Posner's Pragmatist Jurisprudence

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I. INTRODUCTION

Judge Richard Posner is correct. We live in a period in time when the philosophy of law is dominated variously by (mostly moderate) skepticism, moral relativism, ideological perspectives including classical liberal notions of individualism and responsibility, and faith in science or at least scientific methods. The so-called "pragmatic revival," the new "hot" topic in jurisprudence (among law and economics, law and literature, critical legal studies, critical race theory,

3. Minda has argued that the 1980s saw the "simultaneous emergence and maturation of three influential jurisprudential movements—law and economics (L/E), critical legal studies (CLS), and feminist legal thought." Gary Minda, The Jurisprudential Movements of the 1980s, 50 OHIO ST. L.J. 599, 600 (1989). There are, of course, other movements as well, including (but not limited to), pragmatism. See id. at 600 n.2. However, when one draws the "lines" among the "movements," it is clear that unique and radically different conceptions of law and adjudication are available even as the mainstream of academic jurisprudential viewpoints dissolves and becomes more eclectic. See id. at 600 nn.2-3.
4. See RICHARD A. POSNER, OVERCOMING LAW (forthcoming 1995)(manuscript at i, on file with author)[hereinafter OVERCOMING LAW]. Editors Note: Richard Posner's book Overcoming Law was published contemporaneously with the publication of this Article.
5. Richard A. Posner, What Has Pragmatism to Offer Law?, 63 S. CAL. L. REV. 1653 (1990), reprinted in PRAGMATISM IN LAW AND SOCIETY 29, 35 (Michael Brint & William Weaver eds., 1991)[hereinafter Pragmatism]. However, there is an anti-science streak in Posner's view as well. See OVERCOMING LAW, supra note 4, (manuscript at 7 n.12).
6. See Thomas C. Grey, What Good is Legal Pragmatism?, in PRAGMATISM IN LAW AND SOCIETY, supra note 5, at 9; Posner, supra note 5, at 29. Posner, though, warns us to be wary of labels such as "new" or "neo" pragmatism. Posner, supra note 5, at 29-30. He sees, instead, a development of pragmatism rather than a movement striking out entirely or substantially anew:
feminist jurisprudence, postmodernism inter alia), is led by Posner, who has weaved these dominating strands of thought in combination. Much of the pragmatic "revival" may quiet in time, but Posner has succeeded in stating a complete, jurisprudential viewpoint that he now calls pragmatism, which by design, will endure "the tyranny of labels," even if a minor anarchy is created trying to describe that view. Most importantly, Posner may have captured a milieu in American judging and lawyering in his recent works in a way that may endure.

There is little to be gained, however, from calling this recrudescence of pragmatism the "new" pragmatism. That would imply that there were (at least) two schools of pragmatism, each of which could be described and then compared. What is more useful is to observe simply that the strengths of pragmatism are better appreciated today than they were thirty years ago.


8. See Minda, supra note 3, at 600.

9. Arguably this is true to an extent that no American jurisprudential writer, even in the American legal realist tradition, has ever done. This historical point, however, is not addressed within, except in passing.

10. Posner has succeeded in the sense that it develops all the basic elements of a genuine moral philosophical viewpoint.

11. The crux of much of his earlier works was positive and normative economic theory. See generally Richard A. Posner, The Economic Analysis of Law (3d ed. 1986 and earlier editions). Even in more recent works, Posner has argued that law and economics remains the dominant theoretical school of legal analysis. See Richard A. Posner, The Decline of Law as an Autonomous Discipline: 1962-1987, 100 Harv. L. Rev. 761, 767-68 (1987); The Problems of Jurisprudence, supra note 7, at 353. Posner’s pragmatism is not about rejecting economic analysis but is about integrating such analysis into a broader viewpoint.

12. Posner has announced only relatively recently his shift to pragmatism, which should be viewed as a development, rather than a revolution in his view. See The Problems of Jurisprudence, supra note 7, at 31. The recent works can, however, be seen as a (potentially) defining moment in Posner’s writings. Recent works, principally The Problems of Jurisprudence, supra note 7, Richard A. Posner, Cardozo: A Study in Reputation (1990)(hereinafter Cardozo], and several roughly contemporaneous articles, culminating in Overcoming Law, supra note 4, define a discrete period in his works. The roots of Posner’s "prag-

13. If for no other reason than his status, prolificity, and prolixity, Posner seems destined to stir considerable and continuing debate and controversy with his most recent efforts. Stanley Fish’s comments serve to corroborate this:

Not long ago, I was discussing the state of legal theory with Joseph Raz and rehearsing (somewhat churlishly) my criticism of Ronald Dworkin’s Law’s Empire. Raz stopped me in my tracks by asking, “What other book written since Hart’s The Concept of Law is so comprehensive and raises so many of the crucial questions?” I can now answer, “Pos- ner’s The Problems of Jurisprudence.”
Whatever labels one attaches to his writings, Posner addresses viewpoints that run deep, and sometimes silently, in American legal practice. Those viewpoints include the following:

1. **Jurisprudence**—the philosophy of law—is often of little practical value to lawyers and judges in building approaches to concrete legal problems (hence *The Problems of Jurisprudence*).

2. Legal obligation and moral obligation are largely—if not always entirely—revisable and relative claims: "Legal rules are to be viewed in instrumental terms, implying contestability, revisability, mutability."

3. Much of legal practice is inarticulate, even inarticulable.

4. Claims about foundational values can be the most controversial and least susceptible of resolution. Conflicts regarding foundational values give rise to ideological storms and offer little positive benefit. They also block progress towards meaningful reform. Thus, we should be skeptical about the existence of absolute, highly conceptual and nebulous claims.

5. Science, albeit with fits, starts, and retreats, shows, however, demonstrable progress. Science is practical and dwells in a world of

---


14. Although it may be helpful in tearing down faulty arguments, etc., as Posner asserts in *Overcoming Law*, "The use of analytical methods...to knock down metaphysical entities...must be distinguished from its use to construct theories designed to guide action." *Overcoming Law*, supra note 4, (manuscript at 9). See id. at 6-7.

15. See *Overcoming Law*, supra note 4 (manuscript at Introduction, chs. 5, 23). To some extent this is a central feature of the skepticism (now a loaded term for Posner and others; see Lipkin, supra note 2) inherent to Posner's pragmatism. I argue that there is an affinity that such a view has to forms of non-cognitivism in ethics and to modernized anti-theory arguments. See Cheryl N. Noble, *Normative Ethical Theories*, in *Anti-Theory in Ethics and Moral Conservatism* 49 (Stanley G. Clarke & Evan Simpson eds., 1989).

16. *The Problems of Jurisprudence*, supra note 7, at 29. This position, attributed by Posner to Cardozo, is among those that Posner explicitly seeks to extend and update. *Id.*

17. Posner's extended treatment of this notion—a response in many ways to criticisms levelled by the late Paul Bator is developed infra notes 106-132 and accompanying text. What amounts to a succinct restatement is provided by Thomas Grey:

> Pragmatism reminds us of the territory below the level of articulate justification. This is the substratum of ordinary unreflective experience: of habit and of the feelings that sometimes spontaneously rebel against what habit dictates. It is this level of experience that determines most of our actions, and also influences (by supplying the context for) all of our self-conscious reflection. As pragmatists, we have learned to respect both the power and the (sometime) wisdom of experiential know-how of this kind.

Grey, supra note 6, at 26.
fact and testable (or falsifiable) hypothesis. Thus, once we agree that we want to send a man to the moon, we can. Moreover, the roots of pragmatism are arguably linked to science in a fundamental way.\textsuperscript{18}

6. Finding a set of policy objectives and maximizing them,\textsuperscript{19} with attention to costs and benefits, yields the best results in hard cases not controlled by constitutional mandates or incontrovertible intuitions of justice or fairness. In short, some form of teleological reasoning,\textsuperscript{20} of which various forms of utilitarianism, wealth maximization, and law and economics are prime examples, functions best.

Many of Posner’s critics have identified and attacked one or several of these points in Posner’s recent efforts, in one way or another, but a general description (let alone attack) on all fronts has failed to materialize.\textsuperscript{21} Ronald Dworkin, for example, basically was content to dismiss the centerpiece of Posner’s recent work, \textit{The Problems of Jurisprudence}, for sticking to a “trivial claim about disagreement.”\textsuperscript{22} A tendency among notable academics who do not share Posner’s viewpoint to dismiss his recent pragmatism handily upon examination is apparent.\textsuperscript{23} This approach may disserve the development of Posner’s

\begin{itemize}
\item \textsuperscript{18} See Philip P. Weiner, \textit{Evolution and the Founders of Pragmatism} (1949). See also W. Edwards Demming, \textit{Out of the Crisis} (1986); Grey, \textit{supra} note 6, at 11.
\item \textsuperscript{19} At times, Posner finds the genealogy of his pragmatism in legal realism, although he is careful to distinguish his pragmatism from legal realism, and at times to sever the connection. See \textit{Overcoming Law} \textit{supra} note 4, (manuscript at 3); \textit{The Problems of Jurisprudence}, \textit{supra} note 7, at 19-20 n.30. See also \textit{Overcoming Law}, \textit{supra} note 4, (manuscript at ch. 20). There are obvious and some not so obvious connections between Posner’s pragmatism and various well known versions of American legal realism and for that matter the American pragmatist movement(s). To a very significant extent, Posner undertakes the task of making these connections in \textit{Overcoming Law}. See \textit{id}. However, a comparison with the major moments of these related views is a second-order task to the central and prior project of identifying the essential elements of Posner’s pragmatism. See \textit{generally} West, \textit{supra} note 7.
\item \textsuperscript{20} A type of reasoning wherein, loosely speaking, what is right or just, inter alia, is treated as a function (often maximization) of the “good,” suitably defined. Of course, the most prominent types of theories which rely on such reasoning are utilitarian and wealth maximization oriented.
\item \textsuperscript{21} Indeed, there has yet to be an adequate attempt to draw a complete mapping of Posner’s “pragmatist” view (except by Posner himself in \textit{Overcoming Law}), although several authors suggest how such a map might or should read. See, e.g., Fish, \textit{supra} note 13; Rakowski, \textit{supra} note 12. Minda has sketched a broad context for Posner’s pragmatism. See Gary Minda, \textit{Jurisprudence at Century’s End}, 43 J. Legal Educ. 27, 37-38 (1993).
\item \textsuperscript{22} Ronald Dworkin, \textit{Pragmatism, Right Answers, and True Banality}, in \textit{Pragmatism in Law & Society}, \textit{supra} note 5, at 377 n.17. Discussing \textit{The Problems of Jurisprudence}, Dworkin also describes the presentation as “clear, erudite, punchy, knock about, witty, and relentlessly superficial.” \textit{Id}. Moreover, Dworkin has asserted that pragmatism is “philosophically a dog’s dinner.” \textit{Id}. at 360.
\item \textsuperscript{23} See Dworkin, \textit{supra} note 22; Rakowski, \textit{supra} note 12. Of course some others have been more engaged by Posner’s recent works. See Martha Nussbaum, “Only
view in that it is not as likely as constructive criticism to push Posner's view to develop further philosophically in significant ways.

Efforts to develop or constructively criticize the Posner of recent vintage must begin by locating the main argumentative moments within Posner's pragmatism. This task, however, is far from simple because Posner's view, particularly in *The Problems of Jurisprudence*, is sometimes difficult to pin down: the phenomenon of "omnisignificance," developed in section IV.C of this Article, is present in the recent works and leaves these works with a "something for everyone" flavor. That phenomenon has generated a predictable state of affairs in the secondary literature. Critics like Ronald Dworkin and Eric Rakowski feel content to reduce the works to a simple basic claim (or so) that is handily rejected, and some critics get caught running in the circles Posner has created trying to find his essential claims. Constructive interpreters like Stanley Fish have seized upon a feature marketing Posner's Cost-Benefit Analysis of Sex, 59 U. Chi. L. Rev. 1689 (1992)(reviewing Richard A. Posner, Sex and Reason (1992)).

24. This is, to be sure, a contestable point. One perspective would be to map Posner's view, as he has, into the triangular relationships among pragmatism, economics, and liberalism. A different perspective might suggest that the best way to understand Posner is from the outside-in, in the first instance, as opposed to a more inside-out perspective as this Article contends. Thus, for example, a postmodern perspective on Posner might first look at the extant conditions of jurisprudential development and view that the complexities and indeterminacies in Posner's pragmatism reflect deep themes that play themselves out in other, and with respect to other, politically disparate views. See Minda, supra note 21, at 38. Ultimately, any perspective must come to grips with the elemental claims of Posner's pragmatism, see, e.g., id., although the dissection of the view may owe much to a keen attitude for the greater milieu. A more traditional analytical approach—certainly sensitive to broader context—tends to proceed first from a careful dissection to then make broader connections. I have been inclined to adopt the latter approach because I have been dissatisfied, in the large, with the frequently piecemeal interpretations of Posner's recent works.

25. Roughly speaking, omnisignificance arises when one provides a little something for everyone. Although Posner criticizes Rorty for having "a deficient sense of fact," *Overcoming Law*, supra note 4 (manuscript at 496), he bestows upon Rorty the philosophical red badge of courage: "Richard Rorty, the best-known living philosopher of pragmatism, must be doing something right, because he's anathema to both Left and Right." *Id.* Omnisignificance, it seems, can come about when one provides a little kick in the pants for everyone as well.

26. Some will view Posner's most recent books as moving to more discrete statements of his positions.

27. *Overcoming Law* may put an end to some of this, but it is doubtful that it will come to a complete halt.

28. Rakowski asserts, much like Dworkin, that the "central claim" of *The Problems of Jurisprudence* is "that no objectively right answer can be given to difficult legal questions." Rakowski, supra note 12, at 1866. Rakowski argues, correctly, that such a claim is both trivial and superficial. *Id.* What Rakowski (and effectively Dworkin) believes to be the central claim of Posner's pragmatism at best only describes, imperfectly and incompletely, one of its features.

29. See Walt, supra note 12, at 319-21.
or so of Posner's view that suits them best, while denying or ignoring the rest.\textsuperscript{30}

As the main aim of this Article is to elucidate the central features of Posner's pragmatism to facilitate development and criticism — constructive or otherwise — of recent works, the Article undertakes a conservative (and, at points, contestable\textsuperscript{31} and largely traditional) analytical approach to interpreting Posner's recent works. The Article considers, in turn, the jurisprudential methodology, meta-ethics, and normative program of Posner's pragmatism. This method of dissection is familiar in modern analytic moral/political philosophy and serves to demonstrate that Posner's pragmatism is more than just one of, or the sum of, its parts.\textsuperscript{32} Even a "description" bears out two crucial points. Posner's recent views may be arguably incoherent and disorganized, or they may be correct, or developing. But Posner's pragmatism is not a trivial or even sophomoric effort at a complete theory in the philosophy of law.\textsuperscript{33} Superficial, simplistic, or piecemeal praise or criticism will not do, for it will tend to leave much of his pragmatism undeveloped and untouched. Second, and importantly, Posner is midstream in his career and has shown the desire and ability to respond to critics and to take and work with some constructive criticism.\textsuperscript{34} There is a unique opportunity to work with his philosophy of law in media res.

\textsuperscript{30} Fish, supra note 13.

\textsuperscript{31} Many modern writers have given up on attempting a traditional taxonomy of a given writer's viewpoint, for many different reasons. The finer points of these traditional distinctions may be highly philosophically contestable: but for practical purposes, a traditional taxonomy has helped to parse out the essential claims of Posner's recent works.

\textsuperscript{32} One can easily get lost in the parts. Posner runs what he means by pragmatism into the wringer. Compare The Problems of Jurisprudence, supra note 7, at 176, with id. at 28, 270. See Walt, supra note 12, at 319. Only the Chesire Cat could fully catalogue Posner's mountains of claims about pragmatism along with his claim that "to say that one is a pragmatist is to say little." The Problems of Jurisprudence, supra note 7, at 28. In Overcoming Law, Posner appears to have become more conscious of this problem and to have refined his account considerably. Thus, in the preface to Overcoming Law, Posner acknowledges that the introduction thereto "contains the fullest articulation to date of my overall theoretical stance." Overcoming Law, supra note 4 (manuscript at ii).

\textsuperscript{33} In Overcoming Law, Posner begins to link pragmatism more overtly to law and economics and liberalism(s).

A descriptive approach has a critical side as well, much of which is at least potentially constructive. For instance, Posner's jurisprudential methodology sometimes defies traditional analytical methodological approaches and bears a not-so-surprising kinship to brief writing and lawyers' advocacy skills. What works well, perhaps, in some phases of legal practice may not work well in jurisprudential writings of this sort. This Article takes him to task on this point.

35. This Article does not consider generally or systematically whether this is mirrored in Posner's judicial activity. Although Posner wants to distinguish between his judicial and academic/philosophical activities, see Richard A. Posner, Wealth Maximization and Judicial Decision-Making, 4 INT'L REV. L. & Econ. 131, 131 (1984); Jennifer Gerarda Brown, Posner, Prisoners and Pragmatism, 66 Tul. L. Rev. 1117, 1121 & n.7 (1992), his pragmatism's connection with his judicial activities has been perceived, see id. at 1121, and is predictable from his approach to interpreting Cardozo who integrated writing and judicial activity. See CARDozo, supra note 12, at 127. Moreover, a discernable tendency in his decisions to rely less explicitly on wealth maximization criteria may be related to his meta-ethical views, particularly his notion of omnisignificance. As David Logan has pointed out, a survey of Posner's judicial writings tends to show that "economic analysis and language appear with some regularity in Posner's judicial opinions, but not nearly as frequently as in his extrajudicial writing." Logan, supra note 34, at 1760 n.107. See Larry L. Chubb, Note, Economic Analysis in the Courts: Limits and Constraints, 64 IND. L.J. 769, 800-01 (1989). See also Warren J. Samuels & Nicholas Mercuro, Posnerian Law and Economics on the Bench 4 INT'L REV. L. & Econ. 107 (1984); James G. Wilson, Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook and Winter, 40 U. MIAbM L. REV. 1171 (1985). Logan has observed that "Posner's more recent judicial opinions are characterized by a refreshing pragmatism." Logan, supra note 34, at 1747 n.38. Logan believes that "[a]n excellent example is Market Street Assocs. v. Frey, 941 F.2d 588 (7th Cir. 1991), in which Posner glowingly endorses the contract doctrine of 'good faith' performance, an approach more likely to reach fair rather than efficient outcomes." Logan, supra note 34, at 1747 n.38. An even more noticeable shift can be seen in McCarty v. Pheasant Run, Inc., 826 F.2d 1554, 1557 (7th Cir. 1987), wherein Posner's vehement insistence on the use of the "Hand formula (see United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947)) has reformulated into the approach of his more recent writings: "Conceptual as well as practical difficulties in monetizing personal injuries may continue to frustrate efforts to measure expected accident costs... [Juries may be forced to make rough judgments of reasonableness, intuiting rather than measuring the factors in the Hand Formula.” McCarthy v. Pheasant Run, Inc., 826 F.2d 1554, 1557 (emphasis added). See Logan, supra note 34, at 1760-61 & n.112.


37. In Overcoming Law, Posner shifts to a more author-oriented chapter approach in the sense that many chapters, while focused on a topic, tend to show rather close analysis of a given author or author's text. See, e.g., OVERCOMING LAW, supra note 4 (manuscript at ch. 3).
And, in mapping Posner's meta-ethical claims, this Article critiques some certain indeterminacies in his account.

Implicit in this accounting of Posner, though, is the belief in the value of traditional analytic methods and the viability of certain traditional approaches to jurisprudence. Traditional analytical jurisprudence is not dead. That is a deeper point, reflected only at tangents herein. Nonetheless, the ultimate goal is to move scholarship regarding Posner, and hopefully Posner's scholarship, to a new, more challenging and complete level.

II. OVERVIEW: A SKETCH OF THE MAIN THEMES AND THREE POINTS OF VIEW OF POSNER’S PRAGMATISM

In his essay, The Pursuit of the Ideal, Isaiah Berlin posits that two phenomenon will be considered the “outstanding characteristics of our century”: “the development of natural sciences and technology” and “the great ideological storms” (most notably Bolshevism, Nazism, and Fascism) that have “altered the lives of virtually all mankind.” Somewhat paradoxically, Posner proclaims that we live in an “age of relativism.” Yet, the dominance of the themes

38. This belief is one that Posner certainly shares. See OVERCOMING LAW, supra note 4 (manuscript at 497).
39. This Article does not offer a complete competing jurisprudential model, nor does it assert (nor deny) that one in an appropriate form exists at present. The claim—here only that traditional analytical methods have a place—is weak enough that although Posner has a critique of traditional analytical philosophy, it appears that he could and does agree that such a place (or places) exist. The author reserves the possibility of making stronger claims about the power of analytical philosophy.
40. Posner himself tends to support this in, inter alia, the way he takes pains to distinguish his pragmatism from its twin, postmodernism, and in his overt adoption of the use of philosophy. See OVERCOMING LAW supra note 4 (manuscript at 497) (“I have used philosophy throughout this book.”).
41. David Logan believes, as I do, that Posner’s view is evolving. See Logan, supra note 34, at 1770. Posner in earlier periods, was often perceived as dogmatic “aggressive, doctrinaire,” even ideological. Id. See Noreen Marcus, Rule of Law (and Economics), AM. LAW., June 1988, at 38, 40 (observing that Posner lacks “the interpersonal skills to be [a] leader”); Martha Middleton, Shaping a Circuit in the Chicago School Image, NAT’L L.J., July 20, 1987, at 1, 35 (describing Posner as “intellectually aggressive” and “arrogant”).
43. Id.
44. CARDOZO, supra note 12, at 58. This is not the first time Posner has made this observation. See LAW AND LITERATURE, supra note 12, at 285-86, 332. Moreover, Posner believes we live in a “pluralistic age.” THE PROBLEMS OF JURISPRUDENCE, supra note 7, at 458. See LAW AND LITERATURE, supra note 12, at 332. And that “today we are all skeptics,” THE PROBLEMS OF JURISPRUDENCE, supra note 7, at 453, although “radical skepticism” is a “dead end.” Id. at 458. Posner recognizes
of science and ideology in his recent works are hardly surprising.

Posner’s most recent works have drawn attention because he announces therein his shift to pragmatism. In spite of the change, he retains his fascination with science, and particularly scientific method, which he still considers the paradigm of (whatever remains of) objective inquiry. He has also embraced an approach to packaging that his pragmatism is relativistic (and skeptical) but asserts that “the pragmatist rejects skepticism and relativism when embraced as dogmas, as ‘philosophical’ positions.” OVERCOMING LAW, supra note 4 (manuscript at 6). He even suggests that there may be something self-contradictory in philosophical relativism. The view that “some propositions are sounder than others,” Posner believes to be “self-contradictorily challenged by relativism.” OVERCOMING LAW, supra note 4 (manuscript at 6-7). I do not share that view, for there is nothing unusual about ethical relativists asserting a hierarchy of at least some values and propositions. It is possible for a relativist to claim an absolute hierarchy of truths, even the truths of another group or culture: and it is equally possible (and common) for an absolutist to challenge the very proposition Posner puts in play.

45. Scientific method, at least as appropriately redescribed for lawyers, is integral to Posner’s normative and meta-ethical viewpoint. See THE PROBLEMS OF JURISPRUDENCE, supra note 7, at 69-70. Indeed, Posner openly contends that we live in a scientific age, id. at 458, and his normative position, surrounded in the science of law and economics, confirms his allegiance to science. See Lipkin, supra note 2, at 846 n.134. Minda believes that this attitude is endemic to modern law and economics scholarship: “The underlying approach appears to be that law can be studied and understood as a ‘science.’” Minda, supra note 3, at 613. Minda’s concept of “science” in this context closely mirrors Posner’s “redescription” of science for lawyers: “legal scholarship should concentrate on formulating and then testing falsifiable, law-like generalizations about social life.” Id. See id. at 611-12.

46. Much of the conservative ideology of Posner’s early works remains. See Minda, supra note 3 at 605 & n.23. However, Posner has taken positions that are bound to conflict with certain conservative views; his position on homosexuals’ rights is one example. See, e.g., RICHARD A. POSNER, SEX AND REASON (1992) [hereinafter SEX AND REASON]. As Posner states, “[m]any people of conservative bent are distressed by the thought that some people are committing homosexual acts even in private. . . . But once purely mental externalities are brought into economic analysis, economics becomes a potential menace to basic liberties.” OVERCOMING LAW, supra note 4 (manuscript at 24).

47. Posner is now a self-described pragmatist. See Logan, supra note 34, at 1746. Yet, he warns of such an ascription, generally and specifically. Specifically, Posner comments on the “salutary vagueness and breadth of the term ‘pragmatist.’” THE PROBLEMS OF JURISPRUDENCE, supra note 7, at 242 (emphasis added). And more generally, he cautions: “Beware the tyranny of labels [sic]—Nietzsche, greatest of nihilists, denounced nihilism.” Id. Cf. Ferris Bueller in FERRIS BUELLER’S DAY OFF (Paramount Pictures Corp. 1986)(“It’s not that I condone fascism. Or any ‘-ism’ for that matter. ‘-isms, in my opinion, are not good. A person should not believe in an ‘-ism’; he should believe in himself.”).

48. See Pragmatism, supra note 5, at 35.
his favored program of wealth maximization\textsuperscript{49} to a broader group by purporting to debunk every ideology, even ideology per se, and at times pretending to no ideology at all.\textsuperscript{50} Yet Posner's pragmatism remains ultimately linked to principles of the economic analysis of law.\textsuperscript{51}

Posner's pragmatism, dominated by themes of science, ideology, and relativism, evinces tension in his recent writings. Posner has been pulled both by the call of science, exactitude, and predictability, as well as by his creative, individualistic, and literary impulses. In his most recent writings, Posner has clarified that he views his pragmatism as "the middle way"\textsuperscript{52} between formalism and legal realism. In addition, Posner has begun to view his pragmatism more precisely in its relationships to current law and economics scholarship and various strands of liberalism.\textsuperscript{53} The resolution of the tension\textsuperscript{54} animates the adoption and exposition of Posner's pragmatism. In analyzing Pos-

\textsuperscript{49} It is tempting to link the shift to pragmatism with the limits of Posner's successes in promoting the economic analysis of law. See Logan, supra note 34, at 1762-63; Minda, supra note 3, at 604-14.

\textsuperscript{50} It would be a "mistake" to view economics as an "ideology, like Marxism." \textsc{The Problems of Jurisprudence}, supra note 7, at 366. Posner's view, as it has developed into \textit{Overcoming Law}, makes an even stronger claim to be non-ideological; however, the express links of his pragmatism to certain foundational values, particularly certain classical liberal values, will draw claims that he is ideological from some quarters.

\textsuperscript{51} \textit{See} Richard A. Posner, \textit{Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights}, 59 U. Chi. L. Rev. 433, 433-34, 436-37 (1992)[hereinafter \textit{Legal Reasoning from the Top Down and from the Bottom Up}]. \textit{See also} Thomas J. Phillipson & Richard A. Posner, \textsc{Private Choices and Public Health: The AIDS Epidemic in an Economic Perspective} (1993). Logan questions "how much of a change of mind (or of heart) Posner's recent work really represents." Logan, supra note 34, at 1747. Logan believes that much of the economic analysis of law remains but in a "reformulated" way—"Posner is not a formalist." \textit{Id.} Logan advances several particulars for the "shift": (1) "law and economics now may be only one aspect of a larger \textit{scientistic} view of law," \textit{id.} at 1748 (emphasis added); (2) a "new modesty" for claims of economic analysis, \textit{id.}; (3) "professional humility," \textit{id.}; (4) "experience" on the bench, \textit{id.} at 1749; (5) defection of charges of judicial illegitimacy allowing Posner to follow "his personal agenda," \textit{id.}; (5) palatability, \textit{id.} at 1750; and (7) "by introducing a little elusiveness and ambiguity he can garner attention and interest on the part of reputers." \textit{Id.} at 1751. This Article tends to agree with Logan on many of these points, particularly the latter, which is treated in depth under the heading of "omnisignificance," \textit{infra} section IV.C.

\textsuperscript{52} \textit{Overcoming Law}, supra note 4 (manuscript at 4).

\textsuperscript{53} \textit{Id.} (manuscript at Introduction).

\textsuperscript{54} Posner explains that he has been "fascinated by the issue of objectivity in adjudication" and that "it occupies center stage" in \textsc{The Problems of Jurisprudence}. \textsc{The Problems of Jurisprudence}, supra note 7, at xiii. Critics have seen that "[t]he hunt for objectivity sets the book's structure." Rakowski, supra note 12, at 1683. While a search for objectivity is the essence of the tensions in \textsc{The Problems of Jurisprudence}, that hunt is \textit{not} the book's only aspiration. It shares center stage with other characters, like a dominant concern for issues in moral epistemology.
ner's jurisprudence, it may be useful at times to view Posner's pragmatism—perhaps even pragmatism generally—as consisting of two key claims. Thomas Grey has suggested that pragmatism in law claims that (1) our beliefs, judgments, and moral and legal rules are contextual\(^5\) ("relative" in an important way),\(^5\) and (2) we think instrumentally.\(^5\) Yet, development of the "core" of some viewpoint known as pragmatism, and of its key claims, does not necessarily capture all of the functioning elements of Posner's "new" viewpoint with clarity. Posner's pragmatism can be described as more than simply a contextual and instrumental jurisprudence,\(^5\) and in considerably more depth.

However much of Posner's pragmatism is instrumental and contextual. The dominant themes of Posner's recent works and the resolutions of the tensions therein find expression in three main interrelated elemental moments. First, Posner's pragmatism is methodologically anti-foundationalist, anti-formalist,\(^6\) and anti-theoretical in a particular sense. In doing jurisprudence, Posner favors a (largely anti-theory)\(^6\) reductionist\(^6\) and falsification-oriented\(^6\) methodology,

Additionally, it is not the centerpiece of Posner's recent works considered as a whole.

55. But that is another point. See supra note 47.

56. In a colloquial sense Posner has been pulled into claims about the fact of ethical and legal disagreement. So stated, the focus is trivial. However, Posner's pragmatism is more than a series (or single) claim about "disagreement," and even the notion of "disagreement" for Posner is greatly expanded beyond a merely colloquial level. (Thus, for instance, Posner is able to describe various types of disagreement, each of which differ in significant ways.)

57. And in a way different from many traditional claims of relativism.

58. Grey, supra note 6, at 15. Grey also suggests that pragmatism can free itself from "theory," however paradoxical that may seem in light of the two key claims. David Hoy, Is Legal Originalism Compatible with Philosophical Pragmatism?, in PRAGMATISM IN LAW & SOCIETY, supra note 5, at 369. Of course, there is a strong strain of belief that "pragmatism" denotes no specific set of shared beliefs. See Walt, supra note 12.

59. This is not to overlook the fact that contextualism and instrumentalism may not always, or even often, be compatible objectives. Indeed, one feature of a more complete accounting of Posner's viewpoint is that the very nature of the fundamental tension in Posner's works can be explained.

60. Posner views a formal system as one dealing with relations among concepts, not concepts and reality. See OVERCOMING LAW, supra note 4 (manuscript at 1).

61. In Overcoming Law, Posner most clearly speaks of anti-theory as opposed to conceptualism, the latter evaluating outcomes by their conformity to theory "but still keeping well away from facts." Id. Thus, a pragmatic viewpoint has a strong affinity for factual verification or falsification.

62. By reductionist, this does not mean that Posner is attempting to "reduce human behavior to some biological propensity, some faculty of reason, let alone to prove that deep within us, pulling the strings, is a nasty little 'economic man.'" Id. (manuscript at 17). The term is used here methodologically, not ontologically, to refer to the approach of reducing theories, positions, or propositions to testable claims or hypotheses.
flavored with interpretative techniques often used by lawyers. Second, Posner's pragmatism is based upon a meta-ethical posture that is basically ethically relativist (and owes much to the fact that it contains responses to specific criticisms leveled by the late Paul Bator upon earlier works). Third, the recent works suggest a normative program of action, one that is hardly surprising when the corpus of Posner's works is considered.

III. JURISPRUDENCE WITHOUT FOUNDATIONS?—THE JURISPRUDENTIAL METHODOLOGY OF POSNER'S PRAGMATISM

The music came forth as a no that became a yes, then a no again, then again a yes: nothing is true except our conviction that the world we are asked to accept is false. If nothing was true, everything is possible.64

Most of this book is concerned with attacking the dogmas and letting pragmatism emerge as the natural alternative.65

When one cracks a 450-plus page, small print book entitled The Problems of Jurisprudence,66 the centerpiece67 of Posner's recent works, one affirmatively expects an extensive argument that "is built up step by step into what promises to be a magnificent edifice,"68 and when it is authored by Posner, one might have expected to receive explicitly the definitive economic analysis of law or wealth maximization argument.69 Yet, with respect to The Problems of Jurisprudence, as

63. Posner shows great affinity for scientific methods designed to falsify propositions, theories, etc. A theory that cannot be falsified now makes some appeal to us as a kind of provisional truth: A proposition or theory, however conceptually elegant or attractive, deserves rejection if, in the process of testing its factual assumptions, predictions, entailments etc., falsify it. This aspect of Posner's view is what I refer to as "falsification oriented," and clearly, it is not entirely negative in its approach. See, e.g., id. (manuscript at 1).

64. GREIL MARCUS, LIPSTICK TRACES 6 (1989) (commenting on the music of the Sex Pistols).

65. The Problems of Jurisprudence, supra note 7, at 28.

66. It is curious that the book bears the same title as Fuller's famous manuscript, but makes no reference to it. See LON L. FULLER, THE PROBLEMS OF JURISPRUDENCE (1949).

67. In some ways the sequel, Overcoming Law, should occupy center stage as well. Much of the book is devoted to clarifying the problems of jurisprudence and responding to critics. Of course, the basic Posner text on law and economics is in a recent "new" edition of the trend (and curriculum) setting classic, The Economic Analysis of Law. The Economic Analysis of Law (4th ed. 1992).

68. Fish, supra note 13, at 1448. Isaiah Berlin has suggested a way to view the ideal of analytic moral philosophy: "Ethical thought consists of the systematic examination of the relations of human beings to each other, the conceptions, interests and ideals from which human ways of treating one another spring, and the systems of value on which such ends of life are based." Berlin, supra note 42, at 1-2.

69. That expectation was diminished of course by some of Posner's previous works. See Pragmatism, supra note 5. See also Posner's previous works cited supra note 12.
Stanley Fish notes, Posner "rejects most of the goals of legal theory, especially the chief goal of offering an account of the law that is at once comprehensively abstract, strongly normative, and predictive of judicial outcomes, that is, of decisions and holdings"; instead, he engages in an overwhelming "negative project" of conducting a sweeping survey of jurisprudence (with a particular focus on the Anglo-American jurisprudential tradition and works that have influenced that tradition), only to reject and pith virtually everything, sometimes unkindly. An important feature of Posner's self-declared "pragmatism" is its methodology of jurisprudential analysis. That methodology is most prominent in The Problems of Jurisprudence and has softened and matured in Overcoming Law.

Posner employs a methodology of jurisprudential analysis that mirrors skills and tactics that lawyers employ in brief writing and

70. Fish, supra note 13, at 1448. As Nancy Levit has pointed out, "The Problems of Jurisprudence is an ambitious undertaking. It takes on the expanse of issues faced by several centuries of legal philosophers." Levit, supra note 12, at 496.

71. As Posner states in Overcoming Law, "[w]hen a pragmatic approach is taken to law, as I tried to do in The Problems of Jurisprudence and try to do in this book as well, the results are damaging to the amour propre of the legal profession." Overcoming Law, supra note 4 (manuscript at 17)(citation omitted). Posner is willing to expose problems in the economic analysis of law. See Marcin, supra note 7, at 107. Thus, he considers that the economic analysis of law has its own internal weaknesses:

Some progress toward recasting the law in a genuinely rather than merely analogically scientific-technological mold is visible. This progress is due largely to the efforts of economists and economically-minded lawyers. Economics, including the branch known as economic analysis of law, or "law and economics," really is a science, though an immature one. The practitioners of law and economics are trying with some success to use the methods and results of economics to improve our understanding of law and assist in its reform. Further progress on this front can be expected. But in part because the scientific fields, such as economics and psychology, upon which a science of law would have to build are immature, and in part because of the institutional factors noted above, the day is far distant when law can take its place among the sciences. As with science, so with engineering: engineering marvels are more easily determined to be such than are legal ones, progress in engineering is more dramatic than in law, and the methods of engineers are less problematic that those of lawyers.

72. What Fish suggests that passes as "a sense of humor," Fish supra note 13, at 1475, and what "radiates wit" according to Rakowski, see Rakowski, supra note 12, at 1681, might be received differently by other readers: "Hitler had a conception of the good, and could talk as well as [Bruce] Ackerman." The Problems of Jurisprudence, supra note 7, at 338. At other points there is little doubt that Posner aims to be highly critical. Id. at 340 (referring to "the sheer strangeness" of Ackerman's book).

73. Posner uses one method for analyzing jurisprudential materials generally; arguably another methodology is promoted as part of his normative program. Thus, when writing about jurisprudence generally, Posner adopts a lawyer-like anti-
other legal writings, and the attitude of reductionist/falsification-oriented trial/error testing methods. In his own words, his pragmatism focuses on "the continual testing and retesting of accepted 'truths,' the constant kicking over of sacred cows—in short, a commitment to robust and free-wheeling inquiry with no intellectual quarter asked or given."\(^7\) A crucial feature of his jurisprudential methodological approach is (a largely) anti-theory, falsification-oriented reductionism.\(^7\)

There is a paradox\(^7\) in claiming to have jurisprudence without foundations\(^7\) that can be exposed even by separating the methodological claims of pragmatism from its other features. The method of ju-

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74. The Problems of Jurisprudence, supra note 7, at 466. As Martha Nussbaum has pointed out with respect to Sex and Reason, "$I[n the manner of Hume, [Posner] aims 'to strip away the moral and emotional overtones, the preconceptions, the myths, the customary attitudes that make it difficult for people in our society . . . to treat sex, and its regulation by law or social custom, as subjects of dispassionate scientific study.']" Nussbaum, supra note 23, at 1706. See Sex and Reason, supra note 46, at 85.

75. For Posner's interest in falsifiability, see, e.g., The Problems of Jurisprudence, supra note 7, at 115-16. See also Overcoming Law, supra note 4 (manuscript at 7). He fears grand theory construction because its richness makes it contestable and/or untestable: "$I[f a theory is too rich, it may not be falsifiable—a looming danger for economics, as I have noted. Maybe economics isn't reductionist enough!" The Problems of Jurisprudence, supra note 7, at 366 n.11. Indeed his concern with falsifiability may lead him to adopt a meta-ethical stance that would avert the possibility of falsifiability and that would exploit the relentless testing of time.

76. See Fish, supra note 13, at 1447-48. It apparently gives Fish little discomfort that Posner purports to cling at times to traditional analytical methods. See The Problems of Jurisprudence, supra note 7, at 242.

77. There are some who believe that "jurisprudence without foundations," meaning jurisprudence without some theoretical perspective (or, more precisely in a traditional analytical framework), lacking completely in a position on methodology or meta-ethics, is a fiction. Even so, the supposition that this or that view is anti-foundationalist (in some contexts meaning something different) has been a powerful force in the development of recent jurisprudence. See Thomas Morawetz, Understanding Disagreement, The Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory, and Judging, 141 U. Pa. L. Rev. 371 (1992)(arguing that anti-foundationalist claims and positions have altered the study of jurisprudence). It may be a central theme of post-modernism as well. See Minda, supra note 3.
risprudential analysis that Posner employs and his expositional style with respect to non-economic analysis of law normative programs—anti-theory, falsification-oriented reductionism in action—are critical to appreciating one nuance of the resolution of this paradox in Posner's pragmatism. His method and style at times challenge many of the methods and aspirations of the analytical methods that have been characteristic of much of the tradition of Western jurisprudential philosophy.

At one level, Posner's (largely) anti-theory jurisprudential methodological approach is dominated by a desire to appeal to common

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78. Posner claims that jurisprudence needs a methodological shift in direction towards being more pragmatic. The PROBLEMS OF JURISPRUDENCE, supra note 7, at 387. He informs us that, "[t]he object of pragmatic analysis is to lead discussion away from issues semantic and metaphysical and toward issues factual and empirical." Id. at 387 (emphasis added).

79. See supra note 63. Certainly one aspect of pragmatism is its paradoxes, although I do not address the question of whether “pragmatism” in all or most forms contains similar paradoxes. Consider, for example, Rorty's claim that “pragmatists” do not require either a metaphysics or an epistemology. They view truth as, in William James' phrase, what is good for us to believe. So they do not need an account of a relation between beliefs and objects called “correspondence,” nor an account of human cognitive abilities that ensures our species is capable of entering into that relation. They see the gap between truth and justification... simply as the gap between the actual good and the possible better.

RICHARD RORTY, Solidarity or Objectivity?, in ANTI-THEORY IN ETHICS AND MORAL CONSERVATISM 167, 169 (Stanley G. Clarke & Evan Simpson eds., 1989). One might inquire—inter alia—whether the “possible” requires a correlative metaphysics and its attainment a unique epistemology. Dworkin seems to give such paradoxes a less generous resolution. See RONALD DWORKIN, Pragmatism, Right Answers, and True Banality, in PRAGMATISM IN LAW & SOCIETY, supra note 5, at 359.

80. In Overcoming Law, Posner shifts to what is almost like a new Isaiah Berlin-History of Ideas-in-Philosophical-context style, with a great deal more emphasis on careful exegesis (and symmetry, one excellent chapter is Part I, Chapter 3, “The Profession in crisis: Germany and Britain”) and constructive critique. It is not a sharp contrast with The Problems of Jurisprudence, but it is a significant developmental change.

81. The motivation behind Posner's anti-theory approach may arise from Posner's belief as to the source of resistance to the economic analysis of law. Having identified most areas where he believes the economic analysis of law can and should dominate, he indicates, "[I]t is not clear where the spiral ends." THE PROBLEMS OF JURISPRUDENCE, supra note 7, at 439. But if there is to be resistance to the endless tumble of the adoption of the economic analysis of law, Posner tells us it will come from philosophical ideas. "If expansion of the economic approach is to be resisted successfully, the resistance is more likely to be organized around philosophical ideas (for example, philosophical criticisms of utilitarianism) . . . ." Id. Cf. SEX AND REASON, supra note 46, at 85. In Overcoming Law, Posner draws certain limits upon the economic analysis of law and in part they arise from certain traditions in philosophical liberalism. He also repeatedly uses and praises certain analytical philosophy methods and techniques, particularly those that involve careful analysis of concepts that expose weaknesses etc., of those concepts.
Like good brief writing, it is designed to communicate quickly and often simplistically with telling rhetorical effect. The approach is largely anti-formalist. At that level, an important anti-theory aspect of Posner’s “pragmatism” is that it plays to a traditional view among modern practicing lawyers, and many non-lawyers, regarding traditional Western analytic jurisprudence: Non-scientific jurisprudence is largely the province of jargon and irrelevancy—often contrary to common sense and the real world activities of true practitioners and jurists—and that vast treatises on jurisprudence provide “real” lawyers and judges with a nugget or two of wisdom suitable

82. Cardozo, whom Posner ladles with praise, is described as a judge who tried to close the gaps between “legal and lay conceptions of justice.” Cardozo, supra note 12, at 28. In Overcoming Law, Posner points out that his view is “both for and against common sense,” Overcoming Law, supra note 4 (manuscript at 6), in the sense that he recognizes that what is commonly accepted may change rapidly but also can have a foundation that defies the need for proof. I tend to call that common sense, and this is the sense in which I attribute this to Posner.

83. See Steven D. Smith, The Pursuit of Pragmatism, 100 YALE L.J. 409, 424 (1990). Smith states that “scholars also commonly describe pragmatism in terms of its attitude towards theory. This description is apt for depicting much contemporary legal pragmatism, which expresses a deep distrust for ‘abstract theory,’ ‘grand theory,’ ‘formalism,’ or ‘foundationalism.’” Id. Smith has seen this theme as “conspicuous,” id., in Posner’s essay, What Has Pragmatism to Offer Law? and suggests that it is part of The Problems of Jurisprudence as well. Id. at 424 & n.74. Posner’s pragmatism features a “hostility to formalism” and “emphasizes antiformalism as a central and valuable feature of pragmatic thought.” Id. at 425. Of course, Posner’s view cannot be fully anti-formalistic in the sense that it rejects all normative theory construction—if one acknowledges Posner’s claims with respect to the power of the economic analysis of law. Posner pushes towards a notion of anti-formalism that rejects any formal or conceptual system that does not confront the world of fact appropriately. And he is also heard to argue that it would be “wrong to be against formal theory.” Overcoming Law, supra note 4 (manuscript at 481).

84. For example, Posner describes “[part of [Bruce] Ackerman’s problem” as “the acontextual, ahistorical character of his inquiry.” The Problems of Jurisprudence, supra note 7, at 340. Criticizing Ackerman broadly and not simply for this “acontextual” approach, Posner brings an unlikely cast of characters together in his attack on what Posner perceives as a common approach to moral theory—the quest for first principles:

Like Plato and Bentham, not to mention Hobbes and Rawls and Nozick, he wants to start from scratch, from a master principle. . . . Judges do not start from scratch in deciding cases. So while the sheer strangeness of Ackerman’s book need not detract from its academic merits, it should give pause to anyone who thinks that judges should steer by the lights of political or moral philosophy. Philosophers are sometimes driven to conclusions at variance with the moral values of their society; in our present state of moral and intellectual diversity, at variance too with the conclusions of most other philosophers. If there is a mechanism for arbitrating between moral philosophies, it is not possessed by judges. It may not be possessed by philosophers either. At bottom we test our theories by reference to our intuitions, the things we cannot help believing. In today’s United States, people’s moral intuitions are diverse—so much so that different segments of the community seem to inhabit different moral uni-
at best for lunchtime conversation. The approach implicitly impugns an inherent elitism, abstractness, disinterest in fact (and practical application), and exclusiveness of modern analytic jurisprudence.

This aspect of Posner's (largely) anti-theory methodology is apparent, if subtly, at the outset of The Problems of Jurisprudence through two claims by way of disclaimers:

(1) "I have tried to keep the presentation as simple as possible, with a minimum of legal and philosophical jargon. . . .

verses. The moral theories that convince one community will not convince the others, no matter how brilliant the theorists' argumentation.

Id. at 340-41 (footnotes omitted)(emphasis added).

85. "[J]urisprudence is a word which stinks in the nostrils of the practicing barrister," as Dicey has observed. See Denis V. Cowen, An Agenda for Jurisprudence, 49 CORNELL L.Q. 609 (1964). Posner has softened Dicey's invectives a bit: "To practical people, however, including judges and lawyers and even many law professors, philosophy is an exasperating subject. Philosophers seem preoccupied with questions that no one with a modicum of common sense and a living to earn would waste a minute on . . . ." The PROBLEMS OF JURISPRUDENCE, supra note 7, at 3. In Overcoming Law, Posner devotes an entire chapter to the question of "what are philosophers good for?" Overcoming Law, supra note 4 (manuscript at ch. 23). See id. (manuscript at Introduction & ch. 5). Posner critiques the power of modern philosophy "to contribute to the solution of concrete problems of law and of public policy generally." Id. (manuscript at 496). Philosophers suffer "a deficient sense of fact", although they do have strengths in the "interpretation, elaboration, and criticism of philosophical texts" and analogous texts. Id. (manuscript at 496-97). And Posner openly admits "I have used philosophy throughout [Overcoming Law]." Id. (manuscript at 497). Whatever value there is in philosophical inquiry for Posner may be captured in "Bertrand Russell's eloquent defense of philosophy"; "[W]hile diminishing our feeling of certainty as to what things are, it greatly increases our knowledge as to what they may be: it removes the somewhat arrogant dogmatism of those who have never travelled into the region of liberating doubt . . . ." The PROBLEMS OF JURISPRUDENCE, supra note 7, at 4 (quoting BERTRAND RUSSELL, THE PROBLEMS OF PHILOSOPHY, 157 (1912)).

86. Modern analytic jurisprudence, which often demands nothing more than careful reading skills and the mastery of a few key terminological points and classic works for a proficient level of understanding, has been increasingly marginalized in the law school curriculum and hence in law practice. Posner agrees—and theorizes why. See Overcoming Law, supra note 4 (manuscript at ch. 23). The result, whatever its causes, is that lawyers often feel (rightfully to a certain extent) that analytic jurisprudence is a marginal, abstract, and elitist activity. This may not have been so in another generation. But see Sandarac Ass'n v. W.R. Frizzell Architects, Inc., 609 So. 2d 1349, 1353 & n.4 (Fla. Dist. Ct. App. 1992) (Altenbernd, J., in discussing "economic loss" rule, makes reference to the impact of social contract theories on the development of 19th century negligence law). As a practical matter, jurisprudence today is largely an academic exercise, except where explicit inquiry of that type seems required or appropriate. See, e.g., Opinion of the Justices to the Senate, 484 N.E.2d 95, 98 n.4 (Mass. 1985)(citation omitted).
Jurisprudence should [not] be the exclusive preserve of the handful of academic lawyers who specialize in it. 87

(2) "Because this is a book not about the scholarship of jurisprudence but about the problems which that scholarship addresses, the reader should not expect a comprehensive exegesis of the classics of jurisprudence. Nor do I discuss all the problems of jurisprudence ..." 88

The first claim—the virtue of simplicity and de-jargonizing—might seem facetious, 89 yet it contains an inherent argument about jurisprudential methodology. In criticizing "academic specialists" who employ complexity and jargon, Posner suggests that philosophical insight should be reducible to basic and simple statements. A similar theme permeates Posner's second non-disclaimer. Philosophical nuggets, de-jargonized, are worth considering in the absence of comprehensive exegesis. The sheer breadth of jurisprudential material referenced in this work belies these disclaimers. Yet, Posner seems interested principally in what, if anything, jurisprudential views can provide by way of simple instrumental value and premises that can be tested, verified and/or falsified. Posner suggests that jurisprudential views devoid of such value essentially are valueless or pointless. 90

The "pragmatic" reductionism inherent in his approach—not openly and explicitly argued for in The Problems of Jurisprudence 91—is, for Posner, a position that is both anti-theoretical and, at times, non-analytical in a specific way. Posner's pragmatic jurisprudence, we are told, connotes "a rejection of a concept of law as grounded in permanent principles and realized in logical manipulations of those prin-

87. THE PROBLEMS OF JURISPRUDENCE, supra note 7, at xiii. When one reads Posner's disclaimers it is well to remember that Posner had previously noted in reference to Holmes' masterful dissent in Lochner that "[the plain style is often ... an artifice of sophisticated intellectuals." LAW AND LITERATURE, supra note 12, at 284.

88. THE PROBLEMS OF JURISPRUDENCE, supra note 7, at xiii.

89. Posner for his own thesis argues for "a functional, policy-saturated, nonlegalistic, naturalistic, and skeptical, but decidedly not cynical, conception of the legal process; in a word ... for a pragmatic jurisprudence." THE PROBLEMS OF JURISPRUDENCE, supra note 7, at 28 (citation omitted). And Posner marshals an impressive list of jargon in describing other theories, and roams among terms of descriptive jargon at will at times with little or highly unfamiliar grounding. Overcoming Law is much less jargon-laden and Posner is more careful in his readings of relevant texts and the use of jurisprudential terminology.


91. Posner, however, implicitly argues in The Problems of Jurisprudence for such a position in his account of tacit knowing and of the existence of bedrock beliefs, which defy articulation and further analysis. In Overcoming Law, Posner draws more openly upon the need to reduce views to their basic premises, claims, assertions, etc., to enable them to be subject to the methods of testing and falsifiability.
The very quest for any foundational principles, even as a way of evaluating other claims, is purportedly rejected. Posner claims that "the foundations of an overarching principle for resolving legal disputes are rotten." 93

Traditional jurisprudence is presented as an enterprise that either often vacuously engages in rendering articulate what is inarticulable or ignores the realm of fact. 94 Achieving an alternative jurisprudence for Posner means, among other things, adopting a method of jurisprudential analysis that is reductionist, and (largely) anti-theoretical and anti-formalist. 95 At times, Posner challenges the very path of juris-


93. *The Problems of Jurisprudence*, supra note 7, at 392. There is a powerful argument that a core group of traditional Western analytical philosophers rest their views on premises that Posner rejects (that is if we can ignore as a core position, for example, potential strains of nihilism and skepticism in modern Western intellectual writings). See Marcus, supra note 64. See also Hurd, supra note 1, at 1000; Joseph Singer, *The Player and The Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); John Stick, *Can Nihilism be Pragmatic?*, 100 HARV. L. REV. 332 (1986). Isaiah Berlin has argued with appropriate qualification that three dogmas form a central core of Western thought:

"If I may be permitted an almost unpardonable degree of simplification and generalization, I should like to suggest that the central core of the intellectual tradition in the west has, since Plato (or it may be Pythagoras), rested upon three unquestioned dogmas:

(a) that to all genuine questions there is one true answer and one only, all others being deviations from the truth and therefore false, and that this applies to questions of conduct and feeling, that is, to practice, as well as to questions of theory or observation—to questions of value no less than to those of fact;

(b) that the true answers to such questions are in principle knowable;

(c) that these true answers cannot clash with one another, for one true proposition cannot be incompatible with another; that together these answers must form a harmonious whole: according to some they form a logical system each ingredient of which logically entails and is entailed by all the other elements; according to others, the relationship is that of parts to a whole, or, at the very least, of complete compatibility of each element with all the others.


94. At times, Posner virtually teases traditional jurisprudence and the questions that confound it. Traditional activities of jurisprudential scholars can thus take on a kind of naiveté, unworldliness, even a Winnie-the-Pooh kind of charming vapidity. See, e.g., *The Problems of Jurisprudence*, supra note 7, at 468-69. There is more at work, however, than anti-intellectual poking at the silly moments of theory people; at times Posner's view argues that some jurisprudential activities are essentially inarticulable.

prudence as understood by the leading figures of twentieth century analytic jurisprudence—comprehensive, systematic, analytic, careful, and structured exegesis. The challenge is hardly trivial. The rejection of the path (or a part of the path) of traditional jurisprudence may actually form a dominant feature of modern American jurisprudence.

The rejection of that path, at least in the way that Posner at times rejects it, has serious drawbacks. The reduction of philosophical theories to simple pragmatic statements can twist and crush complex theories into unrecognizable forms. Posner's approach to traditional and modern jurisprudential material in The Problems of Jurisprudence does not always advance understanding of these materials or contrasts among them. In fact, his descriptions there tend to confuse the reader as to the positions to which he is committed. Posner's more recent works too frequently present facile conclusions with respect to complex theories, or make odd and overly simplistic connections among philosophical insights. At times, particularly in The

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96. Calvin Woodard has made essentially the same point with respect to Posner's confusing and nontraditional use of labels in The Problems of Jurisprudence: "He has relabeled the traditional schools of jurisprudence so drastically that I myself am left unsure about the meaning of such basic notions as 'positivism,' 'natural law' and even 'legal realism.'" Calvin Woodard, Whose Law is it?, N.Y. Times, Sept. 9, 1990 (reviewing Richard A. Posner, The Problems of Jurisprudence (1990)).

97. In spite of this, Posner informs us that "I have endeavored to use the methods of analytic philosophy to guide a critical appraisal of modern American law." The Problems of Jurisprudence, supra note 7, at 454. And, specifically, he promises to "use philosophy" to evaluate the economic approach to law. Id. at 353. The claim is apparently at odds with his anti-theory methodological claims, except to the extent that Posner can successfully claim that his redescription of scientific methods for lawyers can provide a sufficient methodology to construct the necessary elements of a program of wealth maximization, but which is also strong enough to eviscerate all the other competition. Posner's methodology—which must work in two ways (on traditional jurisprudential materials; and his normative program)—faces the clean shower dilemma. It must be strong enough to clear the mildew but not so strong as to destroy the tile. In Overcoming Law, he appreciates the dilemma and has crafted a position on the uses of analytical philosophy that preserves a significant role for it, but rejects highly formal theory construction that does not connect with the world of fact (or appreciate the divergence of fundamental values).

98. See, e.g., The Problems of Jurisprudence, supra note 7, at 340. The conclusion that Ackerman, Plato, Bentham, Hobbes, Rawls, and Nozick, all want to "start from scratch, from a master principle" and are therefore allied on this basis is misleading in its simplicity. Id. Thus, for example, the works of Plato remain inscrutable as a whole and a bold attribution of a view to Plato without reference to a period of authorship or a specific dialogue is virtually bereft of meaning. Cf. Terence Irwin, Plato's Moral Theory—The Early & Middle Dialogues, 2-4 (1977)(outlining a procedure to approach Plato's works in the early and middle periods). Ascribing the master principle aspiration to Hobbes, even in the context of Leviathan, presents special interpretive problems. See John Rawls, A Theory of Justice 11 n.4 (1970). And Rawls does not identify "a master principle." Posner appears to have in mind the original position, which truly is not a master
Problems of Jurisprudence, Posner runs roughshod over the major works and figures of jurisprudence, particularly those with whom he is not allied philosophically.99 This should not be viewed generally as sloppiness or mere superficiality—it is connected to a methodology of jurisprudential analysis of reductionism that Posner favors and serves the normative program he promotes.100

Travelling through The Problems of Jurisprudence, for example, numerous instances of this tendency pop up—often so distant from the main thrust of the book that it seems almost trifling to raise an objection. To avoid being overly scrupulous, it is well to identify a few specific examples of Posner's methodological tactics to expose the weakness of that approach, especially since Overcoming Law has adopted a more accommodating approach to certain aspects of traditional analytical philosophy.

An important problem associated with Posner's anti-theory methodology in The Problems of Jurisprudence bears this out. In The Problems of Jurisprudence, Posner simply avoids, by sleight of hand and even passing ad hominem, the main theory-building alternatives to his pragmatism.101 This is consistent with his desire to undermine principle in any traditional sense. Now it is especially clear that for Rawls the device of the original position reflects deeper values, and is limited in its scope of application. See generally, John Rawls, Political Liberalism (1993). Posner considers the change and limitations in Rawls' view at some length in Overcoming Law. See, e.g., Overcoming Law, supra note 4 (manuscript at 222).

99. A figure in Western philosophy that Posner makes heavy and more complete use of particularly in discussion of practical reason and corrective justice is Aristotle. See e.g., The Problems of Jurisprudence, supra note 7, at 71-72, 313-35. Posner provides, inter alia, an extensive analysis of Aristotle's account of corrective justice and he asserts that "Aristotle's account of corrective justice is spare, [and] his account of distributive justice is sparer." Id. at 335. Posner links Kant and Aristotle on distributive justice in an interesting way: "In its lack of particularity Aristotle's account of distributive justice is representative of later philosophical accounts of distributive justice as well." Id.

Posner's development of Aristotle's notion(s) of corrective justice in The Problems of Jurisprudence focuses principally upon a rather close textual/historical reading of the Nichomachean ethics (where Posner shows, once again, how at home he is with the classics of Greek literature/philosophy) and leads him to view Aristotle's own view as "a bit meager," id. at 323, and to see it both as limited and potentially useful. See id. at 328-29. Although it appears that Posner's rather lengthy interpretation of Aristotle, and his critique of certain Aristotelians who wish to develop a view independent of the economic analysis of law, see id. at 328, serves to offer a view of Aristotle compatible with Posner's preferred normative program of the economic analysis of law, such an argument is not included in this Article.

100. His jurisprudential methodology serves to uproot competition for his preferred normative program.

101. Rakowski has made very similar points. Thus, he notes that Posner "dispenses with a careful discussion of the views he rejects." Rakowski, supra note 12, at 1687. And he correctly asserts that Posner "does not scrutinize the most influential contemporary theories of distributive justice" including Rawls', about whom
Rakowski states that Posner says “nothing” (in The Problems of Jurisprudence practically, though not technically true, and this is likely the sense in which Rakowski intends). \textit{Id.} at 1702 & n.42. Posner continues to treat Rawls in some depth in the fourth edition of his seminal Economic Analysis of Law, and for that matter has since the first edition of that book in 1973. It is intriguing that Posner felt little need until Overcoming Law to reproduce or refine and expand his position on Rawls in The Problems of Jurisprudence. This is particularly interesting because in the first edition of The Economics of Justice, Posner elected to use the term “justice” “in approximately the sense of \textsc{John Rawls}.” The Economics of Justice vii (1981). (Although he actually refers to Rawls’ description of the primary subject of justice, under Rawls’ view the primary subject of justice is not a definition of justice). Rawls has assisted him in formulating elements of a definition of law. \textit{See Economic Analysis of Law} 265 & n.1 (4th ed.). (And, in that work, he gives primary credit under his discussion in § 16.3 of “The Contract Theory of Distributive Justice.” \textit{Id.} at 461.) Until Overcoming Law, his interpretations centered on Rawls’ \textit{A Theory of Justice} and not upon any of Rawls’ significant later writings, or upon the recent cutting edge constructive interpretation of Rawls’ writings. (In Political Liberalism, Rawls brings together the strands of many of his post \textit{A Theory of Justice} writings.) In Overcoming Law, Posner improves his treatment of Rawls, and levels some critiques upon recent Rawls and Political Liberalism that I am not in complete disagreement with. In Overcoming Law, Posner does provide significant praise to Rawls: Posner describes Rawls as “a real presence[,” OVERCOMING LAW, supra note 4 (manuscript at i), in legal jurisprudential writings, notes Rawls effective use of metaphor, \textit{id.} (manuscript at 584), credits Rawls with an effective if undistinguished writing style, \textit{id.} (manuscript at 469), and perhaps in the highest moment of praise Posner links Rawls to a renaissance in moral and political philosophy, \textit{id.} (manuscript at 166), “the revival . . . of interest in both Kantian and social-contractarian political theory,” \textit{id.}, and as working in the area of the bridge between theory and law. \textit{Id.} However, Rawls is linked to “a number of general philosophers who mention law in passing.” \textit{Id.} (manuscript at 519). Nonetheless, Rawls suffers, according to Posner, from being too abstract, \textit{id.} (manuscript at 237), too unpragmatic, \textit{id.} (manuscript at 32 n.49, 222), weak in the world of fact, \textit{id.} (manuscript at 212-13, 514-515), and sometimes too unworldly, \textit{id.} (manuscript at 515). In addition, Posner misconstrues the difference principle as used by Rawls, and attacks Rawls on this basis. \textit{See id.} (manuscript at 330). Interestingly, Posner and Rawls seem to agree on the level of caution we should have in using and over valuing philosophy’s value for law. \textit{See id.} (manuscript at 439, 498 n.4, 500 n.7). Posner also attacks and redirects Rawls along a front of attack that is bound to plague Political Liberalism: how far can an “overlapping consensus” go in helping us to identify moral values? Is an overlapping consensus more likely if based on values other than differences put forth by justice as fairness? On this front, Posner implicitly attacks Rawls: “[U]niversally shared beliefs do not exhaust the contents of an individual’s frame of reference, and modern people in a complex and heterogeneous society such as that of the United States do not share an overarching frame of reference with which to resolve disputes between individuals whose personal frames of reference do not overlap completely.” \textit{Id.} (manuscript at 6). Rawls comes under significant attack for his account of abortion rights on this basis as well. \textit{Id.} (manuscript at 212-13). However, Posner suggests that there is at least the possibility that an overlapping consensus in Rawls’ sense may exist on “a political principle, such as wealth maximization, to govern a particular field of social interactions.” \textit{Id.} (manuscript at 449). Yet, whatever connections may otherwise exist, Posner explicitly eschews any need to ground pragmatism in Kantian or Rawlsian ethics. \textit{See id.} (manuscript at 448).
permanent principles and those philosophers he perceives to promote such views. Thus, John Rawls, Immanuel Kant, and even H.L.A. Hart—core figures in any analysis of Anglo-American jurisprudence—receive mostly cursory attention and summary dismissal in The Problems of Jurisprudence. Hart receives passing nods—with little reference to the main features of his view. Even more significantly, Kant and Rawls are faulted for their lack of particularity in their accounts of “distributive justice.” And Kant is faulted because his ethical theory is “too abstract . . . to guide the design of legal doctrines.” Posner often attempts to reduce his main competitors, and many others, by fiat and methodological device, to practical irrelevancies.

A taste of the pitfalls associated with this over-simplification and reductionism is most apparent in The Problems of Jurisprudence. Even Posner, in contradiction to his general position, references us to features of Rawls’ and Kant’s theories which make concrete demands upon legal doctrines and the administration of such doctrines. Thus, Posner associates Rawls with principles of formal justice “that might be thought to narrow the range of discretion of judges and other makers and appliers of law.” Posner admits that Rawlsian constraints

102. See OVERCOMING LAW, supra note 4 (manuscript at 448).
103. Posner was willing to admit the confrontation of pragmatism and Kantian or Rawlsian ethics. The PROBLEMS OF JURISPRUDENCE, supra note 7, at 667. And, the conflicts between Kantian and Rawlsian ethics and wealth maximization occupied Posner’s attention in the pre-pragmatist period. See, e.g., THE ECONOMICS OF JUSTICE, supra note 12, at 58-60, 64 n.36, 69, 76, 89, 98-100. Posner gives further attention to the connections in Overcoming Law. See OVERCOMING LAW, supra note 4 (manuscript at 448).
104. See THE PROBLEMS OF JURISPRUDENCE, supra note 7, at 2, 25-26, 52-53, 221 n.2, 229-30, 274, 301, 325 n.18, 425, 427, 432. The problem continues in Overcoming Law, although Posner does acknowledge Hart at one significant point. See OVERCOMING LAW, supra note 4 (manuscript at 121-22 & n.42).
105. As Posner argues, “[w]e must turn to philosophizing lawyers for concrete conceptions of distributive justice.” THE PROBLEMS OF JURISPRUDENCE, supra note 7, at 336. His prime example of such a lawyer is Ackerman, whose theory he rejects. Id. at 336-38.
106. Id. at 329 (emphasis added). Such a view is unsupportable. See IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (John Ladd trans., Bobbs-Merrill Co., Inc. 1965)(1797). Kant’s particular arguments about a just juridical state might be dated (though hardly useless as they went to press in 1797 just a few years after the adoption of our own Constitution) and may be somewhat idealized. Id. at 64-67, 70, 75-76. But they are not entirely abstract. Posner’s argument might be a colloquialized version of one standard criticism of Kant, that the categorical imperative is a purely formal constraint and cannot imply the content that Kant seeks to give it. A recent generation of Kant scholars—call them neo-deontologists—has reemphasized the potential practical significance of Kant and deontological jurisprudence generally. See Peter Lake, Thomas Pogge, Realizing Rawls, 30 COLUM. J. TRANSNAT’L L. 471 (1992)(book review).
107. THE PROBLEMS OF JURISPRUDENCE, supra note 7, at 332.
of formal justice are somewhat concrete because he considers them to be "sensible constraints on legal discretion, but not tight ones."108

In the context of one peculiar shot at Kant, Posner displays this tendency to draw us to a concrete application of moral principles in Kant's view, while adhering to the view in the large that Kant's view (like Rawls') is too abstract. Because Kant is vulnerable to ad hominem—some of his remarks are notorious109—Posner does not miss the opportunity to diminish Kant's twentieth century appeal.110 Where he can, he paints a Prussian picture of Kantian ethics as dated, deviant, cold, revengeful, and brutal.111 One example where Posner

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108. Id. at 334. Posner might rejoin that the loose constraints of formal justice, to be made fully concrete, require principles of "distributive justice" and that is precisely where Rawls' view lacks requisite particularly. Such a rejoinder, however, contains two major flaws. First, there is no reason to accept Posner's apparent interpretation of A Theory of Justice, that Rawls believes that notions of formal justice, as specified in the rule of law, are distinct from notions of distributive justice; indeed Rawls' can hold the view that the rule of law is a special and particularized instance of reasoning from the principles of justice and/or from a common source of reasoning (e.g., the principle of liberty). See John Rawls, A Theory of Justice (1970); John Rawls, Political Liberalism (1993). Second and more importantly, Rawls' theory is designed expressly to assist in making concrete and particular judgments in ideal theory, although Rawls has severely limited this aspiration in Political Liberalism. Rawls gives consideration to the problem of particularization, (he discusses the four stage sequence), and makes particular claims about specific moral problems. See id. at 195-200 (discussing conscientious objection). The practical moral task has inspired others to follow in his footsteps or to deviate only in specific ways that preserve features of Rawls' own view. It has also inspired a number of courts in the resolution of various issues. See Lake, supra note 106, at 479 n.45.


110. In Overcoming Law, Posner, in noting that several German soldiers were executed for desertion after the unconditional surrender of Germany in WWII, draws attention to "Kant's dictum" that "a society would be morally obligated to carry out a death sentence even if no determinate function is served." Overcoming Law, supra note 4 (manuscript at 141). Even in Sex and Reason, Posner is inclined to swipe at Kant. See Sex and Reason, supra note 46, at 223. Perhaps it is accidental, but Posner juxtaposes a rejection of Kants' view of sex with an attack on Nazism. Perhaps it is again accidental, but Posner faults Kant for having made a mistake of fact about sex in a marriage. Id. However, some might feel he praises him, albeit curiously, for having provided "an insightful discussion of the sibling incest taboo." Id. at 110 n.60.

111. See The Problems of Jurisprudence, supra note 7, at 323 n.11. As Posner notes, "[a]lthough Aristotle and Kant obviously had no opportunity to read The Origin of Species, their ideas about remedial justice—the justice of sanctions for transgression—are rooted in a view of human nature, as quintessentially vengeful, that is highly compatible with a Darwinian view." Id. at 331. The only point that Posner seems willing to grant to Kant is limited and simplistic and again based upon colloquial interpretations of Kant. In conceding the fact that our social mores put a premium on individual autonomy, id. at 379-80, he notes in passing that "[p]erhaps it is the Kantian sense that we should not treat one an-
acknowledges a concrete Kantian legal imperative derived from first-order principles is brought to our attention in a particularly unfair light. Posner, in the context of criticizing Bruce Ackerman's "gingerly" approach to the problem of infanticide, presents Kant's "extraordinary answer"—for no particular reason except perhaps that Kant is concerned with issues of corrective and distributive justice—to the question of infanticide.

He is discussing the killing of an illegitimate child by its mother: "A child born into the world outside marriage is outside the law . . . and consequently it is also outside the protection of the law. The child has crept surreptitiously into the commonwealth (much like prohibited wares), so that its existence as well as its destruction can be ignored (because by right it ought not to have come into existence in this way); and the mother's disgrace if the illegitimate birth becomes known cannot be wiped out by any official decree." A comparison of Posner's selective edit with the complete translation, however, demonstrates that there is nothing extraordinary about Kant's argument except for the subtle but strident criticism of the non-status under law of illegitimate minors (and of Prussian military honor). The problem for Kant, which Posner misstates, is the ques-

112. The Problems of Jurisprudence, supra note 7, at 339.
113. Posner only tells us that "the question [of infanticide] [has] also troubled Kant." Id. at 339 n.36.
114. Id. at 339 n.36 (quoting Kant, The Metaphysical Elements of Justice, supra note 106).
115. The full translation of The Metaphysical Elements of Justice, by the same translator in the same edition cited by Posner is set forth herein:

There remain, however, two crimes deserving of death with regard to which it still remains doubtful whether legislation is authorized to impose the death penalty. In both cases, the crimes are due to the sense of honor. One involves the honor of womanhood; the other, military honor. Both kinds of honor are genuine, and duty requires that they be sought after by every individual in each of these two classes. The first crime is infanticide at the hands of the mother (infanticidium maternale); the other is the murder of a fellow soldier (commilitonicidium) in a duel. Now, legislation cannot take away the disgrace of an illegitimate child, nor can it wipe away the stain of suspicion of cowardice from a junior officer who fails to react to a humiliating affront with action that would show that he has the strength to overcome the fear of death. Accordingly, it seems that, in such circumstances, the individuals concerned find themselves in a state of nature, in which killing another (homicidium) can never be called murder (homicidium dolosum); in both cases, they are indeed deserving of punishment, but they cannot be punished with death by the supreme power. A child born into the world outside marriage is outside the law (for this is [implied by the concept of] marriage), and consequently it is also outside the protection of the law. The child has crept surreptitiously into the commonwealth (much like prohibited wares), so that its existence as well as its destruction can be ignored (because by right it ought not to have come into existence in this
tion whether legislation, including the civil constitution, can properly address the very real moral problem of infanticide, which Kant without any stated equivocation believes is wrong, perhaps even categorically so.\textsuperscript{116} Kant's dilemma is essentially a problem associated with the fact that perceived moral obligation and law do not always coincide. Kant, who apparently concedes that illegitimate children are a disgrace from a moral point of view, vehemently disagrees that moral imperatives justify a mother in killing such an infant. To the contrary, Kant regards such an act as criminal. But the law—public legal justice—protects what Kant views to be the honor of womanhood too broadly, by formally construing illegitimate children as outside the protection of the law and giving women public legal "rights" to kill infants only in the sense that the civil constitution and legislation provides no lawful remedy to protect such illegitimates. Kant is not condoning this state of affairs—which he regards as "barbaric"—but explaining it \textit{and} identifying a powerful source of criticism and a higher order obligation (the moral law) which demonstrates the "injustice" of the law.

\textsuperscript{way); and the mother's disgrace if the illegitimate birth becomes known cannot be wiped out by any official decree.

Similarly, a military man who has been commissioned a junior officer may suffer an insult and as a result feel obliged by the opinions of his comrades in arms to seek satisfaction and to punish the person who insulted him, not by appealing to the law and taking him to court, but instead, as would be done in a state of nature, by challenging him to a duel; for, even though in doing so he will be risking his life, he will thereby be able to demonstrate his military valor, on which the honor of his profession rests. If, under such circumstances, his opponent should be killed, this cannot properly be called a murder (\textit{homicidium dolosum}), inasmuch as it takes place in a combat openly fought with the consent of both parties, even though they may have participated in it only reluctantly.

What, then, is the actual Law of the land with regard to these two cases (which come under criminal justice)? This question presents penal justice with a dilemma: either it must declare that the concept of honor (which is no delusion in these cases) is null and void in the eyes of the law and that these acts should be punished by death or it must abstain from imposing the death penalty for these crimes, \textit{which merit it}; thus it must be either too cruel or too lenient. The solution to this dilemma is as follows: the categorical imperative involved in the legal justice of punishment remains valid (that is, the unlawful killing of another person must be punished by death), but legislation itself (including also the civil constitution), as long as it remains barbaric and undeveloped, is responsible for the fact that incentives of honor among the people do not accord (subjectively) with the standards that are (objectively) appropriate to their purpose, with the result that public legal justice as administered by the state is injustice from the point of view of the people.

\textsc{Kant, supra} note 106, at 106-07 (emphasis added) (translator's footnote omitted).

\textsuperscript{116.} There is no need here to make complex arguments regarding the categorical imperative and its relation to Kant's unequivocal prescription of infanticide because Kant simply tells us infanticide is wrong. \textit{See Kant, supra} note 106, at 106-07.
Posner takes another shot at Kant in *Sex and Reason*. Posner effectively portrays Kant as the father of humanistic agnostic Western intellectuals.117 This is an interesting and subtle point. Kant's *humanism* and faith in reason may have challenged the approach to faith of many and may have bred its own brand of agnosticism in Kantians and in others. Yet, it is well to remember that Kant endeavored to justify faith through the use of reason, and that his pervasive sense of transcendentalism was deeply connected to faith in a Christian God.118 The effect of such a characterization is to alienate Kant from a wide range of persons, many of whom may be disposed to the conservative program of wealth maximization that Posner's pragmatism promotes.

In *Overcoming Law*, Posner resists linking the foundations of his pragmatism to Kant.119 Nonetheless, Posner does associate his pragmatism with certain Millian features of liberalism.120 And, in so doing, he links some of Mill's conception to Kant.121 Even with such an important link, Posner is careful not to draw himself too near to Kantian ethics.

In summary, at one level Posner's (largely) anti-theory, falsification-oriented reductionist methodology is often similar to tactics used in some brief writing and some critical legal studies writings.122 Posner sometimes uses authority, in this instance jurisprudential materials, as a means to an end.123 Posner is not always uncomfortable to limit the writings of major philosophers and to treat one line of such

117. Posner states:

Most Western intellectuals no longer believe in God, but many of them continue to believe that the metaphor of man's having been created in God's image captures an important truth: that we are not just animals with large brains but beings of a special worth and dignity, endowed with a moral sense and entitled to respectful treatment by our fellow man. This is the ethics of Kant, and it is influential in modern moral philosophies . . . .

*Sex and Reason*, supra note 46, at 225. See id. at 229, 283.


119. See *Overcoming Law*, supra note 4 (manuscript at 448-49).

120. See id. (manuscript at 25-26).

121. Id. (manuscript at 25 n.39).


123. Posner is no stranger to this technique which he describes at some length. See *The Problems of Jurisprudence, supra* note 7, at 105-08. In addition to discussing reasoning by analogy, which Posner says "is not actually a method of reasoning," *id.*, Posner points to the common use of authority as rhetorical ploy:
authority at the expense of others. Such instrumentalism with primary sources themselves, when it occurs in Posner's pragmatism, is deeply anti-theoretical and non-analytic when compared to much of the methodology employed by traditional Western liberal jurisprudence, even its critics. It is argument in a sense reserved for lawyers and brief writing and is not the method of analysis and argumentation employed by most jurisprudential writers.

At other levels, however, Posner's pragmatic methodology of (largely) anti-theory reductionism does not fully lead to "anti-essentialist, anti-foundational, anti-rational (in the strong sense), anti-metaphysical" claims in the sense that Stanley Fish has described. Posner's pragmatism also entails a normative program and contains a meta-ethical position that admits of foundational claims and some theory construction.

Previous cases are also used to disguise fiat as reason, to establish propositions not in dispute and therefore not in need of support, and as sources from which to quote general language that either is truistic or is contradicted by general language in other cases, which the opinion does not cite.  
Id. Indeed, much of Posner's assessment of Cardozo and his rhetorical skill turns on the explicit awareness of the importation of lawyering skills into judicial opinions (and even jurisprudential literature). See Cardozo, supra, note 12, at 137. Such rhetorical tactics are a "sin" for Posner. Id. However, Posner admits that they have powerful rhetorical force and have seemed to enhance Cardozo's reputation.

124. Again, even at the methodological level Posner is not entirely unequivocal. From one point of view, Posner seems to employ one methodology for considering claims of his jurisprudence and another to actually reach conclusions within his normative programmatic framework. Thus, when dealing with programs of wealth maximization, the theory crushing rod is spared. See Legal Reasoning from the Top Down and from the Bottom Up, supra note 51, at 433-36. In that context scientific methods can uncover better claims organized around a simple theoretical framework. Again, one way to reconcile this is to focus on Posner's redescription of science such that it can serve these two functions simultaneously. One function of methodology is to vanquish grand theory construction by reducing it to its essential and potentially falsifiable claims. The other function is more positive (not in Posner's sense) in that it helps to build results by testing for conclusions that will work. Both approaches might legitimately be referred to as reductionist.

Consider Minda's comments on the law and economics movement: "The language of law and economics continues to assume that legal analysis must proceed in the way that scientific inquiry proceeds—the reduction of complex phenomena into simplified abstractions of universal law." Minda, supra note 3, at 612 (emphasis added). Such reduction assists in falsifying and constructing some "theory." See id. at 613.

125. See Fish, supra note 13, at 1456.
IV. THE META-ETHICAL POSTURE OF POSNER'S PRAGMATISM

In addition to adopting a particular methodological stance, even if it is not without equivocation, Posner takes a closely interrelated position on a meta-ethical level. From a meta-ethical posture, Posner's pragmatism is largely a type of ethical relativism that has some ambiguous affinities for non-cognitivism, neo-intuitionism, and antitheory in ethics. The underlying premises of the argument that leads to the conclusion that Posner is a largely meta-ethical relativist are by no means clear-cut. To fully appreciate the ethical relativism of

126. One could define meta-ethics as "the constraints and ground rules by which a moral theory must abide." See Christopher D. Stone, The Environment in Moral Thought, 56 Tenn. L. Rev. 1, 9 (1988). Richard Brandt claims that meta-ethics regards statements about ethical opinions, but a meta-ethical theory does not consist, as normative theory, of such statements. See Richard Brandt, Ethical Relativism, in Readings in Ethical Theory 335, 336 (Wilfrid Sellars & John Hospers eds., 2d ed. 1970).

A somewhat more precise definition may be more useful here. Robert Justin Lipkin has offered a definition sufficient to capture the distinction between meta-ethical and normative endeavors for a number of purposes.

Traditionally, normative ethics is distinguished from meta-ethics in the following manner. Normative statements are statements that some act or person is right or wrong, good or bad. Meta-ethics is an epistemological inquiry analyzing the meaning of such concepts as objectivity, truth, and justification in ethics. Meta-ethical claims are second-order claims about the concept of validation in normative ethics, while normative ethical statements are first-order claims about what is right or good.

Lipkin, supra note 2, at 845 n.130 (citing DAVID O. BRINK, MORAL REALISM AND THE FOUNDATIONS OF ETHICS 1-2 (1989)).

Distinguishing normative and metaethical claims can be tricky (e.g. some normative statements may serve to validate others; arguably there is no purely formal meta-ethical statement) but it can serve, practically as here, to classify key functioning elements in an overall theory of ethics. The same is true for "methodology" and "meta-ethics," maybe even more so. Thus, if "methodology" is defined as "a general view about the nature of rational inquiry and a universal method for fixing belief," Richard Rorty, Pragmatism Without Method, in Sidney Hook, Philosopher of Democracy and Humanism 259, 263 (Paul Kurtz ed., 1983), one may have trouble making a distinction. However, method or methodology is not traditionally conceived of as a "claim" or "view" about anything although often claims and views are connected by a particular methodology. Perhaps it might be best to view method or methodology as second order (or more) perspectives on meta-ethics and/or normative inquiry. Posner, has however, made these difficult issues easier. His methodology is identifiable as a feature of his pragmatism.

127. Posner admits he is a relativist in Overcoming Law, but seeks to dissociate himself from "dogmatic" or "philosophical" relativism. See OVERCOMING LAW, supra note 4 (manuscript at 6).

128. It is important to dissociate the fact that Posner adopts an ethical relativist stance from the trivial claim that there are no objective answers to disputed moral questions. An ethical relativist is not committed to such a view, even though many in fact do make this claim. For example, it is possible that a limited group of individuals may share common values, giving rise to a sense of objectiv-
Posner's pragmatism and its gray areas, one must develop three predicate elements: (a) the fact that Posner focuses upon specific epistemological attacks leveled by Paul M. Bator, which is related to (b) Posner's account of intuitionism and its implications for "objectivity," and (c) Posner's substantial account of the role of rhetoric, which provides critical foundation for his view of "omnisignificance" as a feature of judicial opinions that survive the test of time. These predicate elements also serve to illuminate the tension in Posner's recent works between its intuitionist, neo-intuitionist, and anti-theory moments.

A. Thicker Epistemology

Most of the commentary on The Problems of Jurisprudence has not focused in any significant way upon Posner's prominent concern at the meta-ethical level with providing a response to specific criticisms leveled upon one of Posner's earlier books, The Federal Courts: Crisis and Reform, by the late Paul M. Bator. Posner dedicates the book to his memory and acknowledges his contribution of providing an "arresting accusation" that Posner is the "captive of a thin and unsatisfactory epistemology." Although there is certainly much more

129. Stanley Fish does not agree. For all practical purposes Fish argues that "the fact that pragmatism too has its foundational premise is not a contradiction of its anti-foundationalism because this particular premise—the irreducibility of difference—is anti-foundationalism." See Fish, supra note 13, at 1454 (emphasis added). In racing to see moral relativism and/or aspects of Posner's anti-theory methodology as the foundation of Posner's pragmatism—e.g., the "pragmatic account"—and in dismissing Posner's "pragmatic project" and failing to appreciate or accept the complexity of Posner's approach, Fish confuses his own view with Posner's and subsumes a part of Posner's pragmatism to the whole. Fish chooses to ignore the fact that Posner's pragmatism has three interrelated functioning features—a methodology, a meta-ethical posture, and a normative program. The "pragmatic program," as Fish describes it, makes at least an equal claim to be the essence of Posner's pragmatism and the "pragmatic account"—to the extent contrary (i.e., implying that such a program is contradictory to a pragmatic account)—is best explained as part of the project of the recent works as a whole.

130. See Bator, supra note 34.

131. For further commentary on The Problems of Jurisprudence, see, e.g., Fish, supra note 13; Rakowski, supra note 12. Jason Scott Johnston has attended to this connection, although he does not explore it in detail. See Jason S. Johnston, Not so Cold an Eye: Richard Posner's Pragmatism, 44 VAND. L. REV. 741, 752 (1991) (book review). Logan also sees a connection. See Logan, supra note 34, at 1770. Posner's recent works circle around these criticisms. See The Jurisprudence of Skepticism, supra note 12, at 888-90: The most mature response is found in The Problems of Jurisprudence. See The Problems of Jurisprudence, supra note 7.

afloat in The Problems of Jurisprudence than simply a response to Bator's criticisms of an earlier book, and that book (and generally the recent writings) is a continuation of Posner's quest for objectivity and legitimacy in adjudication—it is the realization of the response to Bator that gives this book, Cardozo, and indeed the recent works as a whole, much of their special shape. The argument that can be gleaned—with no small trouble—is predominantly epistemological and is primarily focused at the meta-ethical level—it turns upon arguments relating to the source and meaning of ethical obligation, the derivation of ethical obligations, and the problems and potential resolutions of the problem of disagreement. 

My last acknowledgment is to the late Paul Bator, who in a review of an earlier book of mine called me "a captive of a thin and unsatisfactory epistemology." I found this an arresting accusation and one with considerable merit, and it stimulated me to examine the problems of jurisprudence in greater depth than I had ever expected to. In addition, conversations with Professor Bator on the subject matter of the book helped to shape its themes and avert many pitfalls.

Id. (citation omitted)

133. After all, such a response was provided, albeit in less comprehensive and complete form. See The Jurisprudence of Skepticism, supra note 12. See also Rakowski, supra note 12, at 1681 n.3 (noting that the central argument of Posner's The Problems of Jurisprudence premiered in The Jurisprudence of Skepticism).

134. The Problems of Jurisprudence, supra note 7, at 31-32.

135. Id. at 124-57.

136. Fish and Rakowski seem to suggest Posner's pragmatism is principally aimed at an account of objectivity—primarily an ontological problem. However, even though Posner acknowledges the significance of the problem of objectivity in The Problems of Jurisprudence, a powerful argument could be made that Posner recognizes a priority of epistemology over the related and included question of objectivity. Posner himself begins The Problems of Jurisprudence with "The Epistemology of Law," Part I of The Problems of Jurisprudence, (120 pages—roughly a quarter of the book) as an express premise to answering and addressing questions of objectivity which are treated subsequently in Part II. With regard to Part I, Posner begins Chapter 1 by stating "[t]his chapter begins the inquiry into whether and to what degree law is objective, impersonal, determinate: whether, in other words, it is an external (though not necessarily an effective—that is a separate question) constraint on judges . . . ." The Problems of Jurisprudence, supra note 7, at 37.

Although Posner explains that the "questions that give structure to the book are whether, in what sense, and to what extent the law is a source of objective and determinate, rather than merely personal or political, answers," the answers to these questions turn first on the assessment of epistemological questions. Id. at 31. Although Posner is fuzzy on the priority of meta-reasoning about objectivity—suggesting at times that epistemology and ontology are just "different angle(s)" on the same questions of "objectivity," see id. at 30, he admits that Part I of the book treats the questions of "objectivity" as "primarily" epistemological, id. at 161, and relegates ontological inquiry to the fact that "posing entities of debatable ontology is a frequent device [in the attempt] to solve epistemological problems." Id. The primacy of the epistemological questions is foreshadowed in The Jurisprudence of Skepticism, supra note 12.

137. See Dworkin, supra note 22.
epistemological foundations of Posner's pragmatism ground a position that is similar to certain well-known forms of ethical relativism.\textsuperscript{138}

In his review of Posner's *The Federal Courts: Crisis and Reform*, Bator adverted to Posner's comments on judicial self-restraint and credited those remarks as interesting, even if puzzling.\textsuperscript{139} Bator criticized Posner for the puzzle—"a mix of insight and muddle."\textsuperscript{140} Posner's trouble, according to Bator, (which Posner specifically acknowledges and purports to address in *The Problems of Jurisprudence*)\textsuperscript{141} was that he adopts a faulty "epistemology derived from old-fashioned positivist social science"\textsuperscript{142} even as "he brings to bear a vivid and authentic experience of actual judging."\textsuperscript{143} For Bator, Posner's explicit epistemological reasoning was thin, but was ultimately tempered and supplemented by his judging instincts.

Bator identified Posner as adhering to an epistemology consisting of a division of scientific and nonscientific or value-based judgments.\textsuperscript{144} According to such a view, scientific judgments are capable of being verified or falsified, but value judgments are not; nor are the latter "profitably discussable."\textsuperscript{145} Bator conveyed Posner's early position as adhering to a simple model of judicial decisionmaking.

Human rationality is exhausted when it crosses from the first to the second sort of question: the realm of reason consists either of empirical verification or mechanical ("formalistic") deduction. Judicial decisions quickly exhaust these activities unless they falsely pretend to be engaging in them; we are then in an "open" area where "will" is inescapable.\textsuperscript{146}

\textsuperscript{138} Central features of ethical relativism were identified with some substantial clarity by the late Roderick Firth. See Roderick Firth, *Ethical Absolutism and The Ideal Observer*, reprinted in *Readings in Ethical Theory*, supra note 126, at 200, 201-02.

There are some problems with Dworkin's assessment that Posner has fastidiously stuck "to his trivial claim about disagreement." See Dworkin, supra note 22, at 385 n.17. Even though Dworkin gives Posner some praise, see id. at 385 n.17, he essentially slams Posner in a way that overlooks much of the nuance of Posner's pragmatic approach. Dworkin underestimates the potential power of this approach. Posner's ethical relativism is more than just a trivial account of disagreement although it does provide an account (or accounts) of disagreement and even ways in which disagreement can be resolved. And its potential appeal and accessibility to practitioners cannot be underestimated.

\textsuperscript{139} Bator, *supra* note 34, at 1167.

\textsuperscript{140} id. at 1161.

\textsuperscript{141} *See The Problems of Jurisprudence*, supra note 7, at xiv.

\textsuperscript{142} Bator, *supra* note 34, at 1161 (emphasis added).

\textsuperscript{143} Id. Perhaps Bator was suggesting the reverse proposition from that which Posner asserts: judges are not necessarily good philosophers.

\textsuperscript{144} Id.

\textsuperscript{145} Id.; *The Problems of Jurisprudence*, supra note 7, at 203. For a pristine exposition of such a view, see Hans Kelsen, *The Pure Theory of Law* (Max Knight trans., 1967).

\textsuperscript{146} Bator, *supra* note 34, at 1161-62.
Bator's principal argument that Posner gave a thin epistemological account was aimed at the falsity of the science-value dichotomy, and that Posner, in moments of schizophrenia, all but admitted himself that this is a false dichotomy.147

Bator went beyond merely interpreting the text of Posner's book;148 he leveled a two-prong attack on the science/value dichotomy itself, and not merely Posner's exposition of it. First, according to Bator, successful judicial practices "must be animated by ethics."149 And, second, the existence of "scientific inquiry" and logical deduction does not entail that no other forms of rationality exist.150

Ultimately, Judge Posner's book, as well as his judicial decisions, attest deeply and persuasively to the fact that there are vast areas within which human reason and human language can combine to persuade and be persuaded on reasoned grounds, even though no "scientific" or logically entailed answer is available. The fact that interpretation does not admit to some mechanical procedure of validation is not a fatal objection to the concept of interpretation; a profoundly significant and successful network of intellectual and linguistic practices enables us to try to understand each other's meanings, to enter into each other's purposes, and to understand, interpret, apply, and follow rules, all with no (or only infrequent) resort to mechanical deduction.151

147. Bator noted: "Judge Posner knows that most legal reasoning does not involve either empirical verification or logical deduction, and that a 'commitment to reason' is not exhausted as soon as the authoritative texts can no longer 'dictate' a result." Id. at 1162 (citation omitted). Thus as Bator pointed out:

When Judge Posner writes that the judge must have the self-discipline to render "due submission to the authority of statutes, precedents, and other sources of law" and that the reasonable judge "does not try to evade" controlling decisions and is an "honest agent" trying to discern the will of the legislature, he surely is not talking merely about the judge as automaton engaging in a mechanical process of logical entailment. When he suggests that statutes be interpreted through a method of "imaginative reconstruction" of legislative purpose and an attempt to understand what would have seemed reasonable (reasoned?) to the legislators, he is not talking about mechanical jurisprudence either. When Judge Posner, in what he terms the "open area," analyzes the arguments for and against the principle of structural self-restraint, he is clearly making an appeal to our reason, not just our will; and he obviously thinks that such questions are "profitably discussable" because he discusses them, and, by discussion, seeks to persuade us of his views even though he cannot "prove" their truth either by logical deduction or by empirical verification. And, in making these arguments, he refers constantly to his understanding of the structure and purposes of our Constitution even though he cannot "prove" these by logical entailment.

Id. at 1162-63 (citation omitted).

148. Id. at 1161-62. This Article does not address whether Bator's interpretation of Federal Courts was correct, although Posner concedes much of this to Bator. See THE PROBLEMS OF JURISPRUDENCE, supra note 7, at xiv.

149. Bator, supra note 34, at 1163.

150. Id. at 1162.

151. Id. at 1163.
In response to Bator, Posner has refined his epistemological account. The cornerstones of that response, located for Posner in the domain of practical reasoning, are his theory of intuition in its various forms, and the role of rhetoric in enervating change and in the attainment of "omnisignificance." Although these aspects of Posner's pragmatism must be culled with some effort from the texts of his recent works, they contain two broad features that correlate with Bator's attack. First, Posner has softened his earlier position with respect to the rigidity of science and logic as the only valid forms of practical reasoning. Second, he acknowledges and demonstrates more openly than ever the power of rhetoric, and, to a lesser extent, other forms of practical reason, in the clash of values. Although Posner retains much of the fact/value distinction, his newly expressed epis-

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152. THE PROBLEMS OF JURISPRUDENCE, supra note 7, at 73. See Logan, supra note 34, at 1747.

153. Johnston seems to agree in large measure: "Posner addresses Bator's charge by adopting what he calls a pragmatic epistemology and ontology, what I have termed his situated consequentialism. . . . Committed as he is to a situated, contextual consequentialism, Posner sees changes in the law as conversions in world view brought about by conversation and persuasion." Johnston, supra note 131, at 752-53.

154. We can see the door open to new thinking in Posner's abode in Law and Literature:

I may seem to be suggesting that there are only two forms of persuasion: on the one hand logic—which cannot be used to decide the difficult and important cases—and on the other hand the tricks of rhetoric, as illustrated by my examples. To forestall such cynicism, however, it is necessary only to recall that between the extremes of logical, or scientific, persuasion and emotive persuasion lie a variety of methods for inducing justified true belief that are rational though not rigorous or exact. This is the domain of practical reason; it includes, among many other methods of persuasion available within the legal culture, appeals to common sense, to custom, to precedents and other authorities, to intuition and recognition (through which we grasp the meaning of a statutory or constitutional text), to history, to consequences, and to the "test of time" stressed throughout this book.

Law and Literature, supra note 12, at 287 (footnotes omitted). There may be an emerging link in Posner's most recent writings between the power of rhetoric and science. The link is the economic analysis of law. In Overcoming Law, Posner argues:

The "law" to which the title of the book refers is a professional totem signifying all that is pretentious, uninformed, prejudiced, and spurious in the legal tradition. A pragmatic approach can help to demolish the totem. Economic analysis of law can help us put better things in its place, even when we are dealing with the most emotional, politicized, and tabooed subjects that law regulates, such as human sexuality.

Overcoming Law, supra note 4 (manuscript at 33). This link even serves to better explain Posner's rather intriguing turn to the specific subjects of Sex and Reason.

155. In spite of it all, for example, Posner still believes that there remains a role for exact inquiry in law. THE PROBLEMS OF JURISPRUDENCE, supra note 7, at 30. More importantly, however, he retains much of this distinction throughout the
temological viewpoint would modify his "split personality" and bridge some of the gaps that Bator identified.\textsuperscript{156}

B. Intuitionism and Objectivity

1. Intuition-Bedrock, Tacit Knowing, and the Faculty of Induction

To thicken his epistemological account, in \textit{The Problems of Jurisprudence}, Posner focuses upon intuition and identifies three types of intuition which is "itself a method of practical reason":\textsuperscript{157} (1) the "faculty of induction"; (2) the inarticulate awareness which Posner calls "tacit knowing"; and (3) "most interesting" of all, "the body of our bedrock beliefs: the beliefs that lie so deep that we do not know how to question them; the propositions that we cannot help believing and that therefore supply the premises for reasoning."\textsuperscript{158}

Posner's third type of intuition—intuition as bedrock belief—is \textit{foundational}.\textsuperscript{159} His description of bedrock beliefs addresses some of Bator's criticisms and amplifies his own epistemological account. First, bedrock beliefs can give rise to practical certainties: "Of particular importance for law, practical reason can answer some ethical
questions with a high degree of certainty. It is almost as certain that
killing people for pure sport is evil as it is that cats don't grow on
trees.”\textsuperscript{160} They are values, and in a pragmatic world, these are in a
sense effectively “facts” as well. Posner admits, however, that such
certainties can vary with time and place: “Of course, a hundred years
from now this particular ethical certitude (which may well depend on
man's being a ‘social animal’—a condition that conceivably could
change) may be overthrown; but then a hundred years from now it
may be possible to grow cats on trees.”\textsuperscript{161}

Science and morals share this quality of revisability. Posner's refu-
tation of Arthur Leff's “skeptical” arguments reinforces this
conclusion:\textsuperscript{162}

Not only can practical reason yield the occasional ethical certainty; logic and
science cannot. This point is overlooked in Arthur Leff's influential skeptical
writings on law. To show the futility of normative discourse in law, Leff as-
serts the impossibility of establishing in a secular age even the most elemen-
tary moral propositions: “There is today no way of 'proving' that napalming
babies is bad except by asserting it (in a louder and louder voice) or by defin-
ing it as so.” The example is mawkish and incomplete; the morality of
“napalming babies” may depend on whether it is an inevitable accident in a
just war, a readily avoidable accident in such a war, or a deliberate act of
terrorization in an unjust war.\textsuperscript{163}

Leff's misunderstanding is much deeper than that Leff has over-
looked a level of complexity in his analysis:

But forget all that; the pertinent point is Leff's misunderstanding of the na-
ture of knowledge. The quoted passage assumes that the only things we really
know are the things that have been proved. Yet, if a proof is deductive, the
conclusion of the proof will be true (other than by accident) only if the prem-
ises are true, the deduction is valid, and the premises are not the result, but
the beginning, of the proof. If the premises are the result of another proof,
this simply pushes the quest for certainty back a step. The ultimate premise
has to be an intuition—something we cannot help believing—rather than the
conclusion of an earlier proof.\textsuperscript{164}

Science, itself like moral discourse, rests on bedrock intuition. Our
bedrock beliefs give us the most confidence, even though by definition
there is no way to demonstrate their validity.\textsuperscript{165} They simply exist.

\textsuperscript{160.} The Problems of Jurisprudence, supra note 7, at 76.
\textsuperscript{161.} Id. See Overcoming Law, supra note 4 (manuscript at 5).
\textsuperscript{162.} The Problems of Jurisprudence, supra note 7, at 76-77.
\textsuperscript{163.} Id. at 76 (footnotes omitted).
\textsuperscript{164.} Id. at 76-77. See Overcoming Law, supra note 4 (manuscript at 6).
\textsuperscript{165.} As Posner points out in a recent article: “The point is only that our deepest val-
ues (Holmes' 'can't helps') live below thought and provide warrants for action
even when we cannot give those values a compelling or perhaps any rational jus-
tification.” Legal Reasoning from the Top Down and from the Bottom Up, supra
note 51, at 447 (footnote omitted). At times Posner suggests that such intuitions
may be known to us through immature feelings of approval or disapproval. Thus,
Posner reports that “Holmes said (privately, to be sure) that a law was constitu-
tional unless it made him want to 'puke.'” Id. at 447 & nn.40-41. At other times
Our most confident knowledge, therefore, is intuitive, because intuitions lie at the base of all our proofs and reasoning and because it is always possible to make a mistake in the process of proof itself (as by omitting premises). So the fact that we cannot prove that napalming babies is bad does not imply that we cannot know that it is bad. In fact, our intuition that wanton killing is bad is as strong as many of the intuitions on which our knowledge of the empirical world is founded, and stronger than many conclusions of proofs.\textsuperscript{166}

Posner does recognize a major problem, however, that there can and will be a clash of bedrock beliefs.\textsuperscript{167} But this does not undermine the validity of such intuitions, even if they are in dispute.

Difficulties arise only when different people have different and inconsistent moral intuitions regarding the issue at hand. This problem, which is obscured by the tautological character of so many moral propositions (we know murder is wrongful because the word “murder” means deliberate and unjustified killing) is a serious one, but it has nothing to do with the idea, which is false, that knowledge is limited to what can be proved.\textsuperscript{168}

Bedrock intuitions are integral to Posner’s pragmatism. “At bottom we test our theories by reference to our intuitions, the things we cannot help believing.”\textsuperscript{169} Without such foundations, we have no way to put an end to chains of validity or reference; we have no way to even know ultimately what we value. Although Posner, no doubt with Bator on his mind, wishes not to be perceived as “exaggerating the difference between facts and values,”\textsuperscript{170} he acknowledges that “knowledge is tested ultimately by our intuitions, and moral intuitions tend to be at once more stubborn and more divergent than intuitions about the physical world.”\textsuperscript{171} Thus, at least to some extent, some value questions are more intractable than some “facts” about the physical world.\textsuperscript{172} Bedrock value intuitions are less susceptible to revisability.

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\textsuperscript{166} The Problems of Jurisprudence, supra note 7, at 77 (third emphasis added). See Legal Reasoning from the Top Down and from the Bottom Up, supra note 51, at 445-46. Posner considers the possibility that inductive solutions may hold an ultimate answer but counsels this approach rests on intuition as well: “If a proof is inductive rather than deductive—and if you believe in inductive ‘proofs’—its validity depends on the accuracy and number of observations and on the principles of scientific induction, and hence ultimately on our intuitions about perception, causality, and regularity.” The Problems of Jurisprudence, supra note 7, at 77.

\textsuperscript{167} See Overcoming Law, supra note 4 (manuscript at 6).

\textsuperscript{168} The Problems of Jurisprudence, supra note 7, at 77. The point seems aimed precisely as a response to Bator.

\textsuperscript{169} Id. at 340. This point is repeated and relied upon throughout his recent works. “[C]onformity to intuition is the ultimate test of a moral (indeed of any) theory.” Id. at 377. Posner also states the point in reverse: “[N]oninstrumental reason’ is almost an oxymoron.” Id. at 379.

\textsuperscript{170} Id. at 351.

\textsuperscript{171} Id. at 348 (emphasis added).

\textsuperscript{172} See Legal Reasoning from the Top Down and from the Bottom Up, supra note 51, at 445-46. In considering tricky issues of theories of constitutional interpretation
than fact intuitions of this kind, even as they become pragmatic facts by virtue of their stubborn resistance to change.

Bedrock intuitions are not the only form of intuition, however. Indeed, there is a mysterious connection between the third type of intuition and the second—tacit knowing—that Posner never fully articulates. Yet, Posner is as peculiarly concerned with the process of acquiring and displaying tacit knowing as he (and as Bator before him) is with the existence of bedrock beliefs that may themselves, in many instances, be the product of such tacit knowing.

Philosophers as different from each other as Michael Polanyi and Gilbert Ryle have emphasized that some of our most complex thinking is tacit, unconscious. The mathematical formula for adjusting one's weight on a bicycle to keep from falling is highly complex. Yet, without knowing the formula, people learn to ride bicycles. People follow the incredibly intricate rules of language use (going far beyond what is taught in the name of grammar or syntax or vocabulary) without having any conscious knowledge of those rules, leading Noam Chomsky, Jerry Fodor, and others to conclude that people must have a substantial innate facility for language. Many distinguished writers "write with their pen," and the examples are not limited to literature. So much "thinking" is unconscious that the very concept of "mind" becomes problematic.

In the law, much of tacit knowing is an acquired state that comes with experience, not cognitive reasoning alone, if at all.

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173. As Thomas Grey has noted: "Contextualism emphasizes law’s rooting in practice and tacit know-how." See Grey, supra note 6, at 16. Grey, who views contextualism as one of two key claims of "pragmatism" on the whole effectively equates it to what Posner refers to as tacit knowledge. But Posner can identify a broader sense of contextualism, and is not limited to his claims about tacit knowing (e.g., he has an account of bedrock beliefs and induction, inter alia).

174. Indeed, in many cases, Posner may not be able to distinguish them. At many points, he all but equivocates them. See The Problems of Jurisprudence, supra note 7, at 124-26; Legal Reasoning from the Top Down and from the Bottom Up, supra note 51. Curiously, he does not clarify this point in Overcoming Law.


176. Id. at 108-09 (footnotes omitted).

177. See id.

Tacit knowledge is important in legal reasoning. Lawyers develop a feel, not fully articulable, for what types of argument are in the legal ballpark, and what are not ("thinking like a lawyer," again). A comparison can be drawn to the native English speaker who corrects the learner’s description of a “red large barn.” The native speaker is unlikely to be aware of any rule governing the order of adjectives; “red large barn” just doesn’t sound right to him. There are plenty of logical “moves” in law that just don’t sound right to the experienced lawyer.

One also speaks of lawyers who have “good judgment”—some ineffable compound of caution, detachment, imagination, and common sense. But that is a different phenomenon. Sagacity and judgment owe little to legal training and experience (and much to age), being qualities that are
The existence of tacit knowing in a legal system has at least one special problem. Objectivity is a problem because success in law can be judged only by the uses to which it is put, and these are incomplete and often misleading. That problem cries for a solution. Not surprisingly, Posner believes that the solution lies with the scientific or semi-scientific analysis of cause and consequence. In adopting a scientific methodology, he tells us that our problem is that we need further empirical study. Thus, we may be able to test our bedrock

brought to bear on legal methods, materials, and experiences rather than created by them. Young lawyers do not have better judgment than persons of similar age and intelligence in other walks of life.

Id. at 109.

178. See id. at 109-10.

The fundamental difficulty with using the concept of tacit knowledge to defend a view of law as determinate or legal reasoning as distinctive is that unless the possession of such knowledge is stipulated (as in my language example, in which a native English speaker is defined vis-à-vis a novice as one who knows the tacit rules of English), it can be gauged only by observing the uses to which it is put. We measure the bicycle rider's tacit knowledge by watching him ride; if he keeps falling down, we conclude that he lacks it. What are the counterparts in law to the rider who keeps his balance and the rider who keeps falling down? The market for legal services provides some criteria for evaluating the performance of practicing lawyers, but the criteria are imperfect because information about causality is sparse; surprisingly little is known about successful technique in law. Enough is known, however, to make clear that skill in legal reasoning, as measured for example by law-school exams, is only a part of that technique, so that observing successful lawyers in action provides incomplete and often misleading evidence of skill at legal reasoning. The evaluation of judicial performance is also difficult, which in turn makes it difficult to determine which judges are well endowed with the requisite tacit knowledge and which poorly endowed.

Id.

179. One solution that Posner proposes is "further ventures in the new genre that I have dubbed the critical judicial study" of which Cardozo: A Study in Reputation is the first example. See Cardozo, supra note 12, at 150.

180. The underlying problem is that so little is known about the consequences of legal decisions. Not only are the usual methods of scientific verification unavailable but so are the commonplace observations and experiences that enable us to correct our everyday behavior, whether in riding a bicycle, changing a fuse, or assembling a piece of equipment. Common sense cannot answer the question whether the preservation of political or religious freedom requires a broad reading of the First Amendment, or whether the exclusionary rule is needed as an adjunct to the tort remedies against unreasonable police searches. Often when people have difficulty evaluating the output of a process they evaluate its inputs instead. This may be one reason for the emphasis placed by employers (particularly academic employers) on the lawyer's formal credentials. It is easier to determine whether a lawyer did well in law school than whether he is a good lawyer. But it is difficult to monitor even the inputs into judging, let alone its outputs. In this country, judges usually are middle-aged when first appointed to the bench and their academic performance many years earlier is an uncertain predictor of their judicial performance, though not a worthless one. A disproportionate though very small number of distinguished judges have been stellar law stu-
intuitions by seeing whether we cannot help but believing them, and we can test our tacitly acquired intuitions with at least some scientific methods of cause and consequence.

For Posner, the process of acquiring tacit knowing and the possession of bedrock beliefs are fundamental to his approach to the problem of legitimacy in adjudication.\textsuperscript{181} Posner argues, echoing Bator, that it is wrong to believe in "mechanically computational" decisionmaking because of the existence of firmly-held intuitions and tacit knowing: The process of reaching a decision in a broad range of cases is complex and often subject to "private" and "inarticulate" criteria and modes of reaching decisions.\textsuperscript{182}

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\textit{The Problems of Jurisprudence, supra note 7, at 110.}

\textbf{181.} The belief in the fact of bedrock intuition is the source of hope and despair in the quest for legitimacy in adjudication. Moral and legal nihilism are "unteachable," because:

\[ \text{[t]he more uniform the judiciary is, however, the more agreement there will be on the premises for decision, and therefore the fewer difficult cases there will be. . . . [I]t should be borne in mind that even within a judiciary as diverse as ours, there will be many shared intuitions (of course, it could be more diverse, and then there would be fewer), which will provide premises for objective decision making.}\]

\textit{Id. at 459.}

Yet Posner also argues that "moral realism," "legal formalism," and complete objectivity are not achievable. Posner asserts that there are unbridgeable gaps in moral theory, \textit{id. at 349}, and in community intuitions as a whole, \textit{id. at 340-41}, and that judges have no special talent to bridge. \textit{Id. at 340.} Yet at points he modifies this view, suggesting paths to resolve such unbridgeable gaps. See \textit{id. at 387-88. In Overcoming Law, Posner seems to argue that pragmatism and economic analysis can create at least some local success in doctrinal areas that are highly contested.  

\textbf{182.} \textit{The Problems of Jurisprudence, supra note 7, at 124. See Legal Reasoning from the Top Down and from the Bottom Up, supra note 51, at 443. As Posner goes on to note in \textit{The Problems of Jurisprudence:}}

\[ \text{A person should not surrender deeply held beliefs on the basis of a weak argument just because he cannot at the moment find a stronger one in defense of those beliefs. Intuition, itself a method of practical reason, has its claims, and establishes presumptions that the other methods of practical reason may not always be able to overcome. Granted, intuition should rule only in close cases; that is a requirement of the rule of law. But those cases are the focus of professional attention. It would be cold comfort to a defender of law's objectivity to be told that only close cases are indeterminate. Moreover, whether a case is close may depend in part on the strength of the judge's intuition. He may feel that legal doctrine has gone seriously awry, without being able fully to articulate the sources of his unease. So the category of close cases is ill defined. To make the point differently, the preconceptions that judges bring to cases are not extraneous and impertinent foreign matter. The tabula rasa is not the judicial ideal. Society does not want judges to act as}\]
Despite its open-endedness, Posner considers tacit knowing to be "a partial antidote to skepticism about the judicial process"\(^{183}\) even if it is of only limited applicability to the articulation of legal justification.\(^{184}\) Posner takes some comfort in the fact that certain inarticulable processes and some judgments which defy analysis into further articulable claims are rational or reasonable.\(^{185}\) But on the whole, we must rest comfortably, if we can, on Posner's claims that conflicts in fundamental intuitions are rare,\(^{186}\) and that science and

\(\text{183. }\)THE PROBLEMS OF JURISPRUDENCE, supra note 7, at 124-25 (footnote omitted);
Legal Reasoning from the Top Down and from the Bottom Up, supra note 51, at 445-46.

\(\text{184. }\)Id.

\(\text{185. }\)In Overcoming Law, Posner, responding to criticisms, asserts that a pragmatic approach "need not be inarticulate" and that "(t)he responsible judge will not be content with a naked statement of values." Overcoming Law, supra note 4 (manuscript at 217). Thus, empirical testing may be called for, particularly in light of objections: "Prudence dictates that before you react strongly to something you try to obtain as clear an idea as possible of what that something is." Id.

\(\text{186. }\)THE PROBLEMS OF JURISPRUDENCE, supra note 7, at 387-88, 459. Cf. id. at 340-41, 348-49.
scientific method can reduce conflict (particularly of the "how to" variety).187

In responding to Bator, Posner has embraced a view with an affinity for the tradition of non-cognitivism188 in ethics.189 The breadth of Posner's skepticism of the power of rational cognitive analysis to assist in or describe judicial decisionmaking, at least at foundational levels, is captured to a certain extent in a comparison with the late and eminent Kant scholar (and critic) and intuitionist, H.A. Prichard.190

In his famous essay, "Does Moral Philosophy Rest on a Mistake,"191 Prichard stated a non-cognitivist position that, with a great deal more precision, presaged at least part of Posner's account of late twentieth century jurisprudence. Prichard begins much like Posner: "Probably to most students of Moral Philosophy there comes a time when they feel a vague sense of dissatisfaction with the whole subject . . . [which] tends to grow rather than to diminish . . . [and ultimately] the aim of the subject becomes increasingly obscure."192 For Prichard, the solution to this dissatisfaction was not to propose even more intricate and "artificial"193 treatises on moral theory, but to address a fundamental epistemological error.194

[If] as is usually the case we mean by the "Theory of Knowledge" the knowledge which supplies the answer to the question "Is what we have hitherto thought knowledge really knowledge" there is and can be no such thing, and the supposition that there can is simply due to a confusion. There can be no answer to an illegitimate question, except that the question is illegitimate. Nonetheless, the question is one we continue to put until we realize the inevitable immediacy of knowledge.195

187. See The Problems of Jurisprudence, supra note 7, at 387-88. This reduction is noted particularly in localized doctrinal areas. See Overcoming Law, supra note 4 (manuscript at 193-222).

188. See Legal Reasoning from the Top Down and from the Bottom Up, supra note 51, at 447.

189. See, e.g., A.J. Ayer, Language, Truth and Logic (1936); Harold A. Prichard, Moral Obligation (1949); W. David Ross, The Foundations of Ethics (1930); W. David Ross, The Right and The Good (1930); C.L. Stevenson, The Emotive Meaning of Ethical Terms, in Readings in Ethical Theory, supra note 126, at 254-66. This Article does not attempt to explain the connections with all of or even the major variants of this view in its diverse expositions.

190. Prichard received some notoriety with his main work, Kant's Theory of Knowledge, and its broad rejection of the enterprise of Kantian moral constructivism based upon his own theory of ethical intuitionism. H.A. Prichard, Kant's Theory of Knowledge (1909).


192. Id. at 526.

193. Id.

194. Prichard noted, "I shall venture to contend that the existence of the whole subject, as usually understood, rests on a mistake." Id.

195. Id. at 537 (emphasis added).
Prichard argued that "the sense of obligation to do, or of the right-
ness of an action of a particular kind is absolutely underivative and
immediate."\textsuperscript{196} We can engage in an activity of using our moral facul-
ties—call it intuition if you will, and Pritchard did—but moral knowl-
edge consists in "an act of moral thinking."\textsuperscript{197} Proof is impossible.
Direct apprehension of the unreflective consciousness of moral think-
ing is the only source of ultimate moral "knowledge."\textsuperscript{198}

Prichard's non-cognitivism—sharply anti-theoretical in the sense
that it would undermine efforts at normative theory construction—is
most closely mirrored in Posner's description of bedrock beliefs and to
a certain extent in his account of the essential activity of a good judge.
Posner's good judge relies upon rapid instinct.

The judge's essential activity, moreover, is the making of a large number
of decisions in rapid succession, with little feedback concerning their soundness
or consequences. People who are uncomfortable in such a role—and perhaps
they are the most introspective, sensitive, and scrupulous people—do not be-
come judges, do not stay judges, or are unhappy judges.\textsuperscript{199}

In such a scenario, a good judge relies on bedrock intuition and tacit
knowing, particularly the latter, and there is a practical and theoretical
irreducibility to much of what he does. Many decisions are the
result of the direct apprehension of an unreflective attitude towards a
situation—an immediate act of legal thinking—sometimes later recreated
(or rationalized) in whole or in part in an "opinion."\textsuperscript{200}

In \textit{Sex and Reason}, Posner considers moral theories of sexuality\textsuperscript{201}
and argues that "[Joel] Feinberg, [Ronald] Dworkin, and other moral-
ists writing in the tradition of the Enlightenment [notably Kant]" adopt a "tactic"; they "insist that moral principles, to be worthy of re-
spect, must be reflective, reasoned; it is impermissible to base legal
regulations of sex on prejudices, disgust, superstition, received opin-
ion, personal aversions, anecdote, malice, mere rationalizations, or
other unreasoned grounds."\textsuperscript{202} Posner argues to the contrary, how-
ever, that "disgust and other strong emotions in fact supply the sturdi-
est foundations for moral feelings."\textsuperscript{203} Posner asserts, allegedly

\begin{itemize}
\item \textsuperscript{196} \textit{Id. at 531.}
\item \textsuperscript{197} \textit{Id. at 537.}
\item \textsuperscript{198} \textit{If, as is almost universally the case, by Moral Philosophy is meant
the knowledge which would satisfy this demand, there is no such knowl-
edge, and all attempts to attain it are doomed to failure because they
rest on a mistake, the mistake of supposing the possibility of proving
what can be apprehended directly by an act of moral thinking.
\textit{Id.}
\item \textsuperscript{199} \textit{THE PROBLEMS OF JURISPRUDENCE, supra note 7, at 192.}
\item \textsuperscript{200} \textit{Posner goes so far as to characterize this notion of immediacy as \"[t]he idea of
moral feeling as datum rather than inference.\" \textit{SEX AND REASON, supra note 46,
at 232.}
\item \textsuperscript{201} \textit{Id. at 220-40.}
\item \textsuperscript{202} \textit{Id. at 230.}
\item \textsuperscript{203} \textit{Id.}
\end{itemize}
following Wittgenstein, that if the “true foundation of our certitudes is intuition, not proof” there is no point in argument because such attitudes run “deeper than any reason” one could give for them. Even though Posner does not suggest that moral activity is irrational or “utter subjectivity,” it is fallacious, he informs us, to reduce all “knowledge to conscious knowledge.” After all, “[t]he judge whose conscious thoughts are banal might still be a great judge . . . .”

Arguably, Posner meets Prichard at the level of certain bedrock intuitions and even, to an extent, at the level of tacit knowing. Posner’s view, however, features a contextual sense of acquiring such abilities that may not dovetail with Prichard’s demand for “immediacy.” For example, it is possible that the acquisition of much of good judging is acquired through cognitive development, at least in many cases. Thus, law school and early law practice feature tedious, slow moving cognitive activities (briefing a case, etc.) that develop into almost immediate skills (such as the ability to work with a case without briefing it). If much tacit knowledge is of this type, Posner would not need to argue, as Prichard did, that we might as well discard normative theory construction. Importantly, the two interrelated types of intuition, bedrock belief and tacit knowing, do not exhaust Posner’s theory of intuition. In addition, Posner also outlines the strengths and weaknesses of his first type of intuition—the faculty of induction. In praise of the faculty of induction, Posner gives high marks to science and scientific inquiry. “[T]he scientific method is for most people in modern society the model of objective inquiry—such has been the success of science in altering our worldview and our world.” And induction “is a universal method of reasoning.” Yet lawyers’ use of induction is, for a number of reasons, simply primitive compared to the rigors of science.

204. Sex and Reason, supra note 46, at 230 n.20. See The Problems of Jurisprudence, supra note 7, at 76-77.

205. Sex and Reason, supra note 46, at 230 n.20.

206. The Problems of Jurisprudence, supra note 7, at 193.

207. Id.

208. Id.

209. There is a confusion in Posner’s view as to how “immediate” intuitions can be. See supra note 174. Cf. Sex and Reason, supra note 46, at 232.

210. It is instructive that Posner does not do so. See Legal Reasoning from the Top Down and from the Bottom Up, supra note 51, at 443, 450 n.46.

211. The Problems of Jurisprudence, supra note 7, at 62.

212. Id. at 69.

213. The analogy is fine; and maybe it is more than analogy—maybe induction is induction, a universal method of reasoning, as inescapable in law as in science. But neither the fact that lawyers, like scientists, use induction, nor the intriguing suggestion that scientists, like lawyers, are judgmental rather than mechanical in their use of induction—that is, in the weight they attach to “precedents,” viewed as confirming instances—makes law scientific in an interesting sense. What is missing from law
Thus, as Posner praises scientific methods, he suggests potential pitfalls for lawyers in relying upon such methods.\textsuperscript{214}

2. The Redescription of Science for Lawyers

It is not surprising that Posner views induction (and science) as a powerful tool of practical reason and one in which lawyers have little ability.\textsuperscript{215} Nonetheless, Posner links pragmatism\textsuperscript{216} to a redescription of science that gives ample room for lawyers. "If we redescribe 'science' as merely (but not trivially) the idea, practice, and ethics of systematic, disinterested inquiry—in essence, an attitude of respect for fact—we may seem to be setting before the lawyer, judge, and law professor an eminently attainable as well as highly worthwhile ideal."\textsuperscript{217} In Overcoming Law, Posner argues that the pragmatist is anti-dogmatic, one who views the scientist "as the expositor of falsehoods, who seeks to narrow the area of human uncertainty by generating falsifiable hypotheses and confronting them with data."\textsuperscript{218} In short, while critiquing the power of science in law, Posner nonetheless are penetrating and rigorous theories, counterintuitive hypotheses that are falsifiable but not falsified (and so are at least tentatively supported), precise instrumentation, an exact vocabulary, a clear separation of positive and normative inquiry, quantification of data, credible controlled experiments, rigorous statistical inference, useful technological byproducts, dramatic interventions with measurable consequences, and above all and subsuming most of the previous points, objectively testable—and continually retested—hypotheses. In law there is the blueprint or shadow of scientific reasoning, but no edifice.

\textit{Id.}

\textsuperscript{214} Thus Levit has observed that Posner takes a markedly narrow view of the potential for science to evaluate or improve judicial decisionmaking, let alone its prospects for advancing legal theory. . . . Use of the scientific method as a prototype for legal inquiry is dismissed also because, among other reasons, Posner believes science cannot be distilled to a single methodology.


\textsuperscript{215} Posner no doubt believes that much of the weakness in lawyers' faculties is bred in the law schools. Posner claims that this current situation "is deeply rooted in the nature of legal education," The Problems of Jurisprudence, \textit{supra} note 7, at 468, and that pragmatism has implications "for teaching (it is a scandal that law students are not instructed in the fundamentals of statistical inference)." \textit{Id.} at 462.

\textsuperscript{216} \textit{Id.} at 70 n.50.

\textsuperscript{217} \textit{Id.} at 70 (footnote omitted). This redescription of "science" has its implications for Posner's jurisprudential methodology as well. It promotes an attitude towards jurisprudential materials wherein one searches for the "essence" of a viewpoint, particularly "fact" claims. There is a link to anti-theory reductionism: Posner's lawyers would be expected to approach jurisprudential materials with an eye towards reducing them to their nuggets of essential fact and value claims.

\textsuperscript{218} Overcoming Law, \textit{supra} note 4 (manuscript at 7).
argues for the power of a specific type of scientific method: a redescribed method suitable for lawyers that connotes a falsification-oriented reductionist approach to legal inquiry.

In *Sex and Reason*, Posner gives some excellent examples of how such a “redescribed” method of science might work. One way to approach a moral theory, according to Posner, is to recast it “as a scientific one that generates testable hypotheses.” This point is amplified in *Overcoming Law* at many points. Thus, “[w]e can ransack them for their factual implications and then assess the accuracy of those implications . . . and by that means determine whether these theories provide an adequate positive and normative analysis of our subject.” For example, using this “ransacking” method of reductionism of ideology to “fact” claims, reduces Nazism to a set of falsifiable fact claims. Also, some of Kant’s notorious views on sex are rejected “because they rest on factual assumptions that are false.” Even Anita Bryant’s position on homosexuality is rejected on grounds of factual falsifiability.

Promoting a redescribed reductionist “science” for use for lawyers has an immediate problem for Posner. It is subject to skeptical attack: Why should lawyers rely on such a method with any confidence at all? Posner believes the answer to be, echoing Humean skepticism, that the validity of induction “is not demonstrable” and that the “brain imposes structure on our perceptions, so that, for example, we ascribe causal significance to acts without being able to observe—we never do observe—causality.” But whatever “philosophical doubts” and

219. For the most part and practically speaking, Levit is right when she states that Posner “myopically views science solely as a series of experimental ventures.” Levit, *supra* note 12, at 500. But Posner’s redescriptions of scientific method for lawyers has more far reaching consequences. It is linked to his jurisprudential methodology that engages in a special type of experimentation.

220. *Sex and Reason*, *supra* note 46, at 223.
221. See *Overcoming Law*, *supra* note 4 (manuscript at 217).
222. *Sex and Reason*, *supra* note 46, at 223.
223. *Id.* at 222-23.
224. Posner claims that the Nazi fact claims (“predictions”) turned out to be false and claims that it was their falsification that turned Nazism off. “Had [Nazi] Germany won, the history of moral opinion in the last half of the twentieth century might have been different.” *Id.* at 223.
228. *Sex and Reason*, *supra* note 46, at 224.
230. *Id.* at 75.
231. *Id.* at 73.
"practical doubts" we may have about induction (the latter which "would land us in a madhouse"), faith in the faculty of induction is apparently a bedrock belief itself that "practicality" requires us to accept.

Thus, for Posner, the faculty of induction may be the source of some considerable hope. If law is more "scientific" in the redescribed sense, Posner hopes that further knowledge will erode conflicts in deeper values. According to Posner, this is part of Rorty's problem; Rorty acknowledges the trial and error method but does not learn from it. Arguing against Brian Barry and Richard Rorty that wealth maximization has the most to offer the third world (at least compared to socialism), Posner suggests that his disagreement with these "radical" pragmatists is a result of their failure to "evaluate [their] utopian proposals [for economic growth] from the standpoint of history or economics." Unlike Rorty, we can learn from experience. For here, "what happens to be an ethical disagreement is a disagreement over facts; that with knowledge will come ethical convergence." Posner implies that Barry's and Rorty's fascination with socialist ideology might change if they knew more about social science.

3. The Test of Time and Truth

The faculty of induction and the redescription of science is closely linked, for Posner, with the pragmatic equivalent to "truth"—the test of time. Posner asserts the following:

An underestimated device of practical reason is to subject a proposition to the test of time and to accept it if it passes. Though particularly important in aesthetic evaluation, the test also figures in the evaluation of factual (including scientific) and even legal propositions. It is a refinement of the idea that whatever most people think is probably true. The idea itself is unhelpful even if we think "truth" a meaningful and useful concept. Most people are ignorant about most matters, and history is littered with examples of consensus on matters of fact that we now know, or think we know, are false. But the longer a widespread belief persists, surviving changes in outlook and culture and advances in knowledge, the likelier it is to be correct; the intergenerational consensus is more reliable (you can not fool all of the people all of the time).

232. Id. at 88.
233. Id. at 386. See OVERCOMING LAW, supra note 4 (manuscript at 496-522).
234. THE PROBLEMS OF JURISPRUDENCE, supra note 7, at 386. Rorty is critiqued specifically for having "a weak sense of fact." Id. at 386 n.37. Barry's specifications were "a prescription for economic disaster." Id. at 384.
235. Id. at 386.
236. Id. at 387. However, Posner continues to hedge on whether complete convergence is possible, ever. See OVERCOMING LAW, supra note 4 (manuscript at 193-222).
237. THE PROBLEMS OF JURISPRUDENCE, supra note 7, at 386.
238. The "test of time" factors prominently in Law and Literature. See LAW AND LITERATURE, supra note 12, at 301. This is a prominent point at which Posner's pragmatism draws from roots in earlier periods.
Much of our stock of commonsense knowledge and elementary moral beliefs is validated in this and no other way.\textsuperscript{239}

For him, the test of time is a "commonsense idea"\textsuperscript{240} whereby "consensus is the only operational concept of truth that we have."\textsuperscript{241} Moreover, the test of time pushes the limits of the fact/value distinction, as does Posner's concept of intuition generally in its tri-form character. "[M]y proposition is not that all value questions are reducible to questions of fact, but that the fact-value distinction shifts as knowledge grows."\textsuperscript{242} Posner tells us that "[t]here happens to be a substantial consensus in our society concerning ends," but not means, and that the test of time is uniquely suited to alleviating this conflict.\textsuperscript{243}

Instinctively appreciating the relativism of Posner's account of the clash of values, Levit focuses upon Posner's otherwise unsupported claim that consensus establishes a kind of moral truth.\textsuperscript{244} Yet a highly controversial assertion — that there is even something approaching a consensus of ends — is plausible for Posner because he inclines to believe that even deeply rooted bedrock intuitions can possibly be shaken to a core of consensus by fact evaluation.\textsuperscript{245} Posner links consensus to a type of moral truth and suggests that the use of scientific methodology, even if redescribed, can help to bring about consensus, at least in part by exposing the "fact" weaknesses of a "value" position.

But Posner argues that consensus is not "truth."\textsuperscript{246} Pragmatists, instead of speaking of truth, are better off, at a point in time, speaking

\textsuperscript{239} The Problems of Jurisprudence, supra note 7, at 112 (footnotes omitted).
\textsuperscript{240} Id.
\textsuperscript{241} Id. at 113.
\textsuperscript{242} Id. at 387.
\textsuperscript{243} Id. At other points, he seems to argue that there is a great deal of genuine dispute over ends. See Overcoming Law, supra note 4 (manuscript at 196-222).
\textsuperscript{244} "At the center of Posner's theory, but a theme the implications of which are never spun out, is that practical reason is a jurisprudence of consensus." Levit, supra note 12, at 510.
\textsuperscript{245} See Sex and Reason, supra note 46, at 223.
\textsuperscript{246} For Posner:

The pragmatic concept of truth is related to the test of time, but complexity. The pragmatic concept is forward-looking; truth is the destination we have not arrived at, but under the right conditions we can hope to arrive there eventually. The test of time is backward-looking; some of our beliefs are true, and they are probably the ones that, having survived the longest, command the most robust consensus. But the two approaches are at one in referring truth to a process of belief formation that unfolds over time. In so doing they depart from normal usage, in which "truth" and "belief" are sharply distinguished. So what? It might be well to forget about "truth" and speak only of justified or, better (because weaker), warranted belief (and this is the tendency in pragmatist thought), recognizing that there is no way to distinguish in practice between truth and what one cannot help believing, and noting that consensus is a legitimate though highly fallible method of justification.

The Problems of Jurisprudence, supra note 7, at 114.
of warranted belief (some beliefs are so highly warranted that they function as virtual certainties). Even the most highly warranted beliefs must face the test of time and in the end, whenever and wherever that is, they may be ultimately falsified.

Posner regards this feature of ethical knowledge as "a skeptical posture" but not "radical" or "anguished." For Posner, asking for absolute "truth" is too much; that quest gives knowledge a skeptical cast that it need not have. To the contrary, some things are justified more than others, some to the point of being practically certain.

Nonetheless, Posner asserts that law is beset with problems that make the test of time—the operational concept of truth for pragmatists—not really responsive "to the needs of the legal system in a dynamic society." Even so, Posner is careful not to paint "too bleak a picture," and he references us to discernable success in law from the point of view of the test of time. Thus, although consensus is a powerful element in Posner's viewpoint, he clearly comprehends that we can function quite well without it.251 Levit's position, that Posner's pragmatism is a house of cards without consensus, is not a view shared by Posner with respect to his own view, even if at times he can be heard to lament the lack of consensus.252

Crucially, at the intersection between meta-ethical claims and normative programmatic argumentation, Posner suggests that the "situation"—arguably the dissonance between the power of scientific methodology (and the test of time) and actual legal practice—"would be improved if law committed itself to a simple functionalism or consequentialism." Posner's argument proceeds on the thesis that "intangibles such as the promotion of human dignity, the securing of justice and fairness, and the importance of complying with the ideals or intentions of the framers of the Constitution or of statutes," are too "nebulous for progress toward achieving them to be measured," and, therefore, we are left without a way to know whether we are succeeding or failing in achieving them. This programmatic conclusion—simple instrumentalism (consequentialism and functionalism)—

247. Id.
248. Id. at 118. Posner lists several reasons why the test of time has failings as an acid test for truth in law. Id.
249. Id. at 121.
250. Id. at 121-22.
251. This seems to be a critical theme especially stressed in Overcoming Law.
252. THE PROBLEMS OF JURISPRUDENCE, supra note 7.
253. See infra subsection V.A.1.
254. THE PROBLEMS OF JURISPRUDENCE, supra note 7, at 122 (emphasis added).
255. Id. at 123.
256. Id.
bears a kinship to the economic analysis of law and the judicial orientation of Posner's Benjamin Cardozo, in substance and in style.

Posner's thicker epistemological account, grounded in a complex account of intuition, is coupled with a corresponding account of the nature and possibility of "objectivity." Posner recognizes three types of objectivity. The first type is "objectivity as correspondence to an external reality"—so-called "ontological objectivity"—which, in the context of jurisprudence, may, according to Posner, force a Hobson's choice between "natural law in a strong sense" or "legal nihilism" where "law is simply the will of the judges." Second, Posner advert to a "weaker sense . . . of replicable" objectivity, which he calls "the scientific sense of objectivity." Although "[a] finding is objective . . . if different investigators . . . would be bound to agree with it," this second type of objectivity is applicable to more than just scientific inquiry. "[I]ts applications are not limited to science; there are many nonscientific propositions that persons of diverse ideology can agree on." Yet we should not get carried away with too much hope for law. "The problem for law [with respect to this second sense] is that

257. It also bears a distinct affinity for Demming's post World War II economic modeling that has matured into popular (and now under attack) total quality management strategies. See Demming, supra note 18. A central position of Demming's approach is to reduce a phenomena to analytical measurable dimensions; if you cannot measure it you do not know much of anything about it. Much of Demming's faith in scientific analysis, often credited with the success of the post-war economies of Germany and Japan, factors into Posner's approach, if not explicitly, then in spirit.

258. Posner's account of objectivity runs hand in hand with the epistemological account; but although Posner devotes substantial attention to questions of objectivity and considers these issues to be of premium importance, see The Problems of Jurisprudence, supra note 7, at 454, it is questionable whether an account of objectivity adds much once the epistemology of Posner's pragmatism is unveiled. As Joan Williams has noted, "In pragmatist ethics, objective moral certainties are both undesirable and unnecessary . . . . [W]e as pragmatists ought to agree on a vigorous nonfoundationalism. Not only is objectivity undesirable; it also is unnecessary to explain our sense of certainty . . . ." Joan C. Williams, Rorty, Radicalism, Romanticism: The Politics of the Gaze, in Pragmatism in Law and Society, supra note 5, at 158.

259. The Problems of Jurisprudence, supra note 7, at 7. See Fish, supra note 13, at 1448; Rakowski, supra note 12, at 1683.


261. Id. (emphasis added). Rakowski refers to this as "'scientific' objectivity," (apparently sensitive to Bator's criticism of strict science/value dichotomies) a term which Posner does not employ without qualification. See id. at 31. Posner is careful to point out that replicable objectivity is not limited to science and is possible even for persons of different "ideology." Id. at 7. At times, Fish falls prey to this point as well. See, e.g., Fish, supra note 13, at 1448.

262. The Problems of Jurisprudence, supra note 7, at 7.
there is little tendency for inquirers who hold different ideologies to converge on the answers to difficult legal questions." 263

In addition, Posner introduces a third, curious type of objectivity which Posner "sometimes" 264 calls the "conversational sense" of objectivity, and which Posner defines, without a hint of fear for its ambiguity, "as merely reasonable—that is, as not willful, not personal, not (narrowly) political, not utterly indeterminate though not determinate in the ontological or scientific sense, but as amenable to and accompanied by persuasive though not necessarily convincing explanation." 265

Conversational objectivity is a source of some hope for objectivity because it may help to avoid the inherent limits of replicable objectivity and the dilemma of objectivity as correspondence (ontological objectivity): "And only if we are content to define 'objective' in [this] third sense ... will we be able to locate, with respect to difficult legal questions, a middle ground between the natural lawyer's view and the legal nihilist's view." 266 But Posner is not clear as to what this middle ground looks like.

Seeking to fill in this middle, Fish prefers to view Posner's "conversational objectivity" as a "political achievement, and, therefore, an achievement that is the antithesis of objectivity as many understand it: a state of certitude that attends the identification and embrace of bedrock and abiding fact and/or principle." 267 On Fish's interpretation "conversational objectivity" differs from replicable objectivity "only in degree."

In short, the only difference between scientific [replicable] 268 and conversational objectivity is a difference between a community in which assumptions are widely shared and firmly in place, and a community in which assumptions differ and agreement must be repeatedly negotiated. ... Scientific or replicable objectivity is no less political than conversational objectivity; it is just a matter of how much homogeneity the powers that be have managed to achieve. 269

263. Id. Posner's "half empty" thesis is tempered with a recognition that the glass is half full: "Not all legal questions are difficult, of course; and one of the points I shall be emphasizing is that there really are easy legal questions—many of them." Id. His thesis is also moderated by the possibility of submitting to a program of simple instrumentalism and functionalism. See infra subsection V.A.1.

264. The Problems of Jurisprudence, supra note 7, at 7. Posner gives no explanation why this occasional term is applied, or why it is applied only occasionally.

265. Id. (emphasis added). Such convoluted definitions that challenge the rules of clear diction to mortal combat are common in Posner's book(s) prior to Overcoming Law; along with a tendency to use undefined, non-specific terms, they create substantial difficulty in reading and understanding his texts. Overcoming Law has improved on this point.

266. The Problems of Jurisprudence, supra note 7, at 7 (emphasis added).

267. Fish, supra note 13, at 1448.

268. See supra note 261.

269. Fish, supra note 13, at 1448.
Fish predicates this interpretation upon some of Posner's remarks that objectivity in law would be improved by homogeneity and uniformity of the bench and/or the community.  

The temptation to elucidate the difference between these two types of objectivity as a question of degree is understandable. Posner himself makes conversational objectivity enigmatic and indicates to us that its method is "inconclusive in difficult cases when society is heterogenous." Yet, he does qualify this remark almost as if to indicate that he should not have said it in the first place. The latter point could easily mislead one into a mistaken inference: The fact that conversational objectivity may be influenced by heterogeneity, perhaps even conclusively so, does not mean that conversational objectivity is the same thing in kind (even if different in degree) as replicable objectivity. Posner also tells us that conversational objectivity is different in kind from replicable objectivity. It is "not determinate in the ontological or scientific sense." This Article takes Posner up on this suggestion and flushes out an alternative sense of objectivity—one which corresponds roughly yet subtly with Posner's arguments regarding the power of rhetoric, another major feature of Posner's pragmatic response to Bator and a crucial feature of his meta-ethical posture.

270. Id. See The Problems of Jurisprudence, supra note 7, at 30-32, 459.

271. Rakowski acknowledges that the distinction between these two senses of objectivity "is elusive, and Posner does not offer an example to sharpen it." Rakowski, supra note 12, at 1683 n.5. Rakowski, however avoids the problem entirely and considers the distinction of little moment. "Fortunately, the slipperiness of the distinction need not occasion much head-scratching, because it plays no notable role in Posner's argument." Id.

272. Posner tells us, for instance, conversational objectivity "is attainable [in the law]—but that isn't saying much." The Problems of Jurisprudence, supra note 7, at 31. Yet, without describing in any great detail what this means, Posner can be caught at other moments equating conversational objectivity with reasonableness—a position he identifies favorably (perhaps the goal of good judges) and in congruence with pragmatism, Cardozo, supra note 12, at 31, and with the power to locate middle ground in tough legal battles. Id. at 7.

273. The Problems of Jurisprudence, supra note 7, at 32 (emphasis added).

274. Id. at 7 (emphasis added).

275. Posner recognizes that some commentators see a strong connection between Posner's pragmatism and the role of rhetoric. Posner remains a bit coy about this in Overcoming Law. See Overcoming Law, supra note 4 (manuscript at 556). However, he does clearly put scientific methods on a higher footing than rhetoric: "[R]hetoric is held in lower esteem than science. As it should be." Id. (manuscript at 591).
C. The Force of Rhetoric—Literature, the Test of Time, and Omnisignificance

Posner acknowledges, in a moment reminiscent of Holmes, that the “ultima ratio” of law is force, and he argues that the evolution of law is occasioned, in part at least, by the movement away from primitive or less developed means of force. In modern law, such subtle evolution is often occasioned by persuasion, and persuasion is occasioned by the effective use of rhetoric: “Large changes in law often come about as a result of a non-rational process akin to conversion.” Posnerian pragmatism is, in Posner’s most recent works, intimately linked to the appreciation of the power of rhetoric and its critical role in making important doctrinal change possible in contested areas.

276. In an earlier work, Law and Literature, Posner was willing to set down, with some clarity, what his use of the term “rhetoric” was meant to denote: As used by Aristotle and his successors, “rhetoric” ran the gamut of persuasive devices in communication, excluding formal logic. It thus embraced not only style but much of reasoning. Since the Middle Ages the word was come more and more to mean just the eloquent or effective use of language, and that is the approximate sense in which I shall use the word “style.”

LAW AND LITERATURE, supra note 12, at 271. Posner appears to continue in this approximate use of the term.


278. Posner notes Holmes’ belief that the ultima ratio of law is force. See THE PROBLEMS OF JURISPRUDENCE, supra note 7, at 18-19 & n.29. Posner restates this view: “[M]any moral disputes cannot be resolved by peaceful means in a heterogeneous society. Legal means are not necessarily peaceful means in this sense. If a legal decision has no roots in moral consensus, it may rise no higher . . . .” Id. at 237.

279. See id. at 5.

280. See LAW AND LITERATURE, supra note 12, at 226. (“How can a writer persuade, without an effort at logical or empirical proof? The answer is that in areas of uncertainty, areas not yet conquered by logic or science, we are open to persuasion by all sorts of methods, some remote from logic and science.”).

281. “The purpose of rhetoric is to persuade.” Id. at 298. In a truly fascinating chapter in Overcoming Law, Posner considers the nature, uses, and economics of rhetoric. OVERCOMING LAW, supra note 4 (manuscript at ch. 25). Posner considers the negative uses of rhetoric, but also looks at the powerful role and potential of rhetoric when scientific methods are not as strong.

282. THE PROBLEMS OF JURISPRUDENCE, supra note 7, at 459. See LAW AND LITERATURE, supra note 12, at 286. “The reason why rhetoric or style is important in law is that many legal questions cannot be resolved by logical or empirical demonstration.” Id. This theme plays out in Posner’s conclusions with respect to the eminence of Cardozo: “Probably the most important factor is the rhetoric of Cardozo’s opinions.” CARDOZO, supra note 12, at 126.

283. See Johnston, supra note 131, at 753-54.
Posner's account of intuition and objectivity set the stage for his claim that his pragmatism does not distinguish sharply among changes brought about through rational process, emotive or rhetorical appeal, or by peaceable or forcible means. In that context, and while making a strong argument in favor of free expression (and against "essentialist ideas of art and moral-realist ideas of offensiveness"), Posner argues that

The emphasis in *The Problems of Jurisprudence* on the importance of metaphor and other forms of "warm" argument for legal change supplies a further argument against sharply distinguishing rational from emotive expression. Violence is a way of getting people to alter their perspectives, and despite all its emphasis on unforced inquiry pragmatism has difficulty drawing and defending the line between peaceable and forcible means of changing the way people think.

There is a critical link between rhetorical skill and "pragmatism." Posner's discussion of how judges' "visions" are changed at points where reference to scientific methodology will not resolve a potential conflict serves to illuminate the links.

Posner asks a simple question that reeks of problems of objectivity and accountability in judicial activity: "If two social visions clash, which prevails? Equivalently, how does a judge choose between competing social visions?" Such a question arises in Posner's world because of his belief in bedrock beliefs, which, in a pluralistic society, are

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284. See *Overcoming Law*, supra note 4 (manuscript at 588-89.).
286. *Id.*
287. With a clever use of multiple negative ("In stressing the rhetorical side of Cardozo's opinions, I may seem to be belittling him. That is not my intention.") he praises Cardozo on this point.

The power of a vivid statement lifts an opinion by a Cardozo ... out of the swarm of the humdrum, often numbing, judicial opinions, rivets attention, crystallizes relevant concerns and considerations, provokes thought. These are services of great value to the profession. And, odd as it may seem, they are linked to the program of a pragmatic jurisprudence. Pragmatism is not only, or even mainly, policy analysis. It is also and more fundamentally the rejection of a sharp line between truth and rhetoric, between the analytic and the persuasive, the discursive and the metaphoric; it is recognition that knowledge advances through changes in perspective as well as through patient accretions. The judicial opinion that provokes thought by the force of its rhetoric may also advance thought.

Cardozo, supra note 12, at 136-37 (footnote omitted). Posner acknowledges that he emphasizes this point in *The Problems of Jurisprudence*. *Id.* at 137 n.10. See *The Problems of Jurisprudence*, supra note 7, at ch. 4.

bound to clash at this fundamental level. Posner notes that the judge faced with a dilemma at a fundamental level will often choose "on the basis of deeply held personal values, and often these values will be impervious to argument" (or, that is to say, on the basis of bedrock beliefs). If there is to be conversion at all, it will not come necessarily by rational cognitive argument, deduction, logic, science or other forms of "hard" rationality. Instead, "[p]ersuasion will figure in some cases but it will be persuasion by rhetoric rather than by the coolest forms of reasoned exposition. By definition the latter will not arbitrate between competing social visions . . . ."

What form does such conversion take? Posner tells us that the concept of "conversion" has "unsettling overtones." This may be because "[w]e tend to think of it as a sudden, deeply emotional switch from one non-rational cluster of beliefs to another that is no more (often less) rational." And, indeed, as Posner proclaims (using the "women's movement" as a prime example), something akin to religious conversion may take place when one is "offered a fresh perspective that, once glimpsed, strikes many with a shock of recognition." At these dramatic moments of change, "[m]etaphor, narrative, simile and analogy in the figurative or metaphoric sense are important. . . . Its purpose is to jar people out of their accustomed ways of thinking." The most formative element of this approach is not the creation or discovery of new facts, information, or data, but is more precisely tuned to creating an image or idea—"a fresh perspective."

290. Although Posner admits that there must be a clash of such titans, at other points he suggests that there is a substantial congruence of such beliefs, at least with respect to "ends." The Problems of Jurisprudence, supra note 7, at 387. And, he illuminates how we may test our moral hypotheses in a way that may open doors to revision.

291. Id. at 148-49.

292. Id. at 149 (emphasis added). Posner reiterates this point when he tells us: "Swift put it neatly: 'You cannot reason a person out of something he has not been reasoned into.'" Id. at 151.

293. Id. at 150.

294. Id.

295. Id.

296. Id.

297. Id. Thus, in describing the judicial revolution of Baker v. Carr (and other cases), Posner emphasizes that

like the other great turning points in twentieth century American law (and in law period), [Baker v. Carr] was not the product of deep reflection on the meaning of the Constitution and the common law. Often such turning points are not even the product of newly obtained information (and these—meaning and data—are not clearly different things), but instead reflect changing outlooks.

Id. at 152.
A judge can adopt subtle rhetorical tactics to prepare his colleagues for such conversion. Thus, in an especially illuminating passage Posner argues:

The judge who wants to "sell" his social vision to colleagues or future judges does so by presenting it—often, by presenting himself (the tactic that rhetoricians call the "ethical appeal")—in an appealing, winning light, in the hope of converting the reader to his views. The liberal might present himself as hard-headed, the conservative as compassionate, in order to combat the stereotypes attached to the "liberal" and "conservative" labels and to attract followers from the other camp or at least cool the ardor of their opposition. The contenders might seek to "evoke... the core values of [the] audience in a powerful and plausible way" and argue that those values require a particular resolution to the dispute in question.298

Posner insists that this point of view is pragmatic. It rests upon a fundamental epistemological point that is critical to Posner's pragmatism—the recognition that hard cognitive acquisition, like formal deduction, and the attainment of fundamental beliefs, like the belief in efficiency as a model of commercial behavior, which comes about through softer, metaphoric, quasi-religious processes (if at all), are difficult to distinguish in their tenacious quality to persuade. A formalist proof that "2 + 2 = 4" stands on equal footing with the assertion by a follower of Islam that "Allah is Almighty." Thus, in Posner's world, "[p]ersuasion and reason tend to merge in a pragmatist view of truth."299

Posner, however, is careful to suggest that his belief in the power of rhetoric—its ultimate efficaciousness as a tool in final conflicts—is not radically skeptical.

I do not mean to suggest that everything is contingent, "up for grabs," so that the gifted poet or rhetorician can, by skill in generating new metaphors or new perspectives, alter society. I do not believe in the infinite plasticity of human nature or social arrangements. Gifted poets and others can awaken people to facts but cannot create facts.300

The skepticism of Posner's pragmatism—shared by neo-traditionalists, according to Posner—is "skepticism about the power of reason to deliver objective judgments on difficult questions of fact or value," and it is not a philosophical skepticism that is solipsistic.302 It is not complete skepticism because it believes in the existence and power of rhet-

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298. It is well to remember Posner, before his recent avowed shift to pragmatism, considered the issue of the rhetoric of judicial opinions in considerable detail. See LAW AND LITERATURE, supra note 12, at ch. 6. This is further support for the view that Posner's pragmatism is a development, not a radical shift.

299. THE PROBLEMS OF JURISPRUDENCE, supra note 7, at 149 (quoting MICHAEL WALZER, INTERPRETATION AND SOCIAL CRITICISM, 88-89 (1987)).

300. Id. at 151. See CARDozo, supra note 12, at 136-37.

301. THE PROBLEMS OF JURISPRUDENCE, supra note 7, at 152. Posner takes this type of critique even more seriously in Overcoming Law.

302. Id. at 453. Again, Posner follows his interpretation of Hume on this point: "Hume distinguished between these two types of skepticism." Id. at 453 n.41.
oric when reason fails or its use is misplaced. Conversational objectivity is possible even where ontological and replicable objectivity are not. 303

Posner’s remarks on the judicial power of Holmes, and especially of Cardozo, 304 and the ability of their opinions to survive and guide over time, enlighten Posner’s non-skeptical vision of the power of rhetoric. In tackling the disquiet engendered by the propositions that great judges are master rhetoricians, and that “a vital dimension of judicial performance at the appellate level” is rhetoric, Posner implies that

303. Recognizing that there are several methods to obtain objectivity leads Posner to show concern to distinguish himself from the Critical Legal Studies [hereinafter CLS] movement. Thus, the CLS movement is for Posner a “law is politics” school, which “ignores the existence of easy cases and exaggerates the significance of the indeterminate ones (of which there are indeed plenty) by insisting that law is not law unless it lives up to its most extravagant formalist billings.” Id. at 154. Posner acknowledges what has made much of critical legal studies uninteresting to many practitioners: practitioners often perceive, correctly or not, that CLS over-emphasizes hard cases. Posner acknowledges that there are easy cases—ones that resolve quickly and/or easily with hard cognitive processes—and suggests that CLS, if plausible at all, operates most credibly at the level of hard cases, where bedrock beliefs are in conflict.

Yet Posner has another problem with CLS over and above its emphasis. CLS has a tendency to recast the conditions of conflict over values at the most basic, state of nature, level. Posner’s account of the power of rhetoric disagrees that conflict in law is ultimately just a play on raw power: “Disagreement can be rational and creative, or at least cathartic . . . . and the positions of the contending parties need not be vulgarly political in character or motivation. It can be cathartic simply by virtue of being a substitute for physical violence.” Id. Posner sees shades of gray in conflicts, disagreement can be ultimately resolved at a mental if perhaps not strictly cognitive level, where the impetus to resort to force is dissipated.

304. One reviewer has suggested that Posner’s view owes its deepest kinship to Holmes. Certainly, Posner’s treatment of Holmes in The Essential Holmes puts Holmes in a fine light. RICHARD A. POSNER, THE ESSENTIAL HOMES (1992). Holmes is there described as “the most illustrious figure in the history of American law.” Id. at ix. At times, Posner posits that Holmes’ greatness was not as a lawyer, but as a “writer-philosopher,” id. at xvi, giving high praise to the judge for his cultural literary influence. Id. at xvii. Indeed, he even sets up Holmes as a great philosopher and antiphilosopher, see id. at xvii-xix, a position with a deep kinship to Posner’s own. There are other connections as well, for instance, Holmes’ “can’t helps” resemble Posner’s “bedrock beliefs.” Yet, it is at least worth noting that Posner’s fascination for Cardozo at times seems stronger. But see Legal Reasoning from the Top Down and from the Bottom Up, supra note 51, at 450 (stating that Holmes was “the greatest judge in the history of our law, and probably the greatest scholar” and who was imbued with “the finest philosophical mind in the history of judging”). Holmes was “imperfectly pragmatic,” (yet in Overcoming Law Holmes is tagged as the law’s greatest pragmatist) but according to Posner, Cardozo advocated a form of legal pragmatism that resembles the pragmatism that Posner espouses.
what makes Cardozo and other judicial greats is that their opinions are akin to literature.

The competent, even brilliant, analysis of yesterday's legal problems has little current interest, in part because a major task of reconstruction may be necessary to determine that it was brilliant. The sparkling, vivid, memorable opinion is not so chained to the immediate context of its creation. It can be pulled out and made exemplary of law's durable concerns. That is, it is literature; literature is the body of texts that survive the context in which they were created because they speak to us today.

The great judicial opinion writer has the power to convey his ideas over time and to provide ideas that are not chained to context or a particular perspective: They survive (like sharks) as the fittest.

Posner's argument is based upon a broader point about written communication in the form of or akin to literature. For a pragmatist like Posner, "literature" defies simple means/end rationality. Thus, common statutes and constitutions, a type of written communication, are not truly literature. For Posner, they are commands, "a type of communication that requires the recipient to make a good-faith effort to carry out the sender's wishes." Such communications often evince a simple instrumentalism and imply a concern for political legitimacy. Literature, on the other hand, transcends a simple instrumental command style of communication. "Literature... is the body of texts that survive the immediate occasion of their creation to live on

305. Cardozo, supra note 12, at 143. Posner does admit that Cardozo, who is among the greats, may not have been the greatest: "in the long run, he was perhaps the least influential of the great judges in changing the direction of the law." Id. Posner contrasts Cardozo with the "stronger" judicial personalities who were "more opinionated, more aggressive intellectually, more programmatic." Id. at 142. At times Holmes seems to get higher marks. See Cardozo, supra note 12, at 138; Law and Literature, supra note 12, at 285; The Problems of Jurisprudence, supra note 7, at 19. Cardozo instead was "the most neutral, the most even, the most at home in the legal profession, the most comfortable insider: the most professional judge." Cardozo, supra note 12, at 142-43. If the literary judge wears best over time, according to Posner, it appears that the stronger personalities and literary judge wears even better and has more lasting and broad ranged influence. Yet in faint damning, there is subtle praise: "An important part of Cardozo's rhetorical skill was his ability to sugarcoat the pragmatist pill (most strikingly in MacPherson) so that not only his judicial colleagues but the entire legal establishment accepted him as a consummate insider rather than fearing him as a bomb-throwing radical." Id. at 127-28. Thus, having adopted the pragmatic program—perhaps a hard pill for others to swallow—Cardozo adopted a winning style for pragmatism, even if it was not as influential as other programmatic positions.

306. Cardozo, supra note 12, at 143 (footnote omitted).

307. As Posner has noted, "[i]t is no accident that literature tends to deal with basic, timeless features of human existence. The surest, maybe the only, test of literary distinction is survival over time... The process favors works of generality, of universality." Law and Literature, supra note 12, at 15.

308. The Problems of Jurisprudence, supra note 7, at 394.
in cultures and times remote from that creation.” But commands, as H.L.A. Hart might agree, can persist over time. The critical difference for Posner is that literature persists over time in a special way. Literature or communication akin to literature has “omnisignificance.” Omnisignificance is a special characteristic of persistent rhetoric that takes the form of, or is akin to, literature. Opinions that “have a considerable generality, ambiguity or adaptability [have] an ‘omnisignificance’ that enables them to survive vicissitudes of culture and taste.” Literature, great literature, severs the reader “from local, time-bound elements, including beliefs and prejudices that are outmoded or at least widely believed to be vicious or absurd.” The almost indivisible triad of generality, ambiguity, and adaptability are critical to Posner’s account of persistent rhetoric that has omnisignificance.

In Law and Literature, Posner confers masterpiece status upon Holmes’ opinion in Lochner v. New York; in Cardozo, Posner refines

309. Id.
311. THE PROBLEMS OF JURISPRUDENCE, supra note 7, at 394. Interestingly, Posner refrains from expounding further on this idea in Overcoming Law.
312. Id. But such opinions must be wary of becoming too open-ended lest they become little more than Rorschach tests. See LAW AND LITERATURE, supra note 12, at 136.
313. LAW AND LITERATURE, supra note 12, at 301. Thus, the power of rhetoric, when translated into its finest form—literature—serves a fundamental methodological aim of kicking sacred cows. It is the ultimate piece of advocacy as it takes readers away—wherever they are—from certain useless or false gods. If it did not trash those gods, Posner suggests, it would not survive as literature. See id.
314. 198 U.S. 45 (1905). For his dissent in Lochner, Holmes receives some robust praise from Posner. Although he is bluntly critical of Holmes—“[Lochner] is not, in short, a good judicial opinion”—Posner nonetheless conveys his highest marks upon the famous dissent: “It is merely the greatest judicial opinion of the last hundred years. To judge it by ‘scientific’ standards is to miss the point. It is a rhetorical masterpiece.” LAW AND LITERATURE, supra note 12, at 285.

The artistry of the masterpiece for Posner in the dissent in Lochner is its omnisignificance. First it begins upon a tone of considerable generality—“This case is decided upon an economic theory which a large part of the country does not entertain,” which Posner notes is “not elaborated.” Id. at 283 (citing Lochner v. New York, 198 U.S. 45 (1905)). The very proposition is rife with ambiguity. “The reader is told neither what the economic theory is, nor the relevance of the fact (which is not elaborated either) that a large part of the country does not entertain it.” Id. And in its generality, Holmes’ dissent takes on an inherent adaptability. As Posner notes, Holmes dips briefly into case law that competes with the majority opinion and yet returns “quickly again to the general.” Id. at 295. Holmes, Posner relates, refers us to the fact that “a constitution is made for people of fundamentally differing views.” Id. (citing Lochner v. New York, 198 U.S. 45, 76 (1905)). The dissent in Lochner, according to Posner, “invites reflection on the profoundest issues of legal process.” Id. at 287. It reaches out across time to us, its problems are raised to a level of generality such that they are rapidly adaptable to our time and place, without the burden of having to set out all the tedious particulars.

For purposes of illustration, Posner's rendition of Cardozo's opinion in *Palsgraf* is illuminating on the functioning of omnisignificance. To begin with, Posner regards that opinion as an instance where "Cardozo could make silk purses out of sow's ears—a gift vouchsafed to few judges."319 Apart from Cardozo's artistry, the case was perfectly ordinary according to Posner. "To see how ordinary a case *Palsgraf* would have been in the hands of an ordinary judge, one only has to read the majority and dissenting opinions in the intermediate appellate court."320 The strength in Cardozo's opinion lies in its ability to have omnisignificance.

First, Cardozo's opinion in *Palsgraf* is imbued with generality and adaptability. In its "bold generalizations about negligence, the opinion resonates beyond the esoteric issue of liability to unforeseeable victims."321 In his opinion, Cardozo saw broad principles and general propositions running in the land of the ordinary: "Cardozo like Holmes had the gift of being able to see the general in the particular—in *Palsgraf* he saw instantiated the basic principles of negligence law."322 In its generality, the opinion is adaptable. The "bottom line" rule that Cardozo lays down—"there is no liability to an unforeseeable plaintiff"323—has had a type of practical adaptability to any number of variable fact patterns. As Posner notes, it has been followed by a number of states even though its focus upon duty is a minority rule; but perhaps even more importantly, it has been cited hundreds of times outside its jurisdiction.324

The adaptability of the opinion is also related to its ambiguity, itself an element of rhetoric. Cardozo appeals to us with an exotic style, pushes us with subtle but powerful force at moments of great significance, and where necessary, he makes the most of ambiguity to heighten the interest of the reader and focus attention upon the conclusions to which Cardozo would push us. Thus, Cardozo not only

315. 162 N.E. 99 (N.Y. 1928).
316. 131 N.E. 898 (N.Y. 1921).
317. 118 N.E. 214 (N.Y. 1917).
318. 129 N.E. 889 (N.Y. 1921).
319. CARDOZO, supra note 12, at 47.
320. Id.
321. Id. at 45.
322. Id.
323. Id. at 41.
324. Id.
omits and restates facts "to telling [rhetorical] effect," he also makes them up. Posner accuses Cardozo of making up an "inaccurate positioning of Mrs. Palsgraf" which adds to the "mystery" of the case. "The reader is intrigued," according to Posner, for "how did a handful of firecrackers cause a heavy scale at the other end of a long platform to collapse?" Such creation of facts leaves a patent ambiguity in the scenario and in the plaintiff's cause of action, which fortifies Cardozo's own conclusion. An ambiguous and "tenuous . . . causal linkage" makes the mishap seem unforeseeable.

There is another level of ambiguity present in Palsgraf which is seen by comparison to Cardozo's other opinions, particularly the "most influential opinion," MacPherson v. Buick Motor Co.330 Posner considers that a line runs through a number of Cardozo's famous opinions—namely the issue of the scope of liability. This is "Cardozo's most famous line of opinions," and the more important cases in this line are MacPherson, Ultramares Corp. v. Touche, H.R. Moch Co. v. Rensselaer Water Co., Palsgraf, and Glanzer v. Shepard.334 Yet, in what might appear to be a moment of criticism, Posner suggests a failure in these famous cases. "Cardozo's project of making law serve human rather than mandarin needs, however worthy a project, often lacks thrust." The failure lies, if at all, for Posner at the level of rationale. MacPherson and Glanzer suggest expansion of liability, whereas Moch and Ultramares are concerned with the indeterminacy of liability. Although Posner admits that "on the score of consistency . . . there are factual differences . . . that might make all four
decisions correct."337 He is nonetheless willing to take the ultimate position that he thinks the decisions rest upon real inconsistency.338 As to this inconsistency in Cardozo's major line of cases, Posner takes a paradoxical position. First, he considers it a "serious defect in Cardozo's judicial performance."339 Yet, it is that defect which has "served rather to magnify than to diminish his reputation."340

Posner argues that this line of cases "demonstrates the importance of generality, of omnisignificance—of 'something for everyone'—to reputation."341 The line of cases is adaptable to a number of inconsistent arguments, ambiguous as to which rationale dominates, and is general; for example, it applies to a broader range of cases still and appeals to a wide audience of academics, practitioners, and jurists.

Cardozo's rhetorical power does have a dark side, however. Posner tells us that Cardozo "defended the right of a judge to deliberately misstate facts."342 Posner carefully documents Cardozo's fascination with the "elliptical statement of facts,"343 and "omissions, even misleading ones"344 in Palsgraf345 and in other cases.346 Posner does not spare the rod on all of Cardozo's rhetorical style. "There is also a bad judicial rhetoric, which consists of such familiar but unedifying lawyers' tactics as distorting the facts, and it is a rhetoric to which Cardozo at times descended, most strikingly in the Palsgraf case."347 Cardozo committed "rhetorical sins both of commission and of omis-

337. Id. at 113.
338. Id.
339. Id. This may be Posner's most serious indictment of Cardozo.
340. Id.
341. Id. Thus:
Cardozo wrote opinions that can be invoked by judges and scholars who want to broaden the scope of liability, and also opinions that can be invoked by judges and scholars who want to limit or reduce that scope. Such were his narrative and casuistical skills that each set of opinions is a powerful support for one of the opposing positions, while the apparent (and I think real) inconsistency between the two sets provides a challenge to the imaginative powers of law professors, students, trial lawyers, and judges.

Id.
342. Id. at 43. Posner points us to Cardozo's essay, "Law and Literature," where Cardozo stated, "I often say that one [a judge writing a judicial opinion] must permit oneself, and that quite advisedly and deliberately, a certain margin of misstatement." Id. (quoting SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 339, 341 (Margaret E. Hall ed., 1947)). Posner does back off of calling Palsgraf a fabrication outright, however, stating that "whether the factual inaccuracies in Palsgraf or any other opinion were conscious or not is impossible to say." Id. at 43.
343. Id. at 42.
344. Id. at 43.
345. See id. at 33-47.
346. See id. at 48.
347. Id. at 137.
sion"348 that were, according to Posner, a reflection of Cardozo's extensive career as a litigator and "deep . . . immersion in adversarial practice."349

Yet, in spite of his criticisms of Cardozo, Posner seems to adhere to a broader view that puts Cardozo in a more favorable perspective, even as to this rhetorical sin. Thus, although "Cardozo [was] not a saint . . . [and] was not a perfect judge,"350 he was caught between the Scylla and Charybdis of "rhetorical power and factual accuracy,"351 which for Posner is an inevitable trade-off for any judge, both helping and hindering judicial performance.352 Posner sees an inevitable trade-off: "[P]erfection in adjudication may be unattainable. . . . The conditions of employment and the nature of the judicial game conspire to prevent perfection."353 Thus, even in identifying the dark side of Cardozo's performance, Posner puts a positive spin on Cardozo's tactics. Cardozo is presented as balancing competing approaches and adopting a somewhat "sinful" tactic that has its ultimate and necessary usefulness. The adoption of such tactics would not automatically lessen his rank against other greats. "Only by comparing Cardozo to other notable judges can we fix his rank."354

Posner's rendition of omnisignificance, the role of rhetoric and their relationship to the process of conversion, have a deep connection to his approach to meta-ethics. The highest marks of a judicial opinion may be when it becomes art by becoming like literature. The highest marks of a judicial opinion may be when it becomes art by becoming like literature. The high judicial art is sometimes only barely cognitive in its appeal and bears a kinship to a religious experience.355 Yet there is a technical, scientific aspect of omnisignificance and the role of rhetoric and literature as well. The test of time alone generates literature.356 The term "literature," the very force of rhetoric itself, connotes substantial acceptance over time.357 The competitive marketplace of ideas has an invisible hand of efficiency that sorts out what is essential.358

348. Id.
349. Id.
350. Id.
351. Id.
352. Id.
353. Id. at 137-38.
354. Id. at 138.
355. High art pressed into service of politics and propaganda "damages" it. LAW AND LITERATURE, supra note 12, at 356. To the dismay of Posner, literature has been increasingly drawn into politics in the twentieth century. Id. at 356-57.
356. See id. at 323-24.
357. Hence, critical judicial studies focuses heavily on statistics of citation and indicia of popularity. See CARDozo, supra note 12, at 58-73.
358. Most literature is written for a mass audience—regardless of the author's intentions. This proposition is inherent in the definition of literature employed in this book; even the most esoteric literature, to count as "literature" under the test of time, must accrue over time a substantial audience. To be able to do this a work must be relatively impervious to
Indeed, Posner asserts that he believes in a "‘survival’ theory of literature," which "reflects an economic outlook," which in turn rests upon "closely related" notions of evolutionary biology. Great legal works—and thinkers—compete in a competitive marketplace and the ones that survive—in measurable terms—over time are winners.

Indeed, the survival theory, the essence of the power of rhetoric, literature, omnisignificance, and judicial greatness, explain two otherwise undecipherable phenomena in Posner's recent works. First, Posner bends over to explain (and almost apologize) for the blandness of his conclusions and seems to follow in the footsteps of his judicial heroes on this point as well. This flows from the survival theory almost directly. "That is why paraphrasing literature tends to yield bromides and banalities." Judicial opinions that survive tend towards truisms and something for everyone qualities; statements about such opinions run to summaries of such truisms, which are the very essence of blandness.

Second, Posner's position helps to explain his tendency to blast off reams of literature on many topics. By diversifying and multiplying, by offering something for everyone (indeed by not offering some things to everyone), he ensures his competitive survival in the marketplace of ideas. Posner, if successful, could make himself a survivor in jurisprudence. Even a holocaust of criticism will tend to reinforce his competitive position.

D. Posner's Meta-ethical Relativism

In declaring himself a pragmatist and tagging himself with any number of related attributes, Posner has confused his readers as to what positions he is committed to and where. To a certain extent, this is no accident, as it is part of Posner's project itself. His latest temporal and cultural change, which means it must deal with the elementary, the timeless, the recurrent problems of the human condition—with the commonplaces of life, with stock situations, stock characters, stock narratives.

Law and Literature, supra note 12, at 341.
359. Id. at 357.
360. Id. at 357 n.2.
361. Id.
362. The Problems of Jurisprudence, supra note 7, at 31-33.
364. Law and Literature, supra note 12, at 341.
365. See, e.g., supra notes 17 and 22.
366. Although I differ with Smith on this point in certain regards, he has noted this problem in Posner's book(s) as well. See Steven D. Smith, The Pursuit of Pragmatism, 100 Yale L.J. 409, 429 (1990).
works themselves display conscious effort to attain omnisignificance that is designed to capture the hearts and minds of an audience wider than simply those who adhere to the dogmatic economic analyses of law\textsuperscript{367} and to engage a wide variety of individuals who hold otherwise incongruous views. These works are built to survive the test of time. Part of Posner’s pragmatism consists in this rhetorical maneuver,\textsuperscript{368} and it frames his methodology as well as his meta-ethical stance.

The confusion in attempting to sort out Posner’s pragmatism lies in the shifting, but deeply interrelated, functioning features of his view. Some of these relationships can be sorted out. For instance, methodology and meta-ethics run hand in hand and complement each other. Thus, at a meta-ethical level, Posner is committed to a view where ethical certainty, ethical knowledge, and even “truth” rest ultimately on irreducible, \textit{but relative}, footings. We have bedrock beliefs that function as ethical certainties. Certain ethical facts are known tacitly—we just \textit{do} an activity and the test of time, at any point in time, declares certain surviving views as winners (and there is little more to say than that there \textit{is} a winner).\textsuperscript{369} Methodology then aims to uncover the carapace of falsity to find what is irreducible and what is subject to testing. Once ideology\textsuperscript{370} is exposed, science can then do its part to address the rationality of the instrumental component of a theory.\textsuperscript{371} This gets what Posner’s pragmatists are after—not “truth” but


\textsuperscript{368} Smith likewise has noted the manoeuvring of Posner’s position:

In the end we are left with the Jekyll-and-Hyde spectacle of Posner assuming the role of antiformalist, at least for rhetorical purposes, when he wants to criticize a view that he does not favor, and then reappearing as a formalist when he wants to offer a constructive proposal or theory of his own.

Smith, \textit{supra} note 366, at 429. As to this particular twist, Posner now has a clear response. After \textit{Overcoming Law}, Posner can identify a sense of formalism—disrespect for fact—that his theory does not feature.

\textsuperscript{369} The fact that ethical beliefs are irreducible, coupled with Posner’s fascination with reducing these beliefs to what we want, would suggest that Posner will be increasingly interested in an analysis of ends (what is it we want) and theories of psychology and motivation. This prediction is in part born out by his recent effort in \textit{Sex and Reason}, and \textit{Overcoming Law}.

\textsuperscript{370} "Ideology" may be too strong a term in many cases, where “value claims” may not be.

\textsuperscript{371} Pragmatism “shifts the emphasis in the philosophy of science from the discovery of nature’s laws by observation to the formulation of theories about nature (including man and society) on the basis of man’s desire to predict and control his environment, both social and natural.” \textit{The Problems of Jurisprudence}, \textit{supra} note 7, at 464.
“belief justified by social need.” Even here, however, science theory (as opposed to the method of science which may be the essence of pragmatism in its normative moments) has a relative cast as well. When we reduce theoretical claims to their essence of ideology and science, we come to a mutable place; therefore, there is no argument that could insulate any theory from scrupulous, even ferocious examination.

To explore the extent to which Posner’s view has developed and ways it needs to develop, it will be useful to parse out, in a traditional analytic way, the nature of Posner’s ethical relativism. Posner has adopted a meta-ethical stance that is largely and distinctly relativistic in a strikingly traditional way. One could compare historical views with Posner's, yet it is more illuminating to identify certain key features of a relativist view and to compare Posner’s view with a contrasting concept of meta-ethical absolutism to identify some salient features of Posner’s largely relativist meta-ethical approach.

1. Posner’s Approach Is Largely Relativist

Posner himself uses the term “relativist” to describe his own view. Although at times he uses the term in a manner which is familiar to traditional analysis, at other points he circumscribes what he means by relativism. However, a more precise method of determining what is implied by this term is in order. In a famous essay, the late professor of philosophy at Harvard, Roderick Firth, provided a convenient and often useful method to test whether a position is relativist or adopts a relativist analysis. “A moral philosopher is commonly called a relativist, and his analysis of ethical statements is said to be a relativist analysis, if he construes ethical statements to be rela-

372. Id.
373. Id. “[T]he succession of theories on a given topic need not produce a linear growth in scientific knowledge. Science in the pragmatic view is a social enterprise.” Id.
374. The most ferocious examination is driven by “social need”, which in turn justifies beliefs.
375. It would be interesting to compare and contrast Posner with other famous relativists like Westermarck and Berlin, but that would be an enormous and distracting inquiry.
376. This approach substantially follows Roderick Firth. See Firth, supra note 138.
377. At times Posner seems to identify moral relativism with the position that there are no (or not always) right answers to legal questions, and at others, he views himself as a relativist in the sense that beliefs are relative to social need which justify them. See The Problems of Jurisprudence, supra note 7, at 201, 319. In a strict sense, neither position is essentially relativist. At other times, however, he walks closely to tagging himself with relativism in the sense developed herein. See The Problems of Jurisprudence, supra note 7, at 86 & n.28, 236 & n.25; Overcoming Law, supra note 4 (manuscript at 6). Cf. id. at 6.
378. Overcoming Law, supra note 4 (manuscript at 6).
tive." Firth proposed, therefore, that a consequence of adopting ethical relativism would be found in the way its proponents approached the meaning and analysis of ethical statements. According to Firth, an ethical statement is relative "if its meaning cannot be expressed without using a word or other expression which is egocentric." Egocentric expressions are those which vary "systematically with the speaker." An ethical relativist believes that an assertion that "x is right" is meaningfully expressible in other statements which contain egocentric expressions. Thus, for example, one might assert that "killing cats for sport is wrong." When asked why, a relativist might respond with an equivalent statement, "killing cats for sport is not compatible with the mores of my social group." The latter expression is a statement, the meaning of which is expressed through the use of the italicized egocentric expression. If the latter statement is, on the view of the particular ethical philosopher, analyzable into any other expression which does not contain an egocentric expression, or if this statement is the only valid statement that can be made, then that ethical philosopher is a relativist.

There is a "familiar characteristic" of relativist analysis that is a necessary consequence of the use of such egocentric expressions. For if one adopts this approach, it is "possible for one person to say that a certain act is right, and for another person... to say that the very same act is not right." One individual can logically and meaningfully say "killing cats for sport is wrong." Another person in a different society can say "killing cats for sport is right." Both statements are meaningful and without logical contradiction. Such a position is often associated with a "liberal" version of tolerance and acceptance.

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379. Firth, supra note 138, at 201 (emphasis added).
380. We might push Firth's distinction and go so far as to assert that this would include the approach to questions of validity as well. Cf. Firth, supra note 138, at 206-07.
381. Id. at 201.
382. Id. Firth posited that such expressions are "ambiguous in abstraction from their relation to a speaker," and include, inter alia, personal pronouns and other spatio-temporal words and expressions. Id.
383. "x" denotes, for example, some expression which states an action or activity such as "killing cats for sport."
384. Note that any number of positions can share this characteristic.
385. In a passage that illuminates Posner's relativism, he argues, "[m]ost of our certitudes are simply the beliefs current in whatever community we happen to belong to, beliefs that may be the uncritical reflection of our upbringing, professional training, and social milieu." OVERCOMING LAW, supra note 4 (manuscript at 5).
386. Firth, supra note 138, at 202.
387. Id.
388. With appropriate stipulations, here, for example, that the person is not a member of the same social group. Id.
389. Id.
for the views of others, and even a deep respect for the autonomy of others.\textsuperscript{390}

An analysis of ethical statements would be absolutist, if it is not relativist. Thus, an absolutist analysis of ethical statement would not contain egocentric expressions. Accounting for the accidental ambiguity of language,\textsuperscript{391} ethical absolutists would believe that they can contradict one another if one asserts “killing cats for sport is wrong” and another asserts “killing cats for sport is right.”\textsuperscript{392} For Posner, pragmatism is not absolutist and is essentially relativist in certain basic ways. First, Posner’s rendition of the account of bedrock beliefs and tacit knowing—and the process of acquiring that knowing—is essentially an account of ethical relativism. For it is a consequence of Posner’s view that I may hold the view that “x is right” and you may hold the view that “x is not right” and there is nothing meaningless or illogical in asserting that both propositions are meaningful moral assertions.\textsuperscript{393}

Posner’s pragmatism envisions a world of potential (and actual) dissonance, even at the epistemological level. In a broad range of real world situations, there is no ideally correct solution to moral conflict between two or more actors to be made by reference to metaethical considerations. Thus, when Posner and I disagree about what in his world are bedrock beliefs, he is not at liberty to argue that my assertion is meaningless or illogical, except by resort to rhetoric (or other force) or by trying to uncover a fact error upon which we can agree.

\textsuperscript{390} This, and a sense of intolerable suffering brought upon the world by faith in absolutism, animate Sir Isaiah Berlin’s repeated defense of moral relativist (or at least pluralist) positions. See, e.g., ISAIAS BERLIN, THE CROOKED TIMBER OF HUMANITY 1-19 (Henry Hardy ed., 1991). It is interesting to note, however, that this need not be so. An ethical relativist might be wildly intolerant: An ethical absolutist might be quite the contrary. Thus, an ethical relativist who believes that for every x, “x is right” means “x is in accord with my personal mores,” could be intolerant if one of her personal mores includes an intolerance principle. Just because others would assert logical claims to the contrary would not stop her from being intolerant. On the other hand, it may be that Roger Williams, an ethical absolutist (believing in essence that those who did not follow God were doomed) nonetheless espoused a tolerance principle, in the form of a church/state separation notion, that has, somewhat ironically, won him favor as a champion of religious freedom.

\textsuperscript{391} See Firth, supra note 138, at 209-11. Absolutists often comprehend the clash of values as resting on a type of mistake; in some cases the mistakes are considered to be inherent to the human condition. See id. at 211.

\textsuperscript{392} See id.

\textsuperscript{393} For purposes of identifying the ethical relativism of Posner’s view, we might recast the assertions into the form “x is in accord with my bedrock beliefs” or “x is in accord with my tacit understanding.” There is no logical contradiction for Posner in the fact that the truth of these propositions may and in fact does vary systematically with the speaker (even the same speaker at different points in time).
Second, Posner's rendition of the faculty of induction, the test of time, the role of rhetoric, "literature" and omnisignificance connote ethical relativism as well. These aspects of his pragmatism are Darwinian: We test them from a point of view in time. What is literature for "us" now may not be tomorrow, and the only way for us to know what we should induce is by standing in "our" shoes now. There is no higher order meta-justification in any particular claim of induction other than that in a point in time. Indeed the very fact of induction as a method of practical reasoning may turn on a belief justified by "our" needs here and now. There is no way to escape making valid statements about literature, or based on induction, without using or noting the use of some egocentric expression.

There are hints at absolutism running through Posner's view, however. Posner's account of rhetoric and the power of rhetoric contains ambiguity in this regard. Thus, when Posner tells us about conversion, the tactics of rhetoric, and particularly as he adopts a rhetorical approach himself, there is a hint of absolutism in his analysis. What underlies his approach may be an unspoken premise that it is right (or it is not wrong) for anyone, at any time, to promote his/her bedrock beliefs, in whatever form is reasonably calculated to be successful. Posner does not advert to whether only his bedrock beliefs contain such a simple bedrock belief, or whether, from any perspective (a proposition that would therefore not vary systematically with the speaker) every set of bedrock beliefs require this tolerance principle. Of course, Posner's account could conform to an account of ethical relativism, if the tolerance principle could be logically rejected by some speakers, but Posner is vague as to this.

A somewhat more disturbing tendency to undercut his relativist posture and trend towards absolutism is particularly evident in Posner's account of the test of time. Although he puts practical caveats on the power of the test of time, Posner at times tends to an idealized vision of that test. Equating the test of time to truth puts Posner precariously near the camp of those who would view all propositions, including moral propositions, as ultimately testable in accordance with truth.

394. The flip side is that Posner sometimes recants and suggests that not everything is up for grabs. Posner at times indefinitely states a belief in limits on what may qualify as a bedrock belief and upon the terms of their change.

395. There are, of course, other types of tolerance principles. Another type of tolerance principle might prohibit us to proselytize our views upon others. See Peter Lake, Make Lawyers Not Lethal Sheep, 42 J. LEGAL EDUC. 271, 277 n.35 (1992).

396. Posner, however, is increasingly less vague in his endorsement of Millian tolerance notions that smack of absolutism. This may account for his hesitation to accept that he is a philosophical relativist.

397. At times, however, the test is not so idealized. See Sex and Reason, supra note 46.
with some, in this case somewhat unspecified, rationality. Thus, according to Posner, at least some propositions could be called true if in an ideal state of rational awareness, after the passage of all time, they were viewed as correct. Posner’s view lacks sufficient philosophical detail to even begin to specify this ideal state, but his view does have hints of a passion for absolute truth—a sense that such an ideal could exist and perhaps justifies our imperfect reliance on such tools of reasoning.

We should discount, however, whatever idealized version of absolutism is present in Posner’s pragmatism because it is of little practical significance, and not simply because it is so highly undeveloped. Practical problems exist here and now and have little or no useful connection with some omniscient, scientific, rational entity who exists at the end of time. We may adopt an attitude of investigation and inquiry that would, if diligently followed through the course of time, bring us to this end state. But where we are now, we are in no position to criticize the beliefs or propositions of others who have made diligent inquiry—where it is available—because such an ideal theory specifies

398. Levit has perceived this tendency in a way that would move Posner closer to an absolutist analysis. Levit, supra note 12. She states: “For intuition, tacit knowing, and common sense to be the trustworthy qualities that Posner suggests, and not purely individual visceral responses, the unspoken assumption is that they are uniform qualities, shared by all or most decisionmakers.” Id. at 510. Levit however perceives that Posner must contend with consensus as a central feature of his view and this seems to color her perception of Posner’s overall approach to problems of ethical divergence. I read Posner a bit more widely on this point. He seems more comfortable with lack of consensus (and hence ethical relativism) than his more idealized moments and Levit’s view might suggest. I do share one view with her, however. If Posner does demand consensus or if his view is a program of ethical absolutism his pragmatism is inadequate in its present form. It is important to remember as well that ethical absolutism can account for the fact of ethical disagreement conveniently. See Firth, supra note 138, at 209-11.

399. In his account, Posner suggests that this test may be limited to certain types of scientific propositions, yet he often equates the test of time with “truth” broadly.

400. It is easy to see, however, how a shift in emphasis could push Posner to an idealized camp of absolutist thinking of the type proposed by Firth in his argument for an absolutist analysis of ethical teams (in terms of an ideal observer who is omniscient with respect to non-ethical facts, omnipercipient, disinterested, dispassionate, consistent and otherwise normal). See Firth, supra note 138, at 212-21. Such a test for the meaning and analysis (and/or validity) of ethical statements certainly has its appeal to a scientific model. Thus, the appeal to Posner might be evident, but for the fact that Posner has preferred to emphasize the problem of disagreement as one turning upon a fundamentally relativist point, as opposed to arising from the pursuit of an ideal, that rife with the potential of ambiguity (and error), may not result in anything like even a practical consensus.

401. Posner’s exposition of the test of time itself suggests that it is relativist. A statement at the end of time invariably carries an egocentric expression unless anyone is able to access that point from any point in time. That, of course, would turn Posner’s test of time into a test out of time, bringing with it a host of transcendental problems he labors otherwise to avoid.
no choice function for competing views in our frame of reference. Nor could it. At any point in the time continuum, new data could completely undermine all prior theories, and there may be no prior basis to predict this. The ideal for Posner seems subject to the same problems of relativism that plague ethical statements generally. Thus, even if Posner means what he says and does incline towards ethical absolutism, his exposition of bedrock beliefs and tacit understanding is, for all practical purposes, a doctrine of ethical relativism.

There is, however, a nagging sense of absolutism in Posner's view that may not go away. Posner seems committed to a position wherein scientific methodology, apart from some conceptualization or description thereof (namely the activity itself), is an inevitable feature of the human condition. As a technical matter, this sense could mature into a claim that Posner's meta-ethical view is absolutist. Following Firth, however, a theory is absolutist if it construes ethical statements to be not relativist,402 and a scientific methodology is an activity not statements. Statements arising from scientific activity form theories and these are revisable. Even theories about scientific methodology are theories and can be relative. This sense of absolutism with respect to the methodology of science may be somewhat foreign in a traditional analysis of meta-ethics, yet the sense that this forms some essential aspect of being human for Posner is nagging, particularly if the belief in scientific methodology is a special type of bedrock intuition that is immune from revision for anyone at any time.


Posner informs us that his view is empirical, and it is tempting to take him at his word.403 Yet it is unclear whether Posner's views commit him to an empirical model or whether his pragmatism suggests a dualistic meta-ethical model. These points in turn lead to deeper problems in his view.

It is helpful in this regard to set out even a limited sense of what would qualify a theory as empirical. Without attempting a broader definition, it will be sufficient to identify a theory as empirical if it holds that ethical statements are entirely analyzable into equivalent statements about experience, including, but not limited to, psychological observations of emotions of approval or disapproval, feelings of de-

403. See, e.g., OVERCOMING LAW, supra note 4 (manuscript at 5). In fairness to Posner, his sense of "empirical" differs: for him it merely connotes that a pragmatist is "interested in 'the facts,'" id., and hence not a formalist. Nonetheless, even on his view of what it takes for a view to be "empirical," his own pragmatism is dualist: "U]ngroundenness is in fact the character of many of our most firmly held norms." Id. (manuscript at 214).
sire or revulsion. A theory might not be empirical if such experiences merely accompany moral statements (e.g., “When I know something is right, I feel good about it”), but we do not know whether or not the experiences can be analyzed into equivalent statements with the ethical statement (e.g., “x is right” may or may not be equivalent to “under circumstances y with respect to x, I feel an emotion of approval”). A theory is not purely empirical (or empirical at all, as the case may be) if it is dualistic. In other words, “there is no formula, however complex, by which ethical statements can be translated into statements about experiences which confirm them.”

Firth has asserted that such a view is characteristic of ethical intuitionism generally and Prichard’s non-cognitivism: “[I]f there is any one fact about which intuitionists agree, it is the fact that some ethical properties are neither introspectable nor analyzable. And from this fact it follows, necessarily, that their ethical theory is epistemologically dualist.”

Posner seems to vacillate here—whether his view is committed to an empiricist or dualist view is an open issue. According to Posner, many ethical judgments are accompanied by a cognitive experience (most induction is, for example), and we can analyze their validity in terms of such experience. Yet his view seems to be based upon viewing bedrock beliefs as often not analyzable into any other equivalent statements of experience at all—let alone a statement or statements about the experience of having a bedrock belief, however that might be specified. His account of conversion at times suggests both the power of experience and the ineffable character of some “conversions.” In these moments Posner is dualistic. Some experiences confirm certain ethical judgments, other ethical judgments simply exist (at least for practical purposes here and now). Posner’s account of the test of time suggests a contrasting empiricist leaning to the extent that bedrock

404. See Firth, supra note 138. Whatever differences there may be between ethical and scientific empiricist claims is left off here. See John Rawls, A Theory of Justice (1971); Cheryl N. Noble, Normative Ethical Theories, in Anti-Theory in Ethics and Moral Conservatism 49 (Stanley G. Clarke & Evan Simpson eds., 1989). And, it is not necessary to consider in what manner ethical statements may confront experience, let alone how scientific statements may or may not differ in this regard. See W.V. Quine, Two Dogmas of Empiricism, A Priori Knowledge 42 (Paul K. Moser ed., 1987).

405. Related is the fact that we might say that there can be confusion over the truth of an ethical statement that is accompanied by experiences that would suggest the inaccuracy of the statement. Pure ethical intuitionists, for whom dualism is essential, have been known to claim that intuitions can be false, and others have pointed out [that] intuitions may be difficult to distinguish from “feelings or aversions that may only be prejudices.” See Firth, supra note 138, at 206 n.9 (quoting 1 Hastings Rashdall, The Theory of Good and Evil 211-13).

406. Id. at 206.

407. Id.
beliefs ultimately must be analyzable in terms of experience as a whole. No “sacred cow” bedrock belief is immune from ultimate revision by the test of experience. At the point of conversion, we may be able to identify a change in viewpoint brought about by a certain type of disposition and experience.

In focusing his response upon Bator’s specific attacks, Posner might hope to divert attention from the fact that, in thickening his account, he has not resolved certain key problems. His failure to clarify whether he is empiricist or dualist leads to a more complex problem. His view skirts the edges of non-cognitivism; yet he clings to the distinction between irreducible values (in the sense that rational argument cannot change them, in the sense that we have them in the doing, and/or in the sense that the test of time bears them out) and scientific method.

Posner at moments can be read in a “neo-intuitionist” vein such as that described by Cheryl Noble:

Moral theories are said to be composed of principles we already operate on, albeit blindly, unclearly, unsystematically, inconsistently, etc. We know right and wrong pre-theoretically, but imperfectly. As we clarify the underlying principles which inform our intuitions, those intuitions themselves become more clear. We clarify theory and particular ideas of right and wrong in relation to one another in a way which this school calls the justification of the theory. Although we normally act on a number of disparate common sense precepts, these can conflict, give ambiguous guidance, or fail to give any guidance. Moral philosophy is supposed to find the underlying principles that will systematize these, resolve their apparent contradictions, and, where the contradiction is more than apparent, give some basis for a reform of common sense, intuitive morality. In morality, as in science, there is a web of belief in which the justification of any intuition or principle is to be referred to the structure of belief as a whole.408

Posner’s view, at times, reflects such attitudes, particularly in the sense that there may be a plurality of first principles. Posner’s pragmatism asserts that some (if not complete) simplification of first principles is possible, and the attempt to do so is a valuable exercise. The latter claim is drawn out explicitly in Posner’s view in his adherence to the validity of induction and the test of time: Certain intuitions benefit by trial and error. Both claims are implicit in his accounts of normative systems that he credits with some (if limited) validity—notably wealth maximization (and corrective justice). These systems have some order and even a methodology of determining how to order and develop moral beliefs with rational inquiry.

Additionally, a key feature of neo-intuitionist views is that they are not the pure form, dualist intuitionism of the sort advocated by non-cognitivists like Prichard and Sir David Ross.409 In Posner’s pragmatism, intuition plays a “central role . . . in the justification of normative

408. See Noble, supra note 404, at 58.
409. Id. at 63 n.4.
ethical theories." But not every intuition is irreducible or unsystematizable. Thus, Posner's view bears an affinity to the noncognitivist intuitionism of Prichard and Ross, but employs a substantial empirical feature that undermines the classic dualism of their approach.

Further, in light of skepticism towards meta-ethics (a dominant trend in modern moral theory), neo-intuitionism has been coupled with, as Posner's pragmatism has, a claim that doing normative work (normative ethics) is a concern that precedes the enterprise of justification and of meta-ethics. Like Posner, neo-intuitionists claim that questions about the possibility of moral knowledge and the logic of moral justification need not first be settled (nonskeptically) in order to engage in normative ethical inquiry. It is entirely possible, neo-intuitionism suggests, that answers to the meta-ethical questions will be forthcoming only if we first develop general theories of obligation on which to base them.

Thus, Posner's pragmatism is closely allied with neo-intuitionism in (1) its focus on normative activities and a disdain of meta-ethics, (2) its reliance on the fact that it is not radically non-cognitivist (some feature of cognitive rationality in theory construction remains) and, (3) its view that some normative theory building is potentially worthwhile.

There is a danger for Posner in not mapping his viewpoint further. Although it varies from rigid forms of noncognitivism and it bears affinities to neo-intuitionism, it also bears affinities to a somewhat incompatible view of anti-theory in ethics. Anti-theory in ethics is implicit in a non-cognitivist position like Prichard's: Normative moral

Surprisingly enough, the view that normative ethical theories are not a proper goal of moral philosophy was not foreign to the thinking of the two foremost British classical intuitionists of the earlier half of the century, H.A. Prichard and Sir David Ross. Prichard, in his famous essay, "Does Moral Philosophy Rest on a Mistake?" gives an argument which does lead also to the conclusion that the demand for normative ethical theory is misguided. But Prichard thought so because he thought moral theories were always demanded as proofs for what cannot be proved but only "apprehended directly by an act of moral thinking." Sir David Ross argued against the idea that there was something that made right acts right. As an intuitionist, he believed that right acts were made right only by their intuited rightness. His efforts to disprove one particular kind of normative ethical theory, utilitarianism, at times seems to take the form of what is really an attack on the idea of normative ethical theory per se.

Id. (citations omitted).

Indeed, even if every intuition is systematizable, it may not be here and now. At some later point in time, it may be.

Noble, supra note 404, at 54.

This is a sense of anti-theory somewhat different from that stressed by Posner in Overcoming Law.
theory is a waste of time precisely because there is an inevitable immediacy of moral knowledge. Posner's view—whatever its affinities for non-cognitivism—is not thoroughly non-cognitivist, however.

There is, though, at least one other anti-theory approach that sharply contrasts with intuitionism and neo-intuitionism with which Posner's view must contend. It is possible that normative theory construction is futile not because of the immediacy of moral knowledge, but because of the fact that cognitive normative theory construction does little if anything to enhance, deny, build, or validate our moral judgments. This, in essence, seems to be the position adopted by Cheryl Noble. In challenging the scientific model of neo-intuitionism, Noble would apparently equate much of the activity of normative ethics more or less with what Posner might view as the activity of acquiring tacit knowing and/or positive or descriptive theory. Thus, Noble asserts that

what "makes right acts right" is not a function of their relation to one another or to a common source, basis, or foundation, but is a function of the particular dimension of life and practice they form part of and of the relations between these various parts of life. Moral values and standards, after all, lack a substance of their own. There are no purely moral acts, but only moral and immoral ways of working, buying and selling, engaging in friendships, and so forth. . . . The unity and autonomy of morality, in other words, may be only moral, and not theoretical.

The activity of being moral for Noble resembles activity of acquiring tacit knowing. Perhaps, at best, cognitive scientific inquiry can help to expose the process to assist in developing understanding about our moral judgments. Thus, according to Noble, "historians, sociologists, psychologists, and other practitioners of concrete empirical disciplines can provide us with" knowledge regarding our common sense moral judgments which may help to tackle problems in normative ethics in a way that intuitionist theory building cannot.

Noble's position—an alternative way to assert an anti-theory position (while preserving a place for scientific inquiry)—explicitly undermines Posner's avowed reliance on intuitionism and would subvert his reliance upon a scientific/theoretical program of wealth maximization. Although, at times, Posner's pragmatism inclines to such a view (less so in Overcoming Law), it cannot function in its present form along those lines. Prescriptive normative pragmatic activities like the economic analysis of law are just the type of theory building that Noble seems to eschew.

Without clarification, Posner's meta-ethical view will continue to pose nagging problems in a way similar to that which Fish suggests it must—the pragmatic "program" in his terms must be jettisoned—or

416. Id. at 62.
417. Id.
will fail to mature into a legitimate neo-intuitionist variation.\textsuperscript{418} In short, it runs the danger of destroying its own programmatic vision either by suggesting its own impossibility (or futility) or by failing to clarify the nature of its basic bedrock beliefs.\textsuperscript{419}

V. POSNER'S PRAGMATISM IMPLIES A NORMATIVE PROGRAM

I consider myself a liberal, albeit in the classical tradition, the tradition of John Stuart Mill, Herbert Spencer, and Milton Friedman, rather than in the newer, welfarist or redistributive sense pioneered by John Rawls.\textsuperscript{420}

The meta-ethical relativism and methodology of Posner's pragmatism are perhaps now its most conspicuous elements.\textsuperscript{421} It is indeed easy to forget that Posner retains a normative position, and that Posner's pragmatism is more than (largely) anti-theory redescribed scientific falsification-oriented reductionist methodology and relativist meta-ethics.\textsuperscript{422}

Posner's pragmatism is perhaps least surprising at the normative level. In The Problems of Jurisprudence, Posner purports to break ranks with his prior self,\textsuperscript{423} yet he hardly abandons economic analysis.\textsuperscript{424} Posner's previously avowed normative program, the economic analysis of law, is avowedly superseded by "pragmatism."\textsuperscript{425} Yet, his pragmatism is linked heavily to the economic analysis of law.\textsuperscript{426}

\textsuperscript{418} For example, I detect signals in Overcoming Law that Posner is not an ethical constructivist, like Rawls. See OVERCOMING LAW, supra note 4 (manuscript at 215)("We reason from our bedrock beliefs, not to them.").

\textsuperscript{419} Much of the clarification of Posner's pragmatism in Overcoming Law is methodological and normative, not meta-ethical.

\textsuperscript{420} Richard A. Posner, Legal Reasoning from the Top Down and from the Bottom Up, supra note 51, at 436. See OVERCOMING LAW, supra note 4 (manuscript at 25).

\textsuperscript{421} Although with Sex and Reason and Overcoming Law Posner returns to focus significantly on normative issues.

\textsuperscript{422} Thus, in recent writings Posner has felt free to remain associated with both descriptive and prescriptive dictates of wealth maximization. See Legal Reasoning from the Top Down and from the Bottom Up, supra note 51, at 433.

\textsuperscript{423} THE PROBLEMS OF JURISPRUDENCE, supra note 7, at 31.

\textsuperscript{424} Judge Marcin has asserted that "there is a surprise or two in the book for doctrinaire law-and-economics disciples. Posner actually modifies his previously published views on wealth maximization." Marcin, supra note 7, at 107. Yet even Judge Marcin admits that Posner almost, but not quite, "find[s] an overarching principle of justice in the law-and-economics [sic][movement]." Id. at 113.

\textsuperscript{425} THE PROBLEMS OF JURISPRUDENCE, supra note 7, at 382 ("The strongest argument for wealth maximization [as a guiding normative principle] is not moral, but pragmatic.").

\textsuperscript{426} He now makes this explicit. See, e.g., OVERCOMING LAW, supra note 4 (manuscript at i, 17, 23).
Although there have been significant developments in Posner's normative view, much of the "former" Posner remains.\textsuperscript{427}

In \textit{The Problems of Jurisprudence}, Posner's argument for a pragmatic normative program consists of two interrelated parts. First, Posner makes an explicit argument that judges should commit to a policy of simple instrumentalism. Second, although this argument seems to have a flavor of independence to it in that book, it is linked to a convoluted argument in favor of and in defense of wealth maximization and the economic analysis of law. The normative conclusions that Posner draws in \textit{The Problems of Jurisprudence}, and in \textit{Cardozo}, are ultimately none too surprising.\textsuperscript{428} The convolutions in those works are brought to an interesting close in \textit{Overcoming Law} where Posner specifies more clearly the relationships among pragmatism, liberalism, and law and economics.

A. The Argument for a Pragmatic Normative Program in \textit{The Problems of Jurisprudence}

1. Simple Instrumentalism

In an important passage in \textit{The Problems of Jurisprudence}, Posner offers a key programmatic conclusion: The practice of law, particularly judging, would be improved if law committed itself "to a simple functionalism or consequentialism."\textsuperscript{429} Although Posner did not define or specify what this phrase means in straightforward terms,\textsuperscript{430} he

\textsuperscript{427} Rorty, for whom Posner has a substantial fascination (and criticism), see \textit{The Problems of Jurisprudence, supra} note 7, at 27, 67, 70 n.50, 83, 114 n.18, 165 n.4, 222 n.5, 243, 384-87, 414 n.39, 416, 450, 462, 464-65, has articulated a similar position as a call to action for pragmatists: "We should say that we must, in practice, privilege our own group, even though there can be no noncircular justification for doing so. We must insist that the fact that nothing is immune from criticism does not mean that we have a duty to justify everything." Richard Rorty, \textit{Solidarity or Objectivity,} in \textit{Anti-Theory in Ethics and Moral Conservatism,} 167, 176 (Stanley G. Clarke & Evan Simpson eds., 1989). Cf. \textit{Overcoming Law, supra} note 4 (manuscript at 214-15)("The notion that a society should hesitate to make judgments about such issues because people differ about them and neither side can offer reasons to persuade the other exaggerates the role that reasoning does or should play in social ordering.").

\textsuperscript{428} Posner has laid a significant foundation for the premises etc. of the economic analysis of law and the program of wealth maximization. \textit{See principally The Economic Analysis of Law, supra} note 11; \textit{The Economics of Justice, supra} note 12. There is no need to reproduce a discussion of these arguments nor the voluminous secondary literature with respect thereto.

\textsuperscript{429} \textit{The Problems of Jurisprudence, supra} note 7, at 122. It is preferable to consider this as simple instrumentalism for simplicity's sake, and because Posner appears to use these terms almost interchangeably. \textit{See Sex and Reason, supra} note 46, at 220.

\textsuperscript{430} Except however, Posner does give rather simple examples of what he has in mind. \textit{See The Problems of Jurisprudence, supra} note 7, at 122. Thus, for example, Posner considers that the goal of a bankruptcy statute might be to re-
did contrast it to high-minded and "nebulous" idealism and the pursuit of intangibles like justice and fairness.\textsuperscript{431} The adoption of instrumentalism ties to Posner's broader normative vision\textsuperscript{432} because he believes that "[t]here happens to be substantial consensus in our society concerning ends (including ends for other societies). The disagreement is over means . . . ."\textsuperscript{433} Faith in simple instrumentalism, in itself, is an important foundational normative position for Posner.\textsuperscript{434} Echoing the demand that jurisprudence must become more pragmatic and needs "a shift in direction,"\textsuperscript{435} the cry for instrumentalism has an important intermediate significance. Dispensing with abstract, intangible, policy analysis, and formal, non-fact oriented, philosophical theory could tend to lead decisionmakers generally to decide in simple cost-benefit terms. Even for those judges who do not accept or understand principles of wealth maximization, there would be a tendency for such decisions to maximize wealth. Simple instrumentalism, which Posner openly relates to basic forms of utilitarianism\textsuperscript{436} and wealth maximization,\textsuperscript{437} tends to result in the achievement of Posner's preferred "bedrock beliefs." So it is no surprise that Posner promotes simple instrumentalism as a mode of judicial decisionmaking. It is both potentially consistent with wealth maximization and could tend to produce the least damaging results where it is not.\textsuperscript{438} And it is an easy, non-ideological sounding approach for judges. Often little

\textsuperscript{431} Id.

\textsuperscript{432} As he points out in \textit{Overcoming Law,} "[t]he basic assumption of economics, or at least of the brand of economics that I peddle, is instrumental rationality." \textit{Overcoming Law, supra} note 4 (manuscript at 614).

\textsuperscript{433} \textit{The Problems of Jurisprudence, supra} note 7, at 387. Not surprisingly, Posner tells us that this disagreement will lessen as we learn more about economics. \textit{Id.} Yet Posner at other times sings a more moderate tune of "dissensus." \textit{See id.} at 237. He asserts that there is not "a strong tendency for moral principles to converge" and that all but a tiny fraction of moral principles "are conventional and culture-bound to a far greater extent than scientific principles are." \textit{Id.} at 236.

\textsuperscript{434} "The fact that wealth maximization, pragmatically construed, is instrumental rather than foundational is not an objection to its use in guiding law and public policy." \textit{Id.} at 387.

\textsuperscript{435} \textit{Id.}

\textsuperscript{436} It is instructive that Posner references us to consequentialism and functionalism just once in \textit{The Problems of Jurisprudence,} but in the index "Consequentialism" is referenced to "Utilitarianism." \textit{Id.} at 473. Posner appears to consider instrumentalism to be related to a form of utilitarianism.

\textsuperscript{437} \textit{Id.} at 387.

\textsuperscript{438} \textit{Id.} at 121-22.
more is required of a judge than (following Demming) to identify a goal and act in a way that maximizes it.439

2. In Praise of Wealth Maximization

In *The Problems of Jurisprudence*, Posner links wealth maximization, pragmatism, and instrumentalism.440 Thus, at the penultimate point of *The Problems of Jurisprudence*, Posner correlates wealth maximization with "the persistent utilitarian, instrumentalist, [and] pragmatic spirit of American society."441 And at another point he notes that American legal reasoning is prevasively [sic] though not solely utilitarian and instrumentalist; and economics442—in which the idea of balancing costs and benefits plays a leading role—is in one sense applied utilitarianism and in another the science of instrumental reasoning.443

439. *Id.* at 356.
440. In *Sex and Reason*, Posner openly embraces an economic approach to describing and prescribing a theory of sexual behavior and the role of law with respect thereto. As Martha Nussbaum has pointed out, that book has as its "larger aim," "the articulation and defense of a 'bio-economic' theory" of sexual behavior, and of a "libertarian" normative theory of the role of the law in sexual matters. "The libertarian project," according to her, "is connected in complex ways to . . . the bio-economic theory." Nussbaum, *supra* note 23, at 1697. Nussbaum argues that there is a deep connection between wealth maximization and the "economic" maximization of *satisfactions*—if not always a clear connection—and that Posner's theory owes some of its allegiance to economics, but not all. *Id.* at 1710. Much of her argument is aimed at elucidating Posner's various positions on sexual activity and notions of satisfaction and rationality. *See id.* at 1710-29. She draws some interesting, if problematical, links to Posner's view and Dworkin and Mill, *see id.* at 1730-31, indicating that there are points at which Posner makes "no attempt to reduce sexual questions and questions of expression to questions of wealth-maximization." *Id.* at 1731. In part, because Posner's theses in *Sex and Reason* are so frequently (and at times) superficially laced with the linguistic trappings of law and economics, it seems obvious that Posner has returned in normative and descriptive moments to a style more reminiscent of his pre-pragmatist period. Particularly intriguing is Nussbaum's assertion that Posner holds deeper values or notions of "human rights" that themselves are more fundamental than even the belief in the value of wealth maximization as a social goal. Posner challenges that view somewhat by his own argument that only "economic or other utilitarian considerations" could serve to "limit sexual freedom" under a "laissez-faire approach to sex." *Sex and Reason, supra* note 46, at 181. But it is clear that in defense of wealth maximization, Posner at time references deeper values—the value of value creating individuals and individualism for example—that serves to ground such a program. But one must be careful not to push this too far. Posner avowedly sees himself in a tradition of "rights" or liberalism that differs markedly from the types of "rights" espoused by others, especially "welfare liberalism" and Dworkin.

442. Note that Posner uses the term "economic" at times interchangeably with "wealth-maximizing." *See id.* at 439 n.18.
443. *Id.* at 439.
Posner asserts also that wealth maximization is a dominant force in judicial decisionmaking.444

The spirit of wealth maximization "is an ethic of productivity and social cooperation—to have a claim on society's goods and services you must be able to offer something that other people value."445 Utilitarianism, by way of contrast, is for Posner a "hedonistic, unsocial ethic." Thus, wealth maximization enjoys a significant normative advantage over hedonistic utilitarianism. Not only does it comport, according to Posner, with the values of "dominant groups," it is based on a powerful (if flawed)446 ethical norm.

One beauty of wealth maximization is that it skirts the edges of conflating what is and what ought to be. From the descriptive "is" perspective, Posner points out the extensive influence of wealth maximization on the common law447 and the many ways that the common law can be seen as trending towards wealth maximization.448 Thus, Posner tells us that "we should not be surprised to see the common law tending to become efficient" and that the economic analysis of law "provides . . . the key to an accurate description of what judges are up to."449 Its predictive force stops just short of perfection because there are choices yet to be made, and there are imperfections in the system itself.450 But where prediction ends, prescription and proscription begin. For Posner, wealth maximization is "the right benchmark for criticism and reform."451

Beyond prediction, prescription and proscription, "the economic approach enables the common law to be reconceived in simple, coherent

444. "No doubt most judges (and lawyers) think that the guiding light for common law decisionmaking should be either an intuitive sense of justice or reasonableness, or a casual utilitarianism. But these may all be the same thing . . . " Id. at 390-91. And as Posner notes, "usually the judge or lawyer when speaking in utilitarian terms actually means the corresponding economic (wealth-maximizing) terms." Id. at 439 n.18. See id. at ch. 12. See also id. at 391 ("If pressed such a judge would probably have to admit that what he called utilitarianism was what I am calling wealth maximization.").

445. Id.

446. Posner addresses the weaknesses of this ethic in two provisos in The Problems of Jurisprudence. See id. at 391-92.

447. Id. at 358-59.

448. Id. at 356.

449. Id. at 360.

450. Posner informs us that "we cannot expect the law ever to achieve perfect efficiency." Id. The common law is tied to the performance of judges, whose incentives "to perform well along any dimension are weak"—a lamentable side-effect of judicial independence. Id.

451. Id. at 360-61. "If judges are failing to maximize wealth, the economic analyst of law will urge them to alter practice or doctrine accordingly." Id. at 361. Moreover, the same goes for the legislative component—"the analyst will urge . . . a program of enacting only legislation that conforms to the dictates of wealth maximization." Id.
terms and to be applied more objectively than traditional lawyers would think possible." The analysis has somewhat of a "deductive" and "formalist" cast that links to a simple instrumentalism. The analyst can compare things with the reality of the common law and set the heading for the path of reform. In this vision, the beauty of science is resurrected, even in the face of what might seem, at first blush, a "quixotic" task of discovering the inner essence of the common law and reaching for the doctrines which would perfect it. As Posner argues: "Such examples suggest not only that the logic of the common law really is economics but also that the teaching of law could be simplified by exposing students to the clean and simple economic structure beneath the particolored garb of legal doctrine." However, the epiphany is not ungrounded. Although Posner recognizes that his aspirations are reminiscent of Langdell's, his view "differs fundamentally in being empirically verifiable" at a metaphoric level. The scientific method for Posner is the measurable instrumentalism associated with the essence of Demming's position.

3. The "Defense" of Wealth Maximization

In Chapter 12 of *The Problems of Jurisprudence*, Posner, in the context of considering and rejecting various theories of substantive justice, identifies the economic analysis of law as "[t]he most ambitious and probably the most influential effort in recent years to elaborate an overarching concept of justice," and promises to "use philosophy" to critically examine the "most ambitious version of this school." In that chapter, Posner identifies this approach through several basic tenets of wealth maximization, recognizes two types of attacks on the economic analysis of law ("positive" (or descriptive) and "normative") and adopts two "provisos" to a general prescription for

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452. Id.
453. Id.
454. Id. After all, much of the doctrinal luxuriance of the common law is seen to be superficial once the essentially economic nature of the common law is understood. A few principles, such as cost-benefit analysis, the prevention of free riding, decision under uncertainty, risk aversion, and the promotion of mutually beneficial exchanges, can explain most doctrines and decisions.

455. Id. at 362.
456. Id. "The ultimate test of a rule derived from economic theory is not the elegance or logicality of the derivation but the rule's effect on social wealth." Id.
457. Id. at 353.
458. Id. at 362. Again, Posner does treat the fact that the two modes of analysis—"is" vs. "ought" propositions—are not as separable as this. Id. at 374. Posner appeals to authority, id., to establish this point, but does provide one telling argument. In addressing the fuzziness of the line between "is" and "ought" propositions, Posner points out that if judges are normatively required to follow
wholesale adoption of the wealth maximization program based on some of the criticisms. The provisos upon careful examination, however, largely serve to support the program rather than to limit it.459

a. Defense of the Positive Theory

With the exception of two provisos, he rejects all attacks. Posner considers two attacks on the positive theory to be salient, although he considers several other “important” criticisms as well. He credits the arguments (1) that law and economics is a phony science, and (2) that economics belongs to market, not non-market activities, with the greatest credibility (or at least as being “fundamental”).460

In defense against the first salient argument, Posner considers the science of economics to be “weak in comparison with the natural sciences,” yet credits it as a legitimate science and as the strongest of the human sciences.461 Economics is not a “false” science462 (and not an “ideology”)463 although it has two principal weaknesses as a science that are interrelated. For one thing, it is largely a non-experimental science:464 “[T]he infeasibility in most areas of economic inquiry of performing controlled experiments,”465 often means that falsifiability is “beyond the economist’s reach.”466 Second, lack of falsifiability is itself no small problem according to Posner. “A theory that is not effectively falsifiable, but only confirmable, is tenuously grounded.”467 Posner’s problem is that data supporting one theory can also support other theories as well, unless we can falsify those competing theories.

For Posner these weaknesses, however, should not discredit the law and economics movement. First, many rational sciences share the weaknesses of economic analysis, and “economists and other social scientists do on occasion conduct controlled experiments.”468 Additionally, the competition for descriptive study of law is weaker: “[V]}
ous\textsuperscript{469} fields of interdisciplinary legal studies . . . are older than economic analysis of law yet are weaker candidates for a leading role in fashioning a positive theory of law."\textsuperscript{470} In short, Posner considers economics to be the strongest scientific candidate on the short list. It is not perfect, but Posner effectively argues that it is the best that we have.

The other main source of salient criticism that Posner considers is the "essentialist\textsuperscript{471} claim that law and economics is misplaced because it fallaciously considers non-market activities from a scientific vantage point that is classically associated with the study of markets.\textsuperscript{472} Posner tells us, in a shotgun blast of arguments\textsuperscript{473} without any significant development, that "[i]t is an empirical question whether economics has much to contribute to human knowledge outside the domain of explicit markets,"\textsuperscript{474} and that the answer to this "empirical" question "seems" to be in the affirmative.\textsuperscript{475} Posner argues that the fact that (in his opinion at least) an extensive and influential body of literature has developed in the area of economic analysis of law and many other non-market fields should suggest that the theory "ought to be evaluated on its merits."\textsuperscript{476} This argument all but begs the question. The fact that many individuals have attempted to apply the models of market analysis to non-market arenas proves that some think it is fruitful, and is consistent with the possibility that it ultimately is. But Posner's arguments do nothing other than tend to show that the proposition that "the use of economic analysis of

\textsuperscript{469} Posner explicitly considers "psychology of law," "sociology of law," "legal anthropology," "jurisprudence as a positive theory of law" (whatever that may mean), and suggests that "others . . . could be named." \textit{Id.}

\textsuperscript{470} \textit{Id.} Unfortunately, Posner does not summarize why they are weaker from a scientific point of view.

\textsuperscript{471} \textit{Id.} Posner digresses to discuss the stubborn philosophical fallacy of "essentialism." In \textit{Overcoming Law}, Posner contrasts pragmatism's practical and instrumental features with "essentialism," which he regards as a contrast between "what works and what is useful rather than in what 'really' is." \textit{OVERCOMING LAW, supra} note 4 (manuscript at 4).

\textsuperscript{472} Posner recognizes that the limitations on the use of economics to study related disciplines have been scrutinized by even the great gurus themselves. \textit{See, e.g.,} Ronald H. Coase, \textit{Economics and Contiguous Disciplines}, 7 J. LEGAL STUD. 201 (1978). Posner prefers to limit this problem and interpret Coase to be arguing not that economics has little to contribute outside this domain but that economists have little to contribute. \textit{THE PROBLEMS OF JURISPRUDENCE, supra} note 7, at 369. \textit{See OVERCOMING LAW, supra} note 4 (manuscript at ch. 21).

\textsuperscript{473} Posner argues that (a) other disciplines study markets; (b) the historical fact that economics has focused on markets does not "determine its future or delimit its scope;" \textit{THE PROBLEMS OF JURISPRUDENCE, supra} note 7, at 369; (c) the problems of market theory do not suggest non-market application is inappropriate; and (d) lack of formal training is no barrier. \textit{Id.} at 368-69.

\textsuperscript{474} \textit{Id.} at 369.

\textsuperscript{475} \textit{Id.}

\textsuperscript{476} \textit{Id.} at 370.
non-market behavior is useful" is not a completely falsified proposition.477

In addition to effectively rejecting these salient criticisms of positive theory, Posner addresses "a number of specific objections,"478 which he indicates are at least "substantial,"479 and include "important"480 objections, but which presumably are less fundamental criticisms.481 Again, Posner essentially rejects all of them with little difficulty,482 but one criticism is, for Posner, the bridge between the positive criticisms and the normative criticisms that Posner considers.483 “[W]ealth maximization is so incoherent and repulsive a social norm that it is inconceivable that judges would embrace it.”484 In keeping with a theme in The Problems of Jurisprudence of backing into his arguments in favor of wealth maximization, Posner states that the universality of wealth maximization as a social norm is unsatisfactory, yet argues that it has a significant area of application—that is, the common law.485 Thus, he states that “[a]lthough it would be a gross overstatement to conclude from the evidence gathered to date that the logic of the common law has been wealth maximization and the logic of statute law wealth redistribution, the statement contains some truth.”486 He also tells us with faux caution that “[i]t seems that intuitions about wealth maximization have shaped to a significant degree the doctrines of the common law and that statute law does reflect to a much greater degree the pressure of interest groups.”487 Thus, he argues that wealth maximization cannot be incoherent and repulsive, because it has not been so.

Throughout his considerations of the positive arguments against the economic analysis of law, Posner maintains a semi-skeptical posture that is a constructive, if at times disorganized, defense of wealth maximization. The message, flavored with the tone of his pragmatism, is that, despite its “weaknesses”—which are often on his account

477. Id. In his own world view, this suggests that the argument for the economic analysis of law proceeds from inductive reasoning. It has withstood the test of time better than other theories and is therefore truthful in perhaps the most meaningful sense for a pragmatist.

478. Id.

479. Id. at 371.

480. Id. at 373.

481. Posner’s expositional organization in Chapter 12 is not particularly strong at this point. Unfortunately, such moments in The Problems of Jurisprudence may have led some to believe that the book was hastily assembled.

482. Id. at 372-73.

483. Id. at 373.

484. Id. The histrionic framing of the question presented suggests that there is little alternative but to reject the question.

485. Id.

486. Id. at 374.

487. Id. at 373-74.
not really weaknesses—wealth maximization in the form of the economic analysis of law is the best alternative we have.

b. "Criticisms" of the Normative Implications of the Economic Analysis of Law—The Defense

In a complex and sometimes rambling section of Chapter 12 of The Problems of Jurisprudence, Posner considers a variety of attacks on the normative program of wealth maximization. Although it would appear that he has retreated from the program of wealth maximization, Posner minimizes the attacks on all fronts. He considers two provisos to wealth maximization in response to arguments that he purposes to credit as valid criticisms, but these provisos serve as predicates for arguing for a particular type of application of wealth maximization.

A principal area of concern for Posner, borne out in Overcoming Law, is that wealth maximization may not account for individualistic sentiments in American society; this leads to the adoption of a purported limiting proviso. Apparently, another major source of concern for Posner is to diffuse the argument that wealth maximization does not consider the initial or resulting distribution of wealth, but instead focuses mainly upon increasing the aggregate size of the social pie after a series of social inter-transactions. This egalitarian problem requires a second proviso that is ultimately chimerical.

A number of specific criticisms Posner addresses revolve around the first main proviso that Posner adopts to wealth maximization to deal with individualistic sentiments. Posner posits that a realistic system of wealth maximization requires rules and institutions that may limit the maximization of wealth, and wealth maximization may call for limits on certain types of rights and freedoms. The "limitations" of which he speaks are concerned with individual freedom and autonomy, and perhaps ideas of corrective justice that are themselves connected to notions of individualism. Thus, Posner considers the fact that a system of wealth maximization or utilitarianism can treat "people as if they were the cells of a single organism." Where the welfare of society as a whole is at issue, it is possible that "[w]ealth maximization implies that if the prosperity of the society can be promoted by enslaving its least productive citizens, the sacrifice of their

488. Id. at 374-87.
489. Posner informs us at one point that he is "less sure of the extent of egalitarian sentiment in our society than that of individualistic sentiment." Id. at 380.
490. Id. at 378. Posner often confines his remarks to utilitarianism or wealth maximization. This makes reading the chapter carefully rather difficult. At other points, Posner is careful to distinguish utilitarianism and wealth maximization.
491. Id. at 379.
492. Id. at 376.
freedom is worthwhile." Yet, in considering the issue of slavery, Posner is adamant that what may be dictated by wealth maximization is contrary "to the unshakable moral intuitions of Americans." There is a deeper point that Posner draws out with several other examples.

Posner argues that the prohibition of involuntary confessions "rests on a notion of free will" and is similarly unshakable, and this may be inconsistent with a strict cost-benefit wealth maximization calculus which might not rule out every form of torture or coercion that "we" would find utterly reprehensible. Posner also dwells on issues of religious freedom to point out the potential logjam between wealth maximization and bedrock beliefs. Wealth maximization might suggest, Posner relates, that "productive" religions like Mormonism should be subsidized, while despicable, feared, and unproductive religions should be suppressed.

From these examples, Posner draws an important conclusion that serves as the first proviso: "[I]n the present relatively comfortable conditions of our society, the regard for individual freedom appears to transcend instrumental considerations." In valuing freedom for itself—not as a means to "prosperity"—"we do not permit degrading invasions of individual autonomy merely on a judgment that, on balance, the invasion would make a net addition to the social wealth."

In The Problems of Jurisprudence, however, Posner equivocates a bit, when at times he suggests that this type of limitation is itself cost justified. Thus, for Posner, "it is by no means clear that the prohibition of slavery and torture, and the promotion of religious liberty are wealth maximizing, but then again, it is by no means clear that they are not." Posner believes that religious liberty is "the cost-justified policy." He notes that slavery under other names is often tolerated and that even the reprobation of torture is limited in a signif-

493. Id. at 377.
494. See id. at 375-76.
495. Id. at 377. No doubt these are American bedrock beliefs according to Posner.
496. Id.
497. Id. See id. at ch. 5.
498. Id. at 377.
499. Id. at 377-78. Posner argues, apparently unconcerned with his reception with its followers, that Rastafarianism "is a plausible example." Id. at 378 (citing Reed v. Faulkner, 842 F.2d 960 (7th Cir. 1988)(other citations omitted)).
500. Id. at 379.
501. Id.
502. Id. at 379-80. That sentiment is found in some modern versions of liberalism: "Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override." Rawls, supra note 98, at 3.
503. The Problems of Jurisprudence, supra note 7, at 379.
504. Id. at 378.
505. Id. at 379.
cant way, even if not in a clearly wealth maximization way.\textsuperscript{506} Moreover, Posner persists in pointing out that our sense of bedrock rights in certain freedoms and autonomy may owe a great deal to "the present relatively comfortable conditions of our society."\textsuperscript{507} Religious freedom, the prohibition of torture "and the other civilized political amenities of a wealthy society"\textsuperscript{508} may depend for their existence and acceptance upon the fact that they are not cost prohibitive. Thus, Posner predicts that a lower crime rate would itself quell the fervor for a death penalty, and higher crime will bring down a number of civil liberties.\textsuperscript{509} Thus, many rights and liberties may be wealth maximizing and are at the very least not wealth \textit{minimizing}. Indeed, they may turn on a very refined account of the relative value of certain goods.

The broader point is that a system of rights—perhaps the system we have—may well be required by a \textit{realistic} conception of utilitarianism, that is, one that understands that given the realities of human nature a society dedicated to utilitarianism requires rules and institutions that place checks on utility-maximizing behavior in particular cases.\textsuperscript{510}

The determination to promote wealth maximization in \textit{The Problems of Jurisprudence} rings even clearer as Posner considers other "limitations" upon wealth maximization in the context of issues raised by "competing" norms of egalitarianism and of corrective justice.\textsuperscript{511} Posner offers a second proviso to a program of wealth maximization that is more specifically linked to such "egalitarian" arguments. He proclaims that "[i]f wealth maximization is indifferent to the initial distribution of rights, it is a truncated concept of justice,"\textsuperscript{512} and that there is a potential weakness in the distributional consequences of wealth maximization as a normative program. But in reliance upon a single empirical authority,\textsuperscript{513} he tells us that this con-

\begin{enumerate}
\item \textit{Id.} Notably, we often inflict "mental pain for the same purposes."
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id. at 378.} It is by no means clear that Posner is limiting his remarks to average or rule utilitarianism, or both, or neither. His ambiguous example and his references may raise this issue, but do not solve it. \textit{See id.}
\item Issues of corrective justice seem to skate between individualistic and equalitarian sentiments, and also have a distinct flavor of their own, according to Posner. Yet in suggesting limits on wealth maximization, Posner gives notions of corrective justice little effect. Thus, Posner at times is content to leave sentiments of corrective justice which have "no standing in a system powered by wealth maximization", \textit{id. at 377}, as a "residue", \textit{id. at 380}, of a bygone era that need no reconciliation with wealth maximization—simply rejection.
\item \textit{Id. at 375.}
\item \textit{See id. at 375 n.24} (citing Gary S. Becker and Nigel Tomes, \textit{Human Capital and the Rise and Fall of Families}, 4 J. LAB. ECON. S1, S32 (1986)).
\end{enumerate}
cern "may have little practical significance" because any initial distribution may be wiped out in the blink of an eye in the lifetime of any developed society if it is not an efficient distribution.

Yet, Posner seems to view this problem as a more serious threat to wealth maximization. At the end of Chapter 12 of *The Problems of Jurisprudence*, he considers that the "spirit . . . [of] wealth maximization is an ethic of productivity and social cooperation," albeit an impure one. It is impure on at least two grounds. Legal rules aimed at wealth maximization sometimes violate the ground rules of Pareto superiority by making some worse off. And Posner recognizes a fundamental problem associated with existence of chance. He recognizes that market success (returns on investments, etc.) and, more importantly, our place in the system of social wealth maximization (e.g., talents, opportunities, etc.) is often determined by chance: "[I]t is always possible to argue that the distribution of productivity among a population is itself the luck of the genetic draw, or of upbringing, or of where one happens to have been born, and that these forms of luck have no ethical charge." There are, therefore, hints of anti-egalitarianism in wealth maximization according to Posner, if principles of wealth maximization reward inequalities that are of no ethical relevance, and if some players are less equal than others in their claims of equality grounded in the Pareto principle.

To address these problems, Posner adopts a proviso to wealth maximization that arises from such "egalitarian arguments." Posner informs us that transactional freedom (potentially related to the first proviso as being in the nature of individual autonomy) is a limit on wealth maximization which "cannot be derived from wealth maximization." But whatever the pull of transactional freedom, it is, at least initially, subject to similar egalitarian attacks:

Although the advocate of wealth maximization can argue that to the productive should belong the fruits of their labor, the argument can be countered along the lines suggested in that chapter (Chapter 11)—production is really a

514. *Id.* at 375. Posner uses slavery as an example of such a practice although he notes that slavery has had an insidious way of returning even in "modern" societies (e.g. Nazi Germany). *Id.* at 375-76.

515. *Id.*


518. *Id.* at 391-92.

519. *Id.* at 392.

520. Posner suggests (without more) that the criticisms may be broader than or different from purely egalitarian arguments. See *id.* at 380 ("Conflict there is [between wealth maximization and equality of wealth], however, and it points to another important criticism of wealth maximization even if the critic is not an egalitarian.").

521. *Id.*
social rather than individual effort—to which it can be added that wealth may often be due more to luck (and not the luck of the genetic lottery, either) than to skill or effort. 522

But Posner is clear that in “questioning anti-egalitarian arguments” he is not endorsing egalitarianism. 523 Indeed, Posner argues the contrary position—that anti-egalitarian factors based on luck and “natural” endowments are “apt to be strongly resistant to social and political efforts to change it.” 524 His comments are at times technically limited to one aspect of “luck,” the genetic draw, but the argument is far broader. Thus, Posner argues that the “liberal and radical arguments about the exploitiveness of capitalist society are undermined” 525 by the fact that genetic differences arise from a natural basis of distribution that is so strongly resistant to change. 526 But the luck associated with success of a business is really no different on this basis than upbringing or place of birth. All of these factors resist, in Posner’s world, the functioning of political and social mechanisms of redistribution. They also introduce inevitable non-Pareto optimal results that are likewise resistant to change and sometimes anticipation.

Posner’s argument, then, undermines any “egalitarian” proviso. The very “egalitarian” issues that he would suggest should limit wealth maximization are not appropriate or useful to consider from the point of view of a social or political institution that can do nothing significantly productive with respect to such issues. Posner believes that initial distributions of rights and consequent distributions of rights that are not efficient will tend to be evened out, and some inefficiencies of the type that arise from initial unequal distributions, as well as those created by “bad luck,” resist social change.

c. Promoting the Economic Analysis of Law

Not surprisingly, Posner takes the position that “[t]he strongest argument for wealth maximization is not moral, but pragmatic.” 527 In making his pragmatic argument for wealth maximization, Posner attacks leftist views, including Rorty’s, in a ferocious “we’ve won and

522. Id. at 381.
523. Id. at 382.
524. Id.
525. Id.
526. Id.
527. Id. Posner notes that transactional freedom and individualism have roots in liberalism. See id. at 382 & n.30. He even links Mill’s On Liberty to a possible—“pragmatic”—reading and suggests that the connection between philosophical liberalism and wealth maximization may be pragmatic. See id. at 382. This develops into a major theme in Overcoming Law.
Wealth maximization is presented as having helped those less fortunate and as having promoted autonomy and freedom along the way. Among competing conceptions of social "justice," wealth maximization is, roughly speaking, Pareto superior to the alternatives.

Indeed, relying on the proposition that "[t]heory and evidence are mutually supporting," Posner castigates the social experimentations that have run counter to principles of wealth maximization. Thus, "eliminating or radically curtailing the use of material incentives to guide economic production has been tried many times, in the Third World as elsewhere, with catastrophic consequences to the experimental subjects." "Barry's musings on economics"—according to Posner, inspired by Rawls—which suggested restructuring of income levels of various professionals are described by Posner as a prescription for economic disaster. Pointing to actual failures of other theories, Posner nearly gloats: "We have reason to believe that markets work—that capitalism delivers the goods, if not the Good—and it would be a mistake to allow philosophy to deflect us from the implications, just as it would be a mistake to allow philosophy to alter our views of infanticide (see Chapter 11)." Posner is so confident of the practical failure of other systems that he stops just short of advocating (outright) in *The Problems of Jurisprudence* laissez faire economics.

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528. One can imagine Posner's attitude towards recent events and the "demise" of Eastern European communism. There is a hint of anticipation of this in *The Problems of Jurisprudence*; Posner predicts the "sheer empirical failure" of communism. *Id.* at 352. In a recent article he could not resist to point out (completely out of context I might add): "[E]conomic theory can help us interpret the recent events in eastern Europe and the Soviet Union as a refutation of socialism." *Legal Reasoning from the Top Down and from the Bottom Up,* supra note 51 at 446-47 n.39. It will be quite surprising if Posner does not eventually claim that the test of time has vindicated global capitalism.

529. Posner argues that the desire for redistribution—an egalitarian ideal—may be part of the theory of wealth maximization. Interestingly, Posner accepts, therefore, that higher order desires may factor into a calculus of "wealth." But he does not explore it further.


531. *Id.* at 384.

532. *Id.* at 386.

533. *Id.* at 387.

534. See *id.* at 383 n.32.

535. *Id.* at 383-84.

536. *Id.* at 384 (emphasis added). See supra notes 112-115 and accompanying text for the play through of the disparaging reference to Kant.


There happens to be a substantial consensus in our society concerning ends (including ends for other societies). The disagreement is over means, and it will lessen as more of us learn more about how economic systems work.
Having laid the foundation for instrumental incrementalism in the adoption of wealth maximization, Posner prepares the way for his argument that wealth maximization should be the "guiding principle in common law adjudication." Once it is conceded that common-law adjudication properly focuses on wealth maximization, then "a more powerful normative" principle of economics takes over.

This categorical imperative, as it were, of wealth maximization is Posner's interpretation of the Pareto principle, whereby transactions are judged Pareto superior if someone is better off, and no one worse off, whatever other distributional consequences result. Pareto superiority has an appeal based on a claim of "unanimity": "If everyone affected by a transaction is better off, how can the transaction be socially or ethically bad?" Posner believes that the Pareto principle is well illustrated in a single contract situation: Assuming "adequate information" and no externalities, we can assume that contracts are Pareto superior in a world of uncertainty, at least\textit{ex ante}. Robin West's assertion that autonomy and choice in a transactional world may not function as cleanly as Posner asserts are set aside for much

\begin{footnotesize}
My pragmatic judgment is, moreover, a qualified one. All modern societies depart from the precepts of wealth maximization. The unanswered question is how the conditions in these societies would change if the public sector could somehow be cut all the way down to the modest dimensions of the night watchman state that the precepts of wealth maximization seem to imply. . . . Until it is answered, we should be cautious in pushing wealth maximization; incrementalism should be our watchword.

\textit{Id.}
\end{footnotesize}

\textbf{538.} \textit{Id.} at 387.
\textbf{539.} \textit{Id.} at 388.
\textbf{540.} \textit{Id.}
\textbf{541.} \textit{Id.}
\textbf{542.} \textit{See id.} at 388-89.
\textbf{543.} \textit{Id.} at 389. Posner feels content that his reply to West in Chapter 4 of\textit{Law and Literature} has cleared the deck at this point. \textit{Id.} at 389 n.38.
\textbf{544.} \textit{Id.} at 389.
the same reasons put forth in *Law and Literature*. In a world where people do not display "the abnormal passivity of Kafka's (human) characters," the Pareto principle "makes a powerful claim for ethical respect because it draws on intuitions that are fundamental to both utilitarianism and Kantian individualism—respect for preferences, and for persons, respectively." The Pareto principle appeals to both individualistic sentiments and egalitarian notions.

**B. Cardozo—The Argument for Wealth Maximization**

The implicit argument for wealth maximization in *The Problems of Jurisprudence* is born out in comparison with Cardozo. Seizing upon Cardozo's assertion that "[t]he final cause of law is the welfare of society," Posner interprets Cardozo as holding the view that "[l]aw ought to be guided by consideration of the effects of its decisions, rules, doctrines, and institutions on social welfare." For Posner, "the judge...is to steer by the light of social welfare." The common law provides a means to obtain maximum social welfare. "The rules of the common law are instrumental to social welfare, must therefore be tested by that standard, and, subject to considerations of legal stability that slow the pace of judicial reform, should be changed or discarded if they flunk the test." It is no surprise that Posner ascribes to Cardozo "the fullest statement of a jurisprudence of pragmatism that we possess." It is instructive that Posner considers wealth maximization rests on this principle requires a caveat. As Posner concedes, wealth maximization is only Pareto superior if conditions of uncertainty are washed out of the equation *ex post*. *Id.* The reality of Monday morning quarterbacking where *ex post* I berate a choice that was reasonable in the face of uncertainty *ex ante*—requires a mechanism to assure Pareto superior results. That mechanism is insurance: "The essential point is that the availability of insurance, private or social, is necessary to back wealth maximization with the ethical weight of the Pareto principle." *Id.* at 390. Posner is under no illusion that limits on the private and public insurance system prevent *ex post* Pareto optimality, but he appears to believe the adequacy of the system is "an empirical, a studiable issue." Nonetheless, given this caveat, judges should plow full steam ahead with wealth maximization principles in common-law adjudication because it "provides an ethically adequate guide [sic] to common law decision making." *Id.*


546. *See LAW AND LITERATURE*, *supra* note 12, at 199.


548. But the claim that wealth maximization rests on this principle requires a caveat. As Posner concedes, wealth maximization is only Pareto superior if conditions of uncertainty are washed out of the equation *ex post*. *Id.* The reality of Monday morning quarterbacking where *ex post* I berate a choice that was reasonable in the face of uncertainty *ex ante*—requires a mechanism to assure Pareto superior results. That mechanism is insurance: "The essential point is that the availability of insurance, private or social, is necessary to back wealth maximization with the ethical weight of the Pareto principle." *Id.* at 390. Posner is under no illusion that limits on the private and public insurance system prevent *ex post* Pareto optimality, but he appears to believe the adequacy of the system is "an empirical, a studiable issue." Nonetheless, given this caveat, judges should plow full steam ahead with wealth maximization principles in common-law adjudication because it "provides an ethically adequate guide [sic] to common law decision making." *Id.*


550. *Id.*

551. *Id.* at 27.

552. *Id.*

553. *Id.* at 28 (emphasis added). *See id.* at 21, 30, 47, 53, 92, 126, 132, 134, 138, 140.
ers that "[t]he limitations of [Cardozo's] jurisprudence are the limitations of pragmatic jurisprudence generally."554

Indeed, Posner considers that the second most important factor in explaining Cardozo's high reputation "may well be his judicial program."555 That program receives various ascriptions:

(1) "bringing law closer to the (informed) non-lawyer's sense of justice;"556
(2) "Cardozo wanted law to be shaped by social need rather than by the formal values internal to the legal enterprise;"557
(3) Cardozo's opinions "show him carrying through on the project of pragmatism in the nature of the judicial process of making law."558

These various characteristics of Cardozo's normative program are clearly linked to a subtle559 argument for wealth maximization: It promotes the relevant commercial morality. In outlining Cardozo's judicial contribution,560 Cardozo is acknowledged in "one of [his] best known contract cases"561 Wood v. Lucy, Lady Duff-Gordon562—a "characteristic opinion"563—as trying to make the law track lay understanding rather than force lay persons to conform their transactions to rigid legal categories, such as "contract." The legal category is made flexible to embrace the commercial practices of the community (Cardozo's "method of tradition") rather than the practices being truncated to fit pre-existing legal concepts. . . . [T]his making concepts serve human need is characteristic of pragmatism.564

This conception of Cardozo's project turns on the identification of the relevant groups of community whose intuitions are being enforced. In the classic defense of the application of his interpretation of the Pareto principle, Posner asserts that "[t]he relevant lay understanding, the relevant community, is that of the group of people whose practices the law is regulating."565 The law facilitates the choices that the relevant community would itself make.566 But as the law senses "com-

554. Id. at 32. Cardozo is also the first to offer a statement of pragmatism in a nutshell: "The soundness of a conclusion may not infrequently be tested by its consequences." Id. at 118 (quoting from Ostrowe v. Lee, 175 N.E. 505 (N.Y. 1931)).
555. Id. at 127.
556. Id.
557. Id.
558. Id.
559. Note Posner's praise of such a technique. See id. at 128.
560. Id. at ch. 6.
561. Id. at 93.
562. 118 N.E. 214 (N.Y. 1917).
563. Cardozo, supra note 12, at 93.
564. Id. at 93.
565. Id. at 94.
566. Id. (emphasis added).
communities' self-chosen ends," there may be good reasons to depart from simple lay intuitions—reasons founded in wealth maximization itself. It seems no surprise then that Cardozo's project, particularly from the highly commercial vantage point of the New York Court of Appeals, is described as one "of bringing law into phase with commercial necessity." The "understanding of the relevant lay community," which Cardozo's opinions seek to make legally binding, is one which tends to promote (at least ex ante) wealth maximization (at least in the cases Posner focuses upon).

Thus, in the context of discussing *Glanzer v. Shepard*, Posner is able to make the critical and subtle connection of pragmatism, morality (meaning commercial morality), and law and economics: "Commercial morality is perhaps the same thing as efficiency, and *Glanzer* is an even more persuasive decision when the link is made clear." And in discussing Cardozo's famous opinion in *Wagner v. International Railway*, ("danger invites rescue") Posner acknowledges that "[o]nce again the moral and the economic perspectives merge—an important consideration from the standpoint of making a pragmatic jurisprudence more than mere words." Cardozo is critiqued for moralizing and for engaging in indistinct and "proto-economic analysis," but even the tension in Cardozo's scope of liability cases considered by Posner could arguably be resolved on economic rationales and on risk distribution/avoidability and insurance availability.

What Cardozo did was to promote wealth maximization—the commercial morality of the relevant community.

C. **Overcoming Law—Pragmatism, Liberalism, and Law and Economics**

In *Overcoming Law*, Posner makes one of his principal goals "to reconcile my commitments to pragmatism, economics, and liberalism." In the first paragraph of the preface to that book, he acknowledges that "[t]he economic approach to law figures largely in my

567. Id. at 94.
568. Id.
569. Id. at 97 (emphasis added).
570. Id. at 99.
571. 135 N.E. 275 (N.Y. 1922).
572. CARDozo, supra note 12, at 101.
573. 133 N.E. 437 (N.Y. 1921).
574. CARDozo, supra note 12, at 102.
575. Id.
576. Id. at 118.
577. Id. at 112-14.
578. **OVERCOMING LAW, supra note 4** (manuscript at 34). Mapping Posner's pragmatism triangularly this way will be a useful way to understand his jurisprudential viewpoint.
POSNER'S PRAGMATISM

conception of legal theory." However, he is clear that for a pragmatist, "[a] certain conception of economics withers." And, economics is not the only key to legal theory: "[L]iberalism, especially the liberalism of the classical tradition of which John Stuart Mill remains the preeminent spokesman," is another. Normatively, Posner's pragmatism comprehends "three approaches joining to form a powerful beam with which to illuminate theoretical issues in law." Pragmatism features, for him, a special kind of economics and pays homage to certain foundational values related to classic individualistic liberalisms.

In Overcoming Law, Posner's pragmatism confronts "economic conceptualism," a kind of formalism wherein one evaluates "legal outcomes by their conformity to economic theory but still keeping well away from facts." Posner regards his view as the antidote to such conceptualism. Pragmatism, being empirical, consequentialist, scientific, anti-dogmatic, experiential, practical and social, inter alia, does not connect well with purely formal, deductive, conceptual models of law and economics, but does connect well with economics when "[e]conomics can furnish theoretical guidance for the empirical research that law badly needs." Pragmatism works well with that kind of theory.

As pragmatism is, and is compatible with, a certain kind of law and economics, so it is with liberalism. Carrying forth the individualistic proviso in Overcoming Law, Posner admits that he must take

579. Id. (manuscript at (i)). Posner also acknowledges in the Introduction that his pragmatism connects to a certain conception of law and economics, and that was a feature of The Problems of Jurisprudence. See id. (manuscript at 17).

580. Pragmatism, "shorn however of its postmodernist excesses," id. (manuscript at (i)), is the other of the three keys. In Overcoming Law, Posner takes some care to insure that his pragmatism is not too easily claimed by postmodernists, (as some of them do). This aspect of Posner's pragmatism is not developed in any detail in this Article, although I applaud the effort.

581. Id. (manuscript at 17).

582. Id. (manuscript at (i)).

583. Id.

584. And elsewhere.

585. OVERCOMING LAW, supra note 4 (manuscript at (i)).

586. Id. (manuscript at 1).

587. Id.

588. Id.

589. Many will find Posner's discussion of The New Institutional Economics, illuminating on this point. Id. (manuscript at ch. 22). Much of Posner's discussion fulfills the defense of law and economics in The Problems of Jurisprudence.

590. OVERCOMING LAW, supra note 4 (manuscript at 23).

591. Pragmatism is not totally anti-theory. Theory can operate as a tool, see id. (manuscript at 10), and good science unites fact and theory. Id. (manuscript at 23). Indeed law and economics can help to put even highly politicized emotional subjects in a better place. See id. (manuscript at 33).

592. See id. (manuscript at 25).
a stand on moral and political philosophy and makes his with Mill and what he refers to as classical liberalism. In a striking admission, he confesses that "our liberal intuitions are as deep as our utilitarian ones, and there is no intellectual procedure that will or should force us to abandon them." Drawing heavily upon Mill's classic notion of the inviolability of self-regarding behavior, Posner asserts an "intimate" connection between Mill's type of liberalism and his own, and law and economics and pragmatism. Posner notes problems with certain liberalisms—the want of detail in the views, the potential paternalism, welfarism, even socialism in some variants, and even the tension with the idea of democracy itself. Posner's liberalism protects spheres of private activity and creates conditions for liberty and prosperity. It is a scientific liberalism and one (if not Mill's) that distrusts the rule of experts and a comprehensive doctrine.

In short, in *Overcoming Law*, Posner provides a clearer statement of his normative position. It is a position, not surprisingly, based heavily on law and economics, although the economic analysis of law he advocates is not purely conceptual or formal. Additionally, Posner acknowledges that whatever the connections between pragmatism and the economic analysis of law, certain individualistic liberal sentiments are deep in his view.

VI. CONCLUSION

Posner's recent adoption of "pragmatism" has been viewed variously as a substantial shift away from his previously preferred program of law and economics, as resting upon trivial footing, and as a deeply inconsistent position that owes its basic allegiance to the central historical claims of views traditionally labelled pragmatism (and that therefore should jettison those elements that run counter to the central claims of a pragmatic view). These interpretations do not work.

Posner's normative arguments reveal a strong affinity for law and economics. His jurisprudential methodology serves the economic analysis of law and refines his acceptance of it by rejecting overly formal, conceptual rhetorical approaches. Much of his recent work, most notably *The Problems of Jurisprudence*, is an opposing brief to centuries of traditional analytic philosophy which, in his view, vainly attempts to construct comprehensive viewpoints with little attention to

593. Id.
594. Id. But see id. (manuscript at 25 n.38).
595. Id. (manuscript at 25).
596. Id. (manuscript at 26).
597. See id. (manuscript at 27-30).
598. Id. (manuscript at 27).
599. See id. (manuscript at 32).
factual problems. Yet so much of Posner's recent work focuses on meta-ethical and methodological points, that commentators like Stanley Fish have come to view pragmatism as a theory consisting largely of claims that focus at these levels of inquiry.

Alternatively, trivializing Posner can be a dangerous mistake. As a practical matter, Posner has had and will continue to have enormous influence in American law. He may be or become the most illustrious figure in the history of the American judiciary. The appeal of his works, including the recent works, will survive overly superficial philosophical attacks and reconstructing arguments. Indeed, for a wider audience of non-jurisprudential writers, such attacks are likely to backfire and create the very sense of a conflict of bedrocks beliefs that Posner feels is a predicate for his point that we, and philosophers, need more fact-oriented, scientific, instrumentalist inquiry. Taking Posner more seriously may very well be a practical necessity for his critics.

Pragmatism, as Posner sees it, is hardly a trivial set of claims. Posner may state in the doing a methodology for jurisprudence that most non-jurisprudentially trained lawyers and jurists can or may be persuaded to adopt. Posner may capture a milieu in American jurisprudence. Traditional liberal constructive analytic methods may not simply be dead—as a postmodern perspective might suggest—they may never have actually arrived at all in large measure in the practice of American law. In such a world, a simple applicable methodology based on science and in turn upon a simple bedrock intuition (or so) like the Pareto principle and Mill's tolerance proviso, has a powerful practical appeal. Complex claims of normative doctrine—most notably Rawls' own prescriptions which come with sometimes amorphous directives for application in real world non-ideal contexts—have significantly less intuitive appeal in real world contexts, particularly when their central claims are the most abstract and controversial. Traditional liberal analytic philosophers have tended to ignore the kinds of arguments Posner makes or to trivialize them. As such, they are losing ground in the real world to positions that may (or may not) have more serious philosophical drawbacks. Ultimately, Posner may be right: Philosophy should not be the province of a handful of academic specialists alone. Posner may have exposed hidden failures in the traditional liberal (particularly deontological) approach to jurisprudence. It is a serious challenge and a far more serious challenge to traditional constructive liberalism than any espoused by communitarians, crits, or postmoderns.

Moreover, Posner's view is challenging even within the refined moments of an analytic tradition, as he intends it to be. Posner has

600. See Lake, supra note 106.
stated a largely ethical relativist position. There is an irony to Posner's pragmatism in that, in its earliest moments, it eschewed abstract inquiry yet focused so heavily on meta-ethical questions. That inquiry, sometimes no model of precision, nonetheless reveals a challenging combination of claims. Posner's recent works divulge that his meta-ethical posture is closely associated in part with non-cognitivism and intuitionism and in part with anti-theory approaches of the sort suggested by Cheryl Noble. It is a difficult and tricky position, yet it is not a philosophically insignificant approach. His is a complex and variegated approach to comprehending moral knowledge that may defy the more all or nothing approaches of Pritchard, Noble, and even many self-described pragmatists.

Posner calls in the pragmatic airstrikes on his own position not only with the use of the term pragmatism to describe his theory but also with his insistence on instrumentalism, his jurisprudential methodology, and at least a significant part of his account of intuitionism (notably tacit understanding). Posner's view meets many criteria of some tests for "pragmatism." But there are points where his viewpoint sharply differs. Thus, Posner's recent viewpoint, presaged on the eve of publication of the two centerpieces of his recent works—The Problems of Jurisprudence and Cardozo: A Study in Reputation—reminded us that his own approach to law has been "rooted in and inspired by a belief in the intellectual power and pertinence of economics." There is no way to divorce Posner from this approach. And, again as to Grey's claim of contextualism, Posner does not go all the way in completely denying the power of certain cognitive normative theory development. Law is often an activity but it also consists of theory construction as well.

Dworkin has said that "[s]ome lawyers who call themselves pragmatists mean only that they are practical people, more interested in the actual consequences of particular political and legal decisions than in abstract theory." It is tempting to view Posner in this way, even as Dworkin also points out, philosophical pragmatism is often itself an abstract view. Yet these debates about Posner distract and distort. They distract us from the fact that Posner has stated a reasonably complete and powerful jurisprudential theory—as perhaps Cardozo and Holmes arguably did not. (This is not to say that the view is not without areas that call for development and/or fall upon critique). Thus, Posner's jurisprudential methodology may benefit from avoiding over-simplified, and easily refuted reduction of complex works of philosophy. Posner's meta-ethics retain a flavor of absolutism, and nagging problems with respect to its empiricism/dualism.

602. Dworkin, supra note 22, at 360.  
603. Id.
may cause problems for his view, or may allow a somewhat unique view to develop. Certainly, Posner will continue to explore the connections that his intuitionism bears to non-cognitivism, neo-intuitionism, and anti-theory positions. Finally, Posner’s pragmatism must continue to develop the confrontation that his favored program of wealth maximization has with its main theory-building alternatives. A real normative debate remains, one into which Posner will be drawn ever deeper.

Posner’s pragmatism champions relativism, the ideology, and science of relentless inquiry by free-minded individuals who can make themselves valuable to society. Apparently committed to the view in the large that our deepest held views can be relative, Posner seeks solace from the open-endedness and non-cognitive implications of his view in a faith in scientific methods. Exactness and accuracy and means/end rationally can combine to offer some precision in a world where fundamental problems resist precise control. Moreover, scientific method even gives a valhallan hope for the practical person. At the end of time amorphous “value” problems may cease.

A triad of relativism, science, and ideology (or pragmatism, economics, and liberalism) is an interesting formation in modern moral thought. Posner offers a curious alternative to the relativistic ideological position of the sort perhaps promoted by Rorty and Unger in that his focus upon scientific methods makes him decidedly less radical. His focus also is an alternative to largely anti-ideological relativist positions, like Berlin’s. Additionally, it avoids the pretensions of absolutism, formalism, and conceptualism apparently contained in Kantain transcendentalism and even some modern deontological theories.

What is perhaps most interesting of all is the way in which the position breathes life into the tension that runs throughout Posner’s works. Caught between the horns of exactness and the open and mutable character of human involvements expressed through law, Posner is able to offer a unique account of how he views the whole of his experience. It is a unique, conservative vision of law and jurisprudence. It is an arresting vision, one which should stimulate us to continue to consider his views in greater depth, and remind us of whom we have in our midst, now.