific method as an almost magical cure for the ills of legal scholarship and legal decision making, but this oversimplifies the indeterminacy of much empirical research in the social sciences and economics. Debates may rage within a field of research for years over the correctness of the conclusions drawn from empirical research.[63] While these debates may be incredibly useful for legal scholars who do not need to decide the outcome of a specific case before them with specific parties and facts, judges must trod carefully in the world of empirical research.[64]

Posner attempts to distance himself from the legal realists, by among other things, noting the evolution of empirical methodology since the realist era and the problems with the realists' use of social science.[65] Yet when reading *The Problematics of Moral and Legal Theory*, one cannot help but be reminded of Jerome Frank's *Law And The Modern Mind*,[66] given the faith Posner has in empirical methodology—especially economics—for aiding the judge in his or her task.

I do not mean to imply that Posner has no point here. He is right that law, especially legal scholarship, would benefit from increased interaction with other disciplines, especially empirically oriented disciplines. This ties in nicely with his point that academic moral theory cannot provide concrete or objective solutions to controversial legal disputes. Yet is empirical research really "the answer" to all, or many, of the concerns Posner raises? Does Posner oversimplify the nature and conclusiveness of social science research?

In the context of legal scholarship Posner makes an important point. Too much current legal scholarship seems to view law in a vacuum, as though it has no

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62. *Id.* at 212-16.

63. *See*, for example, the discussion about religiosity and discrimination in Frank S. Ravitch, *School Prayer and Discrimination: The Civil Rights of Religious Minorities and Dissenters*, ch. 4 (Northeastern U. Press 1999).

64. *See e.g.* Landon Summers, *The Justices and Psychological Research: But Is It Really Science?*, 21 Law & Psych. Rev. 93 (1997) (suggesting that the Supreme court misused social science research in *Lee v. Weisman*, 505 U.S. 577 (1992), even if the Court ultimately made the right legal decision despite the misuse of the studies); Scott Vaughn Carroll, Student Author, *Lee v. Weisman: Amateur Psychology or an Accurate Representation of Adolescent Development, How Should Courts Evaluate Psychological Evidence?*, 10 J. of Contemp. Health Law & Policy 513 (1993) (same, but implying oversimplification rather than misuse).

65. Posner, *supra* n. 1, at 209-11, 255.

66. Jerome Frank, *Law and The Modern Mind* (Brentano's 1930). Posner's faith in methodology is reminiscent of Jerome Frank's faith in psychology.

social context or impact. It is not that purely doctrinal scholarship is useless, but rather that along with prescriptive (moral theory) based scholarship, it so dominates legal scholarship that the value of good empirical research gets overlooked, or worse, overshadowed. This is not simply true in regard to the amount of empirical research being performed in law schools, but also in regard to the use of empirical research from any discipline by legal academia.[67]

Still, there is a significant minority of legal scholars who do or use empirical research, sometimes even in connection with doctrinal research or research grounded in moral principles. There is a great benefit to an interdisciplinary focus in legal scholarship. I have personally benefited from the wisdom that other disciplines have to share,[68] but it does take careful research to avoid simply taking one side in a debate raging in another discipline. The best-case scenario would be for all sides of a debate in another discipline to point in one direction for the legal scholar observing, or engaged in, that debate.[69]

Unlike Posner, I would not suggest that other forms of legal scholarship, like moral theory, are essentially useless, but I agree with Posner that interdisciplinary, and particularly empirical, research can be helpful in learning the context and consequences of legal decisions and policies, and that context and consequences matter.

When Posner applies these same principles to judging he runs into some minor trouble, but this trouble does not undermine his general assertion that empirical approaches can be useful to judges. Posner acknowledges that in some cases empirical research will not provide solutions because results within the relevant disciplines might not be settled enough for judicial consumption:[70]

> I do not want to seem complacent about pragmatic adjudication. A danger of inviting the judge to step beyond the boundaries of the orthodox legal materials of decision is that judges are not trained to analyze and absorb the theories and data of social science . . . .
>
> A second and related concern about the use of nonlegal materials to decide cases is that it may denigrate into 'gut reaction' judging. Cases do not wait upon an accumulation of a critical mass of social scientific knowledge that will enable the properly advised judge to arrive at the decision that will have the best results.[71]

Posner does not adequately address the concern that empirical data may be misused or misunderstood by courts. This has happened in some major cases.[72] In

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67. *Cf.* Posner, *supra* n. 1, at 210-17.

68. *See e.g.* Ravitch, *supra* n. 63, at Preface, ch. 4.

69. For an example of this *see id.* at ch. 4. Of course, it is just as likely that a legal scholar doing interdisciplinary research might find that the debate in the other discipline is not conclusive regarding the issue he or she is concerned about. Thus, the scholar may wish to do independent empirical research with a colleague trained to do so, explain the complexities of the debate if he or she utilizes the existing data, or not use the empirical data until a time when it is more conclusive.

70. Posner points out elsewhere that the nature of empirical research suggests that at some point a provable, verifiable, and useful answer might result.

71. Posner, *supra* n. 1, at 255.

72. This has been suggested about *Lee v. Weisman*, 505 U.S. 577 (1992), a famous First Amendment Case. *See* Summers, *supra* n. 64; Carroll, *supra* n. 64; *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *see*

this sense empirical research could risk becoming the result-oriented tool Posner seems to rail against. It could become like moral theory or the maxims of statutory construction, a tool that provides a counter argument for every argument.[73] Posner suggests, probably correctly, that with adequate understanding of the indeterminacy of some empirical research at given times and places, courts could come to use the empirical research that is most useful to their endeavor, without turning it into a vice.[74]

Moreover, Posner points out that judges can act more empirically in the decision making process even if they can not employ all the rigor of the scientific method or data that results from the application of that method.[75] When empirical data is unable to provide an adequate answer judges should carefully consider the impact their preconceptions could have on the specific case or generally,[76] and consider the impact their potential decisions might have on the broader policies of the relevant law or legal field.[77] Posner writes for example:

> [W]hen I said the pragmatist 'is drawn to the experimental scientist, whom the pragmatist urges us to emulate by asking, whenever a disagreement arises: What practical, palpable, observable difference does it make to us?' I meant only that judges should avoid becoming entangled in disputes that have no practical significance, such as whether judges 'make' or 'find' law. This is not advising them to create rules of law by pure trial and error; that is not how experimental scientists proceed. To decide cases without a sense of what the purpose of the applicable law is—and so in the DES cases without asking whether the deterrent and compensatory objectives of tort law would be served by collective responsibility in the circumstances of irremediable uncertainty presented by those cases—is decidedly unpragmatic.[78]

Of course, this leaves the question of what judges should do when the purpose of the law, the relevant empirical data, and various suggestions as to "best" results could lead to multiple outcomes. Posner does not adequately address this, but his failure to do so does not undermine the value of his critique of moral theory in resolving legal disputes, or his suggestion that empirical research can be valuable to the judge and should be to the legal academic. His failure to adequately address the issue is the result of his vague definition of Legal Pragmatism.

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e.g. Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 Law & Contemp. Probs. 57, 70 (1978); *Symposium, The Courts, Social Science, and School Desegregation*, 39 Law & Contemp. Probs. (1975). Of course, these cases demonstrate that the resulting decisions need not be bad ones (many people, myself included, think the outcomes in these cases were correct even if the reasoning may have misused or oversimplified social science data).

73. *See e.g.* Posner, *supra* n. 1, at 53 (in regard to moral theory).
74. *See generally id.* at ch. 3-4.
75. *Id.* at 164, 211.
76. *Cf. id.* at 148-49, 182.
77. *Id.* at 254.
78. *Id.* at 254 (emphasis and brackets in the original).

IV. DOG EAT DOG: WHY POSNER'S PRAGMATISM IMPLODES ON ITSELF

What is Legal Pragmatism according to Posner? After reading the book I still do not have a clear answer beyond vague calls for reaching the "best answer," considering consequences, and making things better.[79] Posner does say what his version of legal pragmatism is not. It is not a normative theory that lays claim to any universal foundation.[80] It is not a purely utilitarian theory that seeks maximum "utility," because it is hard to determine a baseline from which to define "utility" in the variety of situations that confront a judge or legal scholar.[81] Interestingly, it is not a theory that is totally based on economic "efficiency,"[82] although Posner backslides in places.[83] It is not a doctrinal theory like positivism, because a total focus on doctrine may artificially ignore both the social context and consequences of legal decisions. It is not postmodern, because it is not relativistic enough and it acknowledges that some answers may be better than others.[84] It is not a form of critical theory, because it does not agree with several of the central tenets of critical theorists.[85]

By juxtaposing Posner's discussion of moral theorists such as Dworkin and theorists such as Habermas, it becomes clear that his Legal Pragmatism neither supports a specific ideology or critique of ideology.[86] But as Jeremy Waldron implies in his review of *The Problematics of Moral and Legal Theory*, it is hard to adequately describe a theory or approach by noting what it is not.[87] Few people would disagree with the assertion that judges should attempt to make "things better" or that they should try to reach the "best results" under the circumstances, and few would argue that judges should not be concerned with the consequences of their decisions, but Posner gives no concrete basis for determining what "making things better" or making the "best decision" mean in the wide variety of cases that come before judges. While Posner suggests that judges should be concerned with the consequences of legal decisions, he gives little guidance as to which consequences across the wide array of potential consequences and decisions. Posner acknowledges the difficulty of doing so given the nature and breadth of judicial decision-making. He does not advocate *ad hoc* decision-

79. Posner, *supra* n. 1, at 241-42, 249, ch. 4. Posner does write, "pragmatist[s] always try to do the best they can for the present and the future, unchecked by any felt *duty* to secure consistency in principle with what other[s] . . . have done in the past." *Id.* at 241. This is one of Posner's more concrete attempts to define his legal pragmatism, yet. He does not undermine the notion that his conception of legal pragmatism is vague.

80. *Id.* at ch. 1, 4.

81. *Id.* at 112, 253.

82. *Id.* at 211.

83. *See id.* at 14-15, 30 n. 35, 35, 216-17, 228-39. By "backslide" I mean that Posner presumes the efficacy, and in some cases the primacy, of economics, without explaining why he has focused on economics more than other fields or why economic principles should actuate legal decisions. *See infra* nn. 95-106 and accompanying text.

84. Posner, *supra* n. 1, at 265-73.

85. *Id.* at 273-80.

86. *Compare* Posner's discussion of Habermas, *id.* at 98-107, *with* his discussion of Dworkin, *id.* at ch. 1-2.

87. Jeremy Waldron, *Ego Bloated Hovel*, 94 Nw. U. L. Rev. 597, 600-01 (2000).

making, but his vaguely defined Legal Pragmatism is not likely to comfort those concerned about such judicial decision-making.

Posner mentions Dewey, Peirce, and even Rorty,[88] but his Legal Pragmatism is not as defined as their philosophical pragmatism,[89] and it must function in the world of legal decision-making where concrete answers are needed to resolve a wide variety of disputes. This is not a knock on Pragmatism generally, or Legal Pragmatism specifically, but rather on Posner's vague concept of Legal Pragmatism. Of course, one of the consistent criticisms of Pragmatism, generally, is that it is vague and undefined.[90] To the extent Pragmatism is unconnected to utilitarianism and basic concepts of economic efficiency it may be a very useful theory if someone could define it. Theorists like Peirce and Rorty have gone much further in doing so than Posner does.

One of the biggest problems with Posnerian Pragmatism is that it functions best when viewed as a form of non-foundationalism, an arguably descriptive approach,[91] yet in prescribing the goals of "making things better" and reaching the "best results," Posner seems to go directly into the prescriptive realm with little explanation of how he gets from his "is" to his "ought."[92] It seems as though there is a foundation or variety of foundations lurking in his approach. Significantly, Posner does not adequately answer the key questions raised by his Legal Pragmatism. What is "best" or "better" in the context of judicial decision-making? Who decides what view of "best" or "better" judges should apply? If it is the judge, how is this functionally different from moral theory?[93]

Non-foundational theory can leave room for answers to these questions, and at some level it can include a prescriptive approach, but foundations and preconceptions would have to be questioned and a better understanding of the interpretive process would be necessary. Posner does a bit of this, but not enough to keep his Legal Pragmatism from falling prey to his own critique of foundational theory. Either his Legal Pragmatism is underdeveloped, in which case it is not terribly useful, or it is based on some foundation—the universal benefit of empirical approaches to law or economic efficiency—that could break the ties that will inevitably arise in many cases.[94] Since we know that empirical research, while

88. Posner, *supra* n. 1, at 228, 264, 266, 270.

89. *See generally id.* at ch. 4 (describing Posner's view of Legal Pragmatism).

90. *Cf.* Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, in *Pragmatism in Law and Society* (Michael Brint & William Weaver eds., Westview Press 1991); Michael Rosenfeld, *Just Interpretations: Law Between Ethics and Politics*, at ch. 6 (U. of Cal. Press 1998).

91. *See* Ravitch, *supra* n. 20 (suggesting that non-foundationalism is most compelling as a descriptive approach, even though it raises prescriptive possibilities).

92. Posner, *supra* n. 1, at 241-42, 249. My reference to the "is" and "ought" harkens back to Kant's discussion of these concepts. *See* Immanuel Kant, *The Critique of Pure Reason* (Paul Guyer & Allen W. Wood trans., Cambridge U. Press 1998). Of course, Posner would reject Kant's broader moral theory. *See e.g.* Posner, *supra* n. 1, at ch. 1.

93. Responding that it is the moral intuition of those who have earned the right to be judges seems an inadequate response.

94. The word "ties" in this sentence refers to situations where both parties have equally good cases and more than one legal result could be equally appropriate under the circumstances. Thus, in applying economic theory, for example, a judge would be inferring that such theory is a better actuating principle for legal decisions and "good" consequences, because without accepting this

immensely useful, will not resolve all controversial cases,[95] what more does Posner offer?

If in the end he relies on economic theory, and particularly on economic efficiency, Posner is substituting one moral theory for another. After all, economic efficiency can easily meet many of the criteria that Posner assigns to moral theory. For example, if one does not accept that economic efficiency is an appropriate goal in some, or all, cases, use of economic theory will not convince one to suddenly accept efficiency as the basis for judicial decisions.[96] As has been noted too often to be overlooked, there are many aspects of law that are not meant to be efficient, and while it is arguable that there are more and less efficient ways to effectuate laws that are not themselves based on efficiency, this does not answer the critic who would not apply efficiency as an actuating principle in these contexts. Economic efficiency is as much a foundational approach as moral theory,[97] and the fact that it is generally analyzed using some scientific methodology is irrelevant to the inherently moral (or at least normative) question of whether efficiency is the basis upon which our legal system or specific laws are based.

Posner astutely avoids making his pragmatism solely dependent on economic efficiency.[98] Yet in many places he hints that efficiency, or at least economic principles, are a major tool for the Pragmatist judge.[99] By suggesting they are only a tool, Posner adeptly deflects some of the criticism that it is a "foundation" for his theory.[100] Yet, unless it is a tool to be used *ad hoc* by judges whenever they think it useful, there must be some explanation for why economic principles are more relevant than moral theory. The fact that economics is a "strong" empirical field is irrelevant to the question of whether economic principles such as efficiency should dictate outcomes in legal decisions. Only after this is accepted is the methodology of economics relevant.

Posner's other arguable foundation is that empirical study of law is generally useful both to legal scholars and judges.[101] As noted above, I agree that empirical study of law, law's social context, and its consequences is exceedingly useful.[102]

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foundation, a different actuating principle leading to different results and "good" consequences might be equally acceptable.

95. *See supra* Parts II and III.

96. This is similar to Posner's critique of moral theory. *See* Posner, *supra* n. 1, at ch. 1.

97. Posner seems to assume that efficiency is a proper basis for legal decision-making because it is more scientific, but the science is only valuable to legal decision-making if economic efficiency is presumed a correct foundation upon which to make legal decisions or to achieve "good" consequences. This leads to a circular argument, because until one accepts the foundation of efficiency the empirical nature of economics is not relevant, but it is that empirical nature that Posner suggests commends the use of economics in legal decision-making.

98. He is quite specific about this in places. *See e.g.* Posner, *supra* n. 1, at 211.

99. *Id.* at 14-15, 30 n. 35, 35, 216-17, 228, 239, 254 (this list is not exhaustive).

100. There are many places in the book where Posner makes an assertion that would tend to deflect criticism of his approach, but the deflection often seems the goal of the deflecting assertion. As Butler, *supra* n. 18, has noted, this is because Posner is making a legal type argument in places and thus using the tools of the advocate rather than the scholarly tools he uses elsewhere in the book.

101. Posner, *supra* n. 1, at 164, 211-26.

102. *See supra* Part III.

Much empirical research is descriptive and might be used by courts in the non-foundational way suggested by Posner. For example, to help judges understand whether a statute is effectuating its stated purpose, what the economic or social consequences of a particular decision or approach is, and whether particular remedies are effective in particular contexts. To the extent this becomes prescriptive—empirical work being used as an actuating principal in legal decisions—we must first accept that it is an appropriate actuating principal. Posner seems to be advocating more of a descriptive use of empirical research through which judges can use empirical research to aid them in understanding the legal and social phenomena in question when making tough decisions.[103] To the extent he does so, this would seem consistent with his first two points. To the extent empirical research would be used to dictate outcomes in cases, without more, one must first accept that this research can be an actuating principal.

What we are left with after considering these points is either a Legal Pragmatism that is so vague that it is little more than a loosely associated group of tools or concepts that judges can use when they think it is appropriate to do so, or an essentially foundational theory that tries to obfuscate its foundational nature and dress itself up as scientific and objective. The latter type of theory is exactly what Posner's first two points argue against.[104] Perhaps, as some have suggested, Posner's Legal Pragmatism is little more than a vehicle for a supposedly objective statement of Posner's policy views.[105] This would be ironic, because Posner accuses Dworkin, his favorite target in *The Problematics of Moral and Legal Theory*, of doing the same thing.[106] I would give Posner more credit than this because his first two points suggest that what he is saying on the whole is far more important than his occasional backsliding to what seem like his policy preferences under the guise of pragmatism.[107] The failure of his pragmatism to meet his first two points is a testament to how salient those points are. Thus, despite Posner's Legal Pragmatism caving in under the weight of his overall analysis, *The Problematics of Moral and Legal Theory* is an important work.

V. CONCLUSION

Posner questions the efficacy of moral theory, or as I have suggested universal normative theory, in legal decision making, and this discussion is a valuable contribution. There may be an adequate response to Posner's critique of moral theory, but to be effective, such a response would need to be based on more than moral theory or a preconceived notion of its value in legal scholarship and decision-making. When Posner argues for the value of empirical research in the legal context he champions an important cause, legal scholars and decision makers alike would benefit from more empirical study of the law, its social context, and its

103. Posner, *supra* n. 1, at 164, 211-17, ch. 3-4 generally.
104. *See supra* Parts II and III.
105. *Cf.* Jeffrey Rosen, *Overcoming Posner*, 105 Yale L.J. 581 (1995).
106. Posner, *supra* n. 1, at 76 n. 141, 94, 96-97, 267-68.
107. *See generally id.* at ch. 1-2, 4.

consequences. Unfortunately, Posner does have a tendency to oversimplify aspects of the issues he takes on. For example, artificially defining academic moralism and failing to adequately analyze the differing efficacy of empirical research for legal scholarship and judicial decision making. Yet, *The Problematics of Moral and Legal Theory* is an important work in the discourse about the nature of law and legal foundations. It is probably most useful when understood as advocating a non-foundational approach—one that recognizes the need for some determinacy in law while understanding that foundational approaches do not necessarily achieve determinacy or coherence. Posner's version of Legal Pragmatism falls prey to his critique of foundational theory in the end, and to the extent it may rely on economic efficiency it fails to distinguish itself from the moral theory that Posner criticizes. Still, Judge Posner has written an important book, and if one can look past some of the oversimplifications and the vagueness of his pragmatism, a book that should be discussed for a long time to come.